COMMON CAUSE (A REGD. SOCIETY)
v.
UNION OF INDIA
(Writ Petition (Civil) No. 215 of 2005)

FEBRUARY 25, 2014

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

CONSTITUTION OF INDIA, 1950:

Art. 21 r/w Art. 32 - Prayer to declare 'right to die with dignity' a fundamental right and to make provision for "living will and Attorney authorization" to exercise right to refuse cruel and unwarranted medical treatment to artificially prolong the natural life of terminally ill persons in the event of their going into permanent vegetative state - Matter referred to Constitution Bench.

Gian Kaur vs. State of Punjab **1996 (3) SCR 697 = (1996) 2 SCC 648;** *Aruna Ramchandra Shanbaug vs. Union of India* **2011 (4) SCR 1057 = (2011) 4 SCC 454 and** *Parmanand Katara vs. Union of India* **1989 (3) SCR 997 = (1989) 4 SCC 286 - referred to.**

Case Law Reference:

1996 (3) SCR 697	**referred to**	**para 3**
2011 (4) SCR 1057	**referred to**	**para 8**
1989 (3) SCR 997	**referred to**	**para 6**

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

Writ Petition (Civil) No. 215 of 2005.

Sidharth Luthra, ASG, R.P. Bhatt, V.A. Mohta, Prashant Bhushan, Rohit Kumar Singh, Pranav Sachdeva, Sunita Sharma, Pranav Aggarwal, Sushma Suri, Supriya Juneja, Aniruddha P. Mayee, Nilakanth, Charudatta Mahindrakar, Praveen Khattar, B. Vijay Kumar for the appearing parties.

The Order of the Court was delivered by

P. SATHASIVAM, CJI. 1. This writ petition, under Article 32 of the Constitution of India, has been filed by Common Cause-a Society registered under the Societies Registration Act, 1860 engaged in taking up various common problems of the people for securing redressal, praying for declaring 'right to die with dignity' as a fundamental right within the fold of 'right to live with dignity' guaranteed under Article 21 of the Constitution and to issue direction to the respondent, to adopt suitable procedures, in consultation with the State Governments wherever necessary, to ensure that the persons with deteriorated health or terminally ill should be able to execute a document, viz., 'my living will & Attorney authorization' which can be presented to hospital for appropriate action in the event of the executant being admitted to the hospital with serious illness which may threaten termination of life of the executant or in the alternative, issue appropriate guidelines to this effect and to appoint an Expert Committee consisting of doctors, social scientists and lawyers to study into the aspect of issuing guidelines regarding execution of 'Living Wills'.

2. On 19.06.2002 and 25.06.2002, the petitioner-Society had written letters to the Ministry of Law, Justice and Company Affairs and the Ministry of Health and Family Welfare with a similar prayer as in this writ petition. Concurrently, the petitioner also wrote letters to the State Governments in this regard, as hospitals come within the jurisdiction of both the State Governments and the Union of India.

3. In the above said communicat d

emphasized the need for a law to be passed which would authorize the execution of the 'Living Will & Attorney Authorization'. Further, in the second letter, the petitioner-Society particularly relied on the decision of this Court in *Gian Kaur vs. State of Punjab* (1996) 2 SCC 648 to support its request. Since no reply has been received, the petitioner-Society has preferred this writ petition.

4. Heard Mr. Prashant Bhushan, learned counsel for the petitioner-Society, Mr. Sidharth Luthra, learned Additional Solicitor General for the Union of India and Mr. V.A. Mohta, learned Senior Counsel and Mr. Praveen Khattar, learned counsel for the intervenors.

Contentions:

5. According to the petitioner-Society, the citizens who are suffering from chronic diseases and/or are at the end of their natural life span and are likely to go into a state of terminal illness or permanent vegetative state are deprived of their rights to refuse cruel and unwanted medical treatment like feeding through hydration tubes, being kept on ventilator and other life supporting machines, in order to artificially prolong their natural life span. Thus, the denial of this right leads to extension of pain and agony both physical as well as mental which the petitioner-Society seeks to end by making an informed choice by way of clearly expressing their wishes in advance called "a Living Will" in the event of their going into a state when it will not be possible for them to express their wishes.

6. On the other hand, Mr. Sidharth Luthra, learned Additional Solicitor General submitted on behalf of the Union of India that as per the Hippocratic Oath, the primary duty of every doctor is to save lives of patients. A reference was made to Regulation 6.7 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002, which explicitly prohibits doctors from practicing Euthanasia. Regulation 6.7 reads as follows:-

> "Practicing euthanasia shall constitute unethical conduct. However, on specific occasion, the question of withdrawing supporting devices to sustain cardiopulmonary function even after brain death, shall be decided only by a team of doctors and not merely by the treating physician alone. A team of doctors shall declare withdrawal of support system. Such team shall consist of the doctor in charge of the patient, Chief Medical Officer/Medical Officer in charge of the hospital and a doctor nominated by the in-charge of the hospital from the hospital staff or in accordance with the provisions of the Transplantation of Human Organ Act, 1994."

In addition, the respondent relied on the findings of this Court in *Parmanand Katara vs. Union of India* (1989) 4 SCC 286 to emphasise that primary duty of a doctor is to provide treatment and to save the life whenever an injured person is brought to the hospital or clinic and not otherwise.

7. The petitioner-Society responded to the abovementioned contention by asserting that all these principles work on a belief that the basic desire of a person is to get treated and to live. It was further submitted that when there is express desire of not having any treatment, then the said person cannot be subjected to unwanted treatment against his/her wishes. It was also submitted that subjecting a person, who is terminally ill and in a permanently vegetative state with no hope of recovery, to a life support treatment against his/her express desire and keeping him under tremendous pain is in violation of his right to die with dignity.

8. Besides, the petitioner-Society also highlighted that the doctors cannot, by some active means like giving lethal injections, put any person to death, as it would amount to "active euthanasia" which is illegal in India as observed in *Aruna Ramchandra Shanbaug vs. Union of India* (2011) 4 SCC 454. Therefore, the petitioner-Society pleads for reading the aforesaid regulation only to prohibit the

the said regulation should not be interpreted in a manner which casts obligation on doctors to keep providing treatment to a person who has already expressed a desire not to have any life prolonging measure. Thus, it is the stand of the petitioner-Society that any such practice will not be in consonance with the law laid down by this Court in *Gian Kaur* (supra) as well as in *Aruna Shanbaug* (supra).

Discussion:

9. In the light of the contentions raised, it is requisite to comprehend what was said in *Gian Kaur* (supra) and *Aruna Shanbaug* (supra) to arrive at a decision in the given case, as the prayer sought for in this writ petition directly places reliance on the reasoning of the aforesaid verdicts.

10. In *Gian Kaur* (supra), the subject matter of reference before the Constitution Bench was as to the interpretation of Article 21 relating to the constitutional validity of Sections 306 and 309 of the Indian Penal Code, 1860, wherein, it was held that 'right to life' under Article 21 does not include 'right to die'. While affirming the above view, the Constitution Bench also observed that 'right to live with dignity' includes 'right to die with dignity'. It is on the basis of this observation, the Petitioner-Society seeks for a remedy under Article 32 of the Constitution in the given petition.

11. Therefore, although the discussion on euthanasia was not relevant for deciding the question of Constitutional validity of the said provisions, the Constitution Bench went on to concisely deliberate on this issue as well in the ensuing manner:-

> "24. Protagonism of euthanasia on the view that existence in persistent vegetative state (PVS) is not a benefit to the patient of a terminal illness being unrelated to the principle of Sanctity of life' or the 'right to live with dignity' is of no assistance to determine the scope of Article 21 for

> deciding whether the guarantee of 'right to life' therein includes the 'right to die'. The 'right to life' including the right to live with human dignity would mean the existence of such a right up to the end of natural life. This also includes the right to a dignified life up to the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life is ebbing out. But the 'right to die' with dignity at the end of life is not to be confused or equated with the 'right to die' an unnatural death curtailing the natural span of life.
>
> 25. A question may arise, in the context of a dying man, who is, terminally ill or in a persistent vegetative state that he may be permitted to terminate it by a premature extinction of his life in those circumstances. This category of cases may fall within the ambit of the 'right to die' with dignity as a part of right to live with dignity, when death due to termination of natural life is certain and imminent and the process of natural death has commenced. These are not cases of extinguishing life but only of accelerating conclusion of the process of natural death which has already commenced. The debate even in such cases to permit physician assisted termination of life is inconclusive. It is sufficient to reiterate that the argument to support the view of permitting termination of life in such cases to reduce the period of suffering during the process of certain natural death is not available to interpret Article 21 to include therein the right to curtail the natural span of life."

In succinct, the Constitution Bench did not express any binding view on the subject of euthanasia rather reiterated that legislature would be the appropriate authority to bring the change.

12. In *Aruna Shanbaug* (supra), this Court, after having referred to the aforesaid Para Nos. 24 and 25 of *Gian Kaur* (supra), stated as follows:-

"21. We have carefully considered paragraphs 24 and 25 in Gian Kaur's case (supra) and we are of the opinion that all that has been said therein is that the view in *Rathinam's* case (supra) that the right to life includes the right to die is not correct. We cannot construe *Gian Kaur's* case (supra) to mean anything beyond that. **In fact, it has been specifically mentioned in paragraph 25 of the aforesaid decision that "the debate even in such cases to permit physician assisted termination of life is inconclusive". Thus it is obvious that no final view was expressed in the decision in Gian Kaur's case beyond what we have mentioned above."**

It was further held that:-

101. The Constitution Bench of the Indian Supreme Court in *Gian Kaur vs. State of Punjab* 1996 (2) SCC 648 held that both euthanasia and assisted suicide are not lawful in India. That decision overruled the earlier two Judge Bench decision of the Supreme Court in *P. Rathinam vs. Union of India* 1994(3) SCC 394. The Court held that the right to life under Article 21 of the Constitution does not include the right to die (vide para 33). **In *Gian Kaur's* case (supra) the Supreme Court approved of the decision of the House of Lords in *Airedale's* case (supra), and observed that euthanasia could be made lawful only by legislation.**

13. Insofar as the above paragraphs are concerned, *Aruna Shanbaug* (supra) aptly interpreted the decision of the Constitution Bench in *Gian Kaur* (supra) and came to the conclusion that euthanasia can be allowed in India only through a valid legislation. However, it is factually wrong to observe that in *Gian Kaur* (supra), the Constitution Bench approved the decision of the House of Lords in *Airedale vs. Bland* (1993) 2 W.L.R. 316 (H.L.). Para 40 of *Gian Kaur* (supra), clearly states that "even though it is not necessary to deal with physician assisted suicide or euthanasia cases, a brief reference to this

decision cited at the Bar may be made…" Thus, it was a mere reference in the verdict and it cannot be construed to mean that the Constitution Bench in *Gian Kaur* (supra) approved the opinion of the House of Lords rendered in *Airedale* (supra). To this extent, the observation in Para 101 is incorrect.

14. Nevertheless, a vivid reading of Para 104 of *Aruna Shanbaug* (supra) demonstrates that the reasoning in Para 104 is directly inconsistent with its own observation in Para 101. Para 104 reads as under:-

"104. It may be noted that in *Gian Kaur's* case (supra) although the Supreme Court has quoted with approval the view of the House of Lords in *Airedale's* case (supra), it has not clarified who can decide whether life support should be discontinued in the case of an incompetent person e.g. a person in coma or PVS. This vexed question has been arising often in India because there are a large number of cases where persons go into coma (due to an accident or some other reason) or for some other reason are unable to give consent, and then the question arises as to who should give consent for withdrawal of life support. This is an extremely important question in India because of the unfortunate low level of ethical standards to which our society has descended, its raw and widespread commercialization, and the rampant corruption, and hence, the Court has to be very cautious that unscrupulous persons who wish to inherit the property of someone may not get him eliminated by some crooked method."

15. In Paras 21 & 101, the Bench was of the view that in *Gian Kaur* (supra), the Constitution Bench held that euthanasia could be made lawful only by a legislation. Whereas in Para 104, the Bench contradicts its own interpretation of *Gian Kaur* (supra) in Para 101 and states that although this court approved the view taken in *Airedale* (supra), it has not clarified who can

decide whether life support should be discontinued in the case of an incompetent person e.g., a person in coma or PVS. When, at the outset, it is interpreted to hold that euthanasia could be made lawful only by legislation where is the question of deciding whether the life support should be discontinued in the case of an incompetent person e.g., a person in coma or PVS.

16. In the light of the above discussion, it is clear that although the Constitution Bench in *Gian Kaur* (supra) upheld that the 'right to live with dignity' under Article 21 will be inclusive of 'right to die with dignity', the decision does not arrive at a conclusion for validity of euthanasia be it active or passive. So, the only judgment that holds the field in regard to euthanasia in India is *Aruna Shanbaug* (supra), which upholds the validity of passive euthanasia and lays down an elaborate procedure for executing the same on the wrong premise that the Constitution Bench in *Gian Kaur* (supra) had upheld the same.

17. In view of the inconsistent opinions rendered in *Aruna Shanbaug* (supra) and also considering the important question of law involved which needs to be reflected in the light of social, legal, medical and constitutional perspective, it becomes extremely important to have a clear enunciation of law. Thus, in our cogent opinion, the question of law involved requires careful consideration by a Constitution Bench of this Court for the benefit of humanity as a whole.

18. We refrain from framing any specific questions for consideration by the Constitution Bench as we invite the Constitution Bench to go into all the aspects of the matter and lay down exhaustive guidelines in this regard.

19. Accordingly, we refer this matter to a Constitution Bench of this Court for an authoritative opinion.

R.P. Matter referred to Constitution Bench.

UNION OF INDIA THROUGH DIRECTOR OF INCOME TAX

v.

M/S TATA CHEMICALS LTD.

(Civil Appeal No. 6301 of 2011 etc.)

FEBRUARY 26, 2014

[H.L. DATTU AND S.A. BOBDE, JJ.]

INCOME TAX ACT, 1961:

s.244-A - Liability of Revenue for payment of interest on refund of tax made to resident/deductor u/s 240 - Held: The language of s. 244-A is precise, clear and unambiguous - Sub-s. (1) of s.244A speaks of interest on refund of the amounts due to an assessee under the Act - Assessee is entitled for the said amount of refund with interest thereon as calculated in accordance with clauses (a) and (b) of sub-s. (1) of s.244A - In calculating the interest payable, the Section provides for different dates from which the interest is to be calculated - Interest payment to assessee is a statutory obligation and non-discretionary in nature - s. 244-A grants substantive right of interest and is not procedural - The principles for grant of interest are the same as under the provisions of s.244 applicable to assessments before 01.04.1989, albeit with clarity of application as contained in s. 244A - Department has also issued Circular clarifying the purpose and object of introducing s.244A to replace ss.214, 243 and 244 - It is clarified therein that since there were some lacunae in the earlier provisions with regard to non-payment of interest by revenue to assessee for the money remaining with Government, the said Section is introduced for payment of interest by the Department for delay in grant of refunds - The statutory obligation to refund carried with it the right to interest also - This is true in the case of assessee under the Act.

s.244-A - Entitlement of resident/deductor to interest on refund of excess deduction or erroneous deduction of tax at source u/s 195 - Held: The object behind insertion of s.244A, is that an assessee is entitled to payment of interest for money remaining with the Government which would be refunded - There is no reason to restrict the same to an assessee only without extending the similar benefit to a resident/ deductor who has deducted tax at source and deposited the same before remitting the amount payable to a non-resident/ foreign company - The obligation to refund money received and retained without right implies and carries with it the right to interest - In the instant case, it is not in doubt that the payment of tax made by resident/ depositor is in excess and the department chooses to refund the excess payment of tax to the depositor - The catechize is from what date interest is payable, since the case does not fall either under clause (a) or (b) of s.244A - In the absence of an express provision as contained in clause (a), it cannot be said that the interest is payable from the 1st of April of the assessment year - Simultaneously, since the said payment is not made pursuant to a notice issued u/s 156, Explanation to clause (b) has no application - In such cases, as the opening words of clause (b) specifically referred to "as in any other case", the interest is payable from the date of payment of tax - Thus, the resident/deductor is entitled not only the refund of tax deposited u/s 195(2), but has to be refunded with interest from the date of payment of such tax.

Circulars issued by Central Board of Direct Taxes - Held: Circulars issued by the Board in exercise of its powers u/s 119 of the Act would be binding on the income tax authorities even if they deviate from the provisions of the Act, so long as they seek to mitigate the rigour of a particular Section for the benefit of the assessee.

Tax refund - Held: A "tax refund" is a refund of taxes when the tax liability is less than the tax paid - In the instant case,

the deductor/assessee had paid taxes pursuant to a special order passed by the assessing officer/Income Tax Officer - In the appeal filed against the said order the assessee has succeeded and a direction is issued by the appellate authority to refund the tax paid - The amount paid by the resident/ deductor was retained by Government till a direction was issued by appellate authority to refund the same - When the said amount is refunded it should carry interest in the matter of course - Awarding interest is a kind of compensation of use and retention of the money collected unauthorizedly by Department - When the collection is illegal, there is corresponding obligation on the revenue to refund such amount with interest in as much as they have retained and enjoyed the money deposited.

Interpretation of Statues:

Golden rule - Held: It is cardinal principle of interpretation of statutes that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning unless such construction leads to some absurdity or unless there is something in the context or in the object of the Statute to the contrary - The golden rule is that the words of a statute must prima facie be given their ordinary meaning - It is yet another rule of construction that when the words of a statute are clear, plain and unambiguous, then courts are bound to give effect to that meaning irrespective of the consequences.

UCO Bank v. CIT **237 ITR 889 - relied on.**

Gurudevdatta VKSSS Maryadit v. State of Maharashtra **2001(2) SCR 654 = [2001] 4 SCC 534; and** *Shyam Sunder vs. Ram Kumar* **2001 (1) Suppl. SCR 115 = (2001) 8 SCC 24 - referred to.**

Case Law Reference:

2001 (2) SCR 654 **refer**

2001 (1) Suppl. SCR 115 referred to para 24

237 ITR 889 relied on para 35

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6301 of 2011.

From the Judgment and Order dated 18.06.2009 of the High Court of Judicature at Bombay in Tax Appeal No. 881 of 2008.

WITH

Civil Appeal No. 2534 of 2012.

Civil Appeal No. 2535 of 2012.

Civil Appeal No. 2536 of 2012.

Civil Appeal No. 2537 of 2012.

Civil Appeal No. 2539 of 2012.

Civil Appeal No. 2540 of 2012.

Civil Appeal No. 2541 of 2012.

Civil Appeal No. 2542 of 2012.

Civil Appeal No. 2543 of 2012.

Civil Appeal No. 2944 of 2012.

Civil Appeal No. 2945 of 2012.

Civil Appeal No. 3445 of 2012.

Civil Appeal No. 3446 of 2012.

Civil Appeal No. 3508 of 2014.

Civil Appeal No. 3509 of 2014.

Civil Appeal No. 3510 of 2014.

Civil Appeal No. 3511 of 2014.

Civil Appeal No. 3512 of 2014.

Civil Appeal No. 5408 of 2012

Civil Appeal No. 3513 of 2014.

Civil Appeal No. 3514 of 2014.

Civil Appeal No. 3515 of 2014.

Civil Appeal No. 3516 of 2014.

Civil Appeal No. 3517 of 2014.

Civil Appeal No. 3518 of 2014.

Civil Appeal No. 3519 of 2014.

Civil Appeal No. 3520 of 2014.

Civil Appeal No. 3521 of 2014.

Civil Appeal No. 3522 of 2014.

Civil Appeal No. 3523 of 2014.

Civil Appeal No. 3524 of 2014.

Civil Appeal No. 7596 of 2012.

Civil Appeal No. 2589 of 2013.

Civil Appeal No. 3525 of 2014.

Civil Appeal No. 3526 of 2014.

Civil Appeal No. 3527 of 2014.

Civil Appeal No. 7772 of 2012.

Civil Appeal No. 3436 of 2012.

Civil Appeal No. 3437 of 2012.

Rajiv Dutta, K. Radhakrishnan, Arijit Prasad, Gargi Khanna, Sriparana Chatterjee, Tanushri k,

Sadhana Sandhu, B.V. Balaram Das, S.A. Habeeb, S.W.A. Qadri, Anil Katiyar, Akshat Shrivastava, Manjeet Kirpal, Pritesh Kapur, Ashok Kulkarni, Mohit Chaudhary, Imran Ali, Damini, Harsh Sharma, Pragya Sharma, Puja Sharma, Priteesh Kapur, S.K. Kulkarni, Abhay A. Jena, Bina Gupta, Ranjit Raut, Vijay Ranjan, Bhargava V. Desai, Shreyas Mehrotra for the Appellant.

Gopal Jain, M.S. Syali, Ashish Wad, Jayashree Wad, Kanika Baweja (for J.S. Wad & Co.), Ruby Singh Ahuja, Neha Gupta, Pallav Mongia (for Karanjawala & Co.) G.C. Srivastava, Preeti Bhardwaj, Shiv Kumar Suri, Sunil Kumar Jain, Vijay Kumar, Aditya Panda, Manoneet Dalal, Rustom B. Hathikhanawala, Ajay Vohra, Kavita Jha, Vijay Ranjan, Bhargava V. Desai, Shreyas Malhotra for the Respondents.

The following Order of the Court was delivered

O R D E R

1. Leave granted.

2. The issue that arise for our consideration and decision in this batch of appeals is, whether the revenue is legally responsible under Section 244A of the Income Tax Act, 1961 (for short, "the Act") for payment of interest on the refund of tax made to the resident/deductor under Section 240 of the Act.

3. At the outset, it is relevant to notice that the assessment years in all these appeals are on and after 01.04.1989, that is after the admittance of Section 244A of the Act by Direct Tax Laws (Amendment) Act, 1987 (4 of 1988) with effect from 01.04.1989, whereby provision for interest on refunds on any amount due to the assessee under the Act was introduced.

FACTS:-

4. We would refer to the facts in Civil Appeal No. 6301 of 2011. The respondent is a company incorporated under the

provisions of Companies Act, 1956. It is engaged in the manufacture of nitrogenous fertilizer. During the assessment year 1997-98, the respondent-company had commissioned its naptha desulphurization plant and to oversee the operation of the said plant it had sought the assistance of two technicians from M/s. Haldor Topsoe, Denmark. M/s. Haldor Topsoe had raised an invoice aggregating to US$ 43,290,06/- as service charges for services of the technicians (US$ 38,500/-) and reimbursements of expenses (US$ 4,790/-).

5. The resident/deductor had approached the Income Tax Officer under Section 195 (2) of the Act inter alia requesting him to provide information/ determination as to what percentage of tax should be withheld from the amounts payable to the foreign company, namely, M/s. Haldor Topsoe, Denmark. On the request so made, the Assessing Officer/ Income Tax Officer had determined and passed Special order under Section 195 (2) of the Act directing the resident/ deductor to deduct/ withhold tax at the rate of 20% before remitting aforesaid amounts to M/s.Haldor Topsoe. Accordingly, the resident/ deductor had deducted tax of Rs.1,98,878/- on the entire amount of US$ 43,290.00/- and credited the same in favour of the Revenue.

6. After such deposit, the resident/ deductor had preferred an appeal before the Commissioner of Income Tax (Appeals) against the aforesaid order passed by the Assessing Officer/ Income Tax Officer under Section 195 (2) of the Act. The appellate authority while allowing the appeal so filed by the resident/ deductor, had concluded, that, the reimbursement of expenses is not a part of the income for deduction of tax at source under Section 195 of the Act and accordingly, directed the refund of the tax that was deducted and paid over to the Revenue on the amount of US$ 4790.06/- representing reimbursement of expenses by order dated 12.07.2002.

7. After disposal of the appeal, the resident/ deductor had claimed the refund of tax on US$ 4 o

Rs.22,005/-) with the interest thereon as provided under Section 244A(1) of the Act by its letter dated 09.12.2002.

8. The Assessing Officer/ Income Tax Officer while declining the claim made, has observed, that, Section 244A provides for interest only on refunds due to the assessee under the Act and not to the deductor and since the refund in the instant case is in view of the circulars viz. Circular No. 769 and 790 issued by the Central Board of Direct Taxes (for short "the Board") and not under the statutory provisions of the Act, no interest would accrue on the refunds under Section 244A of the Act. Therefore, the Assessing Officer/Income Tax Officer while granting refund of the tax paid on the aforesaid amount has refused to entertain the claim for interest on the amount so refunded by order dated 29.07.2003.

9. Since the Assessing Officer/Income Tax Officer had declined to grant the interest on the amount so refunded, the resident/ deductor had carried the matter by way of an appeal before the Commissioner of Income Tax (Appeals). The First Appellate Authority by its order dated 28.03.2005 has approved the orders passed by the Assessing Officer/ Income Tax Officer and declined the claim of the deductor/resident on two counts : (a) that the refund in the instant case would fall under two circulars viz. Circular No. 769 and 790 issued by the Board which specifically provide that the benefit of interest under Section 244A of the Act on such refunds would not be available to the deductor/ resident and (b) that a conjoint reading of Section 156 and the explanation appended to Section 244A (1)(b) of the Act would indicate that the amount refunded to the deductor/resident cannot be equated to the refund of the amount(s) envisaged under Section 244A(1)(b) of the Act, wherein only the interest on refund of excess payment made under Section 156 of the Act pursuant to a notice of demand issued on account of post-assessment tax is contemplated and not the interest on refund of tax deposited under self-assessment as in the instant case.

10. The deductor/resident, aggrieved by the aforesaid order, had carried the matter before the Income Tax Appellate Tribunal (for short, "the Tribunal"). The Tribunal while reversing the judgment and order passed by the Commissioner of Income Tax (Appeals) has opined, that, the tax was paid by the deductor/ resident pursuant to an order passed under Section 195 (2) of the Act and the refund was ordered under Section 240 of the Act, therefore, the provisions of Section 244A(1)(b) are clearly attracted and the revenue is accountable for payment of interest on the aforesaid refund amount. Accordingly, the Tribunal has allowed the appeal of the deductor/ resident and directed the Assessing Officer/ Income Tax Officer to acknowledge the claim and allow the interest as provided under Section 244A(1)(b) of the Act on the aforesaid amount of refund, by order dated 28.06.2008.

11. The Revenue being of the view that they are treated unfairly by the Tribunal had carried the matter by way of Income Tax Appeal before the High Court. The High Court has refused to accept the appeal filed by the Revenue by the impugned judgment and order, dated 18.06.2009. That is how the Revenue is before us in these appeals.

12. We have heard the learned counsel appearing for the Revenue and the respondent-assessee in these appeals and also carefully perused the orders passed by the forums below.

RELEVANT PROVISIONS:-

13. To appreciate the view point of the learned counsel for the Revenue, we require to notice certain provisions of the Act prior to the insertion of Section 244A of the Act. The sections that require to be noticed are; Sections 156, 195(2), 240 and 244 of the Act. A perusal of these sections essentially would indicate the procedure whereby the tax amount is paid and the refund of excess amount is claimed by the assessee. The relevant part of the said sections is sequentially reproduced:

"Section 156. Notice of demand

When any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under this Act, the Assessing Officer shall serve upon the assessee a notice of demand in the prescribed form specifying the sum so payable.

*** *** ***

Section 195. Other sums-

(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest or any other sum chargeable under the provisions of this Act (not being income chargeable under the head 'Salaries') shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force:

Provided that in the case of interest payable by the Government or a public section bank within the meaning of clause (23D) of Section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of chaque or draft or by any other mode:

Provided further that no such deduction shall be made in respect of any dividends referred to in Section 115-O.

Explanation.- For the purpose of this section, where any interest or other sum as aforesaid is credited to any account, whether called 'Interest payable account' or 'Suspense account' or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section

shall apply accordingly.

(2) Where the person responsible for paying any such sum chargeable under this Act other than salary to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application to the Assessing Officer to determine, by general or special order, the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable.

*** *** ***

Section 240. Refund on appeal, etc.

Where, as a result of any order passed in appeal or other proceeding under this Act, refund of any amount becomes due to the assessee, the Assessing Officer shall, except as otherwise provided in this Act, refund the amount to the assessee without his having to make any claim in that behalf.

*** *** ***

Section 244. Interest on refund where no claim is needed

(1) Where a refund is due to the assessee in pursuance of an order referred to in section 240 and the Assessing Officer does not grant the refund within a period of three months from the end of the month in which such order is passed the Central Government shall pay to the assessee simple interest at fifteen per cent per annum on the amount of refund due from the date immediately following the expiry of the period of three months aforesaid to the date on which the refund is granted.

(1A) Where the whole or any part of the refund referred to in sub-section (1) is due to the as of

any amount having been paid by him after the 31st day of March, 1975, in pursuance of any order of assessment or penalty and such amount or any part thereof having been found in appeal or other proceeding under this Act to be in excess of the amount which such assessee is liable to pay as tax or penalty, as the case may be, under this Act, the Central Government shall pay to such assessee simple interest at the rate specified in sub-section (1) on the amount so found to be in excess from the date on which such amount was paid to the date on which the refund is granted:

Provided that where the amount so found to be in excess was paid in instalments, such interest shall be payable on the amount of each such instalment or any part of such instalment, which was in excess, from the date on which such instalment was paid to the date on which the refund is granted:

Provided further that no interest under this sub-section shall be payable for a period of one month from the date of the passing of the order in appeal or other proceeding:

Provided also that where any interest is payable to an assessee under this subsection, no interest under sub-section (1) shall be payable to him in respect of the amount so found to be in excess.

(2) * * *

(3) The provisions of this section shall not apply in respect of any assessment for the assessment year commencing on the 1st day of April, 1989, or any subsequent assessment years.

14. Section 156 of the Act talks about payment of tax, interest, penalty, fine or any other sum payable in consequence of any order passed under the Act on service of notice of

demand issued by the assessing officer to the assessee specifying the said amounts.

15. Section 195(1) casts an obligation upon every person in this Country to deduct tax at the prevailing rates from out of any sum which is remitted to a non resident/Foreign Company. Sub Section (2) of Section 195 provides that where a person responsible for paying any such sum chargeable under the Act to a non resident/Foreign Company considers that the whole of such sum would not be the income chargeable in the case of recipient, he may make an application to the assessing officer/income tax officer to determine, by general or special order, the appropriate proportion of such sum so chargeable. The assessing officer is expected to determine such sum/tax which are deductible out of remittance to be sent to the recipient and only after deduction and payment of such sum/ tax, the balance amount is to be remitted to the non-resident. We clarify here that it is the statutory obligation of the person responsible for paying such sum to deduct tax thereon before making payment, if such application is not filed.

16. Section 240 of the Act provides for refund on appeal etc. The Section envisages that if an amount becomes due to the assessee by virtue of an order passed in appeal, reference, revision, rectification or amendment proceedings, the assessing officer is bound to refund the amount to the assessee without the assessee being required to make any claim in that behalf. The expression 'other proceedings under the Act' used in Section 240 of the Act, are wide enough to include any order passed in proceedings other than the appeals under the Act.

17. Section 244 of the Act provides for interest on refunds where no claim is made or required to be made by the assessee. The said section envisages that where a refund is due to the assessee in pursuance of an order passed under Section 240 of the Act, and the assessing officer does not grant the refund within a period of three months from the end of the month in which such order is passed, th nt

shall pay to the assessee a simple interest of 15% per annum on the amount of refund due from the date immediately following the expiry of the period of three months as aforesaid to the date on which the refund is granted.

18. Since there was disconcert in the minds of both the assessee and the Revenue regarding the cases where payment of interest was required to be made to the assessee by the Revenue, the Parliament has thought it fit to insert a new Section 244A in the place of Sections 214, 243 and 244 in respect of assessments for the assessment year 1989-90 and onwards. The Section is extracted:

"244A. Interest on refunds.

(1)Where refund of any amount becomes due to the assessee under this Act, he shall, subject to the provisions of this section, be entitled to receive, in addition to the said amount, simple interest thereon calculated in the following manner, namely:-

(a) Where the refund is out of any tax paid under section 115WJ or collected at source under section 206C or paid by way of advance tax or treated as paid under section 199, during the financial year immediately preceding the assessment year, such interest shall be calculated at the rate of one-half per cent for every month or part of a month comprised in the period from the 1st day of April of the assessment year to the date on which the refund is granted.

Provided that no interest shall be payable if the amount of refund is less than ten per cent of the tax as determined under sub-section (1) of section 115WE or sub-section (1) of section 143 or on regular assessment;

(b) in any other case, such interest shall be calculated at the rate of one-half per cent for every month or part of a

month comprised in the period or periods from the date or, as the case may be, dates of payment of tax or penalty to the date on which the refund is granted.

EXPLANATION.- For the purpose of this clause, "date of payment of tax or penalty" means the date on and from which the amount of tax or penalty specified in the notice of demand issued under section 156 is paid in excess of such demand.

(2) * * *

(3) * * *

(4) The provisions of this section shall apply in respect of assessments for the assessment year commencing on the 1st day of April, 1989, and subsequent assessment year"

(emphasis supplied)

19. The objects and reasons for introduction of the aforesaid Section is clarified by the Board in its Circular No. 549, dated 31.10.1989. Relevant paragraphs of which are as under:

"11.2 Insertion of a new section 244A in lieu of sections 214, 243 and 244,- Under the provisions of section 214, interest was payable to the assessess on any excess advance tax paid by him in a financial year from the 1st day of April next following the said financial year to the date of regular assessment. In case the refund was not granted within three months from the date of the month in which the regular assessment was completed, section 243 provided for further payment of interest. Under section 244, interest was payable to the assessee for delay in payment of refund as a result of an order passed in appeal, etc., from the date following after the expiry of three months from the end of the month in which such order was passed to the date on which refund was grante

under all the three sections was 15 per cent annum.

11.3. These provisions, apart from being complicated left certain gaps for which interest was not paid by the Department to the assessee for money remaining with the Government. To remove this inequity, as also to simplify the provisions in this regard, the Amending Act, 1987, has inserted a new Section 244A in the Income Tax Act, applicable from the assessment year 1989-90 and onwards which contains all the provisions for payment of interest by the Department for delay in the grant of refunds. The rate of interest has been increased from the earlier 15 per cent annum to 1.5% per month or part of a month, comprised in the period of delay in the grant of refund. The Amending Act, 1987, has also amended sections 214, 243 and 244 to provide that the provisions of these sections shall not apply to the assessment year 1989-90 or any subsequent assessment years."

(emphasis supplied)

SUBMISSIONS:-

20. Shri Arijit Prasad, learned counsel appearing for the Revenue would submit, that, if the tax is paid under Section 195(2) of the Act, then while refunding the amounts so paid, the Revenue need not be burdened with payment of interest on the amount so refunded. He would submit that while Section 244A(1)(a) specifically provides for the four instances under specific provisions where the interest would be payable on the refund of tax paid, Section 244A(1)(b) does not provide for any specific instance but mentions "any other cases" and the explanation appended to the said Section requires payment of refund to be made in cases where notice of demand was issued under Section 156 of the Act and since no demand notice was issued to the assessee under Section 156 of the Act the assessee would not be covered even by the aforesaid provision and hence, no interest is payable to the assessee by

the Revenue. It is further submitted that interest under Section 244A is to be granted in case where refund of any amount becomes due to an assessee under this Act and the refund of tax deducted at source made to the deductor/resident is not under any statutory provisions of the Act, the deductor/ resident is not entitled for interest on the amount of tax deducted and deposited with the revenue.

21. Per contra, learned senior counsel appearing for the resident/deductor would submit that since the payment made under Section 195(2) is payment made under the Act pursuant to an order passed by the assessing officer which in turn would be sheltered under the provisions of Section 156 of the Act, by virtue of clause(b) of sub-Section(1) of Section 244A of the Act, the Revenue is obliged to refund the tax with interest.

DISCUSSION:-

22. It is cardinal principle of interpretation of Statutes that the words of a Statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning unless such construction leads to some absurdity or unless there is something in the context or in the object of the Statute to the contrary. The golden rule is that the words of a Statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of a Statute are clear, plain and unambiguous, then the Courts are bound to give effect to that meaning irrespective of the consequences. It is said that the words themselves best declare the intention of the law giver. The Courts have adhered to the principle that efforts should be made to give meaning to each and every word used by the legislature and it is not a sound principle of construction to brush aside words in a Statute as being inapposite surpluses, if they can have proper application in circumstances conceivable within the contemplation of the Statute (See *Gurudevdatta VKSSS Maryadit v. State of Maharashtra* [2001] 4 SCC 534)

23. It is also well settled principle that the courts must interpret the provisions of the Statute upon ascertaining the object of the legislation through the medium or authoritative forms in which it is expressed. It is well settled that the Court should, while interpreting the provisions of the Statute, assign its ordinary meaning.

24. This Court in Shyam Sunder vs. Ram Kumar (2001) 8 SCC 24 has observed that in relation to beneficent construction, the basic rules of interpretation are not to be applied where (i) the result would be re-legislation of a provision by addition, substitution or alteration of words and violence would be done to the spirit of legislation, (ii) where the words of a Provision are capable of being given only one meaning and (iii) where there is no ambiguity in a provision, however, the Court may apply the rule of beneficent construction in order to advance the object of the Act.

25. Before the insertion of Section 244A as a composite Section by the Direct Tax Laws (Amendment) Act, 1987, the liability to pay interest on refund of pre-paid taxes was contained in Sections 214, 243 read with Section 244 (1A) of the Act. The Parliament has introduced a new Section in the place of Sections 214, 243 and 244 in respect of assessment for the assessment year 1989-90 and onwards.

26. The language of the Section is precise, clear and unambiguous. Sub-Section (1) of Section 244A speaks of interest on refund of the amounts due to an assessee under the Act. The assessee is entitled for the said amount of refund with interest thereon as calculated in accordance with clause (a) & (b) of sub-Section (1) of Section 244A. In calculating the interest payable, the section provides for different dates from which the interest is to be calculated.

27. Clause(a) of sub-Section(1) of Section 244A talks of payment of interest on the amount of tax paid under Section 155WJ, tax collected at source under section 206C, taxes paid

by way of advance tax, taxes treated as paid under Section 199 during the financial year immediately preceding the assessment year. Under this clause, the interest shall be payable for the period starting from the first day of the assessment year to the date of the grant of refund. No interest is payable if the excess payment is less than 10% of the tax determined under Section 143(1) of the Act or on regular assessment. Clause(b) of Sub-Section(1) of Section 244A opens with the words "in any other case" that means in any case other than the amounts paid under Clause(a) of Sub-section(1) of Section 244A. Under this clause, the rate of interest is to be calculated at the rate of one and a half per cent per month or a part of a month comprised in the period or the periods from the date or, as the case may be, either the dates of payment of the tax or the penalty to the date on which the refund is granted. An explanation is appended to clause(b) of the aforesaid sub-Section to explain the meaning of the expression "date of payment of tax or penalty". It clarifies that the "date of payment of tax or penalty" would mean the date on and from which the amount of tax or penalty specified in the notice of demand issued under section 156 is paid in excess of such demand.

28. Having glanced through the relevant sections and the settled legal principles of interpretation of Statute, let us revert back to the factual situation placed before us in this appeal.

29. In the present case, the resident/ deductor had approached the assessing authority inter alia requesting him to determine the tax that requires to be deducted at source before the payment is made to a non-resident/foreign company. On such a request the assessing officer had passed an order under Section 195(2) of the Act directing the resident/ deductor to deduct tax at a particular rate. The resident/ deductor had appealed against the said order, but had deposited the tax as directed by the assessing officer/Income Tax Officer by the aforesaid order in accordance with the

200 of the Act. When the resident/deductor succeeded in the appeal, a direction was issued by the appellate authority for refund of tax so paid. In observance of the same, the assessing authority had granted the refund of the tax amount under Section 240 of the Act, but declined to grant interest on the said refund amount. The conclusion arrived at by the assessing officer was accepted by the first appellate authority on the ground, inter alia, that the conjoint reading of Section 156 and the explanation appended to Section 244A(1)(b) of the Act would indicate that the amount refunded to the resident/ deductor cannot be equated to the refund contemplated under Section 244A(1)(b) of the Act, whereunder only the interest on refund of excess payment made under Section 156 of the Act on account of post-assessment tax is contemplated and not the interest on refund of tax deposited under self-assessment. However, the Tribunal has rejected the aforesaid rationale of the assessing authority as well as the first appellate authority and granted the claim of the resident/deductor. The High Court has endorsed the view of the Tribunal and dismissed the appeals filed the Revenue.

30. The refund becomes due when tax deducted at source, advance tax paid, self assessment tax paid and tax paid on regular assessment exceeds tax chargeable for the year as a result of an order passed in appeal or other proceedings under the Act. When refund is of any advance tax (including tax deducted/collected at source), interest is payable for the period starting from the first day of the assessment year to the date of grant of refund. No interest is, however, payable if the excess payment is less than 10 percent of tax determined under Section 143(1) or on regular assessment. No interest is payable for the period for which the proceedings resulting in the refund are delayed for the reasons attributable to the assessee (wholly or partly). The rate of interest and entitlement to interest on excess tax are determined by the statutory provisions of the Act. Interest payment is a statutory obligation and non-discretionary in nature to the assessee. In tune with the aforesaid general principle, Section 244A is drafted and

enacted. The language employed in Section 244A of the Act is clear and plain. It grants substantive right of interest and is not procedural. The principles for grant of interest are the same as under the provisions of Section 244 applicable to assessments before 01.04.1989, albeit with clarity of application as contained in Section 244A.

31. The Department has also issued Circular clarifying the purpose and object of introducing Section 244A of the Act to replace Sections 214, 243 and 244 of the Act. It is clarified therein, that, since there was some lacunae in the earlier provisions with regard to non-payment of interest by the revenue to the assessee for the money remaining with the Government, the said section is introduced for payment of interest by the Department for delay in grant of refunds. A general right exists in the State to refund any tax collected for its purpose, and a corresponding right exists to refund to individuals any sum paid by them as taxes which are found to have been wrongfully exacted or are believed to be, for any reason, inequitable. The statutory obligation to refund carried with it the right to interest also. This is true in the case of assessee under the Act.

32. The question before us is, whether the resident/ deductor is also entitled to interest on refund of excess deduction or erroneous deduction of tax at source under Section 195 of the Act.

33. We would begin our discussion by referring to circular No. 790, dated 20.04.2000, issued by the Board. Omitting what is not necessary, the material portion of the circular is extracted:

"....

6. Refund to the person making payment under Section 195 is being allowed as income does not accrue to the non-resident. The amount paid into the Government account in such cases, is no longer 'tax'. In view of this, no interest under section 244A is admissible o ed

in accordance with this Circular or on the refunds already granted in accordance with Circular No. 769."

34. What the deductor/ resident primarily contend is that, what has been deposited by him is a tax, may be for and on behalf of non-resident/ foreign company and when the beneficial circular provides for refund of tax to the deductor under certain circumstances, the refund of tax should carry interest.

35. The circular issued by Central Board of Direct Taxes ("the Board" for short) is binding on the department. Binding nature of the circular is explained by this Court in the case of *UCO Bank v. CIT* 237 ITR 889, wherein this Court has observed that the circulars issued by the Board in exercise of its powers under Section 119 of the Act would be binding on the income tax authorities even if they deviate from the provisions of the Act, so long as they seek to mitigate the rigour of a particular Section for the benefit of the assessee. Therefore, we cannot be taking exception to the reasoning and conclusion reached by the authorities under the Act. However, the Tribunal and the High Court, have granted interest on the amount of tax deposited by the resident/ deductor from the date of payment on the ground, firstly, the refund of tax is directed by the first appellate authority in the appeal filed by the deductor/ resident under Section 240 of the Act and secondly, the Revenue for having retained the sum by way of tax has to compensate the person who had deposited the tax.

36. Section 240 of the Act provides for refund of any amount that becomes due to an assessee as a result of an order in appeal or any other proceedings under the Act. The phrase "other proceedings under the Act" is of wide amplitude. This Court has observed, that, the other proceedings under the Act would include orders passed under Section 154 (rectification proceedings), orders passed by the High Court or Supreme Court under Section 260 (in reference), or order passed by the Commissioner in revision applications under Section 263 or in an application under Section 273A.

37. A "tax refund" is a refund of taxes when the tax liability is less than the tax paid. As per the old section an assessee was entitled for payment of interest on the amount of taxes refunded pursuant to an order passed under the Act, including the order passed in an appeal. In the present fact scenario, the deductor/assessee had paid taxes pursuant to a special order passed by the assessing officer/Income Tax Officer. In the appeal filed against the said order the assessee has succeeded and a direction is issued by the appellate authority to refund the tax paid. The amount paid by the resident/ deductor was retained by the Government till a direction was issued by the appellate authority to refund the same. When the said amount is refunded it should carry interest in the matter of course. As held by the Courts while awarding interest, it is a kind of compensation of use and retention of the money collected unauthorizedly by the Department. When the collection is illegal, there is corresponding obligation on the revenue to refund such amount with interest in as much as they have retained and enjoyed the money deposited. Even the Department has understood the object behind insertion of Section 244A, as that, an assessee is entitled to payment of interest for money remaining with the Government which would be refunded. There is no reason to restrict the same to an assessee only without extending the similar benefit to a resident/ deductor who has deducted tax at source and deposited the same before remitting the amount payable to a non-resident/ foreign company.

38. Providing for payment of interest in case of refund of amounts paid as tax or deemed tax or advance tax is a method now statutorily adopted by fiscal legislation to ensure that the aforesaid amount of tax which has been duly paid in prescribed time and provisions in that behalf form part of the recovery machinery provided in a taxing Statute. Refund due and payable to the assessee is debt-owed and payable by the Revenue. The Government, therebeing no express statutory provision for payment of interest on the refund o x

collected by the Revenue, cannot shrug off its apparent obligation to reimburse the deductors lawful monies with the accrued interest for the period of undue retention of such monies. The State having received the money without right, and having retained and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest. Whenever money has been received by a party which ex ae quo et bono ought to be refunded, the right to interest follows, as a matter of course.

39. In the present case, it is not in doubt that the payment of tax made by resident/ depositor is in excess and the department chooses to refund the excess payment of tax to the depositor. We have held the interest requires to be paid on such refunds. The catechize is from what date interest is payable, since the present case does not fall either under clause (a) or (b) of Section 244A of the Act. In the absence of an express provision as contained in clause (a), it cannot be said that the interest is payable from the 1st of April of the assessment year. Simultaneously, since the said payment is not made pursuant to a notice issued under Section 156 of the Act, Explanation to clause (b) has no application. In such cases, as the opening words of clause (b) specifically referred to "as in any other case", the interest is payable from the date of payment of tax. The sequel of our discussion is the resident/deductor is entitled not only the refund of tax deposited under Section 195(2) of the Act, but has to be refunded with interest from the date of payment of such tax.

40. In the result, the appeals fail. Accordingly, the appeals are dismissed. No order as to costs.

R.P. Appeals dismissed.

DEFENCE RESEARCH & DEVELOPMENT ORGANIZATION

v.

ANJANAPPA & ANR.

(Civil Appeal No. 7269 of 2013 etc)

FEBRUARY 26, 2014

[DR. B.S. CHAUHAN AND J. CHELAMESWAR, JJ.]

LAND ACQUISITION ACT, 1894:

Compensation - Award of compensation in respect of comparable lands - High Court enhanced market value of land, on the basis of comparable lands in other land acquisition case - Held: High Court adopted the method of 10 per cent increase every year in market value of land and used the exemplar to conclude that appellant could not be permitted to acquire land of respondents at the price lesser than the market value of their land - Land in question had a potential value on the date of preliminary Notification as was evident from oral evidence adduced before reference court - There was no dispute that the land which was subject matter of another case and lands in question were in contiguous and same geographical situation - High Court relied upon the judgment in earlier case considering the geographical situation of the land -- It cannot be said that compensation awarded is not justified - There is no cogent reason to interfere with impugned judgment and order.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7269 of 2013.

From the Judgment and Order dated 20.03.2009 of the High Court of Karnataka at Bangalore in MFA No. 2588 of 2004.

WITH

SLP (C) No(s). 1046-1059 of 2009.

SLP(C) No(s). 17875-17881 of 2009.

SLP(C) No(s). 29763-29765 of 2010.

SLP(C) No(s). 31805-31806 of 2010.

SLP(C) No(s). 35767-35778 of 2010.

SLP(C) No(s). 14378-14379 of 2013.

SLP(C) No(s). 767-768 of 2011.

SLP(C) No(s). 23294-23337 of 2012.

SLP (C) No(s). 22532 of 2010.

SLP(C) No(s). 22533-22534 of 2010.

SLP(C) No(s). 22535-22536 of 2010.

SLP(C) No(s). 22538-22539 of 2010.

SLP(C) No(s). 25647-25648 of 2010.

SLP(C) No(s). 25649-25652 of 2010.

CIVIL APPEAL No. 1425 of 2013.

S.W.A. Qadri, Kiran Bhardwaj, Mehmood Umar, B.V. Balaram Das, Anil Katiyar, B. Krishna Prasad, Rajesh Mahale, Krutin R. Joshi, Shialesh Madiyal, Aswathi, E.C. Vidya Sagar, Devendra Singh, S.N. Bhat, Dasharath T.M., D.P. Chaturvedi, M.A. Chinnasamy, K. Krishna Kumar, V. Senthil Kumar, S. Muthu Krishnan, Shankar Divate, E.R. Sumathy, Vaijayanthi Girish, Anilendra Kant Srivastava, B.V. Bhandarkar, Ashok K. Mishra, Naresh Kumar for the appearing parties.

The following Order of the Court was delivered

ORDER

1. All these appeals and Special Leave Petitions have been preferred against various impugned judgments and orders passed by the High Court of Karnataka at Bangalore in various appeals including M.A. No. 2588 of 2004 by which the High Court has enhanced the amount of compensation.

2. The facts and circumstances giving rise to these appeals and special leave petitions mostly disposed of by a common judgment impugned before us had been that:

A. A huge chunk of land stood notified under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act) vide Notifications dated 4.3.1993, 13.5.1993 and 2.6.1995 for the use of Defence Research and Development Organisation and the possession was taken after completing all the requirements under the Act. The persons interested therein filed their claims under Section 5 of the Act and led evidence, on the basis of which the Special Land Acquisition Officer (hereinafter called as the `SLAO') had assessed the market value of the land as Rs. 60,000/- per acre.

B. Aggrieved, the respondents approached the Reference Court by filing applications under Section 18 of the Act and the Reference Court vide award dated 30.11.2002 assessed the market value at the rate of Rs. 3,15,000/- per acre and Rs.3,45000/- per acre with respect to Notifications dated 4.3.1993, 13.5.1993 and 2.6.1995 respectively.

C. Aggrieved, the Union of India filed appeals under Section 54 of the Act for reducing the amount of compensation before the High Court. Respondents preferred cross-objections which have been allowed and the appeals of the Union of India have been dismissed. The High Court further enhanced the market value of land at the rate of Rs. 7,70,000/- in respect of land acquired under Notifications dated 4.3.1993 and 13.5.1993 and enhanced the market va d

under the Notification dated 2.6.1995 to Rs.8,40,000/-.

Hence, these appeals and special leave petitions.

3. The High Court had adopted the method of 10 per cent increase every year in the market value of the land and used the exemplar to conclude that the appellant cannot be permitted to acquire the land of the respondents at the price lesser than the market value of their land. The Court placed reliance on the earlier judgments of the Division Bench of the High Court of Karnataka and held that the land was comparable to the lands wherein the award dated 13.11.2002 had been delivered in LAC No. 263 of 1996. The land in question had a potential value on the date of preliminary Notification as was evident from the oral evidence adduced before the Reference Court. There was no dispute that the land which was subject matter of LAC 263 of 1996 and the lands in question were in contiguous and same geographical situation. After reaching the conclusion by the court, the award was given as per the market value as referred to hereinabove.

4. The High Court relied upon the judgment in earlier case in LAC No. 263 of 1996 and reached the aforesaid conclusion. Considering the geographical situation of the land, it cannot be held that compensation awarded is not justified.

We do not see any cogent reason to interfere with the impugned judgment and order, the appeals and special leave petitions lack merit and are accordingly dismissed.

R.P. SLPs dismissed.

NANAK RAM

v.

STATE OF RAJASTHAN

(Criminal Appeal No. 1985 of 2010 etc.)

FEBRUARY 26, 2014

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

PENAL CODE, 1860:

s. 300, Exception 4 and s. 304 (part I) -Dispute between rival groups over a land dispute, turned into sudden fight resulting into death of one person on complainant's side - High Court converting conviction u/s 302 to one u/s 304(Part II) - Held: Out of 9 injuries on deceased only one was held to be grievious in nature which was sufficient in ordinary course of nature to cause the death - In heat of passion upon a sudden quarrel accused caused injuries on deceased - The act was done by accused person with intention of causing such bodily injury as was likely to cause the death - Offence will squarely fall within s.304 (Part I) - Conviction and sentence u/s 304 (Part II) set aside and appellants convicted u/s 304 (Part I) and sentenced to 7 years RI each - Appellants are not entitled to be released on probation - Probation of Offenders Act, 1958.

The appellant in Crl. A. No. 1985 of 2010 and the appellants in Crl. A. No. 342 of 2011 along with four others were stated to have caused injuries to victim party over a land dispute. One of the victims died on the spot and another received injuries. The appellant in Crl. A. No. 1985 of 2010 absconded whereas the others were prosecuted and, except one of them, were convicted and sentenced to various terms of imprisonment. One of the appellant in Crl. A. No. 342 of 2011 and another were convicted and sentenced u/s 302 IPC. Others were convicted and

sentenced to five years RI u/s 304 (part II) IPC. All the five accused persons were also sentenced to various terms of imprisonment for other offences. The appellant in Crl. A. No. 1985 of 2010, when apprehended, was tried and was convicted and sentenced u/s 302 IPC. He was also sentenced to various terms of imprisonment for other offences. During the pendency of appeal before the High Court, four of the accused died and their appeals abated. The High Court converted the conviction u/s 302 to one u/s 304(part II) IPC and sentenced the accused persons to 5 years RI. The conviction and sentences under various other sections were maintained. The appeal of the State against complete acquittal of one of the accused and for enhancement of sentence of other accused was dismissed. The surviving accused filed the appeals challenging their conviction whereas the State filed the appeal for enhancement of their sentence.

Disposing of the appeals, the Court

HELD: 1.1 PW 7, the injured witness and PW11 are brothers of the deceased and PW6 is their sister. PW 2 is an independent witness. All these persons witnessed the occurrence. The testimonies of PW2, PW6, and PW11 are natural cogent and in all material particulars corroborated the testimony of PW7. Accepting their testimonies it is clear that during the occurrence all the seven accused as members of unlawful assembly inflicted injuries with their weapons on the deceased and PW 7. [para 13] [337-A, F, G-H]

1.2 That the deceased died of homicidal violence is established by the medical evidence adduced in the case. There is no doubt that the deceased died of injuries sustained during the occurrence. It is further relevant to note that the doctor (PW9) examined PW7 immediately after the occurrence and found 11 injuries on him. There is no delay in registering case and there is no flaw in the investigation. [para 14 and 15] [338-A, C, F]

1.3 It is true that the accused party had land dispute with the victim party. The evidence shows that the accused party was desirous to get the subject land to themselves and were taking legal steps to achieve it. On coming to know of the fencing put by the deceased and his brothers, they were annoyed and went there to remove the fencing. While they were dismantling the fencing, the deceased and his brothers came there and objected to it and a sudden quarrel erupted. A fight suddenly takes place for which both parties are more or less to be blamed and it is a combat whether with or without weapons. It may be that one of them starts it, but if the other had not aggravated it by his own conduct, it would not have taken the serious turn it did. Heat of passion requires that there must be no time for the passions to cool down and in this case the parties have worked themselves into a fury on account of the verbal altercation in the beginning. Out of the 9 injuries, only injury no.1 was held to be of grievous nature, which was sufficient in the ordinary course of nature to cause death of the deceased. This goes to show that in the heat of passion upon a sudden quarrel the accused persons had caused injuries on the deceased. That being so, Exception 4 to s. 300 IPC is applicable. [para 16-17] [338-G; 339-B-F]

Ghapoo Yadav & Ors. vs. State of M.P. **2003 (2) SCR 69 = (2003) 3 SCC 528, relied on.**

1.5 Looking at the nature of injuries sustained by the deceased and the circumstances, the conclusion is irresistible that the death was caused by the acts of the accused done with the intention of causing such bodily injury as is likely to cause death and, therefore, the offence would squarely come within s. 304 (part I) IPC and imposition of 7 years rigorous imprisonment on each of the appellants would meet th

Accordingly, the conviction of the appellants u/s 304 (Part II) IPC read with s. 149 IPC and the sentences of 5 years rigorous imprisonment each are set aside and instead they are convicted u/s 304 (Part I) read with s. 149 IPC and sentenced to undergo seven years rigorous imprisonment each. The other conviction and sentences imposed on the appellants are sustained. They are not entitled for release on probation. [para 18-20] [339-G-H; 340-B, D-E, C]

State of Karnataka vs. Muddappa **(1999) 5 SCC 732 and** *Eliamma and Another vs. State of Karnataka* **2009 (3) SCR 135 = (2009) 11 SCC 42;** *Mahesh Balmiki alias Munna vs. State of M.P.* **(2000)1 SCC 319; and** *Arun Nivalaji More vs. State of Maharashtra* **2006 (4) Suppl. SCR 301 = (2006) 12 SCC 613 - cited.**

Case Law Reference:

(1999) 5 SCC 732	**cited**	**para 11**
2009 (3) SCR 135	**cited**	**para 11**
(2000)1 SCC 319	**cited**	**para 12**
2006 (4) Suppl. SCR 301	**cited**	**para 12**
2003 (2) SCR 69	**relied on**	**para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1985 of 2010.

From the Judgment and Order dated 19.01.2010 of the High Court of Judicature for Rajasthan at Jodhpur in Criminal Appeal No. 314 of 1990.

WITH

Criminal Appeal No. 1990, 1991, 1992 of 2010.

and Criminal Appeal No. 342 of 2011.

Mahabir Singh, Nikhil Jain, Gagandeep Sharma, Preeti Singh, Rakesh Dahiya for the Appellant.

Sonia Mathur, Pragati Neekhra for the Respondent.

The Judgment of the Court was delivered by

C. NAGAPPAN, J. 1. This judgment shall dispose of three appeals in Criminal appeal Nos.1985 of 2010 filed by the appellant Nanak Ram/Accused and Criminal Appeal No.342 of 2011 filed by appellants/Accused Mohan Ram and Surja Ram against their conviction and sentence, and Criminal Appeal Nos. 1991 of 2010, 1990 of 2010 and Criminal Appeal No.1992 of 2010 filed by the State of Rajasthan for the enhancement of the sentence against the above mentioned accused, respectively.

2. The case of the prosecution in brief is as follows : PW 7 Shera Ram is the younger brother of deceased Shivji Ram and they had obtained land from Gram Panchayat towards the western side of the village and obtained Pattas for the said land. Accused Bhera Ram and accused Chuna Ram are real brothers while accused Surja Ram and accused Mohan Ram are sons of accused Sadula Ram. Accused Bhera Ram and Sadula Ram told Shivji Ram and Shera Ram that they will not allow them to take the land and will snatch it from them. Two months prior to occurrence Shivji Ram and Shera Ram erected fencing around their land whereupon the accused Bhera Ram and other accused were seriously annoyed over the same. On the occurrence day i.e. on 29.5.1983 at 10.30 a.m. Shivji Ram and both his younger brothers were repairing/re-erecting the fencing in their land, accused persons Bhera Ram, Sadula Ram and his sons Mohan Ram and Surja Ram, Gordhan Ram, Nanak Ram and Chuna Ram, all duly armed entered into Bara from south side and started dismantling the fence. Shivji Ram and his brothers questioned the same by saying that they have obtained Patta from the Panchayat. Thereupon Bhera Ram and Surja Ram simultaneously inflicted Barchhi blow on the head of Shivji Ram, as a result of which he fell down and all the accused attacked him with their weapons. Shera Ram

intervened and accused Mohan Ram inflicted Barchhi blow which landed on the left side of his head and accused Chuna Ram inflicted the jei blow on his right leg. Then all the accused started beating whereupon his sister Dhuri came running and fell upon Shera Ram in order to protect him. PW 11 Balu Ram and PW 2 Mangi Lal who were present at the occurrence place were threatened by the accused and they got frieghtened and saw the occurrence standing by the side of the road. After that all the accused went away. Shivji Ram died on the spot.

3. Some unknown person gave a telephonic information about the occurrence to the Police Station Nokha on 29.5.1983 and after making Exh.P-54 entry in the Roznamcha PW 13 Attar Ali Khan went to the occurrence place and found Shivji Ram lying dead and Shera Ram with injuries and he recorded Exh.P9 statement of Shera Ram, sent him to Nokha Hospital for treatment. He forwarded Exh.P9 statement to the Police Station for registering the case and Exh. P55 FIR came to be registered. He conducted inquest on the body of Shivji Ram and prepared Exh.P5 'inquest report'. He prepared Exh.P3 site plan and Exh.P45 site inspection note. He seized blood stained earth and ordinary earth under Exh. P33 and also seized jeis used by the accused Chuna Ram, Nanak Ram from the occurrence place and the blood stained wooden jei under Exh. P34. He also seized the footwear of Shivji Ram viz. Exh.P35 and sent the body for post mortem.

4. Dr. Moti Lal Mishra (PW 9) conducted the autopsy on the body of Shivji Ram and found the following 9 injuries:

i) An incised wound of 6-½" x ½" and deep upto brain on the head,

ii) a punctured wound of 1 x ½ x ½ cm on the left knee joint deep to the bone;

iii) multiple contusion of 1 cm each incised on the left elbow joint;

iv) an abrasion 1 x ½ cm on the left ring finger dorsally;

v) a contusion of 4 x 2 cm on the lower half of the left leg anteriorly;

vi) swelling 2 x 2 cm on the left leg near the 5th injury;

vii) a contusion of 1 x 1 cm on the right thigh

viii) an abrasion 3 x 1 cm on the right knee joint near the ankle joint; and

ix) an abrasion on the right middle finger dorsally.

He issued Exh. P 33 Post Mortem report by expressing opinion that the death has occurred due to destruction of all the elements of brain and shock due to excessive bleeding.

5. PW 9 Dr. Moti Lal Mishra examined Shera Ram in the Nokha hospital and found the following 11 injuries on him:

i) One crushed wound of 4 x 3 cm bone deep on lower half of the left leg interiorly;

ii) One crushed wound of 1cm x .5x.5 cm on middle 1/3 of the right leg laterally;

iii) Contusion of 15 x 1.5 cm on the lower portion of glutal region;

iv) An abrasion 3 x ½ cm on the right scapula;

v) One crushed wound of 6 x 1 x 1.5 cm on the left side of the head, 7 cm above the left ear,

vi) An abrasion 1cm x 1 cm on the back side of the head;

vii) Swelling 4 x 3 cm on the right palm;

viii) An abrasion 1 x ½ cm on th

ix) A contusion of 6 x 1 cm on the middle half of the right thigh medially;

x) A contusion of 3 x 1 cm on the right thigh 2 cm above the ninth injury and

xi) Contusion two in number, one of 4 x 1 cm and another of 3 x 1 cm on the upper half of the right glutal.

He opined that all the above injuries were simple in nature and issued Exh. P 32 Injury Report.

6. After completing investigation challan was filed in the Court of Munsif-cum-Judicial Magistrate Nokha against all the accused persons. Accused Nanak Ram was absconding. The other accused persons namely Bhera Ram, Sadula Ram, Chuna Ram, Surja Ram, Mohan Ram and Gordhan Ram were tried in Sessions Case No.63 of1983 for the alleged offences under Section 302, 307, 323 and 324 all read with Section 149 IPC and also the offence under Section 147 and 148 IPC. The prosecution examined 13 witnesses and tendered in evidence 59 documents. The learned Sessions Judge convicted accused Bhera Ram and Surja Ram for the offences under Section 302 read with section 149 IPC and sentenced them each to undergo imprisonment for life. He also convicted accused persons Sadula Ram, Mohan Ram and Gordhan Ram for the offences under Section 304 Part II read with Section 149 IPC and sentenced them each to undergo five years rigorous imprisonment. Besides he convicted accused persons namely Surja Ram, Bhera Ram, Gordhan Ram and Mohan Ram for the offence under Section 148 IPC and sentenced them each to undergo six months rigorous imprisonment He also convicted Sadula Ram for the offence under Section 147 IPC and sentenced him to undergo 3 months rigorous imprisonment. In addition he convicted accused persons Surja Ram, Bhera Ram, Mohan Ram, Sadula Ram and Gordhan Ram for the offence

under Sections 323 and 324 read with Section 149 IPC and sentenced them each to undergo 6 months rigorous imprisonment and directed all the sentences to run concurrently. However, he acquitted accused Chuna Ram of the charges.

7. All the five convicted accused persons preferred appeal in Appeal No.428 of 1984 on the file of High Court of Judicature of Rajasthan, at Jodhpur, challenging their conviction and sentences. The State of Rajasthan challenged the complete acquittal of Chuna Ram and the acquittal of accused persons Sadula Ram, Mohan Ram and Gordhan Ram for the offences under Section 302 read with 149 IPC , in Appeal No.106 of 1985. During the pendency of the appeals four accused persons namely Sadula Ram, Gordhan Ram, Bhera Ram and Chuna Ram died, with the result the appeal preferred against them in Appeal No. 106 of 1985 abated and the said appeal continued only as against the accused Mohan Ram. Like wise Appeal No.428 of 1984 preferred by the accused persons Bhera Ram, Sadula Ram, Gordhan Ram also stood abated and it continued on behalf of accused Surja Ram and Mohan Ram only.

8. The High Court of Rajasthan partly allowed the appeal in Appeal No.428 of 1984 filed by the accused Surja Ram by setting aside his conviction for the offence under Section 302 read with Section 149 IPC and instead convicted him under Section 304 Part II read with Section 149 IPC and sentenced him to undergo 5 years rigorous imprisonment and the other conviction and sentences imposed on him were maintained. At the same time it dismissed the appeal in Appeal No.428 of 1984 preferred by accused Mohan Ram, by confirming the conviction and sentence imposed on him. The High Court also dismissed the Appeal No.106 of 1985 preferred by the State of Rajasthan against accused Mohan Ram.

9. The accused Nanak Ram on being apprehended was tried in Sessions Case No.24 of 1985 and the learned

Sessions Judge, Bikaner convicted him for the offence under Section 302 read with Section 149 IPC and sentenced him to undergo life imprisonment. He also convicted him for the offence under Section 148 IPC and sentenced him to undergo six months rigorous imprisonment and further convicted him for the offence under Section 324 read with Section 149 IPC and sentenced him to undergo one year rigorous imprisonment and in addition he convicted him for the offence under Section 323 read with Section 149 IPC and sentenced him to undergo three months rigorous imprisonment and further he convicted him for the offence under Section 447 IPC and sentenced him to undergo two months rigorous imprisonment and directed all sentences to run concurrently. Challenging the conviction and sentence Nanak Ram preferred appeal in Criminal Appeal No.314 of 1990 on the file of High Court of Judicature at Rajasthan at Jodhpur and the High Court partly allowed the appeal by setting aside the conviction under Section 302 read with Section 149 IPC and instead convicted him for offence under Section 304 Part II read with Section 149 IPC and sentenced him to undergo five years rigorous imprisonment and maintained all the other convictions and sentences imposed by the Sessions Court.

10. Challenging their convictions and sentences imposed by the High Court on them accused Nanak Ram, Mohan Ram and Surja Ram preferred Criminal Appeal referred to above and the State of Rajasthan also filed appeals against the above accused seeking for enhancement of the sentences imposed on them. All these appeals were heard together and are being disposed of by this common judgment.

11. Mr. Mahabir Singh, learned senior counsel appearing for the appellants contended that the occurrence took place about 30 years ago and accused persons went to the occurrence place only to remove the fence put up by Shivji Ram and his brothers and when it was resisted a free fight followed which was accidental and there was no intention to kill and only

one blow on the head of Shivji Ram was fatal and the other injuries were only minor injuries, and the Courts below have failed to appreciate that there are material improvements and infirmities in the prosecution case and the presence of eye witnesses is highly doubtful and the conviction of appellants is wholly unwarranted and liable to be set aside. The alternative plea of the learned counsel for the appellants was that the appellants have undergone three years of their sentence and they be granted the benefit of probation under the provision of Section 360 of Code of Criminal Procedure as well as under Section 4 of the Probation of Offenders Act, 1958, and in support of the submission he relied on the decision of this Court in *State of Karnataka vs. Muddappa* (1999) 5 SCC 732 and *Eliamma and Another vs. State of Karnataka* (2009) 11 SCC 42.

12. Per contra Ms. Sonia Mathur, learned counsel appearing for the State of Rajasthan strenuously contended that Shivji Ram and his brothers are the Patta holders of the land and lease deeds have been executed by the Panchayat in their favour and the accused persons having failed in their legal proceedings had decided to attack the brothers and take forcible possession of the land and in pursuance of the said common object all the seven accused persons duly armed forcibly entered the land and inflicted injuries on Shivji Ram with barchhi and jei resulting in instantaneous death and also inflicted injuries on his younger brother Shera Ram and the alteration made by the High Court on the conviction from Section 302 IPC read with Section 149 IPC to one under Section 304 Part II IPC read with Section 149 IPC is erroneous and legally unsustainable. In support of her submissions she relied on the decisions of this Court in *Mahesh Balmiki alias Munna vs. State of M.P.* (2000)1 SCC 319 and *Arun Nivalaji More vs. State of Maharashtra* (2006) 12 SCC 613.

13. The prosecution has examined PW 7 Shera Ram, PW 2, Mandi Lal, PW6 Dhuri and PW11 [illegible]g

witnessed the occurrence. PW7 Shera Ram and PW 11 Balu Ram are the younger brothers of deceased Shivji Ram and PW6 Dhuri is their sister. PW 7 Shera Ram was also injured during the occurrence and according to him on the occurrence day namely on 29.5.1983 at 10.30 a.m. Shivji Ram and both his brothers were repairing/re-erecting the fencing in their Patta Land and accused persons Bhera Ram, Sadula Ram and his sons Mohan Ram and Surja Ram, Gordhan Ram, Nanak Ram and Chuna Ram armed with weapons entered into Bara from south side and started dismantling the fence and they questioned the same by saying that they have obtained Patta from Panchayat and at that time Bhera Ram and Surja Ram inflicted Barchhi blow on the head of Shivji Ram as a result of which he fell down and all the accused attacked him with their weapons and when he intervened accused Mohan Ram inflicted barchhi blow on the left side of his head and accused Chuna Ram inflicted jei blow on his right leg and other accused also started beating him whereupon his sister Dhuri came running and fell upon him in order to protect him and the accused persons also threatened PW 11 Balu Ram and PW2 Mangi Lal and being frightened they stood by the side of the road and saw the occurrence and Shivji Ram died on the spot. PW7 Shera Ram sustained as many as 11 injuries on his person as a result of the attack made by all the accused on him at the time of occurrence. PW 11 Balu Ram was involved in the fencing of the land along with his brothers and his presence in the occurrence place cannot doubted. PW 2 Mangi Lal happened to be with Shivji Ram in his land and he has witnessed the occurrence. He is an independent witness. On seeing the attack made by the accused on her brothers PW 6 Dhuri came running and tried to protect Shera Ram by falling upon him. The testimonies of PW2 Mangi Lal, PW6 Dhuri, PW11 Balu Ram are natural cogent and in all material particulars corroborated the testimony of PW7 Shera Ram. Accepting their testimonies it is clear that during the occurrence all the seven accused as members of unlawful assembly have inflicted injuries with their weapons on deceased Shivji Ram and PW 7 Shera Ram.

14. Shivji Ram died of homicidal violence is established by the medical evidence adduced in the case. PW9 Dr. Moti Lal Mishra conducted autopsy on the body of Shivji Ram and found on the head an incised wound of 6½" x ½" deep upto brain and on internal examination the destruction of the elements of the brain. He also found eight other injuries on the other parts of the body. He issued Exh. P33 post mortem report and expressed opinion that the death has occurred due to destruction of the elements of brain and shock due to excessive bleeding. In the oral testimony PW9 Dr. Moti Lal Mishra has categorically stated that injury No.1 found on the head was itself sufficient to cause death. There is no doubt that Shivji Ram died of injuries sustained during the occurrence. It is further relevant to note that PW9 Dr. Moti Lal Mishra examined PW7 Shera Ram immediately after the occurrence in Nokha hospital and found 11 injuries on him. Ex.P.32 is the injury report issued by him mentioning the injuries. According to him all the injuries are simple in nature.

15. Telephonic information about the occurrence was given to Nokha Police Station by some unknown person on 29.5.1983 itself and PW13 Attar Ali Khan after making Exh.P54 entry in the Roznamcha, immediately went to the occurrence place and found Shivji Ram lying dead and Shera Ram with injuries. He recorded Exh.P9 statement of Shera Ram and sent him to Nokha hospital for treatment and forwarded the statement to the Police Station for registering the case Exh.P55 is the First Information Report. He also seized jeis used by the accused from the occurrence place under Exh.P34 Mazhar. There is no delay in registering case and there is no flaw in the investigation.

16. It is true that the accused party had land dispute with the victim party. The Collector ordered conversion of subject land into abadi and on the applications made by Shivji Ram and his two brothers, Pattas were issued as evident from P12, P16, P17, P20, P21 and P24. Accused Bhera Ram preferred appeals against the grant of Patta to P[illegible]e

first instance and they came to be dismissed and the revision preferred before the Collector was pending. PW8 Sarpanch Dhura Ram and PW5 record keeper Hanuman Das have stated so. Thus the evidence shows that the accused party was desirous to get the subject land to themselves and were taking legal steps to achieve it. On coming to know of the fencing put by Shivji Ram and his brothers they were annoyed and went there to remove the fencing. While they were dismantling the fencing, Shivji Ram and his brothers came there and objected to it by saying that they have obtained Patta and a sudden quarrel erupted.

17. A fight suddenly takes place for which both parties are more or less to be blamed and it is a combat whether with or without weapons. It may be that one of them starts it, but if the other had not aggravated it by his own conduct, it would not have taken the serious turn it did. Heat of passion requires that there must be no time for the passions to cool down and in this case the parties have worked themselves into a fury on account of the verbal altercation in the beginning. Out of the 9 injuries, only injury no.1 was held to be of grievous nature, which was sufficient in the ordinary course of nature to cause death of the deceased. The assaults were made at random. Even the previous altercations were verbal and not physical. The earlier disputes over land do not appear to have assumed the characteristics of physical combat. This goes to show that in the heat of passion upon a sudden quarrel the accused persons had caused injuries on the deceased. That being so the Exception 4 to Section 300 IPC is applicable. The fact situation bears great similarity to that in *Ghapoo Yadav & Ors. vs. State of M.P.* (2003) 3 SCC 528.

18. Looking at the nature of injuries sustained by the deceased and the circumstances as enumerated above the conclusion is irresistible that the death was caused by the acts of the accused done with the intention of causing such bodily injury as is likely to cause death and therefore the offence would squarely come within the first part of Section 304 IPC and the

appellants would be liable to be convicted for the said offence. The conviction of the appellants/accused under Section 304 Part II read with Section 149 IPC by the High Court is liable to be set aside.

19. We are of the considered view that imposition of 7 years rigorous imprisonment on each of the appellants for the conviction under Section 304 Part I IPC would meet the ends of justice. We sustain the other conviction and sentences imposed on the appellants. We are also of the view that the appellants are not entitled for release on probation.

20. In the result Criminal Appeal No.1990 of 2010, 1991 of 2010 and 1992 of 2010 preferred by the State of Rajasthan against the accused persons Nanak Ram, Mohan Ram and Surja Ram are partly allowed and their conviction for the offence under Section 304 Part II IPC read with Section 149 IPC and the sentences of 5 years rigorous imprisonment each are set aside and instead they are convicted for the offence under Section 304 Part I read with Section 149 IPC and sentenced to undergo seven years rigorous imprisonment each. All other convictions and sentences imposed on them by the High Court are maintained. Criminal Appeal No.1985 of 2010 and 342 of 2011 are dismissed.

R.P. Appeals disposed of.

ORIENTAL BANK OF COMMERCE & ORS.
v.
S.S. SHEOKAND & ANR.
(Civil Appeal No. 3081 of 2006)

FEBRUARY 26, 2014

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

SERVICE LAW: Punishment - Respondent senior manager in appellant bank - Allegation of purchasing third party cheques and drafts of huge amounts beyond his authority of lending - Inquiry report - Correspondence of appellant bank with Central Vigilance Commission (CVC) - Respondent's request for furnishing of papers exchanged with the CVC declined - Imposition of punishment of reduction of two stages in pay scale on advise of CVC - Request of Vigilance Officer of the bank to the CVC that the penalty imposed deserved to be modified to a minor penalty - Not accepted - Writ petition by respondent seeking quashing of order of punishment and direction to consider him for further promotion - Allowed by High Court - On appeal, held: Undoubtedly, there were serious allegations against the respondent, and such acts could not be condoned - At the same time, the Bank itself had taken the view in the initial stage that the action did not require a major penalty - High Court was also informed at the stage of review that the Bank was considering imposition of a minor penalty - As the advise from CVC was sought, it could not be said that this additional material was not part of their decision making process - When this report was not made available to the respondent, it is difficult to rule out the apprehension about the decision having been taken under pressure - Any material, which goes into the decision making process against an employee, cannot be denied to him - Therefore part of judgment interfering with the punishment is sustained - As regards issue of promotion, the

respondent had previous adverse entry in his record - Inasmuch as the record of respondent was not satisfactory, there was no occasion for High Court to give any such direction on the footing that the respondent was denied the consideration only because he had suffered a punishment - The direction to consider him for promotion, and give him benefits on that footing set aside - Natural justice.

The respondent at the relevant time was working as the Senior Manager in the appellant-bank. The charges against the respondent were that he had purchased third party cheques/drafts of huge amounts beyond the discretionary powers of lending without completing the pre-sanction formalities and had released advance under the Prime Minister Rojgar Yojna, and unauthorisedly insisted such borrowers to provide collateral securities in the shape of immovable property and guarantee in violation of the Scheme. The charge-sheet was followed by an inquiry. The inquiry officer held that the acts of omission and commission on the part of the respondent were essentially in the nature of procedural lapses and the charge of lack of integrity was not substantiated and, therefore, charge no.1 was, partly proved and charge No.2 was not proved.

After receiving the inquiry report, the respondent made his representation, and pleaded that he deserved to be exonerated. The appellant-bank, thereafter, submitted all the papers to the Chief Vigilance Officer of the Bank to forward the same to the Chief Vigilance Commissioner (CVC). The respondent at that stage wrote to the appellant-bank seeking this correspondence with the CVC.

The appellant-bank declined the request of furnishing the correspondence of papers exchanged with the CVC. The Chief Vigilance Officer thereafter sent a letter to the disciplinary author[illegible]

Vigilance Commission had advised to impose a major penalty of reduction of two stages in pay scale, and thereupon the punishment of reduction of two stages in pay scale was imposed. The respondent filed a departmental appeal, which was rejected. The review thereof was also rejected by the Board of Directors.

The respondent filed a writ petition before the High Court on which an order came to be passed that the reviewing authority may consider the review application of the respondent. Time to take the decision was also extended on one occasion, and the High Court was informed that the Bank was considering commutation of the major penalty. The Chief Vigilance Officer of the bank wrote to the Chief Vigilance Commission that the penalty imposed deserved to be modified to a minor penalty. However, the request was not accepted and, the appellant-bank informed the respondent that the review petition was rejected. This led the respondent to file a writ petition. Apart from the prayer to quash the order of punishment, the respondent also sought a direction that he be considered for further promotion. It was his contention that his turn had come up for consideration for promotion, and it was declined because of the departmental action. The High Court relied upon *Nagaraj Shivarao Karjagi and quashed the punishment and also directed to consider him for further promotion. The instant appeal was filed challenging the order of the High Court.

Partly allowing the appeal, the Court

HELD: 1. Undoubtedly, there was a serious allegation against the respondent, and such acts could not be condoned. At the same time, the bank management itself had taken the view in the initial stage that the action did not require a major penalty. The High Court was also informed at the stage of review that the Bank was

considering imposition of a minor penalty. It is quite possible to say that the bank management did arrive at its decision to maintain a major penalty at a later stage on its own, and not because of the dictate of the CVC, but at the same time it has got to be noted that the CVC report had been sought by the management of the bank, and thereafter the punishment had been imposed. The Disciplinary Authority had recorded its own findings, and had arrived at its own decision, but when this advise from CVC was sought, it could not be said that this additional material was not a part of the decision making process. When this report was not made available to the respondent, it is difficult to rule out the apprehension about the decision having been taken under pressure. Any material, which goes into the decision making process against an employee, cannot be denied to him. [para 17] [355-H; 356-A-D]

***Nagaraj Shivarao Karjagi vs. Syndicate Bank Head Office, Manipal AIR 1991 SC 1507: 1991 (2) SCR 576; *State Bank of India vs. D.C. Aggarwal* AIR 1993 SC 1197: 1992 (1) Suppl. SCR 956 - relied on.**

***Disciplinary Authority-Cum-Regional Manager vs. Nikunja Bihari Patnaik* 1996 (9) SCC 69: 1996 (1) Suppl. SCR 314 - referred to.**

2. The respondent was already in a post of a Senior Manager. He was seeking a promotion to a still higher position. Promotion as such, and in any case, to a higher post cannot be insisted as a matter of right. In the instant case, the respondent was considered for promotion in 2002 and was not found fit. It was pointed out that this was not merely on the basis of the punishment that was imposed on the respondent. He had previous adverse entry also in his record in the year 1999. Besides, even if the charge is seen independently, purchasing third party cheques and drafts of huge am[illegible]s

authority of lending has been held to be proved against the respondent, and that finding has not been seriously contested and dislodged. Whether he deserved a major punishment or not, or whether a lenient view of the allegations should be taken by considering his conduct as a procedural lapse is another aspect. In the instant case, the decision to impose a major punishment had to be interfered with because of the manner in which the decision was taken. It is apparent that it was not a case for complete exoneration, however, it will not be desirable to give such direction after so many years, particularly, when the respondent has since retired. That being so, the order quashing the punishment will remain. That, however, would not mean that the direction of the High Court to the appellant to consider the respondent for promotion should be sustained. The respondent was considered for promotion once again in the year 2005, and not found fit for the promotion. Thus, the bank had considered the respondent after the impugned judgment which was in favour of the respondent. Inasmuch as the record of the respondent was not satisfactory, there was no occasion for the High Court to give any such direction on the footing that the respondent was denied the consideration only because he had suffered a punishment. That inference was not called for. Whereas the judgment and order of the High Court setting aside the punishment will remain, the direction to consider him for promotion, and give him benefits on that footing will have to be set aside. The respondent will however get the monetary benefits on the footing that the said punishment is quashed. [para 18 to 20] [356-G-H; 357-A-H; 358-A]

Case Law Reference:

1991 (2) SCR 576	**Para 10**
1992 (1) Suppl. SCR 956	**Para 10**

1996 (1) Suppl. SCR 314 **Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3081 of 2006.

From the Judgment and Order dated 16.03.2004 of the High Court of Punjab and Haryana at Chandigarh in Civil Writ Petition No. 18847 of 2001.

K.N. Bhatt, Rajat Arora, Rajiv Nanda, Anantha Narayana M. G. for the Appellants.

Nidhesh Gupta, Tarun Gupta, Daphne (for S. Janani) for the Respondents.

The Judgment of the Court was delivered by

H.L. GOKHALE, J. 1. This Civil Appeal seeks to challenge the judgment and order dated 16.3.2004 rendered by a Division Bench of Punjab and Haryana High Court in Civil Writ Petition No.18847 of 2001, allowing the said Writ Petition filed by the respondent, a Senior Manager in the appellant-bank. That judgment and order quashed the disciplinary order passed by the appellant-bank reducing him in two stages in pay scale with cumulative effect and also directed that he be considered for further promotion.

The facts leading to this appeal are this wise:-

2. The respondent at the relevant time was working as the Senior Manager in a branch of the appellant-bank at Narwana, Bahadurgarh. It was noticed by the bank that he had purchased third party cheques/drafts of huge amounts beyond the discretionary powers of lending. This was done without completing the pre-sanction formalities. The appellant-bank, therefore, served a show cause notice to the respondent on 26.2.1997 for committing these unauthorised acts. The respondent filed a detailed reply dated 12.4.1997. Therein the respondent admitted committing of t[illegible],

however, stated that this was done with the intention of increasing the profits of the bank. He also contended that the bank had not suffered any loss in these transactions.

3. The appellant-bank, thereafter, charge-sheeted the respondent on 1.12.1997 for two specific irregularities, they were as follows:-

"Charge No.1 – Respondent had unauthorisedly purchased 3rd party cheques/drafts of huge amount aggregating to Rs.45.23 crores for a number of parties much beyond his discretionary powers of lending without completing pre-sanction formalities in violation of head office guidelines. Thus he violated Regulation 3(i) of Oriental Bank of Commerce Officer Employees (Conduct) Regulation, 1982.

Charge No.2 – Respondent had released advance under the Prime Minister Rojgar Yojna, and unauthorisedly insisted such borrowers to provide collateral securities in the shape of immovable property and guarantee in violation of the above scheme."

4. The charge-sheet was followed by an inquiry. The inquiry officer gave a report dated 26.2.1999 which was forwarded by the respondent on 17.4.1999 to make a representation on the findings. In paragraph 4 of the report, the inquiry officer dealt with statement of SW-1 (State Witness No.1) which stated that as per the head office circular, the discretionary powers of the Branch Manager at the relevant time were up to Rs.30 lacs for purchasing bank drafts and government cheques, and up to Rs.1.5 lacs for third party cheques. As against this provision, the respondent had purchased cheques/drafts aggregating to Rs.45.23 crores as per the details produced in the inquiry report. This was done without any authorization, and particularly when the authority of the respondent in this behalf was placed under abeyance. The respondent raised various technical objections with respect to the production of the documents, but

essentially contended that his acts, which went beyond discretionary powers, were ratified and confirmed by the higher authorities. He submitted that these instruments were received from the respectable parties to increase the profit of the branch. With respect to the instructions issued to him by the Regional Manager to stop purchasing these cheques and drafts, he submitted that he had not violated these instructions.

5. The paragraph 4.3 of the Enquiry report contains the assessment of evidence on charge No.1. It reads as follows:-

"4.3 Assessment of Evidence:-

Ex. S.27 and S.28 are head office circulars which lay down the discretionary powers of the branch incumbent. SW1 confirmed that during the material time the powers of the BM (Branch Manager) was 30 lacs for purchase of bank draft and Rs. 1.5 lacs for third party cheques. SW1 also confirmed that the CO(Charged Officer) had purchased cheques/drafts beyond his discretionary powers. He deposed that 77 cheques/drafts amounting to 40 crores and 153 cheques/drafts amounting to 14.63 crores were purchased through clearing adjustment account. It was confirmed that discounting of cheques/drafts through clearing adjustment account was not permitted as per HO guidelines. SW1 confirmed that Ex. S2 was HO (Head Office) Circular dated 11.12.95 which had placed in abeyance the discretionary powers of the BM and Regional Heads in respect of loans and advances except in the priority sector. SW1 confirmed that s-15 was HO circular dated 23.10.96 releasing the aforesaid restrictions. It is, therefore, evident that the powers of the BM and the Regional Heads had been kept in abeyance between 11.12.95 to 23.10.96. On examining Ex. S.3, S4 and S.17, SW1 confirmed that the CO had unauthorisedly purchased cheques/drafts during the period. Furthermore, SW1 confirmed that the cheques purchased through clearing adjust at

of sister and allied concerns. Ex. S.27 and 28 would evidence that this power was vested with the GM (General Manager) and higher officers only. SW1 also confirmed that since the parties in question were also enjoying certain credit facilities sanctioned by RO/HO (Regional Office/Head Office), the branch should not have purchased cheques/drafts of the parties under its own powers. Ex. S-6, S.7, S.8 and S.9 are correspondence which proved that the higher formation of the bank had raised serious objections to the CO's purchase of cheques/drafts. Ex. S.10 and S.12 are letters/replies of the CO where in he had admitted his mistakes. SW1 also confirmed that Ex.S.13 and S.14 are letters from the GM Personnel giving details of the unauthorised purchase of cheques and drafts by the CO, which were beyond his discretionary powers and made at a time when his powers were placed under abeyance. His non-reporting in the matter to RO has also been questioned. Ex. S14 is a letter from the CO accepting the aforesaid matter with an assurance to not to repeat the same in future. In view of the aforesaid evidence the contention of the CO to treat the matter as that of the priority sector is naturally not tenable. However, the CO has stated that there was no loss to the bank. The PO (Prosecuting Officer) has not disputed this. Therefore, the act of omission and commission of the CO can essentially be treated as procedural lapses. The charge of the lack of integrity has not been substantiated.

Charge-1 is held as partly proved."

*Thus, the inquiry officer had held that the acts of omission and commission on the part of the respondent were essentially in the nature of procedural lapses. He held that the charge of lack of integrity had not been substantiate*d. Thus, charge No.1 mentioned above was, partly proved.

6. As far as charge No.2 is concerned, it was alleged therein that the respondent had released advances under the Prime Minister Rojgar Yojna, and for that insisted on the borrowers to provide collateral securities/guarantees of third party. The inquiry officer, however, noted that the prosecution had not placed on record any single primary document of the collateral securities/guarantees of third party to prove that part. He, therefore, held that charge No.2 was not proved.

7. After receiving the inquiry report the respondent made his representation dated 4.5.1999, and pleaded that he deserved to be exonerated. The bank, thereafter, submitted all these papers to the Chief Vigilance Officer of the Bank to forward the same to the Chief Vigilance Commissioner (CVC). The respondent at that stage wrote to the appellant-bank on 28.6.1999 seeking this correspondence with the CVC. In that he stated as follows:-

> *"Now, after giving representation dated 4.5.99 on the findings of inquiry officer dated 26.2.99, the stage has come where second stage advice has to be remitted to the CVC through Chief Vigilance Officer of Oriental Bank of Commerce and I also understand that the case has been remitted or the same is in the process of remitting to the Chief Vigilance Officer alongwith recommendations of action proposed for onward submission to the Chief Vigilance Commissioner (CVC). In the light of above facts, you are requested to kindly supply me the copies of all such recommendations meant for second stage advice and the advice so received or likely to be received from the CVC for my representation on these recommendations prior to the stage of final disposal under Regulation '7' of Discipline & Appeal Regulations, 1982 so that the interest of my defence is not jeopardized."*

8. The appellant declined that request of furnishing the correspondence of papers exchanged w[illegible]f

Vigilance Officer thereafter sent a letter to the disciplinary authority that the Central Vigilance Commission had advised to impose a major penalty of reduction of two stages in pay scale, and thereupon the order came to be passed on 27.10.1999 imposing the punishment of reduction of two stages in pay scale. The respondent filed a departmental appeal, and the appeal came to be rejected. The review thereof was also rejected by the Board of Directors. The appellate order dated 26.5.2000 passed by the General Manager (Personnel) who was the disciplinary authority at the end of it stated as follows:-

"……In this connection it is submitted that awarding of punishment with cumulative effect falls within Regulation 4(f) and the Disciplinary Authority has independently applied its mind while awarding the punishment. It is further submitted that the advice of the CVC is not binding on the Disciplinary Authority. Since the CVC is rendering advice to the Disciplinary authority the correspondence exchanged is not required to be provided to the charge sheeted employee. The punishment has been awarded keeping in view the gravity of the misconduct committed by the officer employee alongwith the submissions made by the employee.

Submitted for orders please.

SD/- General Manager (Per.)

Disciplinary Authority."

The Chairman & Managing Director, who was the appellate authority, passed his orders into following words:-

"I don't wish to entertain"
Sd/-
2.6.2000"

9. Being aggrieved by the imposition of this punishment, the respondent filed one Writ Petition earlier bearing No.4116 of 2001 to the Punjab and Haryana High Court on which an order came to be passed that the reviewing authority may consider the review application of the respondent. Time to take the decision was also extended on one occasion, and the High Court was informed that the Bank was considering commutation of the major penalty. The Chief Vigilance Officer of the bank wrote to the Chief Vigilance Commission on 18.8.2001 that the penalty imposed deserved to be modified to a minor penalty. It, however, appears that the request was not accepted and, the appellant-bank informed the respondent that the review petition was rejected. This led the respondent to file Civil Writ Petition No.18847 of 2001. Apart from the prayer to quash the order of punishment, the respondent also sought a direction that he be considered for further promotion from the post which he was then holding viz. that of MMGS-III to SMGS-VI. It was his contention that his turn had come up for consideration for promotion, and it was declined because of this departmental action. The High Court allowed the Writ Petition by the impugned judgment and order.

10. The High Court essentially relied upon the judgment and order rendered by this Court in the case of *Nagaraj Shivarao Karjagi vs. Syndicate Bank Head Office, Manipal* reported in AIR 1991 SC 1507. In that matter also the bank had acted as per the advice of the Central Vigilance Commission. The punishment was interfered by this Court. In paragraph 19 of its judgment, this Court observed as follows:-

"19……...The punishment to be imposed whether minor or major depends upon the nature of every case and the gravity of the misconduct proved. The authorities have to exercise their judicial discretion having regard to the facts and circumstances of each case. They cannot act under the dictation of the Central Vigilance Commission or of the Central Government. N[illegible]e

Central Vigilance Commission or the Central Government could dictate the disciplinary authority or the appellate authority as to how they should exercise their power and what punishment they should impose on the delinquent officer. (See. De Smith's Judicial Review of Administrative Action, Fourth Edition, p. 309). The impugned directive of the Ministry of Finance is, therefore, wholly without jurisdiction and plainly contrary to the statutory Regulations governing disciplinary matters."

11. The High Court relied upon another judgment of this Court in the case of *State Bank of India vs. D.C. Aggarwal* reported in AIR 1993 SC 1197. In that matter also, the High Court had quashed the punishment imposed on the respondent, since the CVC report had not been furnished to him. In paragraph 5 of the judgment this Court observed as follows:-

"5…… May be that the Disciplinary Authority has recorded its own findings and it may be coincidental that reasoning and basis of returning the finding of guilt are same as in the CVC report but it being a material obtained behind back of the respondent without his knowledge or supplying of any copy to him the High Court in our opinion did not commit any error in quashing the order."

12. Therefore, in the present case, the High Court set aside the punishment imposed on the respondent. It also issued a Mandamus to the appellant-bank to consider the respondent for promotion, which he had sought. Being aggrieved by that judgment and order, this appeal has been filed. Mr. K.N. Bhatt, learned senior counsel appeared for the appellants and Mr. Nidhesh Gupta, learned senior counsel appeared for the respondent.

Submissions on behalf of the parties:-

13. It was submitted on behalf of the appellants that the High Court had erred in interfering with the punishment and in any

case, directing consideration of the respondent for promotion. Mr. Bhatt, learned senior counsel for the appellant submitted that the bank was required to refer the matter to the CVC which is constituted under the Central Vigilance Commission Act, 2003. Regulation 19 of 1982 Regulations framed thereunder makes it obligatory whenever there is a vigilance angle involved. This regulation reads as follows:-

"19. Consultation with the Central Vigilance Commission: The Bank shall consult the Central Vigilance Commission wherever necessary, in respect of all disciplinary cases having a vigilance angle."

14. That apart, he submitted that the bank had arrived at its decision on its own, and not because of any dictate by the CVC. Charge No.1 was a serious charge. It was already proved in the Departmental Enquiry, and although it is true that at some stage the bank management thought that a lenient view may be taken, it specifically arrived at its own decision as can be seen from the appellate order. In his submission, there was no prejudice caused to the respondent by not making the report of the CVC available to him. Conduct of this type required a stringent action to be taken. He relied upon the judgment of this Court in the case of *Disciplinary Authority-Cum-Regional Manager vs. Nikunja Bihari Patnaik* reported in 1996 (9) SCC 69. This Court has held in that matter that when the bank officer acts beyond his authority, it is a misconduct, and a proof of any loss to the bank is not necessary. That was a case where also a senior officer of the Central Bank of India had allowed over-drafts and passed cheques involving substantial amounts beyond his authority, and the respondent had been dismissed from his service. Mr. Bhatt, submitted that in the instant case, the appellant-bank had, in fact, been lenient in imposing the punishment of merely reducing the respondent by two grades.

15. It was then submitted by Mr. Bhatt, that in any case the direction to consider the respondent for the promotion could not be sustained. He pointed out to us that th n

punished earlier for similar conduct on 27.10.1999. He was considered for promotion in the year 2002, and subsequent to the impugned judgment in the year 2005 also but was not found fit. The learned counsel for the appellant-bank submitted that the question of promotion to such a senior post had to be decided on merits and suitability of the candidate. Mr. Bhatt, further submitted that even if the punishment was to be interfered with, there was no case for direction for promotion.

16. It was submitted on behalf of the respondent on the other hand, that there was no loss suffered by the bank, and at the highest it was a technical lapse. The bank management had also decided that a minor punishment was required, and it was only because of the dictate of the CVC that the disputed punishment had been imposed. Firstly, there was mo reason to refer the issue to the CVC since there was no vigilance angle involved therein. That apart, the report of CVC was not made available to the respondent, and it clearly amounted to denial of fair opportunity to defend. Mr. Gupta submitted that the denial of promotion was essentially because of this punishment, or else the respondent would have been promoted. He, therefore, submitted that there was no occasion to interfere with the impugned judgment and order. Mr. Gupta submitted that the two judgments relied upon by the High Court in the case of *Nagaraj Shivarao* (supra) and *State Bank of India* (supra) squarely applied to the present case, and there was no occasion for this Court to take a different view or to interfere with any part of the judgment.

Consideration of the submissions:-

17. We have considered the submissions of both the counsel. When we come to the question of imposition of punishment on the respondent, what we find is that undoubtedly, there was a serious allegation against him, and as it has been held in the case of *Disciplinary Authority-Cum-Regional Manager* (supra), such acts could not be condoned. At the same time, we have also to note that the bank management itself had

taken the view in the initial stage that the action did not require a major penalty. It is also relevant to note that the High Court was also informed at the stage of review that the Bank was considering imposition of a minor penalty. It is quite possible to say that the bank management did arrive at its decision to maintain a major penalty at a later stage on its own, and not because of the dictate of the CVC, but at the same time it has got to be noted that the CVC report had been sought by the management of the bank, and thereafter the punishment had been imposed. As observed in the case of *State Bank of India* (supra), may be that the Disciplinary Authority had recorded its own findings, and had arrived at its own decision, but when this advise from CVC was sought, it could not be said that this additional material was not a part of the decision making process. When this report was not made available to the respondent, it is difficult to rule out the apprehension about the decision having been taken under pressure. Any material, which goes into the decision making process against an employee, cannot be denied to him. In view of the judgment in the case of *Disciplinary Authoritycum-Regional Manager* (supra), the decision of the Bank could have been approved on merits, however, the two judgments in the cases of *Nagaraj Shivaraj Karajgi* (supra) and *State Bank of India* (supra) lay down the requisite procedure in such matters, and in the facts of this case, it will not be appropriate to depart from the dicta therein. On this yardstick alone, a part of the judgment of the High Court interfering with the punishment will have to be sustained.

18. Then, we come to the issue of direction of the High Court to consider the respondent for promotion. The respondent was already in a post of a Senior Manager. He was seeking a promotion to a still higher position. Promotion as such, and in any case, to a higher post cannot be insisted as a matter of right. In the instant case, it has been brought to our notice that the respondent was considered for promotion in 2002 and was not found fit. It was pointe

this was not merely on the basis of the punishment that was imposed on the respondent. He had previous adverse entry also in his record in the year 1999. Besides, even if we look to the charge independently, purchasing third party cheques and drafts of huge amounts beyond his authority of lending has been held to be proved against the respondent, and that finding has not been seriously contested and dislodged. Whether he deserved a major punishment or not, or whether a lenient view of the allegations should be taken by considering his conduct as a procedural lapse is another aspect. In the instant case, the decision to impose a major punishment had to be interfered with because of the manner in which the decision was taken. It has also been submitted that the High Court should have referred the matter back to the appropriate authority for reconsideration and imposition atleast of a minor penalty. It is apparent that it was not a case for complete exoneration, however, it will not be desirable to give such direction after so many years, particularly, when the respondent has since retired. That being so, the order quashing the punishment will remain. That, however, would not mean that the direction of the High Court to the appellant to consider the respondent for promotion should be sustained.

19. We have also been informed that the respondent was considered for promotion once again in the year 2005, and not found fit for the promotion. Thus, the bank had considered the respondent after the impugned judgment which was in favour of the respondent. We are not concerned as such with this subsequent consideration, but this is only to point out that the bank had not declined to consider him. We are of course concerned with the direction in the impugned judgment to consider him once again, on the basis of the material prior to the judgment. Inasmuch as the record of the respondent was not satisfactory, in our view, there was no occasion for the High Court to give any such direction on the footing that the respondent was denied the consideration only because he had suffered a punishment. That inference was not called for.

20. In the circumstances, we allow this appeal only in part. Whereas the judgment and order of the High Court setting aside the punishment will remain, the direction to consider him for promotion, and give him benefits on that footing will have to be set aside, which we hereby direct. The respondent will however get the monetary benefits on the footing that the said punishment is quashed.

21. Appeal is, therefore, allowed in part as above. Parties will bear their own costs.

D.G. Appeal partly allowed.

EX. ARMYMEN'S PROTECTION SERVICES P. LTD.

v.

UNION OF INDIA AND OTHERS

(Civil Appeal No. 2876 of 2014)

FEBRUARY 26, 2014

[SUDHANSU JYOTI MUKHOPADHAYA AND KURIAN JOSEPH, JJ.]

ADMINISTRATIVE LAW:

Security policy - Natural justice -- Airport - Ground handling agency - Security clearance withdrawn in the interest of national security - Held: What is in the interest of national security is not a question of law - It is a matter of policy - It is not for the court to decide whether something is in the interest of State or not - It should be left to the Executive - In a situation of national security, a party cannot insist for the strict observance of the principles of natural justice - In such cases it is the duty of the Court to read into and provide for statutory exclusion, if not expressly provided in the rules governing the field - The security clearance granted to the appellant for a period of five years has already expired - It has become unnecessary for this Court to go into more factual details and consideration on merits.

The instant appeal arose out of the order of the respondents withdrawing in the interest of national security, the security clearance of the appellant company for the ground handling services to Jet Airways in various aerodromes including Patna. The question for consideration before the Court was: On whether any reasonable restriction or limitation or exception to the principle of the natural justice would be permissible in the interest of national security.

Disposing of the appeal, the Court

HELD: 1.1 There are some exceptions to principles of natural justice. National security would generally include socio-political stability, territorial integrity, economic solidarity and strength, ecological balance, cultural cohesiveness, external peace, etc. What is in the interest of national security is not a question of law. It is a matter of policy. It is not for the court to decide whether something is in the interest of State or not. It should be left to the Executive. [para 11,15 and 16] [365-B; 367-C & D]

Secretary of State for the Home Department v. Rehman **(2003) 1 AC 153;** *Council of Civil Service Union and others v. Minister for the Civil Service* **(1985) AC 374;** *The Zamora* **(1916) II AC 77 - referred to.**

Administrative Law, 10th Edition, H.W.R. Wade & C.F. Forsyth, Pages-468-470 - referred to.

1.3 In a situation of national security, a party cannot insist for the strict observance of the principles of natural justice. In such cases it is the duty of the court to read into and provide for statutory exclusion, if not expressly provided in the rules governing the field. Depending on the facts of the particular case, it will, however, be open to the court to satisfy itself whether there were justifiable facts, and in that regard, the court is entitled to call for the files and see whether it is a case where the interest of national security is involved. Once the State is of the stand that the issue involves national security, the court shall not disclose the reasons to the affected party. [para 17] [367-F-H]

1.4 The security clearance granted to the appellant by order dated 17.04.2007 for a period of five years has already expired. In that view of the matter, it has become unnecessary for this Court to go into **s**

and consideration of the appeal on merits. [para 18 and 19] [368-A & C]

Case Law Reference:

(1985) AC 374	**referred to**	**para 12**
(1916) II AC 77	**referred to**	**para 13**
(2003) 1 AC 153	**referred to**	**para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2876 of 2014.

From the Judgment and Order dated 27.04.2010 of the High Court of Patna at LPA No. 60 of 2010.

Samir Ali Khan for the Appellant.

Atul Nanda, Rameeza Hakeem, Amol N. Suryawashi, Parinay T. Vasandani, Law Associates, Sushma Suri for the Respondents.

The Judgment of the Court was delivered by

KURIAN, J. 1. Leave granted.

2. Natural justice is a principle of universal application. It requires that persons whose interests are to be affected by decisions, adjudicative and administrative, receive a fair and unbiased hearing before the decisions are made. The principle is traceable to the Fundamental Rights under Part III of the Constitution of India. Whether any reasonable restriction or limitation or exception to this principle is permissible in the interest of national security, is the issue we are called upon to consider in this case.

3. The appellant was granted business of ground handling services on behalf of various airlines at different airports in the country. The ground handling service is subject to security clearance from the Central Government. Section 5 of the Aircraft

Act, 1934 empowers the Government to make rules providing for licensing, inspection and regulation of aerodromes and, thus, Aircraft Rules, 1937 have been framed. Rule 92 proves for ground handling services. The Rule reads as follows:

> "92. Ground Handling Services- The licensee shall, while providing ground handling service by itself, ensure a competitive environment by allowing the airline operator at the airport to engage, without any restriction, any of the ground handling service provider who is permitted by the Central Government to provide such service:
>
> Provided that such ground handling service provider shall be subject to the security clearance of the Central Government."
>
> (Emphasis supplied)

4. For processing the security clearance, the Central Government created a Bureau of Civil Aviation Security (hereinafter referred to as 'BCAS'). As per circular No. 4 of 2007 dated 19.02.2007 issued by BCAS, no ground handling agency shall be allowed to work in any airport without prior security clearance obtained from BCAS. The appellant company was granted security clearance for a period of five years w.e.f. 17.04.2007. On the strength of such clearance, the appellant company entered into a contract with Jet Airways for the ground handling services in various aerodromes including Patna. On 27.11.2008, the appellant company was informed that the security clearance had been withdrawn in national interest. That was challenged by the appellant company before the High Court of Judicature at Patna in CWJC No. 758 of 2009. The said writ petition was disposed of by judgment dated 25.03.2009 directing the BCAS to afford a post decisional hearing. There was also a direction that the appellant should be furnished materials relied on by the respondents for withdrawal of the security clearance, without disclosing the source of information. The BCAS acc[illegible]er

dated 20.04.2009, holding the view that documents available in the file were classified as 'secret' and the same could not be shared with the appellant and, thus, order dated 27.11.2008 withdrawing the security clearance was affirmed. That was challenged by the appellant in the High Court leading to judgment dated 27.10.2009.

5. The learned Single Judge called for the files and they were produced in a sealed cover. According to the Single Judge "the information that is available is an apology in support of the action. There was nothing at all to justify any such emergent action so as to avoid pre-decisional hearing". The court was also of the view that the principles of natural justice would have to be read into wherever any administrative action visits a person with civil consequences, unless such procedure is excluded by any Statute. However, the court also held that if there are justifiable facts and there is threat to national security, then, nobody, let alone the court, can insist on the compliance of principles of natural justice as a pre condition for taking any action resulting even in adverse civil consequences.

6. Learned Single Judge was also of the view that at least gist of allegations should be disclosed so that the affected party gets an opportunity to meet the same at the time of hearing. In the absence of any such justifiable reason, the impugned order was set aside and the writ petition was allowed.

7. In the intra court appeal, the Division Bench of the High Court also called for the files and after minute perusal of the same, took the view that there were many more materials available in the files which could not be disclosed in national interest to the appellant and hence, the impugned action was justified. It was held that:

> "... The learned single judge, after perusal of the allegations in the sealed cover, we are disposed to think, has not taken it seriously on the ground that the allegations

> were to please the politicians, etc. the same is not actually correct. We have already, after perusal of the report, stated earlier that it contains many more things and the basic ingredients of security are embedded in it. The report is adverse in nature. It cannot be said to be founded on irrelevant factors. We are disposed to think that any reasonable authority concerned with security measures and public interest could have taken such a view. The emphasis laid in the report pertains to various realms and the cumulative effect of the same is the irresistible conclusion that it is adverse to security as has been understood by the authority. This court cannot disregard the same and unsettle or dislodge it as if it is adjudicating an appeal."
>
> (Emphasis supplied)

and thus, the appeal was allowed setting aside the order passed by the learned Single Judge.

8. Thus aggrieved, the appellant is before us.

9. By order dated 17.05.2010, while issuing notice, this Court stayed the operation of the impugned judgment of the Division Bench.

10. Heard the counsels on both sides. The learned Single Judge, after going through the files, has taken one view and the Division Bench, after going through the entire files, some of which had not been noticed by the learned Single Judge, has taken another view. We do not find it necessary for this Court to go into the disputed contentions or on the different views taken by the High Court. We find that on principle of law, the High Court, be it through the learned Single Judge or the Division Bench, is of the same view. According to the learned Single Judge, if there are justifiable facts and national security is threatened, then, a party cannot insist nor any court can insist on compliance of principle of natural

precedent to take adverse action. Though in different words, after having gone through the entire files, it is the same principle that has been restated and reiterated by the Division Bench in the impugned judgment.

11. It is now settled law that there are some special exceptions to the principles of natural justice though according to Sir William Wade[1], any restriction, limitation or exception on principles of natural justice is "only an arbitrary boundary". To quote further:

> "The right to a fair hearing may have to yield to overriding considerations of national security. The House of Lords recognized this necessity where civil servants at the government communications headquarters, who had to handle secret information vital to national security, were abruptly put under new conditions of service which prohibited membership of national trade unions. Neither they nor their unions were consulted, in disregard of an established practice, and their complaint to the courts would have been upheld on ground of natural justice, had there not been a threat to national security. The factor which ultimately prevailed was the danger that the process of consultation itself would have precipitated further strikes, walkouts, overtime bans and disruption generally of a kind which had plagued the communications headquarters shortly beforehand and which were a threat of national security. Since national security must be paramount, natural justice must then give way.
>
> The Crown must, however, satisfy the court that national security is at risk. Despite the constantly repeated dictum that 'those who are responsible for the national security must be the sole judges of what the national security requires', the court will insist upon evidence that an issue of national security arises, and only then will it accept the opinion of the Crown that it should prevail over some legal right. …"
>
> (Emphasis supplied)

1. Administrative Law, 10th Edition, H.W.R. Wade & C.F. Forsyth, Pages-468-470.

12. In Council of Civil *Service Union and others v. Minister for the Civil Service*[2], the House of Lords had an occasion to consider the question. At page-402, it has been held as follows:

> "… The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the Government and not for the courts; the Government alone has access to the necessary information, and in any even the judicial process is unsuitable for reaching decisions on national security. But if the decision is successfully challenged, on the ground that it has been reached by a process which is unfair, then the Government is under an obligation to produce evidence that the decision was in fact based on ground of national security. …"
>
> (Emphasis supplied)

13. The Privy Council in *The Zamora*[3], held as follows at page-107:

> "… Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public."

14. According to Lord Cross in *Alfred Crompton Amusement Machines v. Customs and Excise Commissioners (No.2)*[4]:

2. (1985) AC 374.
3. (1916) II AC 77.
4. (1974) AC 405, Page- 434.

"… In a case where the considerations for and against disclosure appear to be fairly evenly balanced the courts should I think uphold a claim to privilege on the grounds of public interest and trust to the head of the department concerned to do whatever he can to mitigate the effects of non-disclosure. …"

15. It is difficult to define in exact terms as to what is national security. However, the same would generally include socio-political stability, territorial integrity, economic solidarity and strength, ecological balance, cultural cohesiveness, external peace, etc.

16. What is in the interest of national security is not a question of law. It is a matter of policy. It is not for the court to decide whether something is in the interest of State or not. It should be left to the Executive. To quote Lord Hoffman in *Secretary of State for the Home Department v. Rehman*[5]:

"… in the matter of national security is not a question of law. It is a matter of judgment and policy. Under the Constitution of the United Kingdom and most other countries, decisions as to whether something is or is not in the interest of national security are not a matter for judicial decision. They are entrusted to the executive."

17. Thus, in a situation of national security, a party cannot insist for the strict observance of the principles of natural justice. In such cases it is the duty of the Court to read into and provide for statutory exclusion, if not expressly provided in the rules governing the field. Depending on the facts of the particular case, it will however be open to the court to satisfy itself whether there were justifiable facts, and in that regard, the court is entitled to call for the files and see whether it is a case where the interest of national security is involved. Once the State is of the stand that the issue involves national security, the court shall not disclose the reasons to the affected party.

5. (2003) 1 AC 153.

18. Be that as it may, on facts we find that the security clearance granted to the appellant by order dated 17.04.2007 for a period of five years has already expired. To quote:

"I am directed to inform you that background check or the company has been conducted and nothing adverse has been found Companies security clearance shall be valid for a period of five years from the date of this letter at the end of which a fresh approval of this Bureau is mandatory."

(Emphasis supplied)

19. In that view of the matter, it has become unnecessary for this Court to go into more factual details and consideration of the appeal on merits. The same is accordingly disposed of.

20. There is no order as to costs.

R.P. Appeal disposed of.

SIKANDER MAHTO

v.

TUNNA @ TUNNU MIAN @ TUNNA MIAN @ MOBIN ANSARI & ANR.

(Criminal Appeal No. 511 of 2014)

FEBRUARY 27, 2014

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

JUVENILE JUSTICE CARE AND PROTECTION OF CHILDREN ACT, 2000:

Claim of juvenility - Offences punishable u/ss 376 and 302/201 IPC - Trial court holding the accused not a juvenile and the school certificate produced by him, as forged - High Court on the basis of medical report holding him as juvenile - Held: The evidence i.e. the record of the two schools produced by complainant and Principals of two schools before Supreme Court, established that accused was not a juvenile on the date of occurrence - Order of High Court set aside and that of trial court restored - Penal Code, 1860 - s. 376 and 302/201 - Evidence -Evidence led before Supreme Court in appeal.

The respondent was prosecuted for commission of offences punishable u/s 376 and 302/201 IPC. He produced before the trial court a certificate issued by Government Primary Urdu School showing him a juvenile on the date of occurrence. The trial court held the certificate as a forged one and sent the respondent for medical examination. The medical report indicated the accused to be of 17 years of age on the date of occurrence. The trial court did not accept the claim of accused for juvenility. However, the High Court declared him to be a juvenile on the date of occurrence.

In the instant appeal, the complainant produced two certificates, one by the Government Primary Urdu School, showing that the accused was never admitted in that school, and another of a different Government Primary School showing the admission of the accused in the school and his date of birth according to which the accused was of 21 years of age on the date of occurrence. The Court summoned Principals of both the Schools. They proved the two certificates respectively.

Allowing the appeal, the Court

HELD:

The relevant records placed before this Court by the Principals of the two schools pursuant to the order dated 27.01.2014, indicate that the claim of the first respondent to be a juvenile remains unsubstantiated and, in fact, the records of the school where he was enrolled would indicate that his date of birth is 28.11.1985. Properly calculated with reference to the date of the alleged crime, the first respondent was aged about 21 years on the relevant date and therefore he was not a juvenile. Therefore, the order passed by the High Court is set aside and that passed by the trial court restored. [para 9 & 10] [373-D-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 511 of 2014.

From the Judgment & Order dated 14.11.2008 of the High Court of Patna Criminal Revision No. 46 of 2008.

Mohit Kumar Shah, Gopal Singh, Manish Kumar, Chandan Kumar, Gaurav Agrawal for the appearing parties.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave gra

2. The first respondent Tunna @ Tunnu Mian @ Tunna Mian @ Mobin Ansari was committed to the Court of Sessions to face trial for offences under Sections 302/201 and 376 of the Indian Penal Code. The first respondent filed an application claiming to be a juvenile and in support thereof he had enclosed a certificate issued by the Government Primary Urdu School, Shekhawa, Basantpur, Block Mainatand wherein his date of birth was mentioned as 15.01.1991. The date of occurrence of the offences alleged in the present case is 16.11.2006.

3. The learned Trial Court, for reasons not very clearly stated, recorded the finding that the certificate produced by the first respondent was a forged one. Accordingly, the first respondent was sent for medical examination by a Board. Though the report of the Board was to the effect that the first respondent was 17 years of age, the learned Trial Court took the view that the said opinion would admit the possibility of a variation of 2 years. Consequently, the learned Trial Court by order dated 24.12.2007 refused to accept the claim of juvenility raised on behalf of the first respondent.

4. Aggrieved, the first respondent moved the Patna High Court. By order dated 14.11.2008 the High Court interfered with the order of the learned Trial Court and allowed the application of the first respondent herein declaring him to be a juvenile and to be of sixteen and a half years of age on the date of alleged occurrence. Challenging the aforesaid finding of the High Court, the complainant, who is the father of the victim of the crime, has approached this Court.

5. A reply has been filed on behalf of the first respondent in the present appeal wherein reliance has, once again, been placed on the school certificate issued by the Government Urdu School Shekhwa, Basantpur, Distt. East Champaran reference to which has been made earlier. The first respondent in his reply has also contended that the report of the medical examination clearly indicates that he was a minor on the relevant date and that there is no reason as to why the said

medical report should not be accepted.

6. The appellant has been allowed by this Court leave to bring on record certain documents which, according to the appellant, have a significant bearing to the issues arising in the present case.

7. The first document that has been brought on the record of the present appeal is a letter/certificate dated 3.4.2013 issued by the Principal, Government Primary Urdu School, Shekhawa, Basantpur, Block-Mainatand wherein it is mentioned that no student having the name and particulars of the first respondent had ever studied in the school in question and that the certificate issued in the name of the school is a forged document. The second document is another certificate issued by the Principal, Government Primary School, Purbi Paukuahwa, Block-Mainatand, West Champaran, Bihar which states that the particulars of the first respondent are entered in the records of the said school and that his date of birth as mentioned in the school admission register is 28.11.1985. As the controversy arising in the present case is capable of being resolved on the basis of the aforesaid two documents, reference to any other document would be superfluous and hence is avoided.

8. The first respondent has not filed any affidavit or objections denying the veracity of the two certificates referred to above. However, as the Court had to be satisfied with the authenticity of the said two documents, on 27.01.2014 the following order was passed.

> "In order to find out the age of Respondent No.1-accused on the date of occurrence, we direct the Principal, Government Primary Urdu School, Shekhawa, Basantpur, Block-Mainatand, West Champaran, Bihar and Principal, Government Primary School, Purbi Paukuahwa, Block-Mainatand, West Champaran, Bihar to appear alongwith the connected original record bef[illegible]h

February, 2014.

List on 24th February, 2014"

9. Pursuant thereto the Principal of the two schools appeared in Court today alongwith the records in original. The said records would indicate that there is no record of the first respondent being enrolled or having studied in the Government Primary Urdu School, Shekhawa, Basantpur, Block-Mainatand. From the records of the Government Primary School, Purbi Paukuahwa, Block-Mainatand, West Champaran, Bihar it is evident that the first respondent had enrolled himself in the said school on 08.01.1996 and his date of birth is recorded in the admission register as 28.11.1985. The relevant records placed before this Court by the Principals of the two schools pursuant to the order dated 27.01.2014 therefore indicates that the claim of the first respondent to be a juvenile remains unsubstantiated and, in fact, the records of the school where he was enrolled would indicate that his date of birth is 28.11.1985. Properly calculated with reference to the date of the alleged crime, the first respondent was aged about 21 years on the relevant date and therefore he was not a juvenile.

10. We, therefore, cannot sustain the order dated 14.11.2008 passed by the High Court. In the result, we allow this appeal and set aside the said order dated 14.11.2008 passed by the High Court and restore the order dated 24.12.2007 passed by the learned Trial Court.

R.P. Appeal allowed.

STATE OF M.P. & ANR.

v.

SURESH NARAYAN VIJAYVARGIYA & ORS.

(Contempt Petition (Civil) No. 390 of 2011)

IN

Civil Appeal No. 4060 of 2009.

FEBRUARY 27, 2014

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

CONTEMPT OF COURT:

Medical admissions - Admission to MBBS seats - Interim orders by Supreme Court in matter of sharing of seats between State Government and respondent-private medical colleges - Admissions made by respondents on all seats in violation of orders of Supreme Court - By order of High Court state quota students also admitted resulting in admissions in excess of sanctioned strength - Held: Once the court passes an order, the parties to the proceed 9ings before the court cannot avoid implementation of that order by seeking refuge under any statutory rule and it is not open to the parties to go behind the orders and truncate the effect of those orders - There has been a willful disobedience by the contemnors of the orders passed by the Court, which is nothing but interference with the administration of justice - Contemnors have shown scant respect to the orders passed by the highest Court of the land and depicted undue haste to fill up the entire seats evidently not to attract better students or recognize merit, but possibly to make unlawful gain, adopting unhealthy practices - Contemnors have tendered unconditional and unqualified apology and volunteered to set right the illegality committed by them, but the purpose for flouting the orders has been achieved, that is, the contemnors wanted to fill up the entire seats by themselves - Therefore, to maintain the

sanctity of the orders of the Court and to give a message that the parties cannot get away by merely tendering an unconditional and unqualified apology after enjoying the fruits of their illegality, the Court imposes a fine of Rs.50 lakhs - Directions given for adjustment of seats in the following academic sessions - Medical education.

The Supreme Court of India passed interim order dated 27.5.2009 and 27.1.2011 in the matter of sharing of MBBS seats between private medical colleges and the State Government. The State Government and the Director of Medical Education filed the instant contempt petition alleging that the respondents-private medical colleges filled up the entire 150 seats for the year 2011-2012 without sharing it with the State Government and thus violated the orders of Court passed on 27.5.2009 and 27.1.2011. The students of the State quota approached the High Court, which directed the respondents to admit the said students and with that the number of admitted students went upto 245 as against sanctioned strength of 150. It was further stated that since the respondents did not have infrastructural facility to admit 245 students, it adversely affected the academic standards of the students admitted.

Disposing of the petition, the Court

HELD: 1.1 The situation has been created by the contemnors themselves by filling up of the entire 150 seats in total defiance of the interim orders passed by this Court on 27.5.2009 and 27.1.2011 making an interim arrangement for seat sharing between the State Government and the private educational institutions from the year 2009-10 onwards in the State of Madhya Pradesh, which are binding on the contemnors. The contemnors attempted to justify their action on the ground that they are regulated by the Private Universities Act and that AFRC Act has ceased to apply and, after the

notification dated 4.5.2011, the State Government has no right even to share seats in their institution, de hors the interim orders passed by this Court. This stand taken by the contemnors is also not correct, since s. 7(m) of the Private University Act, 2007 provides that admission shall not be started till the concerned statutes and ordinances are approved as per s. 35 of the Act, which states that the statutes and ordinances shall come into force only upon publication in the official Gazette. Even otherwise, once there is an order in force binding on the parties, they cannot violate or ignore that order, taking shelter under a statutory provision and if any modification of the orders is warranted, parties should have approached this Court and sought for clarification or modification of those orders. However, without doing so, in total defiance of the orders passed by this Court, they filled up the entire seats, leaving the students who figured in the State list in the lurch. Later, though they were admitted in the College having the infrastructure for accommodating only 150 students, it has affected the quality and standard of medical education. [para 13] [386-D-H; 387-A-B]

1.2 There has been a willful disobedience by the contemnors of the orders passed by this Court, which is nothing but interference with the administration of justice. Disobedience of an order of a court, which is willful, shakes the very foundation of the judicial system and can erode the faith and confidence reposed by the people in the Judiciary and undermines rule of law. The contemnors have shown scant respect to the orders passed by the highest Court of the land and depicted undue haste to fill up the entire seats evidently not to attract better students or recognize merit, but possibly to make unlawful gain, adopting unhealthy practices. [para 14] [387-D-F]

TMA Pai Foundation & Ors. v. State of Karnataka & Ors. **2002 (3) Suppl. SCR 587 = (2002) 8**

1.3 Once the Court passes an order, the parties to the proceedings before the court cannot avoid implementation of that order by seeking refuge under any statutory rule and it is not open to the parties to go behind the orders and truncate the effect of those orders. [para 14] [387-F-G]

T.R. Dhananjaya v. J. Vasudevan **1995 (3) Suppl. SCR 64 = (1995) 5 SCC 619;** *Mohd. Aslam alias Bhure, Acchan Rizvi v. Union of India* **1994 (5) Suppl. SCR 104 = (1994) 6 SCC 442 - relied on.**

1.4 Contemnors cannot take refuse under a notification issued under a Statute to defeat the interim orders passed by this Court which are binding on the parties, unless varied or modified by this Court. In the instant case, all the appeals in which interim orders have been passed, are pending before this Court and if the contemnors had any doubt on the applicability of those orders, they could have sought clarification or modification of the order. By tendering unconditional and unqualified apology, the contemnors are trying to wriggle out of the possible action for Contempt of Court, after violating the orders causing considerable inconvenience to the students and after enjoying the fruits of the illegality committed by them. It is trite law that apology is neither a weapon of defence to purge the guilty of their offence nor is it intended to operate as universal panacea; it is intended to be evidence of real contriteness. [para 15] [388-C-F]

M.Y. Shareef & Anr. v. Hon'ble Judges of the High Court of Nagpur & Ors. **(1955) 1 SCR 757;** *M.B. Sanghi, Advocate v. High Court of Punjab & Haryana & Ors.* **1991 (3) SCR 312 = (1991) 3 SCC 600 - relied on.**

1.5 Contemnors have tendered unconditional and unqualified apology and volunteered to set right the

illegality committed by them, but the purpose of flouting the orders has been achieved, that is the contemnors wanted to fill up the entire seats by themselves. Therefore, to maintain the sanctity of the orders of this Court and to give a message that the parties cannot get away by merely tendering an unconditional and unqualified apology after enjoying the fruits of their illegality, this Court imposes a fine of Rs.50 lakhs. [para 16] [388-G-H; 389-A]

1.6 In the circumstances, it is ordered that the admission of students under the State quota for the academic year 2011-12 in Medical College is valid and legal and appropriate steps should be taken by the State Government and the Medical Council of India to regularize the admission. The excess 107 admissions made by the Medical College for the MBBS during the year 2011-12 and the previous year, be adjusted in the session 2014-15 in full taking note of the full sanctioned strength and the balance seats be adjusted in the year 2015-16. The unconditional and unqualified apology tendered by the contemnors is accepted. [para 20] [390-D-F]

Mridul Dhar (Minor) & Anr. v. Union of India & Ors. **2005 (1) SCR 380 = (2005) 2 SCC 65 - referred to.**

Case Law Reference:

2002 (3) Suppl. SCR 587	**referred to**	**para 14**
1995 (3) Suppl. SCR 64	**relied on**	**para 14**
1994 (5) Suppl. SCR 104	**relied on**	**para 14**
(1955) 1 SCR 757	**relied on**	**para 15**
1991 (3) SCR 312	**relied on**	**para 15**
2005 (1) SCR 380	**referred to**	**para 18**

CIVIL APPELLATE JURISDICTION : Contempt Petition (Civil) No. 390 of 2011.

IN

Civil Appeal No. 4060 of 2009.

Vibha Datta Makhija, Mishra Saurabh, Vanshaja Shukla, Archi Agnihotri, Ankit Lal, B.S. Banthia for the Petitioners.

Sushil Kumar Jain, Paramjit Singh Patwalia, Puneet Jain, Christ Jain, Navdeep, Pratibha Jain, Amal Pushp Shroti, Gaurav Sharma, Vivek Shiwastava for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. We are, in this contempt petition, concerned with the question whether the contemnors have violated the interim orders passed by this Court on 27.5.2009 and 27.1.2011 in Civil Appeal No. 4060 of 2009 in the matter of sharing of MBBS seats between the respondent private medical college and the State Government.

2. Civil Appeal No. 4060 of 2009 was preferred by the respondents/contemnors herein, challenging the judgment of the High Court of Madhya Pradesh dated 15.5.2009, which upheld the validity of the Madhya Pradesh (Admission and Fee Regulatory Committee) Act, 2007 (for short "AFRC Act"), empowering the State Government to fill all the seats (including the NRI seats) in all the education institutions in the State of Madhya Pradesh, including private medical and dental collages. Since serious disputes were raised with regard to seat sharing and fixation of quota of seats for MBBS/BDS, this Court felt that some interim arrangement should be made taking note of the interest of both the parties and also that of the students. This Court, therefore, as an interim measure, passed an order on 27.5.2009 in C.A. No.4060 of 2009 and the connected appeals, which reads as follows:

> "We, therefore, direct that the admissions in the private unaided medical/dental colleges in the State of Madhya Pradesh will be done by first excluding 15% NRI

> seats (which can be filled up by the private institutions as per para 131 of *Inamdar case*), and allotting half of the 85% seats for admission to the undergraduate and post-graduate courses to be filled in by an open competitive examination by the State Government, and the remaining half by the Association of the Private Medical and Dental Colleges. Both the State Government as well as the Association of Private Medical and Dental Colleges will hold their own separate entrance examination for this purpose. As regards "the NRI seats", they will be filled as provided under the Act and the Rules, in the manner they were done earlier.
>
> We make it clear that the aforesaid directions will for the time being only be applicable for this Academic Year i.e. 2009-2010. We also make it clear that if there are an odd number of seats then it will be rounded off in favour of the private institutions. For example, if there are 25 seats, 12 will be filled up by the State Government and 13 will be filled up by the Association of Private Medical/ Dental Colleges. In specialities in PG courses also half the seats will be filled in by the State Government and half by the Association of Private Medical/Dental Colleges and any fraction will be rounded off in favour of the Association. In other words if in any discipline there are, say, 9 seats, then 5 will be filled in by the Association and the remaining 4 will by the State Government. Capitation fee is prohibited, both to the State Government as well as the private institutions, vide para 140 of *Inamdar case*. Both the State Government and the Association of Private Medical/Dental Colleges will separately hold single window examinations for the whole State (vide para 136 of *Inamdar case*).
>
> We make it clear that the solution we have arrived at may not be perfect, but we have tried to do our best to find out the best via media. Althou[illegible]or

Academic Year 2009-2010, we recommend that it may also be considered for future sessions.

Six weeks' time is allowed for filing counter-affidavit and four weeks thereafter for filing rejoinder.

List these appeals for final hearing in September 2009. In the meantime, pleadings may be completed by the parties."

3. The interim arrangement made continued in the subsequent years as well and in the year 2011-2012, this Court vide its order dated 27.1.2011 in I.A. No. 50 of 2011 passed the following order:

"The order dated 27th May, 2009 made in Civil Appeal No. 4060 of 2009 etc. shall be applicable for the academic year 2011-2012.

There shall be an order accordingly."

4. This contempt petition has been preferred by the State Government and the Director of Medical Education Department alleging that the contemnors have filled up the entire 150 seats available for the year 2011-2012, without sharing it with the State Government, violating the orders of this Court dated 27.5.2009 and 27.1.2011. Petitioners pointed out that the contemnors had sent a letter dated 23.5.2011 stating that they would fill up the entire seats during the academic year 2011-2012 since their colleges would be functioning under the Madhya Pradesh Niji Vishwavidyalaya (Sthapana Avam Sanchalan) Adhiniyam, 2007 [for short "Adhiniyam 2007"], consequent to the establishment of the Peoples' University under M.P. Act No.18 of 2011 and the admission process of those constituent institutions would be governed by the statutes and ordinances framed under the above-mentioned Act. The State Government noticing the stand taken by the contemnors, wrote a letter dated 14.7.2011 to the Managing Director of the

Medical College stating that the admissions have to be made only following the arrangement made by this Court vide order dated 27.1.2011 and, if any change has to be made, the same could be done only with the permission of this Court.

5. The Directorate of Medical Education of the State Government also wrote a letter dated 14.7.2011 to the Medical Council of India, informing the Council of the defiant attitude taken by the contemnors by not giving admission to any of the students included in the State quota for the academic year 2010-11.

6. The Directorate of Medical Education then wrote a detailed letter dated 8.8.2011 to the Secretary, Association of Private Dental & Medical Colleges, in the State, specifically referring to the interim order passed by this Court on 27.1.2011 reminding them of the necessity of the compliance of the Court's directions in the matter of seat sharing. The contemnors, ignoring those letters, published an advertisement in a local newspaper "People Samachar" on 9.8.2011 informing the public that 150 seats would be available with them for admission to MBBS course under the management quota for the year 2011-12.

7. The Directorate of Medical Education, in the meanwhile, sent a list of 66 students under the State quota to the Medical College for admission to MBBS course. The contemnors refused to admit those students under the State quota and the State Government received several complaints from the students who were included in the State quota, but not admitted by the contemnors. The State Government then sent a notice dated 17.8.2011, to the Dean of the Medical College to show cause why the following action be not initiated against the college:-

(a) withdraw the Desirability and Feasibility Certificates issued in favour of the college;

(b) report the matter to the Medical Council of India to take suitable action against the college.

(c) report the matter to the concerned authorities for action against Madhya Pradesh Niji Vyavsayik Shikshan Sanstha (Pravesh Ka Viniyaman Avam Shulk Ka Nirdharan) Adhiniyam, 2007.

8. The contemnors, in total defiance of the Court's order as well as the various directions issued by the Directorate of Medical Education, filled up the entire 150 seats in the management quota for the academic year 2011-12.

9. The students, who figured in the State quota, then approached the High Court of Madhya Pradesh. The High Court directed the contemnors to admit students who were included in the State quota. Consequently, they admitted those students and the number of students admitted in the College went up to 245 as against the sanctioned strength of 150 seats. The Medical College does not have the infrastructural facilities to admit 245 students, which has adversely affected the academic standards of the students admitted. The State Government, as also the Directorate of Medical Education, in the above-mentioned circumstances, approached this Court and filed the present Contempt Petition for taking appropriate action against the contemnors for violating the orders passed by this Court on 27.5.2009 and 27.1.2011 and also by not complying with the various directions issued by the State Government as well as the Directorate of Medical Education.

10. When the matter came up for hearing, this Court issued notice to the contemnors. Learned senior counsel appearing for the contemnors, submitted before this Court on 3.2.2014 that they would be tendering their unconditional and unqualified apology for their actions and made a proposal to set right the illegalities committed, which reads as under :-

(a) None of the 245 students admitted in the Institution

– Peoples College of Medical Sciences (PCMS) during the academic year 2011-12 shall be disturbed and they all will continue to pursue their course without any interruption. This would include the students allotted by the State who had been given provisional admissions pursuant to the orders of the Hon'ble High Court.

(b) In the academic session 2011-12 on the basis of the 50-50 admissions between the College and State after 15% NRI quota is deducted as per the orders of this Hon'ble Court, the State entitlement filled in by the institution was 63 seats. The institution shall accordingly surrender 21 seats in each of the following three academic years i.e. 2014-15, 2015-16 and 2016-17 to the State government to be filled in through the procedure laid down in the order dated 27.5.2009.

11. The contemnors on 13.2.2014, filed a written note wherein, after reiterating the proposals submitted on 3.2.2014, they stated as follows :

"13. Though admissions have already been made by the State against the said 63 seats for the year 2011-12 in the said year itself still in deference to the orders of this Hon'ble Court the Respondent is willing to give up the said 63 seats. It is however requested that if these 63 seats are adjusted only in one year, the college would suffer adversely. Therefore, the Respondent again humbly submits that it be permitted to surrender 21 seats in each of the following three academic years i.e. 2014-15, 2015-16 and 2016-17 as submitted before this Hon'ble Court on 3.2.2014 to the State Government to be filled in through the procedure laid down in the order dated 27.5.2009.

14. It is respectfully submitted that in the captioned contempt petition of the Petitioner s

50% quota of admissions i.e. 63 seats in the academic year 2011-12.

15. The respondents reiterate the proposal submitted on 3.2.2014 and again tender an unconditional and unqualified apology for their actions."

12. In the written note filed by the State of Madhya Pradesh on 13.2.2014, in response to the submissions made by the contemnors on 3.2.2014, the State of Madhya Pradesh stated as follows :-

"20. For the academic session 2011-12, the State Government had a quota of 107 students :-

- 63 seats as per the 50:50 order of this Hon'ble Court.
- 42 seats as per letter dated 19.9.2011 of MCI since Peoples College made excess admissions in 2010-11.
- 2 seats which were not filled in the NRI quota.

21. The aforesaid position of State quota seats for 2011-12 is explained in detail in the letter of MCI dated 5.3.2012 (annexed herewith as Annexure A-1).

22. For the academic session 2011-12

Total sanctioned strength	150
Total seats filled by College	245
College authorized to fill	43
State quota seats filled by College	95
Excess seats filled by College	107

23. The issue of excess admissions made by the College

is to be considered as per the Regulations framed by the MCI under the Indian Medical Council Act, 1956 and the submissions made by the MCI in that regard.

24. However, if the scheme formulated by the Peoples College is considered by this Hon'ble Court, then the excess 107 admissions made by the College in 2011-12 be adjusted in the session of 2014-15 in full and remaining seats be adjusted in 2015-16.

25. On account of illegal and unlawful acts of Respondents/ Contemnors, not only the State Government, but the students of the State quota, who were illegally denied admissions were severely harassed and were drawn on a long drawn legal battle with uncertainty of their respective careers."

13. We have no hesitation in saying that the above situation has been created by the contemnors themselves by filling up of the entire 150 seats in total defiance of the interim orders passed by this Court on 27.5.2009 and 27.1.2011 making an interim arrangement for seat sharing between the State Government and the private educational institutions from the year 2009-10 onwards in the State of Madhya Pradesh, which are binding on the contemnors. The contemnors attempted to justify their action on the ground that they are regulated by the Private Universities Act and that AFRC Act has ceased to apply and, after the notification dated 4.5.2011, the State Government has no right even to share seats in their institution, *de hors* the interim orders passed by this Court. This stand taken by the contemnors is also not correct, since Section 7(m) of the Private University Act, 2007 provides that admission shall not be started till the concerned statutes and ordinances are approved as per Section 35 of the Act, which states that the statutes and ordinances shall come into force only upon publication in the official Gazette. Even otherwise, once there is an order in force binding on the parties, they cannot violate or ignore that order, taking shelter unde[illegible]n

and if any modification of the orders is warranted, parties should have approached this Court and sought for clarification or modification of those orders. However, without doing so, in total defiance of the orders passed by this Court, they filled up the entire seats, leaving the students who figured in the State list in the lurch. Later, though they were admitted in the College having the infrastructure for accommodating only 150 students, it has affected the quality and standard of medical education. After having convinced that they had violated the orders of this Court, they have come up with an unconditional and unqualified apology and making some suggestions to undo the illegality committed by them after eating away the seats from the State quota.

14. We have, on facts, found that there has been a willful disobedience by the contemnors of the orders passed by this Court, which is nothing but interference with the administration of justice. Disobedience of an order of a Court, which is willful, shakes the very foundation of the judicial system and can erode the faith and confidence reposed by the people in the Judiciary and undermines rule of law. The Contemnors have shown scant respect to the orders passed by the highest Court of the land and depicted undue haste to fill up the entire seats evidently not to attract better students or recognize merit, but possibly to make unlawful gain, adopting unhealthy practices, as noticed by this Court in *TMA Pai Foundation & Ors. v. State of Karnataka & Ors.* (2002) 8 SCC 481 and various other cases. Once the Court passes an order, the parties to the proceedings before the Court cannot avoid implementation of that order by seeking refuge under any statutory rule and it is not open to the parties to go behind the orders and truncate the effect of those orders. This Court in *T.R. Dhananjaya v. J. Vasudevan* (1995) 5 SCC 619, held that once the Court directed that appeal be disposed of after giving him opportunity of hearing and such direction was not appealed from, it is not open to the concerned authority to deny the hearing on the ground that the Police Manual does not provide for the same. This Court in *Mohd.*

Aslam alias Bhure, Acchan Rizvi v. Union of India (1994) 6 SCC 442 held that circumvention of an order can be by 'positive acts of violation' or 'surreptitious and indirect aids to circumvention and violation of orders. In the instant case, the violation is a positive act of violation, which is apparent on the face of the record.

15. We have already pointed out that the contemnors earlier took up the stand that, after notifying their institution as a University on 4.5.2011 under the Private University Act, 2007, the AFRC Act ceased to apply, hence, they are not bound by the orders passed by this Court. Contemnors cannot take refuse under a notification issued under a Statute to defeat the interim orders passed by this Court which are binding on the parties, unless varied or modified by this Court. In the instant case, all the appeals in which interim orders have been passed, are pending before this Court and if the contemnors had any doubt on the applicability of those orders, they could have sought clarification or modification of the order. Now, by tendering unconditional and unqualified apology, the contemnors are trying to wriggle out of the possible action for Contempt of Court, after violating the orders causing considerable inconvenience to the students and after enjoying the fruits for the illegality committed by them. It is trite law that apology is neither a weapon of defence to purge the guilty of their offence; nor is it intended to operate as universal panacea, it is intended to be evidence of real contriteness. (See *M.Y. Shareef & Anr. v. Hon'ble Judges of the High Court of Nagpur & Ors.* (1955) 1 SCR 757 and *M.B. Sanghi, Advocate v. High Court of Punjab & Haryana & Ors.* (1991) 3 SCC 600.

16. Contemnors have now tendered unconditional and unqualified apology and volunteered to set right the illegality committed by them, but the purpose for flouting the orders has been achieved, that is the contemnors wanted to fill up the entire seats by themselves. Therefore, to maintain the sanctity of the orders of this Court and to giv

parties cannot get away by merely tendering an unconditional and unqualified apology after enjoying the fruits of their illegality, we are inclined to impose a fine, which we quantify at Rs.50 lakhs.

17. We may now examine how the illegality committed by the contemnors can be rectified. For the academic year 2011-12, the State Government's quota was 107 seats, details of which is given below :-

- 63 seats as per the 50:50 order of this Hon'ble Court.
- 42 seats as per letter dated 19.9.2011 of MCI since Peoples College made excess admissions in 2010-11.
- 2 seats which were not filled in the NRI quota.

18. The total sanctioned strength for the academic year 2011-12 was 150 students, but the contemnors had filled up 245 seats, though the college was authorized to fill up only 43 seats. The contemnors filled up 95 seats, which would have gone to the State quota. Consequently, 107 excess seats were filled up by the college. The contemnors, however, took up the stand that if 63 seats are to be adjusted for the academic year 2014-15 that may seriously affect the functioning of the College, hence their suggestion is that they will compensate the lost seats in a phased manner, that is 21 seats in the year 2014-15 and the rest in equal proportion in the years 2015-16 and 2016-17, which we find difficult to accept. We are of the view that the excess of 107 admissions made in the year 2011-12 have to be adjusted by adjusting the same for the academic session 2014-15 in full and remaining seats be adjusted in the year 2015-16, because the illegality committed must be set right at the earliest. This Court in *Mridul Dhar (Minor) & Anr. v. Union of India & Ors.* (2005) 2 SCC 65, held (Direction No.11) as follows :

> "11. If any private medical college in a given academic year for any reason grants admission in its management quota in excess of its prescribed quota, the management quota for the next academic year shall stand reduced so as to set off the effect of excess admission in the management quota in the previous academic year."

19. We may reiterate that the above-mentioned situation has been created by the contemnors themselves and due to their illegal and unlawful acts, by admitting students over and above the sanctioned strength, the students who were later admitted from the list of State quota, could not get the quality medical education, which otherwise they would have got. Further, they were also driven to unnecessary litigation before the High Court creating uncertainty to their future.

20. We, therefore, order that the admission of students under the State quota for the academic year 2011-12 in Medical College is valid and legal and appropriate steps should be taken by the State Government and the Medical Council of India to regularize the admission. The excess 107 admissions made by the Medical College for the MBBS during the year 2011-12 and the previous year, be adjusted in the session 2014-15 in full taking note of the full sanctioned strength and the balance seats be adjusted in the year 2015-16. The unconditional and unqualified apology tendered by the contemnors is accepted, but the contemnors are directed to pay a fine of Rs.50 lakhs in two months from today, to the State Government. Ordered accordingly.

21. The Contempt Petition is disposed of accordingly.

R.P. Contempt Petition disposed of.

BASAPPA

v.

STATE OF KARNATAKA

(Criminal Appeal No. 512 of 2014)

FEBRUARY 27, 2014

[SUDHANSU JYOTI MUKHOPADHAYA AND KURIAN JOSEPH, JJ.]

PENAL CODE, 1860: ss.279, 304A - Rash and negligent driving resulting in death of 2 year old child - Magistrate acquitted the appellant holding that there was no impeachable and clinching evidence to show the appellant was the driver at the relevant point of time and that the accident happened due to the rash and negligent act on his part - On State's appeal u/s.378, Cr.P.C., High Court re-appreciated the whole evidence and held that the appellant was liable to be convicted u/ss.279 and 304A - On appeal, held: There was no direct evidence with regard to the ingredients of ss.279 and 304A - High Court, on the only evidence that the appellant was scolded by people in the hospital came to conclusion that the appellant was the driver of the tractor -High Court, on re-appreciation of the evidence took another view so as to convict the appellant - There was no finding in the impugned Judgment by the High Court that the conclusions drawn by trial court were perverse so as to mean that the same was against the weight of evidence - Thus, in such circumstances, the High Court was not justified in reversing the acquittal.

CODE OF CRIMINAL PROCEDURE, 1973: s.378 - Acquittal by trial court - Scope of interference by High Court - Held: High Court in an appeal u/s.378 is entitled to reappraise the evidence and conclusions drawn by trial court, but the same is permissible only if the judgment of trial court is perverse - The exercise of power u/s.378 by the court is to

prevent failure of justice or miscarriage of justice - In the instant case, High Court did not take view that the judgment of trial court acquitting the accused was based on no material or it was perverse or the view by trial court was wholly unreasonable or it was not a plausible view or there was non-consideration of any evidence or there was palpable misreading of evidence, etc. - On the contrary, High Court held that on the available evidence, another view was also reasonably possible in the sense that the appellant-accused could have been convicted - In such circumstances, the High Court was not justified in reversing the acquittal.

The prosecution case was that an accident occurred while the appellant was driving a tractor resulting in death of 2 year old child. The appellant was charge sheeted under Sections 279 and 304A, IPC and Sections 187 and 196 of the Motor Vehicles Act, 1988. The Magistrate acquitted the appellant holding that there was no any cogent, impeachable and clinching evidence to show the appellant was the driver at the relevant point of time and the accident happened due to the rash and negligent act on his part. On State's appeal under Section 378, Cr.P.C., the High Court re-appreciated the whole evidence and held that the appellant was liable to be convicted under Sections 279 and 304A, IPC. The High Court further held that the prosecution has failed to prove the offences under Section 187 and 197 of the MV Act. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1. In the instant case, the main defence of the appellant before the trial court was that there was no evidence to hold that he was the driver of the tractor at the relevant time. Even the injured witness PW-5, who was driving the scooty, did not identify the driver. The High Court, on the only evidence that the appellant was scolded by people in the hospital ca[illegible]n

that the appellant was the driver of the tractor. There was also no direct evidence with regard to the ingredients of Sections 279 and 304A of IPC. The High Court, on re-appreciation of the evidence took another view so as to convict the accused. There was no finding in the impugned judgment by the High Court that the conclusions drawn by the trial court were perverse so as to mean that the same was against the weight of evidence. [paras 6, 7] [398-F-H; 399-A]

2.1. The High Court in an appeal under Section 378 of Cr.PC is entitled to re-appraise the evidence and conclusions drawn by the trial court, but the same is permissible only if the judgment of the trial court is perverse. It was not the case of the prosecution that the judgment of the trial court was based on no material or that it suffered from any legal infirmity in the sense that there was non-consideration or mis-appreciation of the evidence on record. Only in such circumstances, reversal of the acquittal by the High Court would be justified. [para 8, 9] [399-C and G]

Gamini Bala Koteswara Rao and Ors. v. State of Andhra Pradesh through Secretary **(2009) 10 SCC 636: 2009 (14) SCR 1;** *K. Prakashan v. P.K. Surenderan* **(2008) 1 SCC 258: 2007 (10) SCR 1010;** *T. Subramanian v. State of Tamil Nadu* **(2006) 1 SCC 401: 2006 (1) SCR 180;** Bhim Singh v. State of Haryana **(2002) 10 SCC 461;** *Kallu alias Masih and Ors. v. State of Madhya Pradesh* **(2006) 10 SCC 313: 2006 (1) SCR 201;** *Ramesh Babulal Doshi v. State of Gujarat* **(1996) 9 SCC 225: 1996 (2) Suppl. SCR 265 ;** *Ganpat v. State of Haryana and Ors.* **(2010) 12 SCC 59: 2010 (12) SCR 400 - relied on.**

2.2. The exercise of power under Section 378 of Cr.PC by the court is to prevent failure of justice or miscarriage of justice. There is miscarriage of justice if an innocent person is convicted; but there is failure of justice

if the guilty is let scot-free. The High Court in the impugned judgment did not take a view that the judgment of the trial court acquitting the accused was based on no material or it was perverse or the view by the trial court was wholly unreasonable or it was not a plausible view or there was non-consideration of any evidence or there was palpable misreading of evidence, etc. It was not the stand of the High Court that there had been some miscarriage of justice in the way the trial court has appreciated the evidence. On the contrary, it was the only stand of the High Court that on the available evidence, another view was also reasonably possible in the sense that the appellant-accused could have been convicted. In such circumstances, the High Court was not justified in reversing the acquittal. [Para 14, 16] [402-F; 404-F-H; 405-A]

State of Punjab v. Karnail Singh **(2003) 11 SCC 271: 2003 (2) Suppl. SCR 593;** *Chandrappa and Ors. v. State of Karnataka* **(2007) 4 SCC 415: 2007 (2) SCR 630 - relied on.**

Case Law Reference:

2009 (14) SCR 1	**relied on**	**Para 9**
2007 (10) SCR 1010	**relied on**	**Para 9**
2006 (1) SCR 180	**relied on**	**Para 9**
(2002) 10 SCC 461	**relied on**	**Para 10**
2006 (1) SCR 201	**relied on**	**Para 10**
1996 (2) Suppl. SCR 265	**relied on**	**Para 12**
2010 (12) SCR 400	**relied on**	**Para 13**
2003 (2) Suppl. SCR 593	**relied on**	**Para 14**
2007 (2) SCR 630	**relied on**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 512 of 2014.

From the Judgment & Order dated 15.11.2010 of the High Court of Karnataka Circutt Bench at Dharwad in Criminal Appeal No. 2139 of 2005.

Anil V. Katarki, E.R. Sumathy, Anil Nishant for the Appellant.

V.N. Raghupathy, Kusum, R.S. Rathi 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. 707 of 2004 on the file of the Judicial Magistrate First Class at Hubli, Karnataka. He was charge-sheeted under Sections 279 and 304A of the Indian Penal Code (45 of 1860) (hereinafter referred to as 'IPC') and Sections 187 and 196 of The Motor Vehicles Act, 1988 (hereinafter referred to as 'MV Act'). The accident occurred on 11.02.2004 at 02.30 P.M. when the appellant was allegedly driving a tractor with a trailer. The vehicle hit against a scooty and resultantly a two year old child travelling in the scooty fell down. The tractor ran over the child and she succumbed to the injury. PWs 1 to 11 were examined and seven documents were marked on the prosecution side. Two documents were marked on the side of the accused. The learned Magistrate, after elaborately discussing the evidence, came to the following conclusion at paragraph-22 of the Judgment dated 25.05.2005:

"**22.** Perused the evidence of PW-1 to 11 and the case file after perusal of the same, it creates doubt whether this accused was the driver at the relevant point of time or not, so also to say that the accident was happened due to the rash and negligent act of this accused, as there is no any cogent, impeachable and clinching evidence with respect to the ingredients of alleged offences. Further in view of these types of discrepancies of the prosecution witnesses

case is not beyond doubt. Had the prosecution able to explain clearly the above said doubtful circumstances, then certainly this court could have believed the evidence of the material witnesses but now the doubtful evidence and circumstances are not cleared. Hence I am not accepting the stand taken by the learned APP. Therefore in view of the so many discrepancies in the versions deposed before the court and one given before the police, it creates doubt whether this accused was involved in the commission of offences or not. Therefore, I feel accused is entitled for acquittal."

(Emphasis supplied)

3. We are informed that the accused was on bail during the trial but remained in custody for five months and five days during investigation.

4. The State filed appeal under Section 378 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.PC'). The High Court re-appreciated the whole evidence and came to the conclusion that the appellant was liable to be convicted under Sections 279 and 304A of IPC. Further, it was held that "the prosecution has failed to prove the offences under Section 187 and 197 of the MV Act". Accordingly, the appeal was allowed and the appellant was sentenced to undergo simple imprisonment for a period of six months with fine of Rs.2,000/- under Section 304A and for three months with fine of Rs.500/- under Section 279 of IPC. A default sentence was also given. The sentences were to run concurrently. Thus aggrieved, the appellant is before this Court.

5. Section 197 of the MV Act deals with unauthorized driving of a motor vehicle. Section 187 of the MV Act reads as follows:

"**187. Punishment for offences relating to accident.**- Whoever fails to comply with the p[illegible]C)

of sub-section (1) of section 132 or of section 133 or section 134 shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both or, if having been previously convicted of an offence under this section, he is again convicted of an offence under this section, with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

Section 132(1)(c) of the MV Act was omitted w.e.f. 14.11.1994. Section 133 deals with duty of the driver, owner or conductor to furnish information on demand. There is no such case for the prosecution. Therefore, the alleged offence could only be non-compliance of Section 134, which reads as under:

"**134. Duty of driver in case of accident and injury to a person.-** When any person is injured or any property of a 3rd party is damaged, as a result of an accident in which a motor vehicle is involved, the driver of the vehicle or other person-in-charge of the vehicle shall-

(a) unless it is not practicable to do so on account of mob fury or any other reason beyond his control, take all reasonable steps to secure medical attention for the injured person by conveying him to the nearest medical practitioner or hospital, and it shall be the duty of every registered medical practitioner or the doctor on duty in the hospital immediately to attend to the injured person and render medical aid or treatment without waiting for any procedural formalities, unless the injured person or his guardian, in case he is a minor, desires otherwise;

(b) give on demand by a police officer any information required by him, or, if no police officer is present, report the circumstances of the occurrence,

including the circumstances, if any, for not taking reasonable steps to secure the medical attention as required under clause (a), at the nearest police station as soon as possible and in any case within twenty-four hours of the occurrence.

(c) give the following information in writing to the insurer, who has issued the certificates of insurance, about the occurrence of the accident, namely:-

(i) insurance policy number and period of its validity;

(ii) date, time and place of accident;

(iii) particulars of the persons injured or killed in the accident;

(iv) name of the driver and the particulars of his driving licence.

Explanation.-For the purposes of this section, the expression "driver" includes the owner of the vehicle."

(Emphasis supplied)

6. In the instant case, the main defence of the appellant before the trial court was that there was no evidence to hold that he was the driver of the tractor at the relevant time. According to the prosecution, there is no direct evidence. Even the injured witness PW-5, who was driving the scooty, has not identified the driver. The High Court, on the only evidence that the appellant was scolded by people in the hospital, has come to the conclusion that the appellant was the driver of the tractor. There is also no direct evidence with regard to the ingredients of Sections 279 and 304A of IPC. The High Court, on re-appreciation of the evidence, has taken another view so as to convict the accused.

7. There is no finding in the impugned Judgment by the High Court that the conclusions drawn by the trial court are perverse so as to mean that the same is against the weight of evidence. The important issue, thus, for our consideration is - whether the High Court was justified in re-appreciating the evidence and reversing the order of acquittal merely because of a possibility of another view.

8. The High Court in an appeal under Section 378 of Cr.PC is entitled to reappraise the evidence and conclusions drawn by the trial court, but the same is permissible only if the judgment of the trial court is perverse, as held by this Court in *Gamini Bala Koteswara Rao and Others v. State of Andhra Pradesh through Secretary*[1]. To quote:

> "**14.** We have considered the arguments advanced and heard the matter at great length. It is true, as contended by Mr Rao, that interference in an appeal against an acquittal recorded by the trial court should be rare and in exceptional circumstances. It is, however, well settled by now that it is open to the High Court to reappraise the evidence and conclusions drawn by the trial court but only in a case when the judgment of the trial court is stated to be perverse. The word "perverse" in terms as understood in law has been defined to mean "against the weight of evidence". We have to see accordingly as to whether the judgment of the trial court which has been found perverse by the High Court was in fact so."
>
> (Emphasis supplied)

9. It is also not the case of the prosecution that the judgment of the trial court is based on no material or that it suffered from any legal infirmity in the sense that there was non-consideration or misappreciation of the evidence on record. Only in such circumstances, reversal of the acquittal by the High Court would be justified. In *K. Prakashan v. P.K. Surenderan*[2], it has also been affirmed by this Court that the appellate court should not reverse the acquittal merely because another view is possible on the evidence. In *T. Subramanian v. State of Tamil Nadu*[3], it has further been held by this Court that if two views are reasonably possible on the very same evidence, it cannot be said that the prosecution has proved the case beyond reasonable doubt.

1. (2009) 10SCC 636.
2. (2008) 1 SCC 258.

10. In *Bhim Singh v. State of Haryana*[4], it has been clarified that interference by the appellate court against an order of acquittal would be justified only if the view taken by the trial court is one which no reasonable person would in the given circumstances, take.

11. In *Kallu alias Masih and others v. State of Madhya Pradesh*[5], it has been held by this Court that if the view taken by the trial court is a plausible view, the High Court will not be justified in reversing it merely because a different view is possible. To quote:

> "**8.** While deciding an appeal against acquittal, the power of the appellate court is no less than the power exercised while hearing appeals against conviction. In both types of appeals, the power exists to review the entire evidence. However, one significant difference is that an order of acquittal will not be interfered with, by an appellate court, where the judgment of the trial court is based on evidence and the view taken is reasonable and plausible. It will not reverse the decision of the trial court merely because a different view is possible. The appellate court will also bear in mind that there is a presumption of innocence in favour of the accused and the accused is entitled to get the benefit of any doubt. Further, if it decides to interfere, it should assign reasons for differing with the decision of

3. (2006) 1 SCC 401.
4. (2002) 10 SCC 461.
5. (2006) 10 SCC 313.

the trial court."

(Emphasis supplied)

12. In *Ramesh Babulal Doshi v. State of Gujarat*[6], this Court has taken the view that while considering the appeal against acquittal, the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable and if the court answers the above question in negative, the acquittal cannot be disturbed. To quote:

"**7.** … the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then — and then only — reappraise the evidence to arrive at its own conclusions. …"

(Emphasis supplied)

13. In *Ganpat v. State of Haryana and others*[7], at paragraph-15, some of the above principles have been restated. To quote:

"**15.** The following principles have to be kept in mind by the appellate court while dealing with appeals, particularly, against an order of acquittal:

6. (1996) 9 SCC 225.

7. (2010) 12 SCC 69.

(*i*) There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is founded and to come to its own conclusion.

(*ii*) The appellate court can also review the trial court's conclusion with respect to both facts and law.

(*iii*) While dealing with the appeal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the judgment of acquittal.

(*iv*) An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference.

(*v*) When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed. …"

14. The exercise of power under Section 378 of Cr.PC by the court is to prevent failure of justice or miscarriage of justice. There is miscarriage of justice if an innocent person is convicted; but there is failure of justice if the guilty is let scot-free. As cautioned by this Court in *State of Punjab v. Karnail Singh*[8]*:*

"6. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden

8. (2010) 11 SCC 271.

thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence even where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. …"

(Emphasis supplied)

15. In this context, yet another caution struck by this Court in *Chandrappa and others v. State of Karnataka*[9] would also be relevant.

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(*1*) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(*2*) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(*3*) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very

9. (2007) 41 SCC 415.

strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(*4*) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. *Firstly*, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(*5*) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

(Emphasis supplied)

16. The High Court in the impugned Judgment does not seem to have taken a view that the judgment of the trial court acquitting the accused is based on no material or it is perverse or the view by the trial court is wholly unreasonable or it is not a plausible view or there is non-consideration of any evidence or there is palpable misreading of evidence, etc. It is not the stand of the High Court that there had been some miscarriage of justice in the way the trial court has appreciated the evidence. On the contrary, it is the only stand of the High Court that on the available evidence, another view is also reasonably possible in the sense that the appellant-accu[illegible]n

convicted. In such circumstances, the High Court was not justified in reversing the acquittal. The High Court itself having acquitted the appellant under Section 187 of the MV Act on the ground of no evidence, whether it was possible, to hold him guilty under Sections 279 and 304A of IPC, is itself a seriously doubtful question. However, it is not necessary to pronounce on that issue since the appellant is liable to succeed otherwise.

17. The appeal is allowed. The impugned Judgment is set aside and that of the trial court is restored.

D.G. Appeal allowed.

MAHESH DHANAJI SHINDE

v.

STATE OF MAHARASHTRA

(Criminal Appeal No. 1210-1213 of 2012)

FEBRUARY 27, 2014

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

PENAL CODE, 1860:

ss. 302 r/w120B - 9 murders - Circumstantial evidence - "Money shower" case - Accused meticulously planned murders by inducing innocent persons in the name of "money showers" (multiplying cash money), took money from them, killed them and looted their cash and jewellery - Conviction and death sentence to all four accused - Confirmed by High Court - Held: On the basis of the evidence brought by the prosecution it has been conclusively established that the death of all the deceased persons was homicidal in nature and that dead bodies recovered were of the deceased, as claimed by the prosecution - Therefore, conviction of all four accused u/ss 302 and 120-B is affirmed - Evidence - Circumstantial evidence.

Sentence - Held: Criminal acts of accused were the result of a carefully planned scheme - Crimes were committed over a period of nearly two months in three different episodes - Assaults on some of the victims were merciless and gruesome - Some of the victims were young and hapless children - At the same time, all the four accused were young in age at the time of commission of offence - They belong to economically, socially and educationally deprived section of population - They were living in acute poverty - Materials show that while in custody all the accused had enhanced their educational qualifications -- There is no material or information to show

any condemnable or reprehensible conduct on the part of any of appellants during their period of custody - All the circumstances point to possibility of accused-appellants being reformed and living a meaningful and constructive life if they are to be given a second chance - Balancing two sets of circumstances i.e. one favouring commutation and the other favouring upholding death penalty, option of life sentence is not "unquestionably foreclosed" - Therefore, sentence of death awarded to accused-appellants is commuted to life imprisonment - Their custody for rest of their lives will be subject to remissions, if any, which will be strictly subject to the provisions of ss. 432 and 433-A, Cr.PC.

The appellants (A-1, A-2, A-3 and A-6) were prosecuted for committing murders of 9 persons for money. The prosecution case was that A-1 claimed to have been gifted with supernatural powers of "money showers" i.e. to multiplying cash money, and A-2, A-3 and A-6 used to spread and circulate amongst innocent people the magical powers of "money showers" of A-1; that these accused conspired to induce the people, collect money from them on the assurance of multiplying it, take such people to a certain place (place of occurrence) and kill them there, take away their cash and jewellery and other belongings and dispose of their bodies. The relatives of some of the deceased lodged complaints of missing of the deceased. The investigation led to recovery from the place of occurrence of 10 dead bodies in highly decomposed condition, unable to be identified, out of which DB1 to DB9 were identified by the relatives on the basis of their belongings, DNA tests and super-imposition test. The accused were tried in three Sessions cases. In two of them A-1, A-2, A-3 and A-6 were convicted u/ss 302 and 120B IPC and were sentenced to death. The High Court confirmed the conviction and the sentence. In the third Sessions case in which only A-1, A-2 and A-3 were the accused, they were acquitted of the

offence punishable u/ss 302 and 120B IPC, but the High Court reversed their acquittal and sentenced them to life imprisonment.

Disposing of the appeals, the Court

HELD: 1.1 On the basis of the evidence brought by the prosecution it has been conclusively established that the death of all the deceased persons, except DB-10, which could not be identified, was homicidal in nature and that DB-1 to 9 were of the deceased, as claimed by the prosecution. [para 13] [422-F-G]

1.2 In so far as the involvement of the accused in the crimes alleged against them is concerned, the evidence and other materials on record make it clear that A-1, A-2, A-3 and A-6 were known to each other and they were residing in Mumbai. It was deliberately circulated and spread by the accused that A-1 was gifted with super-natural powers of causing money showers i.e. multiplying cash money. The evidence on record also establishes that the accused had been persuading people, including the victims, to arrange for cash money and bring the same to them at the named places so that the same can be multiplied. Accordingly, the victims, including the deceased persons, after obtaining cash money from different sources, had gone to the stated places and they were put up in different lodges/hotels by the accused. The prosecution had also established that while staying in the hotels/lodges the victims and the accused did not use their real names. Specifically, the prosecution evidence shows that A-2 arranged for conveyance and stay of the victims whereas A-3 had assisted A-2 in shifting the victims from the lodges to the place where the crimes were committed. The evidence adduced also shows that the victims had left in the mornings of the days of incident for the place of occurrence alongwith some of the a[illegible]e

money spinner and A-6 was in the company of the other accused with full knowledge of what was going on and with active participation therein. [para 17]

1.3 The victims were missing for days and their relatives had lodged complaints in different police stations. From the place of occurrence articles like wearing apparels, brief case, diaries etc. were recovered which have been proved to be belonging to some of the deceased persons whereas articles like wrist watch, jewellery items etc. also belonging to the deceased had been recovered from persons who were in such possession through the accused. All such articles have been identified by the close relatives of the deceased to be belonging to the respective deceased persons. Around the time of the incidents, the accused persons had made unaccounted cash deposits in their Bank accounts or in the accounts of their close relatives and A-1, A-2 and A-3 had purchased automobiles/motorcycles on cash payment. The sources of such receipts have not been explained. These conclusions which this Court has thought proper to draw on a consideration of the evidence of the prosecution appears to be more or less in conformity with what has been found by the High Court to have been proved by the prosecution. Therefore, there is no doubt, whatsoever, that in the instant case the prosecution has succeeded in proving a series of highly incriminating circumstances involving the accused all of which, if pieced together, can point only to one direction, namely, that it is the accused-appellants and nobody else who had committed the crimes in question. [para 17] [432-H; 433-A-E]

1.4 Therefore, this Court affirms the impugned common judgment and order of the High Court holding accused A-1, A-2, A-3 and A-6 in Sessions Case Nos. 3/2005 and 5/2005 guilty of commission of the offences

alleged including the offence u/s 302 IPC read with s. 120-B IPC. This Court also affirms the finding of the High Court that accused A-1, A-2 and A-3 in Sessions Case No. 4/2005 are guilty of commission of the offence u/s 302 IPC read with s. 120-B IPC, insofar as the death of deceased (DB-1) is concerned. [para 17] [433-E-G]

Santosh Kumar Satishbhushan Bariyar Vs. State of Maharashtra **(2009) 6 SCC 498;** *Mulla & Anr. Vs. State of Uttar Pradesh* **2010 (2) SCR 633 = (2010) 3 SCC 508;** *Ramesh & Ors. Vs. State of Rajasthan* **2011 (4) SCR 585 = (2011) 3 SCC 685; and** *Shankar Kisanrao Khade Vs. State of Maharashtra* **(2013) 5 SCC 546 - cited.**

2.1 As regards the sentence, the essential principles in death penalty jurisprudence has been laid down by two Constitution Benches of this Court in *Jagmohan Singh* and *Bachan Singh*. The expanse of the death penalty jurisprudence clearly and firmly laid down in Bachan Singh is called out as following:

(1) Life imprisonment is the rule and death penalty is the exception. (para 209)

(2) Death sentence must be imposed only in the gravest cases of extreme culpability, namely, in the "rarest of rare" where the alternative option of life imprisonment is "unquestionably foreclosed". (para 209)

(3) The sentence is a matter of judicial discretion to be exercised by giving due consideration to the circumstances of the crime as well as the offender. (para 197) [para 21 and 23] [436-B-C; 437-B-E]

Jagmohan Singh Vs. The State of U.P. **1973 (2) SCR 541 = (1973) 1 SCC 20;** *Bachan Singh Vs. State of Punjab* **(1980) 2 SCC 684 - relied on.**

Mithu Vs. State of Punjab **1983 (2) SCR 690 = AIR 1983 SC 473;** *Sunil Dutt Sharma vs. State (Govt. of NCT of Delhi)* **2013 (12) SCALE 473; and** *Sushil Sharma Vs. The State of NCT of Delhi* **2013 (12) SCALE 622 - referred to.**

2.2 The Constitution Bench in Bachan Singh sounded a note of caution against treating the aggravating and mitigating circumstances in separate water-tight compartments, as in many situations it may be impossible to isolate them and both sets of circumstances will have to be considered to cull out the cumulative effect thereof. [para 24] [437-F-G]

2.3 In the instant case, there is no manner of doubt that the accused appellants have committed the murder of as many as 9 innocent and unsuspecting victims who were led to believe that A-1 had magical powers to multiply money. The deceased, after being killed, were robbed of the cash amounts that they had brought with them for the purpose of "money shower". The criminal acts of the accused were actuated by greed for money and such acts were the result of a carefully planned scheme. The crimes were committed over a period of nearly two months in three different episodes. The assaults on some of the victims were merciless and gruesome. Some of the victims were young and hapless children. [para 28] [441-G-H; 442-A-B]

2.4 At the same time, all the four accused were young in age i.e. 23-29 years at the time of commission of the offence. They belong to the economically, socially and educationally deprived section of the population. They were living in acute poverty. It is possible that, being young, they had a yearning for quick money and it is these circumstances that had led to the commission of the crimes in question. Materials have been laid before this Court to show that while in custody all the accused had enrolled themselves in Open University and had

either completed the B.A. Examination or are on the verge of acquiring the degree. A-2, A-3 and A-6 have, at different points of time, participated in different programmes of Gandhian thoughts and have been awarded certificates of such participation. In prison, A-2 has written a book and A-3 has been associated with the said work. There is no material or information to show any condemnable or reprehensible conduct on the part of any of the appellants during their period of custody. All the circumstances point to the possibility of the accused-appellants being reformed and living a meaningful and constructive life if they are to be given a second chance. In any case, it is not the stand of the State that the accused-appellants are beyond reformation or are not capable of living a changed life if they are to be rehabilitated in society. Each of the accused have spent over 10 years in incarceration. [para 29] [442-C-H]

2.5 Balancing the two sets of circumstances i.e. one favouring commutation and the other favouring upholding the death penalty, this Court is of the view that in the instant case the option of life sentence is not "unquestionably foreclosed". Therefore, the sentence of death awarded to the accused is commuted to life imprisonment. Each of the accused-appellants, shall undergo imprisonment for life for commission of the offence u/s 302/120B IPC. The custody of the appellants for the rest of their lives will be subject to remissions, if any, which will be strictly subject to the provisions of ss.432 and 433-A of the Cr.PC. [para 30] [443-A-D]

Case Law Reference:

(1980) 2 SCC 684	relied on	para 18
(2009) 6 SCC 498	cited	para 18
2010 (2) SCR 633	cited	para 18

2011 (4) SCR 585	**cited**	**para 18**
(2013) 5 SCC 546	**cited**	**para 18**
1973 (2) SCR 541	**relied on**	**para 21**
1983 (2) SCR 690	**referred to**	**para 24**
2013 (12) SCALE 473	**referred to**	**para 24**
2013 (12) SCALE 622	**referred to**	**para 24**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1210-1213 of 2012

From the Judgment & Order dated 17.10.2011 of the High Court of Judicature at Bombay in Confirmation Cases Nos. 3 and 6 of 2009 alongwith Criminal Appeal Nos. 731 and 732 of 2010.

WITH

Criminal Appeal No. 2089-2091, 1238-1239, 1240-1241 of 2012

Colin Gonsalves, Aparna Jha, Braj Kishore Mishra, Kamlesh Mishra, Jyoti Mendiratta Shivaji M. Jadhav, Sushil Karanjkar, S.N. Bhanage, P.R. Narvekar, A.P. Mayee, Asha Gopalan Nair, Amol B. Karande for the appearing parties.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. The appellants, Santosh Manohar Chavan, Amit Ashok Shinde, Yogesh Madhukar Chavan and Mahesh Dhanaji Shinde who were tried as accused Nos. 1, 2, 3 and 6 (hereinafter referred to as A-1, A-2, A-3 and A-6) in Sessions Case Nos. 3/2005, 4/2005 and 5/2005 have assailed the impugned common judgment and order of the High Court of Bombay dated 17.10.2011 whereby their conviction in Sessions Case Nos. 3/2005 and 5/2005, inter alia, under Section 302/120B of the IPC and for offences under the Arms Act have been upheld by the High Court. The death penalty

imposed on the appellants by the learned Trial Judge has been confirmed by the High Court by the order under appeal apart from the punishment imposed under different Sections of the Penal Code as well as the Arms Act. Insofar as Sessions Case No. 4/2005 is concerned, the learned Trial Judge had acquitted accused 1, 2 and 3 of the offence under Section 302/120B IPC. In the appeal by the State, the High Court has reversed the acquittal and convicted the aforesaid three accused of the aforesaid offence and has sentenced them to undergo RI for life. The accused No. 6, i.e., appellant Mahesh Dhanaji Shinde is not an accused in Sessions Case No. 4/2005. It is the common order of the High Court rendered in the aforesaid cases convicting and sentencing the accused-appellants, as aforementioned, which has been challenged in the present appeals. It may also be mentioned at the outset that in all the cases the accused-appellants have been exonerated of the charge under Section 364A of the IPC by the order under appeal.

2. The case of the prosecution in short is that on 20.12.2003 the Superintendent of Police, Sindhudurg received anonymous letters and phone calls to the effect that some unidentified dead bodies were lying dumped on the hillocks of village Nandos, Taluk Malvan, District Sindhudurg. A search operation was organised on the very day i.e. 20.12.2003 in the course of which 7 dead bodies were recovered. Two more dead bodies were recovered on the next day i.e. 21.12.2003 and one dead body was recovered on 29.12.2003. Alongwith the dead bodies, articles like clothes, trouser hooks, broken brief case etc. alongwith two blood stained diaries were also recovered. Though all the dead bodies were sent for post-mortem examination the high level of decomposition rendered any post-autopsy opinion impossible. The dead bodies were therefore sent to Medical College, Miraj and a team of doctors was constituted who performed forensic chemical tests on the dead bodies. Some of the organs from the dead bodies were sent to the Centre for DNA Fingerprin[illegible]s,

Hyderabad (CDFD) for DNA test and the skulls sent to the Forensic Laboratory, Kalina, Bombay for super-imposition tests.

3. In the two diaries recovered by the police from the spot some names and addresses were found. It is from these persons that the names and particulars of the persons to whom the diaries belonged could be ascertained. Having traced the initial identity of some of the deceased in the above manner, enquiries from such friends and relatives revealed the names and identities of other persons who were in the company of the deceased persons. Information lodged in different police stations with regard to missing persons around the relevant time were collected and co-related. The opinion of handwriting experts were obtained which showed that the diaries belonged to one Dada Saheb Chavan and Kerubhai Mali. Blood samples of the relatives were sent to the CDFD, Hyderabad for DNA test. Some of the dead bodies were also identified by the relatives and friends of the deceased on the basis of articles recovered from the spot which were seized in the course of the investigation. The investigation which proceeded on the aforesaid lines, prima facie indicated the involvement of the accused-appellants. Accordingly, accused Santosh Manohar Chavan (A-1) was arrested on 22.12.2003 and from the information obtained during the course of his interrogation, accused Nos. 2 to 7 were arrested. The disclosures made by the accused led to recovery of gold articles, bank passbooks etc. from the house of A-7 as well as incriminating weapons like iron rods, cut bars of guns, one muzzle loader gun etc. Test Identification Parade was held where A-1, A-2 and A-3 were identified by witnesses. The assets acquired by the aforesaid persons around that time including motor bikes, a Tata Sumo jeep etc. were seized alongwith bank statements of the accused, their wives and relatives. The bank statements revealed that cash deposits well beyond the income of the accused were made around the time of the incidents. The accounts also showed purchase of Tata Sumo by A-1 at a cost of Rs. 2.6 lakhs on 24.08.2003 and purchase of motorcycles

by A-2 and A-3 on 20.11.2003 and 25.11.2003 respectively.

4. According to the prosecution, investigation further disclosed that A-1 Santosh Manohar Chavan who plied an auto rickshaw in Mumbai claimed super natural powers to bring about "money showers" i.e. to multiply cash money. According to the prosecution while A-2 was a LIC agent, A-3 was employed in a private institution and A-6 was running a ration shop. All the aforesaid accused used to spread and circulate amongst innocent and unsuspecting persons the magical powers claimed by A1 to multiply money by creating "money showers". They would ask the victims to come to Malvan with currency notes of higher denominations alongwith empty gunny sacks (ostensibly to collect the proceeds of the money shower). In Malvan they were put up in lodges and hotels. From those lodges and hotels the victims would be ferried to the Nandos plateau by auto rickshaw. The vehicle will halt near the village Panchayat Office from where the victims were asked to travel by foot to the plateau. The prosecution alleged that the accused ensured that the victims did not bring their own vehicles to Malvan and that they did not leave any personal effects in the hotel or lodge. All this was done to avoid any trace of the victims. The registers of lodges and hotels where the deceased persons and some of the accused had, according to the prosecution, stayed on different dates during the relevant period were also seized in the course of investigation.

5. According to the prosecution, the investigations carried out had also revealed that one Shankar Sarage and one Hemant Thakre were done to death by the accused persons on 24.9.2003. Dead bodies number 1 and 10 (DB-1 and DB-10) were claimed to be of the aforesaid two persons who, according to the prosecution, were killed on 24.9.2003. The accused were charged of the offence of kidnapping and murder of the aforesaid two persons and were put to trial in the proceeding registered as Sessions Case No. 4/2005. On the basis of the report of the forensic tea

College the prosecution alleged that the aforesaid two persons were killed by gun shots, swords, rods and revolver and that they have been robbed of a sum of Rs. 1,55,000/-. While the Trial Court acquitted the accused A-1, A-2 and A-3 on the ground that the dead bodies DB-1 and DB-10 could not be identified to be that of deceased Shankar Sarage and Hemant Thakre, the High Court reversed the said finding insofar as deceased Shankar Sarage is concerned and held accused 1, 2 and 3 to be guilty of murder of Shankar Sarage. They have been accordingly sentenced to undergo RI for life.

6. The prosecution had further alleged that the second incident involved four persons i.e. Vijaysinha Dude, Dadasaheb Chavan, Sanjay Garware and Vinayak Pisal and that the same had occurred on 30.10.2003. It is the further case of the prosecution that Dead Bodies i.e. DB-2, DB-3, DB-4 and DB-5 were that of the four deceased persons mentioned above who were killed and robbed of Rs. 3,10,000/-. Such identification was claimed on the basis of super-imposition tests carried out at the Forensic Laboratory, Kalina, Bombay. Sessions Case No. 5/2005 was registered in respect of the said incident wherein the accused A-1, A-2, A-3 and A-6 were tried and convicted under Section 302/120B IPC and other provisions of the Code as well as under different provisions of the Arms Act. They have been awarded the death sentence by the learned Trial Court which has been confirmed by the High Court by the order under challenge in the present appeals.

7. The prosecution has further alleged that the third incident occurred on 14.11.2003 and involved four persons of a family who were identified to be Kerubhai Mali, Anita Mali, Sanjay Mali and Rajesh Mali. On the basis of the report of DNA analysis, the prosecution alleged that dead bodies DB-8, DB-7, DB-6 and DB-9, respectively, belonged to the aforesaid persons in seriatim and that they had been killed and robbed of Rs. 3,10,000/-. Sessions Case No. 3/2005 was registered against accused A-1, A-2, A-3 and A-6 in respect of the incident in

question. All the four accused persons have been convicted by the learned Trial Court *inter alia* under Section 302/120B IPC and other provisions of the Code as well as different provisions of the Arms Act and have been sentenced, inter alia, to death. The conviction and sentence has been maintained by the High Court.

8. Though separate chargesheets in respect of the three incidents of alleged murder on the three different dates were filed in Court and separate sessions cases were registered wherein separate charges had been framed against the accused persons, evidence in all the cases was led in the trial of Sessions Case No. 3/2005.

9. 128 witnesses including 38 panch witnesses; 22 persons acquainted with the accused and the victims; 9 relatives of the victims; 13 medical officers; 5 witnesses connected with the mobile phone calls made by the accused; 29 police witnesses; two executive magistrates; 5 bank officers and 5 DNA experts, super-imposition experts, handwriting experts and ballistic experts were examined by the prosecution. The accused persons denied their involvement in any of the offences alleged against them but did not adduce any evidence.

10. A broad overview of the core evidence brought by the prosecution to bring home the charges against the accused may now be made.

On the basis of the report of the Forensic Expert Committee (Exhibit 419) proved by PW-76, Dr. Anil Jinturkar, the prosecution has tried to prove that the death of all the 10 deceased (DB-1 to DB-10) was homicidal in nature. The findings of the forensic tests, as deposed to by PW-76, may be set out below:-

. **DB 1** was of a human male aged between 25 to 45 years. Time of death was 6 months prior to examination. Probable caus d

as single hole firearm injury to the thorosic region, although the exit wound was not found. Other injuries to the mandible and verterbrae were caused by a hard, blunt object. Although the appearance of these injuries were similar to those caused by iron bars, PW-76 could not affirm that iron bars alone caused the injuries due to the non-availability of brain matter. Analysis of brain and brain matter would reflect the impact of blows from an iron bar, in the absence of which, PW-76 could not rule out the possibility of the injuries due to fall.

. **DB 2** was of human male aged between 25 to 45 years and the person died 6 months before the examination. He stated that all injuries expect the gnawing marks were *ante mortem* & the probable cause of death was the head injuries resulting into the fracture of the skull & these injuries could have been caused by a sharp cutting object.

. **DB 3** was of human male aged between 25 to 45 years and the person died 6 months before the examination. He stated that all injuries were found ante mortem & the probable cause of death was fire arm injury to chest & fracture of skull leading to head injury. Two injuries of circular holes on posterior parts were caused by fire arm & rest of the injuries by hard & blunt object.

. **DB 4** was of human male aged between 25 to 45 years and the person died 6 months before the examination. He stated that all injuries expect the gnawing marks were found ante mortem & the probable cause of death was the head injury due to fracture of the skull bone with blunt thorosic trauma associated with multiple ante mortem fracture. It was stated that all ante mortem injuries could be caused by hard & blunt object.

. **DB 5** was of human male aged between 25 to 45 years and the person died 6 months before the examination. He stated that all injuries could have been caused by hard & blunt object & the cause of death was head injury due to fracture of skull bone with blunt thorosic trauma associated with multiple ante mortem fracture.

. **DB 6** was of human male aged between 12 to 18 years and the person died 6 months before the examination. An ante mortem injury of linear fracture over the left aspect of frontal bone was found & two post mortem injuries of broken styloid processes (points of attachment for muscles) & gnawing marks at left & right hands were found. The cause of death was stated to be head injury as a result of linear fracture of bone of left side.

. **DB 7** was of human female aged between 25 to 45 years & could have died 6 months before the examination. All the injuries found were ante mortem & the probable cause of death was fire arm injuries to abdomen and pelvis with evidence of multiple fracture of skull leading to head injury.

. **DB 8** was of human male aged between 25 to 45 years & could have died 6 months before the examination. All injuries of fracture of right frontal bone were found ante mortem caused probably by a hard & blunt object & some gnawing injuries were found post-mortem. The probable cause of death was stated to be head injury resulting into fracture of vault & anterior cranial fossa at the base of the skull.

. **DB 9** was of human male aged between 18 to 20 years & could have died 6 months before the examination. All injuries wer &

were caused by hard & blunt object. The cause of injury was stated to be head injury resulting into depressed communicated fracture of skull bone.

. **DB 10** was of human male aged between 25 to 45 years & could have died 6 months before the examination. He opined that like DB 1 and 3, DB 10 had also suffered fire arm injuries, but he could not opine as to what type of fire arm was used in as much as it was a shot gun or rifle, but at the same time it was noticed that no exit wound was found on the skeleton.

11. The prosecution has laid evidence to show that blood samples of the relatives of some of the deceased persons were collected as per prescribed guidelines and alongwith some parts of the organs of the deceased were sent to the CDFD at Hyderabad for DNA analysis. The report of Dr. S. Pandurang Prasad, Senior Technical Examiner in the laboratory (PW-107) to the effect that dead bodies 1, 2, 6, 7, 8 and 9 were found to be that of deceased Shankar Sarage, Vijaysinha Dudhe, Sanjay Mali, Anita Mali, Kerubha Mali and Rajesh Mali was brought on record by the prosecution. In so far as DB-2 to 5 are concerned, the identity thereof could not be established by DNA analysis as the specimens sent were found not to be fit for a conclusive determination of the question. However, the skulls of the DB-2 to 5 were sent for superimposition tests which were carried out by PW-108, Ratna Prabha Gujarati. The aforesaid witness had testified that the probability of her finding being correct is almost 99% and the reliability of the superimposition test technique is 91%. PW-108 had testified, on the basis of superimposition tests, that DB-2 to 5 were of deceased, Vijaysinha Dudhe, Dadasaheb Chavan, Sanjay Gavare, and Bala Pisal respectively.

12. The prosecution has sought to establish the identity of the dead bodies, additionally, on the basis of oral evidence. In this regard, PW-66, Mohan Doke, brother of deceased Anita

Mali, (DB-7) had identified the mobile phones, pieces of saree, hair clips, brief case, wrist watch, gold rings, earrings along with mangal sutra belonging to members of the Mali family which were either recovered from the spot/place of occurrence or from other persons who had come into possession of the same through the accused. In respect of DB-2 to 5, the identification of the personal effects of the deceased were made by close relations. Specifically, PW-97, Pradip Pisal, brother of deceased Vinayak Pisal (DB-5) had identified the clothes worn by the deceased whereas PW-98, Vinayak Dinkar Chavan, brother of deceased Dadasaheb Chavan (DB-3) had identified the clothes and chappals worn by the deceased as well as the diary belonging to him. Similarly, PW-80, Smt. Jyoti Gavare, wife of deceased Sanjay Gavare (DB-4) identified the clothes recovered from the dead body as well as the rubber ring of the deceased worn by him around the waist. Similarly, DB-2 was identified by PW-63-Fatehsingh Dudhe to be the dead body of Vijaysinha Dudhe on the basis of the gaps in the central teeth of the dead body and the personal effects of the deceased like clothes, shoes, wrist watch etc. Similarly, the DB-1 was identified to be the dead body of Shankar Sarage by PW-119 Parvati Shankar, the widow of the deceased. Such identification was made on the basis of the clothes that the deceased was wearing at the time he had left his home.

13. On the basis of the above evidence brought by the prosecution there can be no manner of doubt, whatsoever, that the death of all the deceased persons except Hemant Thakre (DB-10 - whose dead body could not be identified) was homicidal and that DB-1 to 9 were of the deceased, (excluding Hemant Thakre) as claimed by the prosecution.

14. The evidence of the relevant witnesses examined by the prosecution in all the three cases to establish a possible link and show a live nexus between the crime(s) committed and the persons responsible therefor may now be taken note of.

(a) PW- 1, Ashok Nemalekar -

rickshaw in Malvan. He has deposed that on 14.11.2003 he ferried five passengers from Mayur Lodge to the Village Panchayat Office at about 11.00-11.30 am. On the basis of the photographs shown to him by the investigating team he had identified four members of the Mali family i.e. Sanjay Mali (DB-6), Anita Mali (DB-7), Kerubhai Mali (DB-8), Rajesh Mali (DB-9) and the accused No.2 Amit Ashok Shinde as his passengers.

(b) PW-4 Smita is the wife of A-7. She had testified that A-1 had lived in her house since his childhood until he moved to Mumbai to ply auto-rickshaw. Though he would visit her only once in a year during Ganpati Festival (usually held in the calendar month of August). A-1 had visited her in May, 2003 and stayed with her for 15 days. Thereafter, again in September, 2003 A-1, A-2 and A-3 stayed at her home for 10 days. According to PW-4 during this visit she could notice that the three accused would go to the plateau (Nandos) ostensibly for hunting though they never returned with any prey. This witness had further deposed that A-1 and A-3 unexpectedly arrived at her house on 24.9.2003 at about 1.30 a.m. and when A-7 (husband of PW-4) had asked them why they had come at such an odd hour A-1 replied that they had some urgent work. According to PW-4 at about 9.30 a.m. in the morning, A-1's mobile phone started ringing and A-3 answered the same by saying "Bol Amit" (Amit speak). Thereafter within half an hour A-1 and A-3 left for Katta in the Tata Sumo jeep by which they had come. According to PW-4, her daughter Deepika had informed her that she had seen A-3, lurking around her school, which is near the Nandos Village Panchayat. A-3, on being asked what he was doing in the vicinity of the school had informed

Deepika that she must have seen somebody else as he had not gone near the school. PW-4 further deposed that A-3 left her house at about 6.00 p.m. on 24.9.2003 followed by A-1 (around 7.00-7.15 pm) and they had returned at about 9.00 -9.30 p.m. thoroughly drenched though it was not raining. PW-4 had further testified that the accused had asked her to wash their clothes which she refused to do at night.

PW-4 in her deposition had further stated that on 22.10.2003, A-1, his second wife Sonali, A-3 and a friend of A-1, one Jeetu, visited her and stayed for two days. On both the dates A-1 and A-3 had visited Katta. According to this witness about 5 to 6 days thereafter and two days after Diwali day of Bhaubeej A-1, Sonali, A-3 and A-6 came to her house where they were joined by A-2. Next day, she saw A-1, A-2, A-3 and A-6 bathing near the well and in the rear side of her house. She has further testified that A-6 was suffering from a cut injury on his index finger for which he had to be taken to a doctor who had put a bandage on the injured index finger.

PW-4 has further testified that on 12.11.2003 A-1, A-3, A-6 and Sonali had come to her house. On the next day the accused persons left her house in the morning for Katta and returned in the evening. On 14.11.2003 A-1, A-3, A-6 left her house at about 10.00-10.30 A.M. and returned around 3.00 P.M. with A2. Before entering the house they had bathed near the well. Thereafter the accused left her house on different dates.

(c) PW-5 Sachin, who is the younger brother of A-1 had testified that he had transported some of the victims in his auto-rickshaw at the request of A-1. His testimony was, however, rejected by the learned Trial Court on the ground that the same appeared to be incredible.

(d) PW-8 Vinod Deorukhkar is an employee of Mayur Lodge, Malvan. He had testified that on 14.11.2003, at about 7.00-7.30 am, one man, aged about 40-45 years, one woman, aged about 30-35 years, two boys, aged between 8 to 10 years, and one man, aged about 28-30 years, reached Mayur Lodge. They were allotted room no.6. When they were asked their names, the man aged 28-30 years came forward and introduced himself as Anil Jadhav; thus, the entry "Anil Jadhav and family" was made in the register. They left their room at 9.00 am that day for a walk and returned at 11.00 am. Shortly thereafter, they informed that they would be leaving the hotel. At that time, PW-8 noticed that the man, aged about 45 years, was carrying a medium sized, grey suitcase/briefcase. He identified Karubhai Mali's briefcase as the one carried by the man, before the Court. PW-8 also identified A2 as the man who disclosed his name as Anil Jadhav. He identified the Mali family from photographs shown to him in Court.

(e) PW-9 Appa is the Manager of Pallavi Lodge at Kankavli. The lodge register which was exhibited (Exh.-89) showed that on 29.10.2003 five persons including one Amit Shenoy occupied room No. 5 of the lodge. This witness recognized A-2 as the person who called himself as Amit Shenoy. This witness identified the other four persons from the photographs shown to him and deposed that they had left the room on the next day i.e. 30.10.2003 at about 9.00 a.m. The persons identified by him from the photographs are the deceased Vijaysinh Dudhe (DB-2), Dadasaheb Chavan (DB-3), Sanjay Gavare (DB-4) and Bala Pisal (DB-5).

(f) PW-10 Yogesh Dhake had testified that deceased

Dadasaheb Chavan, whose diary was found by the police, and Vijaysinh Dudhe (DB-3 and DB-2) had insisted on their being given a sum of Rs. 3,00,000/- promising that they would return Rs. 6,00,000/-. According to this witness on 28.10.2003 he gave a sum of Rs. 3,10,000/- (which he had collected from another customer for investment purpose) to the aforesaid two persons and one Sanjay Gavare (DB-4) who was also known to him. This witness has also testified that he was introduced to Vinayak Pisal (DB-5) and Accused No. 2. All the aforesaid persons told him that they would leave for Kankavli at 11.30 p.m. According to this witness on the next day deceased Dadasaheb Chavan called to inform him that they had reached Pallavi Lodge and that he could be reached on a different mobile number which turned out to be that of A-2.

(g) PW-12 – Dipak Kumar who was working as a Booking Clerk of Sarvottam Tours and Travels had deposed that A-2 whom he knew by name had booked 5 tickets for the journey on 13.11.2003 from Borovili to Malwan and that at Varshi one male person, one female and two children along with A-2 had boarded the bus.

(h) PW-14- Jagan Patil, was a friend of Bala @ Vinayak Pisal (DB-5). PW-14's evidence shows how, under the guise of "money shower" he was duped Rs 3 lakhs. He had gone with another sum of Rs.3 lakhs for 'money shower' for the second time but he was sent back by the accused. This was due to the fact that he had gone to Nandos in a private vehicle instead of using public transport as advised by the accused.

(i) PW-15 Amit Patel is the son of the owner of the Konkan Plaza Hotel at Kanka[illegible]e

used to maintain the hotel register. The hotel register which was exhibited (Exh-120) indicated that deceased Shankar Sarage (DB-1) and Hemant Thakre (DB-10) and one Samir Sonavane had arrived at the lodge on 25.09.2003 (1.00 A.M.) and stayed in room No. 5. The evidence of PW-104 Dipak Wagle (handwriting expert) is to the effect that the handwriting in the register was in the hand of A-2. (From the above it is evident that A-2 had used a fake name i.e. Samir Sonavane to sign the register)

(j) PW-17 Subhash Chalke testified that he had given Rs. 1,55,000/- to his friend deceased Shankar Sarage (DB-1) on 22.09.2003 for the purpose of money shower. He also testified that he had met A-1, A-2 and A-3 in the presence of deceased Shankar Sarage a couple of days before the money was handed over to the deceased. He further stated that after he had handed over the money, the deceased had contacted A-1 from a PCO and informed him that the money had been arranged. Further PW-17 had stated that on 23.09.2003 he received a phone call from the deceased that he along with deceased Hemant Thakre (DB-10) and A-1 & A-3 were proceeding to Malwan.

(k) PW-22 Anil Kisan Garate, a gold smith, testified that on 21.11.2003 a gold ring was sold to him by A-6 claiming the same to be of his grandmother. The said ring has been identified by PW-66, Mohan Dhoke, brother of deceased Anita Mali, to be belonging to his sister.

(l) PW-18 – Aijaz had deposed as to how he had been cheated by A-1 of Rs.1,20,000/- on two different occasions (Rs.60,000/- on each occasion) by promise of money shower.

(m) PW-30 Dr. Rajendra Rane had testified that on 30.10.2003 he treated A-6 for a cut injury on the right index finger. (knife was recovered at the instance of A-6)

(n) PW-34 Satish is elder brother of A-7 and another uncle of A-1. He has deposed with regard to purchase of Tata Sumo vehicle by A-1 in the name of A-2 and payment of Rs.10,000/- on 24.8.2003 and thereafter payment of Rs.85,000/- in connection with the aforesaid. This witness has also deposed with regard to the nervousness and apprehension shown by A-1 after the dead bodies were recovered.

(o) PW-47 Chetan Bhagwan Rawoot, a classmate of A-6, testified that on 6.12.2003 A-6 had handed over a Rado watch to him for safe keeping claiming that it belonged to one of his customers who had not paid his dues. PW-66 (brother of deceased Anita Mali) had identified the said watch as belonging to deceased Kerubhai Mali.

(p) PW-49 Hariram Patil had testified that he had agreed to sell his shop in Eksar, Borivali to the father of A-6, one Dhanaji Shinde. According to PW-49 he had received part payments in cash on 15.6.2003 and 25.8.2003 and on 1.12.2003 he had received a cheque for Rs. 50,000/- drawn on Maratha Cooperative Bank from A-6. On 30.12.2003, the police accompanied by A-6, arrived at his shop and he handed over Rs.50,000/- cash, which A-6 had paid to him earlier.

(q) PW-65 Vimal was engaged in the business of sale and purchase of second-hand vehicles. He had deposed regarding the sale of a Tata Sumo vehicle to A-1, in the name of

Rs.95,000/- in cash from A-1 in two instalments.

(r) PW-70 – Harjeet Singh Kochar, used to run a garage and also used to deal with sale and purchase of second-hand two wheelers. This witness has deposed that on 20.11.2003, A-2 and A-3 (he had identified them) had visited his garage for purchase of second-hand motor bikes. PW-70 has also deposed that while on 22.11.2003 he sold one motorcycle to A-2 who paid to him Rs. 17,500/-, on 25.11.2003 A-2 and A-3 visited his garage again and A-3 purchased another motorcycle for Rs.20,500/-. Both these amounts were paid to him by the accused in cash.

(s) PW-75 Santosh Yadav is another relative of A-1. This witness has corroborated the evidence of PW-4 with regard to the visit of A-1 to A-3 to the house of PW-4 on 5 occasions between October and December, 2003 and that A-6 had accompanied the other accused persons on 2 or 3 occasions. He had also testified that he had seen the accused bringing guns and swords to the house of PW-4 who was aware that the accused persons were in possession of fire arms and other weapons.

(t) PW-76 Dr. Jinturkar was the head of the team of Forensic Experts of Miraj Medical College, Mumbai constituted for forensic examination of the remains of the deceased persons. This witness had testified that DB-1 to DB-7 were received in the Medical College, Miraj on 23.12.2003 and DB-8 and DB-9 on 26.12.2003 and DB-10 on 5.1.2004. (The findings of the committee proved by this witness have already been extracted above.)

(u) PW-107 Dr. S. Pandurang Prasad was, at the relevant time, working as a Senior Technical

Examiner in the laboratory of DNA and Finger Printing Services, CDFD, Hyderabad. This witness has testified that upon the workable bone and blood samples, he found that DB-1 was the biological relative of Mr. D.B. Sarge, D-8 was biological father of DB-6 & DB-7 was biological mother of DB-6. DB-6 & DB-9 were also found biologically related. DB-7 was found biological relative of Ratnakar & Mohan Tukaram Doke. DB-8 was found biological son of Mrs. Yamunabhai Nanaji Mali and biological father of DB-9. DB-2 was found biological son of Mr. Vinayak Anandrao Dudhe, aged 80 years and biological relative of Mr. Ranjitsing Vinayak aged 40 years.

(v) PW-100, Babaji s/o Bhaskarrao Pavade, Branch Manager of Mahanagar Cooperative Bank, Turbhe Branch, New Mumbai, PW-109, Anand Vishnu Banodkar, Officer attached to Bank of Maharashtra, Dahisar Branch, PW-110-Vijaykumar Sangodkar, Branch Manager, State Bank of India, Dahisar Branch, PW-111, Krishna Dattaram Parab, Branch Manager of the Greater Bombay Cooperative Bank, Borivali Branch and PW-112, Vidhyadhar Rawool, Branch Manager of Maratha Sahakari Bank Ltd., Borivali Branch have proved the deposit of several cash amounts in the bank accounts of the accused, their wives or their immediate relatives. All such deposits were made in and around the relevant time.

15. Ms. Aparna Jha, learned counsel has very elaborately argued the case of the appellants contending that in the absence of any direct evidence the prosecution not only has to prove that circumstances incriminating to the accused had been laid before the Court but further that the sum total of such evidence unerringly points to the com[illegible]d

offence by the accused leaving no room for any other view. Learned counsel has taken us through the relevant parts of the evidence of the material witnesses to contend that the same are not free from doubt and ambiguity and are tainted on account of embellishments and improvements. No circumstance that implicates the accused-appellants, much less a chain of circumstances which admits of no other possibility except the guilt of the accused, has been established by the prosecution, in the present case, contends the learned counsel. In particular, learned counsel has pointed out that the identity of the dead bodies recovered will always remain in doubt in view of the extreme decomposition of the dead bodies when recovered. It is urged that DNA matching and super-imposition tests cannot lead to firm and conclusive results, beyond all reasonable doubt, as regards the identity of dead bodies. That apart, learned counsel has pointed out that some of the registers of the lodges and hotels where the victims were allegedly put up by the accused contain over-writings, additions and deletions which would make the same highly unreliable and unsafe in order to arrive at any conclusion with regard to the involvement of the accused.

16. Shri Sushil Karanjakar, learned State counsel, in reply, has submitted that in a case of the present nature where events had occurred as a result of a meticulous planning made by the accused persons, absence of any eye witness or direct evidence is, but, natural. Learned State counsel has however pointed out that the prosecution has systematically laid before the Court one adverse/incriminating circumstance after the other, the cumulative effect of which satisfies the test which circumstantial evidence has to pass through before acceptance by the Court. According to learned counsel, in the present case, not only highly incriminating and material circumstances have been established beyond doubt by the prosecution, the cumulative effect of such circumstances points to only one conclusion i.e. that the accused and no one else who had committed the crime alleged. In this regard learned State

counsel has drawn the attention of the Court to paragraph 96 of the judgment of the High Court wherein the circumstances held to be proved and established by the prosecution has been set out in seriatim.

17. We may now proceed to analyse the substratum of the evidence adduced by the prosecution as noted above. As already held, the homicidal nature of death of the concerned persons and their identities (except DB-10 Hemant Thakre) has been conclusively established by the prosecution. In so far as the alleged involvement of the accused in the crimes alleged against them is concerned, the evidence and other materials on record makes it clear that A-1, A-2, A-3 and A-6 were known to each other and they were residing in Mumbai. It was deliberately circulated and spread by the accused that A-1 was gifted with super-natural powers of causing money showers i.e. multiplying money. The evidence on record also establishes that the accused had been persuading people, including the victims, to arrange for cash money and bring the same to them at Malvan or Kankavli so that the same can be multiplied. Accordingly, the victims, including the deceased persons, after obtaining cash money from different sources, had come to Malvan or Kankavli and they were put up in different lodges/ hotels by the accused. The prosecution had also established that while staying in the hotels/lodges the victims and the accused did not use their real names. Specifically, the prosecution evidence shows that A-2 arranged for conveyance and stay of the victims whereas A-3 had assisted A-2 in shifting the victims from the lodges to the place where the crimes were committed. The evidence adduced also shows that the victims had left in the mornings of the days of incident for the Nandos plateau alongwith some of the accused. A-1 was the money spinner and A-6 was in the company of the other accused with full knowledge of what was going on and with active participation therein. The victims were missing for days and their relatives had lodged complaints in different police stations. From the place of occurrence articles

brief case, diaries etc. were recovered which have been proved to be belonging to some of the deceased persons whereas articles like wrist watch, jewellery items etc. also belonging to the deceased had been recovered from persons who were in such possession through the accused. All such articles have been identified by the close relatives of the deceased to be belonging to the respective deceased person(s). Around the time of the incidents, the accused persons had made unaccounted cash deposits in their Bank accounts or in the accounts of their close relatives and A-1, A-2 and A-3 had purchased automobiles/motorcycles on cash payment. The sources of such receipts have not been explained. The above conclusions which we have thought proper to draw on a consideration of the evidence of the prosecution appears to be more or less in conformity with what has been found by the High Court to have been proved by the prosecution (para 96 of the impugned judgment). In the light of the above facts, we do not entertain any doubt, whatsoever, that in the present case the prosecution has succeeded in proving a series of highly incriminating circumstances involving the accused all of which, if pieced together, can point only to one direction, namely, that it is the accused-appellants and nobody else who had committed the crimes in question. We, therefore, have no hesitation in affirming the impugned common judgment and order of the High Court holding the accused A-1, A-2, A-3 and A-6 in Sessions Case No. 3/2005 and 5/2005 guilty of commission of the offences alleged including the offence under Section 302 IPC read with Section 120-B IPC. We also agree with the finding of the High Court that the accused A-1, A-2 and A-3 in Sessions Case No. 4/2005 are guilty of commission of the offence under Section 302 IPC read with Section 120-B IPC, insofar as the death of Shankar Sarage (DB-1) is concerned.

18. Having held that the accused-appellants are liable to be convicted for the offences, *inter alia,* under Section 302/ 120B IPC, the next question, and perhaps a question of equal

if not greater significance, that would require consideration is the measure of punishment that would be just, adequate and complete. It has already been noted that in two of the cases the accused-appellants have been awarded death penalty whereas in the third case the sentence of life imprisonment has been imposed in reversal of the verdict of acquittal rendered by the learned Trial Court.

19. Shri Colin Gonsalves, who has argued the case on behalf of the appellants in so far as sentence is concerned, has submitted that all the accused persons are young and at the time of commission of the offence they were between 23-29 years of age. None of the accused-appellants have any previous criminal record; they have spent 10 years in jail custody and the jail record amply demonstrates that while in custody they have been educating themselves and have passed or have partly completed the graduate course under the Yashahantrao Chavan Maharashtra Open University. The accused-appellants have reformed themselves and, if rehabilitated in society, they can prove to be assets to Society, it is submitted. The prospects of their committing any further crime, according to the learned counsel, is remote. It has also been submitted by Shri Colin Gonsalves that the accused come from the lowest strata of society and had committed the crime due to poverty. All these, according to the learned counsel, are mitigating circumstances which if balanced against the incriminating circumstances of the case would tilt the scales in favour of commutation of the sentences of death into that of life imprisonment. Stressing the principle laid down in *Bachan Singh Vs. State of Punjab,*[1] Shri Colin Gonsalves has submitted that the legislative policy under Section 354(3) Cr.PC is that life imprisonment is the rule and death sentence is an exception. It is submitted by Shri Gonsalves that in the present case the option of life imprisonment does not stand "**unquestionably foreclosed**" so as to justify the death penalty imposed. Reliance has been placed on the decision in *Santosh*

1. (1980) 2 SCC 684.

Kumar Satishbhushan Bariyar Vs. State of Maharashtra[2] to contend that the circumstances set out above are all mitigating circumstances that ought to be taken into account at the time of consideration of the sentence to be imposed. Particular stress has been laid on the observations in para 159 of the report that emphasis that must be laid on the possibility of reform and rehabilitation of the accused even to the extent of requiring the State to prove that the same would not be possible. Shri Gonsalves has also drawn attention of this Court to the decision of this Court in *Mulla & Anr. Vs. State of Uttar Pradesh*[3] (authored by the learned Chief Justice). In particular, the observations in para 81 of the report has been placed to show that the state of poverty of the accused is a mitigating circumstance that should be taken into account and that the initial shock of the circumstances in which the crime is committed needs to be balanced with the possibility of reform of the accused over a period of time. We were also reminded that the long period of custody that a death convict has endured has been held to be a mitigating circumstance in *Ramesh & Ors. Vs. State of Rajasthan*[4] **(**Para 76). The decision of this Court in *Shankar Kisanrao Khade Vs. State of Maharashtra*[5] (para 52) has been relied upon to contend that "to award the death sentence, the "crime test" has to be fully satisfied, that is, 100% and "criminal test" 0%, that is, no mitigating circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record, etc. the "criminal test" may favour the accused to avoid the capital punishment ……".

20. On the other hand, learned counsel appearing for the State has submitted that the accused-appellants have

2. (2009) 6 SCC 498.
3. (2010) 3 SCC 508.
4. (2011) 3 SCC 685.
5. (2013) 5 SCC 546.

committed not one but a series of heinous, depraved and diabolical crimes resulting in the death of innocent and unsuspecting victims. The crimes have been committed to satisfy the greed for money. The criminal acts committed by the accused are the result of a carefully planned and meticulously executed conspiracy. Societal needs would justify the upholding of the sentence of death awarded in the present case to the accused-appellants. The cry for justice by the families of the victims cannot fall on deaf ears, it is contended.

21. Death penalty jurisprudence in India has been widely debated and differently perceived. To us, the essential principles in this sphere of jurisprudence has been laid down by two Constitution Benches of this Court in *Jagmohan Singh Vs. The State of U.P.*[6] which dealt with the law after deletion of Section 367(5) of the old Code but prior to the enactment of Section 354(3) of the present Code and the decision in *Bachan Singh* (supra). Subsequent opinions on the subject indicate attempts to elaborate the principles of law laid down in the aforesaid two decisions and to discern an objective basis to guide sentencing decisions so as to ensure that the same do not become judge centric.

22. The impossibility of laying down standards to administer the sentencing law in India was noted in *Jagmohan Singh* (supra) in the following terms:

> "The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the judge with a very wide discretion in the manner of fixing the degree of punishment. … The exercise of judicial discretion on well-recognized principles is, in the final analysis, the safest possible safeguards for the accused." (Para 26)

23. *Bachan Singh* (supra) contained a reiteration of the aforesaid principle which is to be found in para 197 of the

6. (1973) 1 SCC 20.

report. The same was made in the context of the need, expressed in the opinion of the Constitution Bench, to balance the aggravating and mitigating circumstances in any given case, an illustrative reference of which circumstances are to be found in the report. *Bachan Singh* (supra), it may be noted, saw a shift; from balancing the aggravating and mitigating circumstances of the crime as laid down in *Jagmohan Singh* (supra) to consideration of all relevant circumstances relating to the crime as well as the criminal. The expanse of the death penalty jurisprudence was clearly but firmly laid down in *Bachan Singh* (supra) which can be summarized by culling out the following which appear to be the core principles emerging therefrom.

(1) Life imprisonment is the rule and death penalty is the exception. (para 209)

(2) Death sentence must be imposed only in the gravest cases of extreme culpability, namely, in the "rarest of rare" where the alternative option of life imprisonment is "unquestionably foreclosed". (para 209)

(3) The sentence is a matter of judicial discretion to be exercised by giving due consideration to the circumstances of the crime as well as the offender. (para 197)

24. A reference to several other pronouncements made by this Court at different points of time with regard to what could be considered as mitigating and aggravating circumstances and how they are to be reconciled has already been detailed hereinabove. All that would be necessary to say is that the Constitution Bench in *Bachan Singh* (supra) had sounded a note of caution against treating the aggravating and mitigating circumstances in separate water-tight compartments as in many situations it may be impossible to isolate them and both sets of circumstances will have to be considered to cull out the

cumulative effect thereof. Viewed in the aforesaid context the observations contained in para 52 of *Shankar Kisanrao Khade* (supra) noted above, namely, 100% crime test and 0% criminal test may create situations which may well go beyond what was laid down in *Bachan Singh* (supra).

25. We may also take note of the separate but concurring judgment in *Shankar Kisanrao Khade* (supra) enumerating the circumstances that had weighed in favour of commutation (Para 106) as well as the principal reasons for confirming the death penalty (Para 122).

In para 123 of the aforesaid concurring opinion the cases/instances where the principles earlier applied to the sentencing decision have been departed from are also noticed. Though such departures may appear to give the sentencing jurisprudence in the country a subjective colour it is necessary to note that standardisation of cases for the purposes of imposition of sentence was disapproved in *Bachan Singh* (supra) holding that "it is neither practicable nor desirable to imprison the sentencing discretion of a judge or jury in the strait-jacket of exhaustive and rigid standards".(Para 195) In this regard, the observations with regard to the impossibility of laying down standards to regulate the exercise of the very wide discretion in matters of sentencing made in *Jagmohan Singh* (supra), (Para 22 hereinabove) may also be usefully recalled. In fact, the absence of any discretion in the matter of sentencing has been the prime reason for the indictment of Section 303 IPC in *Mithu Vs. State of Punjab*[7]. The view of Justice Chinnappa Reddy in para 25 of the report would be apt for reproduction hereinbelow:-

"**25.** Judged in the light shed by *Maneka Gandhi* and *Bachan Singh*, it is impossible to uphold Section 303 as valid. Section 303 excludes judicial discretion. The scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence.

7. AIR 1983 SC 473.

So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive. Section 303 is such a law and it must go the way of all bad laws. I agree with my Lord Chief Justice that Section 303, Indian Penal Code, must be struck down as unconstitutional."

26. In a recent pronouncement in *Sunil Dutt Sharma* vs. *State (Govt. of NCT of Delhi)*[8] it has been observed by this Court that the principles of sentencing in our country are fairly well settled – the difficulty is not in identifying such principles but lies in the application thereof. Such application, we may respectfully add, is a matter of judicial expertise and experience where judicial wisdom must search for an answer to the vexed question —whether the option of life sentence is unquestionably foreclosed? The unbiased and trained judicial mind free from all prejudices and notions is the only asset which would guide the judge to reach the 'truth'.

27. Before proceeding to examine the relevant circumstances for adjudging the sentence that would be proper in the facts of the present case, we may take notice of a recent pronouncement of this Court in *Sushil Sharma Vs. The State of NCT of Delhi*[9] wherein in paras 79, 80, and 81 this Court, once again, had the occasion to take notice of the circumstances which had weighed in commutation of the death sentence as well as those which have formed the basis for upholding such sentences. Thereafter in para 81 of the report it has been held that the core of a criminal case lies in its facts and facts differ from case to case. The relevant paragraphs mentioned above may now be recalled.

"79. We notice from the above judgments that mere

8. 2013 (12) SCALE 473.

9. 2013 (12) SCALE 622.

brutality of the murder or the number of persons killed or the manner in which the body is disposed of has not always persuaded this Court to impose death penalty. Similarly, at times, in the peculiar factual matrix, this Court has not thought it fit to award death penalty in cases, which rested on circumstantial evidence or solely on approver's evidence. Where murder, though brutal, is committed driven by extreme emotional disturbance and it does not have enormous proportion, the option of life imprisonment has been exercised in certain cases. Extreme poverty and social status has also been taken into account amongst other circumstances for not awarding death sentence. In few cases, time spent by the accused in death cell has been taken into consideration along with other circumstances, to commute death sentence into life imprisonment. Where the accused had no criminal antecedents; where the State had not led any evidence to show that the accused is beyond reformation and rehabilitation or that he would revert to similar crimes in future, this Court has leaned in favour of life imprisonment. In such cases, doctrine of proportionality and the theory of deterrence have taken a back seat. The theory of reformation and rehabilitation has prevailed over the idea of retribution.

80. On the other hand, rape followed by a cold-blooded murder of a minor girl and further followed by disrespect to the body of the victim has been often held to be an offence attracting death penalty. At times, cases exhibiting premeditation and meticulous execution of the plan to murder by leveling a calculated attack on the victim to annihilate him, have been held to be fit cases for imposing death penalty. Where innocent minor children, unarmed persons, hapless women and old and infirm persons have been killed in a brutal manner by persons in dominating position, and where after ghastly murder displaying depraved mentality, the accused ha[illegible]e,

death penalty has been imposed. Where it is established that the accused is a confirmed criminal and has committed murder in a diabolic manner and where it is felt that reformation and rehabilitation of such a person is impossible and if let free, he would be a menace to the society, this Court has not hesitated to confirm death sentence. Many a time, in cases of brutal murder, exhibiting depravity and sick mind, this Court has acknowledged the need to send a deterrent message to those who may embark on such crimes in future. In some cases involving brutal murders, society's cry for justice has been taken note of by this court, amongst other relevant factors. But, one thing is certain that while deciding whether death penalty should be awarded or not, this Court has in each case realizing the irreversible nature of the sentence, pondered over the issue many times over. This Court has always kept in mind the caution sounded by the Constitution Bench in **Bachan Singh** that judges should never be bloodthirsty but has wherever necessary in the interest of society located the rarest of rare case and exercised the tougher option of death penalty.

81. In the nature of things, there can be no hard and fast rules which the court can follow while considering whether an accused should be awarded death sentence or not. The core of a criminal case is its facts and, the facts differ from case to case. Therefore, the various factors like the age of the criminal, his social status, his background, whether he is a confirmed criminal or not, whether he had any antecedents, whether there is any possibility of his reformation and rehabilitation or whether it is a case where the reformation is impossible and the accused is likely to revert to such crimes in future and become a threat to the society are factors which the criminal court will have to examine independently in each case. Decision whether to impose death penalty or not must be taken in light of guiding principles laid down in several authoritative

pronouncements of this Court in the facts and attendant circumstances of each case."

(Underlining is ours)

28. In the present case, there is no manner of doubt that the accused appellants have committed the murder of as many as 9 innocent and unsuspecting victims who were led to believe that A-1 had magical powers to multiply money. The deceased, after being killed, were robbed of the cash amounts that they had brought with them for the purpose of "money shower". The criminal acts of the accused were actuated by greed for money and such acts were the result of a carefully planned scheme. The crimes were committed over a period of nearly two months in three different episodes. The assaults on some of the victims were merciless and gruesome. Some of the victims were young and hapless children i.e. Sanjay Mali and Rajesh Mali.

29. At the same time, all the four accused were young in age at the time of commission of the offence i.e. 23-29 years. They belong to the economically, socially and educationally deprived section of the population. They were living in acute poverty. It is possible that, being young, they had a yearning for quick money and it is these circumstances that had led to the commission of the crimes in question. Materials have been laid before this Court to show that while in custody all the accused had enrolled themselves in Yashahantrao Chavan Maharashtra Open University and had either completed the B.A. Examination or are on the verge of acquiring the degree. At least three of the appellants (A-2, A-3 and A-6) have, at different points of time, participated in different programmes of Gandhian thoughts and have been awarded certificates of such participation. In prison, A-2 has written a book titled "Resheemganth" and A-3 has been associated with the said work. There is no material or information to show any condemnable or reprehensible conduct on the part of any of the appellants during their period of custody. All the circumstances point to the possibility of the accus g

reformed and living a meaningful and constructive life if they are to be given a second chance. In any case, it is not the stand of the State that the accused-appellants, are beyond reformation or are not capable of living a changed life if they are to be rehabilitated in society. Each of the accused have spent over 10 years in incarceration. Though it must not be understood in any other manner the entire case against the accused is built on circumstantial evidence.

30. Balancing the two sets of circumstances i.e. one favouring commutation and the other favouring upholding the death penalty, we are of the view that in the present case the option of life sentence is not "unquestionably foreclosed". Therefore, the sentence of death awarded to the accused should be commuted to life imprisonment. We order, accordingly, and direct that each of the accused-appellants, namely, Santosh Manohar Chavan, Amit Ashok Shinde, Yogesh Madhukar Chavan and Mahesh Dhanaji Shinde shall undergo imprisonment for life for commission of the offence under Section 302/120B IPC. The sentences awarded to the accused-appellants by the High Court for commission of all other offences under the IPC and the Arms Act are affirmed to run concurrently. We also make it clear that the custody of the appellants for the rest of their lives will be subject to remissions if any, which will be strictly subject to the provisions of the Sections 432 and 433-A of the Cr.PC.

31. We accordingly dispose of all the appeals with the modification of the sentence as above.

R.P. Appeals disposed of.

CBI, ACB, MUMBAI
v.
NARENDRA LAL JAIN & ORS.
(Criminal Appeal No. 517 of 2014)

FEBRUARY 28, 2014

[P. SATHASIVAM, CJI, RANJAN GOGOI AND N.V. RAMANA, JJ.]

Code of Criminal Procedure, 1973: s.482 - Quashing of proceedings - Allegation against accused-respondents that they conspired with the bank officials and projected inflated figures of the creditworthiness of the companies represented by them to secure more advances/loans from the bank than they were entitled to - Accused-respondents charged u/ss.120-B/420, IPC - Suit for recovery by Bank - Consent decree - Civil liability of the accused to pay the amount to the bank settled amicably - No subsisting grievance of the bank in this regard - High Court quashed proceedings u/s.482 - Held: There is no fault in the order of the High Court exercising power u/s.482 - s.482 inheres in High Court the power to make such order as may be considered necessary to, inter alia, prevent the abuse of the process of law or to serve the ends of justice - Continuance of a criminal proceeding which is likely to become oppressive or may partake the character of a lame prosecution would be good ground to invoke the extraordinary power u/s.482 - Penal Code, 1860 - ss.120-B/420.

The prosecution case was that the accused-respondents conspired with the bank officials and by projecting inflated figures of the creditworthiness of the companies represented by them secured more advances/loans from the bank than they were entitled to. FIR was registered against the accused-respondents and several officers of the Bank of Maharashtra. In the chargesheet filed, offences under Sections 120-B/420 IPC

and Sections 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act, 1947 corresponding to Sections 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 were alleged against the accused persons.

While the criminal cases were being investigated, the bank had instituted suits for recovery of the amounts claimed to be due from the respondents. The said suits were disposed of in terms of consent decrees. Thereafter the respondents applied for discharge which was rejected by the trial court. The trial court thereafter framed charges under Sections 120B/420 IPC and against the bank officials under the Prevention of Corruption Act, 1988. The respondents filed application under Section 482, Cr.P.C. which was allowed. The instant appeal was filed challenging the said order of the High Court.

Dismissing the appeal, the Court

HELD: 1. In the instant case, the offence with which the accused-respondents had been charged were under Section 120-B/420, IPC. The civil liability of the respondents to pay the amount to the bank was already settled amicably. No subsisting grievance of the bank in this regard was brought to the notice of the Court. While the offence under Section 420 IPC is compoundable the offence under Section 120-B is not. [para 10] [451-G]

2. In the instant case, having regard to the fact that the liability to make good the monetary loss suffered by the bank was mutually settled between the parties and the accused having accepted the liability in this regard, the High Court had thought it fit to invoke its power under Section 482 Cr.P.C. There is no fault in the order of the High Court exercising of power under Section 482 Cr.P.C. Section 482 Cr.P.C. inheres in the High Court the power to make such order as may be considered necessary to,

inter alia, prevent the abuse of the process of law or to serve the ends of justice. Continuance of a criminal proceeding which is likely to become oppressive or may partake the character of a lame prosecution would be good ground to invoke the extraordinary power under Section 482 Cr.P.C. [para 11] [452-B-E]

B.S.Joshi and Others vs. State of Haryana and Anr. **AIR 2003 SC 1387;** *Nikhil Merchant vs. Central Bureau of Investigation and Anr.* **(2008) 9 SCC 677: 2008 (12) SCR 236 - relied on.**

Gian Singh vs. State of Punjab and Anr. **(2012) 10 SCC 303: 2012 (8) SCR 753 - held inapplicable.**

Central Bureau of Investigation, SPE, SIU(X), New Delhi vs. Duncans Agro Industries Ltd., Calcutta **(1996) 5 SCC 591: 1996 (3) Suppl. SCR 360 - referred to**

Case Law Reference:

2012 (8) SCR 753	**held inapplicable**	**Para 7**
1996 (3) Suppl. SCR 360	**referred to**	**Para 8**
AIR 2003 SC 1387	**relied on**	**Para 8**
2008 (12) SCR 236	**relied on**	**Para 9**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 517 of 2014.

From the Judgment & Order dated 28.10.2005 of the High Court of Judicature at Bombay in Criminal Writ Petition Nos. 1339/2005, 1636/2005 and Crl. Application No. 838/2002 in Special Case Nos. 20/1996 and 15/1995 arising out of RC. 21(A)/93 Bom. And RC. 22(A)/93-Bom.

P.P. Malhotra, ASG, Rajiv Nanda, T.A. Khan, B.V. Balramdas, P. Parmeswaran, Sushil Karanjkar, K.N. Raj, A.P. Mayee, Sunil Kumar Verma for the Ap

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave granted.

2. The appellant, Central Bureau of Investigation (CBI) ACB, Mumbai seeks to challenge an order dated 28.10.2005 passed by the High Court of Bombay quashing the criminal proceedings against the respondents Narendra Lal Jain, Jayantilal L. Shah and Ramanlal Lalchand Jain. The aforesaid respondents had moved the High Court under Section 482 Code of Criminal Procedure, 1973 (for short "Cr.P.C.") challenging the orders passed by the learned Trial Court refusing to discharge them and also questioning the continuance of the criminal proceedings registered against them. Of the three accused, Jayantilal L. Shah, the court is informed, has died during the pendency of the present appeal truncating the scope thereof to an adjudication of the correctness of the decision of the High Court in so far as accused Narendra Lal Jain and Ramanlal Lalchand Jain are concerned.

3. On the basis of two FIRs dated 22.03.1993, R.C. No. 21(A) of 1993 and R.C. No.22 (A) of 1993 were registered against the accused-respondents and several officers of the Bank of Maharashtra. The offences alleged were duly investigated and separate chargesheets in the two cases were filed on the basis whereof Special Case No. 15 of 1995 and Special Case No. 20 of 1995 were registered in the Court of the Special Judge, Mumbai. In the chargesheet filed, offences under Sections 120-B/420 IPC and Sections 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act, 1947 corresponding to Sections 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (for short "PC Act") were alleged against the accused persons. In so far as the present accused-respondents are concerned the gravamen of the charge is that they had conspired with the bank officials and had projected inflated figures of the creditworthiness of the companies represented by them and in this manner had

secured more advances/loans from the bank than they were entitled to.

4. While the criminal cases were being investigated the bank had instituted suits for recovery of the amounts claimed to be due from the respondents. The said suits were disposed of in terms of consent decrees dated 23.04.2001. Illustratively, the relevant clause of the agreement on the basis of which the consent decrees were passed reads as follows:

> **"10. Agreed and declared that dispute between the parties hereto were purely and simply of civil nature and on payment mentioned as aforesaid made by the Respondents the Appellants have no grievance of whatsoever nature including of the CBI Complaint against the Respondents."**

5. Applications for discharge were filed by the accused-respondents which were rejected by the learned Trial Court by order dated 04.09.2011. The learned Trial Court, thereafter, proceeded to frame charges against the accused. In so far as the present accused-respondents are concerned charges were framed under Sections 120-B/420 of the Indian Penal Code whereas against the bank officials, charges were framed under the different provisions of the Prevention of Corruption Act, 1988 (PC Act). The challenge of the respondents to the order of the learned Trial Court refusing discharge and the continuation of the criminal proceedings as a whole having been upheld by the High Court and the proceedings in question having been set aside and quashed in respect of the respondent, the CBI has filed the present appeal challenging the common order of the High Court dated 28.10.2005.

6. We have heard Mr. P.P. Malhotra, learned Additional Solicitor General appearing on behalf of the appellant and Mr. Sushil Karanjkar, learned counsel appearing on behalf of Respondent Nos. 1 and 4.

7. Shri Malhotra, learned Additional Solicitor General, has taken us through the order passed by the High Court. He has submitted that the High Court had quashed the criminal proceeding registered against the accused-respondents only on the ground that the civil liability of the respondents had been settled by the consent terms recorded in the decree passed in the suits. Shri Malhotra has submitted that when a criminal offence is plainly disclosed, settlement of the civil liability, though arising from the same facts, cannot be a sufficient justification for the premature termination of the criminal case. Shri Malhotra has also submitted that the offence under Section 120-B alleged against the accused-respondents is not compoundable under Section 320 Cr.P.C.; so also the offences under the PC Act. Relying on the decision of a three Judges Bench of this Court in *Gian Singh vs. State of Punjab and Another*[1], Shri Malhotra has submitted that though it has been held that the power of the High Court under Section 482 Cr.P.C. is distinct and different from the power vested in a criminal Court for compounding of offence under Section 320 of the Cr.P.C., it was made clear that the High Court must have due regard to the nature and gravity of the offences alleged before proceeding to exercise the power under Section 482 Cr.P.C. Specifically drawing the attention of the Court to para 61 of the report in *Gian Singh* (supra) Shri Malhotra has submitted that "any compromise between the victim and the offender in relation to the offences under special statutes like the Prevention of Corruption Act…. cannot provide for any basis for quashing criminal proceeding involving such offences". Shri Malhotra had contended that having regard to the gravity of the offences alleged, which offences are prima facie made out, in as much as charges have been framed for the trial of the accused-respondents, the High Court was not justified in quashing the criminal proceedings against the accused-respondents.

8. Per contra, the learned counsel for the respondents (accused) have submitted that the High Court, while quashing

1. (2012) 10 SCC 303.

the criminal proceedings against the respondents (accused), had correctly relied on the judgments of this Court in *Central Bureau of Investigation, SPE, SIU(X), New Delhi vs. Duncans Agro Industries Ltd., Calcutta*[2] and *B.S.Joshi and Others vs. State of Haryana and Another*[3]. Learned counsel has submitted that though simultaneous criminal and civil action on same set of facts would be maintainable, in *Duncans Agro Industries Ltd.* (supra) it has been held that the disposal of the civil suit for recovery, on compromise upon receipt of payments by the claimants, would amount to compounding of offence of cheating. No error is, therefore, disclosed in the order of the High Court insofar as the offence under Section 420 IPC is concerned. As for the offence under Section 120-B it is submitted that this Court in *B.S. Joshi* (supra) has held that the power under Section 482 Cr.P.C. to quash a criminal proceeding is not limited by the provisions of Section 320 Cr.P.C. and even if an offence is not compoundable under Section 320 Cr.P.C., the same would not act as a bar for the exercise of power under Section 482 Cr.P.C. As the dispute between the parties have been settled on the terms of the compromise decrees, it is submitted that the High Court had correctly applied the principles laid down in *B.S. Joshi* (supra) to the facts of the present case.

9. Learned counsel has further pointed out that the charges framed against the accused-respondents are under Section 120-B/420 of the Indian Penal Code and the respondents not being public servants, no substantive offence under the PC Act can be alleged against them. The relevance of the views expressed in para 61 of the judgment of this Court in *Gian Singh* (supra), noted above, to the present case is seriously disputed by the learned counsel in view of the offences alleged against the respondents. Learned counsel has also submitted that by the very same impugned order of the High Court the criminal proceeding against one Nikhil Merchant was declined

2. (1996) 5 SCC 591.
3. AIR 2003 SC 1387.

to be quashed on the ground that offences under Sections 468 and 471 of the IPC had been alleged against the said accused. Aggrieved by the order of the High Court the accused had moved this Court under Article 136 of the Constitution. In the decision reported in *Nikhil Merchant vs. Central Bureau of Investigation and Another*[4] this Court understood the charges/ allegations against the aforesaid Nikhil Merchant in the same terms as in the case of the accused-respondents, as already highlighted. Taking into consideration the ratio laid down in *B.S. Joshi* (supra) and the compromise between the bank and the accused Nikhil Merchant (on the same terms as in the present case) the proceeding against the said accused i.e. Nikhil Merchant was quashed by the Court taking the view that the power and the Section 482 Cr.P.C. and of this Court under Article 142 of the Constitution cannot be circumscribed by the provisions of Section 320 Cr.P.C. It is further submitted by the learned counsel that the correctness of the view in *B.S. Joshi* (supra) and *Nikhil Merchant* (supra) were referred to the three Judges Bench in *Gian Singh* (supra). As already noted, the opinion expressed in *Gian Singh* (supra) is that the power of the High Court to quash a criminal proceeding under Section 482 Cr.P.C. is distinct and different from the power vested in a criminal court by Section 320 Cr.P.C. to compound an offence. The conclusion in *Gian Singh* (supra), therefore, was that the decisions rendered in *B.S. Joshi* (supra) and *Nikhil Merchant* (supra) are correct.

10. In the present case, as already seen, the offence with which the accused-respondents had been charged are under Section 120-B/420 of the Indian Penal Code. The civil liability of the respondents to pay the amount to the bank has already been settled amicably. The terms of such settlement have been extracted above. No subsisting grievance of the bank in this regard has been brought to the notice of the Court. While the offence under Section 420 IPC is compoundable the offence under Section 120-B is not. To the latter offence the ratio laid

4. (2008) 9 SCC 677.

down in *B.S. Joshi* (supra) and *Nikhil Merchant* (supra) would apply if the facts of the given case would so justify. The observation in *Gian Singh* (supra) (para 61) will not be attracted in the present case in view of the offences alleged i.e. under Sections 420/120B IPC.

11. In the present case, having regard to the fact that the liability to make good the monetary loss suffered by the bank had been mutually settled between the parties and the accused had accepted the liability in this regard, the High Court had thought it fit to invoke its power under Section 482 Cr.P.C. We do not see how such exercise of power can be faulted or held to be erroneous. Section 482 of the Code inheres in the High Court the power to make such order as may be considered necessary to, inter alia, prevent the abuse of the process of law or to serve the ends of justice. While it will be wholly unnecessary to revert or refer to the settled position in law with regard to the contours of the power available under Section 482 Cr.P.C. it must be remembered that continuance of a criminal proceeding which is likely to become oppressive or may partake the character of a lame prosecution would be good ground to invoke the extraordinary power under Section 482 Cr.P.C.

12. We, therefore, decline to interfere with the impugned order dated 28.10.2005 passed by the High Court and dismiss this appeal. We, however, make it clear that the proceedings in Special Case No. 15/95 and 20/95 stands interfered with by the present order only in respect of accused-respondents Narendra Lal Jain and Ramanlal Lalchand Jain.

D.G. Appeal dismissed.

JHARKHAND STATE ELECT.BOARD & ORS.
v.
M/S. LAXMI BUSINESS & CEMENT CO.P. LTD. & ANR.
(Civil Appeal No. 2909/2014)

FEBRUARY 28, 2014

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

ELECTRICITY LAWS:

Power of Tariff Fixation - Held: Transferred exclusively to SERC and State Electricity Board is completely denuded of this power - Before coming of Electricity Act, 2003, Electricity Act, 1910 and thereafter Electricity (Supply) Act, 1948 were in force - It was the Electricity Board in the respective States which were supplying electricity to the consumers and determining the operation rates at which the electricity was to be supplied - After the enactment of Electricity Act, 2003, power to frame tariff is given to the SERC - 2003 Act has distanced the Government from all forms of regulations, including tariff regulation which is now specifically assigned to SERC - Thus, the State Electricity Boards have no power whatsoever to frame tariff which is under the exclusive domain of the SERC - Electricity Act, 2003 - Electricity Act, 1910 - Electricity (Supply) Act, 1948.

Fixation of tariff by SERC - Issue of demand charge from HT consumers - Held: The 1994 HT Agreement was not saved under Electricity Act, 2003 and the tariff structure - Issue of demand charge from HT consumers was considered and given effect to in the Tariff Order dated 27.12.2003 which came into effect on 1.1.2004.

Delay/Laches: Delay in filing the writ petitions - Bills raised by the JSEB on the basis of Clause 4(c) of the 1994 HT Agreement, even after the formulation of 2004 Tariff

Schedule - Payment made under threat of disconnection - Writ petition - Direction by High Court to appellant to refund the excess amount charged under the bills raised for earlier period - Challenged on the ground that there was delay in filing of writ petition by consumers - Held: Delay was duly explained - The consumers had paid the amount of bills raised by JSEB under protest because of the threat of disconnection - While doing so, they had raised specific plea with the JSEB that it was now supposed to raise the bills in accordance with the 2004 Tariff Schedule - The matter remained under consideration at the level of JSEB which kept approaching the Court as well as SERC seeking clarification of 2004 Tariff Schedule.

In the year 1994, HT Agreement was entered into between Bihar State Electricity Board (predecessor in interest of JSEB) and the consumers which, inter-alia, stipulated the tariff that was to be charged by the JSEB from the consumers for supply of electricity. In Clause 4(c) of the Agreement, there was a provision for Minimum Guarantee Charges. In the year 2003, Electricity Act was enacted. The power to frame tariff under this Act was given to SERC. SERC passed order framing the new tariff schedule (2004 Tariff Schedule) under Section 86 of the Electricity Act. The grievance of the consumer-respondent was that the JSEB continued to send the bills as per the Clause 4(c) referred to in the agreement which were paid by the consumers under protest. In May 2010, writ petitions were filed by the consumers for quashing of the energy bills on the ground that it had wrongly been raised as per Clause 4(c) of the Agreement which had ceased to have any effect on the framing of 2004 Tariff Schedule by the SERC. The JSEB, however, contended that the HT agreement entered into with the consumers still survived as the 2004 Tariff Schedule saved this Agreement. The High Court allowed the writ petitions.

In the instant appeals, the questions which arose for consideration were: whether after the enactment of the Electricity Act, 2003 which came into force on 10.6.2003 and after passing of the new tariff order dated 27.12.2003 by Jharkhand State Electricity Regulatory Commission (SERC) as per the Act of 2003, the State Electricity Board can still charge a tariff determined by itself; whether the issue of demand charge to HTS - 1 category of consumers has been left non-considered by the SERC in the tariff order dated 27.12.2003 so that the same may be continued in the manner existed in the State or whether the same has been considered and given affect to in the tariff order dated 27.12.2003 which came into effect from 1.1.2004; what would be the effect of Section 185 (Repeal and Saving Clause) of the Electricity Act 2003 upon the HT supply Agreement entered upon the Board and the Consumer prior to Electricity Act, 2003.

Dismissing the appeals, the Court

HELD: 1. Re.: Power of SERC under Electricity Act 2003.

Before Electricity Act, 2003 was enacted, Indian Electricity Act, 1910 and thereafter Electricity (Supply) Act, 1948 was passed. It was the Electricity Board in the respective States which were supplying electricity to the consumers and determining the operation rates at which the electricity was to be supplied. Section 49 of the Act, 1948 empowered the Board to supply electricity to any person upon such terms and conditions as the Board thinks fit and made for the purposes of such supply from time to time and were empowered to frame uniform tariffs for the purpose of such supply. This power to frame tariff under Section 49(1) of the Act 1948 included the power to fix minimum guarantee charges. In State of Bihar, such rates were fixed in the 1993 tariff. It, inter-alia, provided for tariff for HT consumers. Three categories of HT

consumers were mentioned there. HTS-I, II and III. Both the consumers in the instant appeals were put in HT-I category. HT Agreement dated 26.4.1994 was entered into between the Board and the consumers. As per Clause 4 of this Agreement, the consumers were to pay to the Board for the energy so supplied and registered or taken to have been supplied at the appropriate rates applicable to the consumers according to the tariff framed by the Board and in force from time to time. It was subject to the minimum contract demand applicable for the category of supply category in which the consumers fell. Clause 4(b) explained that the maximum demand of the consumer for each month shall be the largest total amount of kilovolt amperes (KVA) that was delivered to the consumers at the point of supply during any consecutive 30 minutes in the months. As per clause 4(c), JSEB had been raising energy bills on the basis of 75% of the contract demand. [Para 6] [463-F-H; 464-A-G]

1.2. After the Electricity Act, 2003 was enacted, power to frame tariff was given to the SERC. This power was statutorily conferred upon the SERC under the Act. Before the passing of this Act, Electricity Regulatory Commission Act, 1998 was enacted and under Section 17 of the said Act, Jharkhand SERC was constituted by the Government of Jharkhand. Its functions and duties were notified by the Government as per Section 22 of the Electricity Regulatory Commission Act. On the passing of the Electricity Act, 2003, Electricity Act 1910, Electricity (Supply) Act 1948 and Electricity Regulatory Commission Act, 1998 were repealed. At the same time, Act 2003 recognized the SERCs constituted under the 1998 Act. 2004 Tariff Schedule framed by the SERC was in exercise of powers conferred upon it under Section 86 (a) of the Act. The Act, 2003 is an exhaustive code on all matters concerning electricity which also provides for "unbundling" of State Electricity B e

utilities for generation, transmission and distribution. Further, Regulatory regime is entrusted to the SERC which are given vide ranging responsibilities. This Act has distanced the Government from all forms of regulations, including tariff regulation which is now specifically assigned to SERC. It is, thus, beyond the pale of doubt that the State Electricity Boards have no power whatsoever to frame tariff which is under the exclusive domain of the SERC. This legal position has been judicially recognized. [Paras 7 to 10] [464-G-H; 465-A-C and F; 467-D]

PTC India Ltd. v. Central Electricity Regulatory Commission **(2010) 4 SCC 603: 2010 (3) SCR 609;** *Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.* **(2008) 4 SCC 755: 2008 (4) SCR 822;** *A.P. TRANSCO v. Sai Renewable Power (P) Ltd.* **(2011) 11 SCC 34: 2010 (8) SCR 636 - relied on.**

2. Re: Whether the Agreement dated 26.4.1994 is saved by the 2004 Tariff Schedule?

2.1. The SERC fixed the tariff on the request of the JSEB itself when it approached the SERC for this purpose. In the Tariff Petition filed by the JSEB before the SERC, the JSEB did not propose to continue the manner of 75% of contract demand and the SERC allowed the demand charge 140-KV-Month. The Tariff Order has Annexure 5.1 containing the 'Tariff Schedule'. This Tariff Schedule which is the final outcome of the tariff process is binding on the State as well. However, the JSEB itself in its application/reference to the SERC did not ask for fixing any minimum guarantee charges. The JSEB in its proposal for fixation of tariff for 2003-04, submitted before the SERC indicated both the existing tariff and the tariff proposed by it in respect of all consumers, including all categories of HTS (High Tension Service) consumers. The SERC after undertaking the necessary exercise, fixed the tariff of all categories. The tariff proposed by the

Board for HTS-I consumers along with existing tariff was reproduced in Tables 5.28 and 5.29 of the 2004 Tariff Schedule which clearly reflected that the aspect of minimum guarantee charges was duly considered by the SERC. [Paras 12, 13] [469-C-F; 470-G-H; 471-A]

2.2. The tariff order further revealed that the SERC had even compared the proposal of JSEB with the tariff prevailing in other States in India and after detailed analysis thereof, it approved the tariff for HTS consumers which is mentioned in table 5.31 of the 2004 Tariff Schedule. Therefore, it cannot be said that the SERC was oblivious of the clause relating to minimum guarantee charges which JSEB was charging from its consumers as per the earlier agreements entered into with them. The position would become crystal clear from the discussion in the 2004 Tariff Schedule wherein the SCRC gave specific reasons for revising and approving the tariff for HTS consumers. The High Court rightly held that the SERC has considered the proposal of the Electricity Board with respect to their claim for Demand Charge and the manner in which it will be charged. The Board cannot take help of Clause 5.1. wherein it was observed that some of the matters have not been dealt with and they shall continue to be the same as they were in existence in the State because of the reason that there is a specific proposal made by the Electricity Board for the Demand Charge as well as the manner in which it will be charged and this proposal was considered by the SERC and thereafter Tariff Order has been issued. The JSEB had even filed clarification applications before the SERC contending that having regard to the Clause 4(c) of the Agreement with the HT-I consumers, the maximum demand charges would be those prescribed under Clause 4(c) of the Agreement. These applications were specifically rejected by the SERC. No appeal was preferred by the JSEB challenging [illegible],

therefore, too late in the day for the JSEB to now argue that this aspect of minimum guarantee charge has not been dealt with by the SERC in the 2004 Tariff Schedule. [Para 14 to 16] [473-C-D; 475-G-H; 476-A-E]

3. Re.: Effect of Section 185 of the Electricity Act 2003.

The tariff in force during the period was Tariff Order dated 27.12.2003 for the period 2003-04 which was having force of law under the Electricity Act 2003. Thus, even if it is assumed on the basis that the statutory agreements entered into earlier were saved, the agreement in question stood replaced by 2004 Tariff Schedule. Even the argument based on Section 185 of the Electricity Act, 2003 would not bring any change to the results of this case. There was no fault with the judgment of the High Court appealed against. [Paras 19, 20] [479-F-G; 481-A-B]

State of Punjab vs. Mohar Singh **1955 (1) SCR 893;** *BSES v. Tata Power Co. Ltd.* **(2004) 1 SCC 195: 2003 (4) Suppl. SCR 932 - relied on.**

4. It was submitted that there was delay in filing the writ petitions inasmuch as bills raised by the JSEB on the basis of Clause 4(c) of the 1994 Agreement, even after the formulation of 2004 Tariff Schedule were being paid by the consumers and they approached the Court by filing writ petitions only in the year 2010 and that in such scenario, the High Court at least should not have directed the appellants to refund the excess amount charged under the bills raised for earlier period and it would be unjust enrichment to the consumers who would have recovered the amount from the user of the electricity. In so far as delay in filing the writ petition is concerned, it appears from the chronology of events that the same has been duly explained. It is not in doubt that the consumers had paid the amount of bills raised by JSEB under protest because of the threat of disconnection.

While doing so, they had raised specific plea with the JSEB that it was now supposed to raise the bills in accordance with the 2004 Tariff Schedule. The matter remained under consideration at the level of JSEB which kept approaching the Court as well as SERC seeking clarification of 2004 Tariff Schedule. The clarification applications were filed which were dismissed by the SERC. However, as the JSEB did not judge from its stand even after the dismissal of these applications, the consumers approached the Court and filed the Writ Petitions. The writ petitioners have thus furnished satisfactory explanation for approach the Court. The plea of unjust and enrichment will not be available to the appellants. In the first place, no such plea was raised before the High Court either before the Single Judge or the Division Bench. In the Special Leave Petition, this submission was made for the first time at the time of hearing of the appeals. Moreover, it is not a case of payment of tax which is a burden passed on the consumers. [Paras 21 to 23] [481-B-H; 482-A-B]

Himachal Pradesh State Electricity Regulatory Commission & Anr. v. Himachal Pradesh State Electricity Board **(2013) 12 SCALE 397;** *Mafatlal Industries Ltd. vs. Union of India* **(1997) 5 SCC 536 - referred to.**

Case Law Reference:

2010 (3) SCR 609	**relied on**	**Para 9**
2008 (4) SCR 822	**relied on**	**Para 10**
2010 (8) SCR 636	**relied on**	**Para 10**
(2013) 12 SCALE 397	**referred to**	**Para 17**
1955 (1) SCR 893	**relied on**	**Para 17**
2003 (4) Suppl. SCR 932	**relied on**	**Para 19**

(1997) 5 SCC 536 referred to Para 23

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2909 of 2014.

From the Judgment & Order dated 05.07.2011 of the High Court of Jharkhand at Ranchi in LPA No. 466 of 2010.

WITH

Civil Appeal No. 2910, 2911 and 2913 of 2014.

Ajit Kumar Sinha, M.L. Verma, M.S. Mittal, A.K. Ganguly, Ashwarya Sinha, Ambhoj Kumar Sinha, Himanshu Shekhar, Faisal Khan, M.P. Jha, Ram Ekbal Roy, Harshvardhan Jha, Dileep Pillai, Kaushik Poddar, Shankar Lal Aggarwal, Devashish Bharuka, Jasmeet Kuar, Chandan Kumar Rai, Ravin Dubey for the appearing parties.

The Judgment of the Court was delivered by

A.K. SIKRI, J. 1. Delay condoned.

2. Leave granted.

3. The appellant in both the cases is Jharkhand State Electricity Board (JSEB), which is aggrieved by the common judgment dated 5th July 2011 passed by the High Court of Jharkhand in two appeals. These appeals were preferred by the appellant JSEB against the orders dated 17th February 2010 passed by the learned Single Judge of that court in the two Writ Petitions which were filed by M/s. Laxmi Business & Cement Co. Pvt. Ltd. and M/s. Laxmi Ispat Udyog (arrayed as respondent No.1 in each appeal and hereinafter referred to as the 'consumers'). These respondents had questioned the validity of the bills raised by the JSEB in those Writ Petitions, primarily on the ground that the bills were contrary to and in excess of the tariff fixed by the Jharkhand State Electricity Regulatory Commission (hereinafter referred to as the 'SERC"). Their contention was accepted by the learned Single Judge

and the order of learned Single Judge is affirmed by the Division Bench as well.

4. To give a glimpse of the controversy involved, in the year 1994 HT Agreement was entered into between Bihar State Electricity Board (predecessor in interest of JSEB) and the consumers which, inter-alia, stipulated the tariff that was to be charged by the JSEB from the consumers for supply of electricity to these consumers by the JSEB. In Clause 4(c) of the Agreement there was a provision of Minimum Guarantee Charges. In the year 2003, Electricity Act was enacted. Indubitably, power to frame tariff under this Act is given to SERC. SERC passed order dated framing the new tariff schedule ('2004 Tariff Schedule' for short) under Section 86 of the Electricity Act (hereinafter referred to as the Act). The JSEB, however, continued to send the bills as per the Clause 4(c) referred to in the agreement which were paid by the consumers under protest. In May 2010, Writ Petitions were filed by the consumers for quashing of the energy bills on the ground that it had wrongly been raised as per Clause 4(c) of the Agreement which had ceased to have any effect on the framing of 2004 Tariff Schedule by the SERC. The JSEB, however, contended that the HT agreement entered into with the consumers still survived as the 2004 Tariff Schedule saves this Agreement.

5. Since the Writ Petitions of the consumers were allowed and the order of the learned Single Judge is already upheld by the Division Bench, it is obvious that pleas raised by the JSEB have not found favour with the High Court. Before us as well, same very contentions were raised which were raised by the JSEB in the High Court. Additionally, it was also contended that even Section 185 (2)(a) of the Act read with Section 6(B) of the General Clauses Act categorically protects the previous operation of the earlier enactment, duly done or saved thereunder.

H It is, thus, clear that questions which ar n

these appeals are the following:

(i) Whether after the enactment of the Electricity Act, 2003 which came into force on 10.6.2003 and after passing of the new tariff order dated 27.12.2003 by Jharkhand State Electricity Regulatory Commission as per the Act of 2003 can the State Electricity Board still charge a tariff determined by itself?

(ii) Whether the issue of demand charge to HTS – 1 category of consumers has been left non-considered by the State Commission in the tariff order dated 27.12.2003 so that the same may be continued in the manner existed in the State or whether the same has been considered and given affect to in the tariff order dated 27.12.2003 which came into effect from 1.1.2004?

(iii) What would be the effect of Section 185 (Repeal and Saving Clause) of the Electricity Act 2003 upon the HT supply Agreement entered upon the Board and the Consumer prior to Electricity Act, 2003?

6. While dealing with these questions, we will narrate further seminal facts and the details submissions of the learned counsel for the parties of either side.

1. Re.: Power of SERC under Electricity Act 2003.

Legal position contained in Act of 2003 is hardly in dispute. Before this Act was enacted in the year 2003, we had Indian Electricity Act, 1910 and thereafter Electricity (Supply) Act, 1948 was passed. It is the Electricity Board in the respective States which were supplying electricity to the consumers and determining the operation rates at which the electricity was to be supplied. Section 49 of the Act, 1948 empowered the Board to supply electricity to any person upon such terms and conditions as the Board thinks fit and made for the purposes of such supply from time to time and were empowered to frame uniform tariffs for the purpose of such

supply. This power to frame tariff under Section 49(1) of the Act 1948 included the power to fix minimum guarantee charges. In State of Bihar, such rates were fixed in the year 1993 tariff. It, inter-alia, provided for tariff for HT consumers. Three categories of HT consumers were mentioned there. HTS-I, II and III. Both the consumers in the instant appeals were put in HT-I category. HT Agreement dated 26.4.1974 was entered into between the Board and the consumers. As per Clause 4 of this Agreement, the consumers were to pay to the Board for the energy so supplied and registered or taken to have been supplied at the appropriate rates applicable to the consumers according to the tariff framed by the Board and in force from time to time. It was subject to the minimum contract demand applicable for the category of supply category in which the consumers fell. Clause 4(b) explained that the maximum demand of the consumer for each month shall be the largest total amount of kilovolt amperes (KVA) that was delivered to the consumers at the point of supply during any consecutive 30 minutes in the months. Since the JSEB has worked out the charges as per Clause 4 (c) which it is demanding, we reproduce the said clause hereinbelow:

> "4(c) Maximum demand charges for supply in any month will be based on the maximum KVA demand for the month or 75 per cent of the contract demand whichever is higher, subject to provision of clause 13. For the first twelve months service the maximum demand charges for any month, will however, be based on the actual monthly maximum demand for that month."

Thus, as per the aforesaid clause, JSEB had been raising energy bills on the basis of 75% of the contract demand.

7. As mentioned above, after the Electricity Act, 2003 was enacted, power to frame tariff is given to the SERC. This power is statutorily conferred upon the SERC under the Act. However, it would be relevant to mention herein that before the passing of this Act, Electricity Regulatory Commission Act, 1998 was enacted and under Section 17 of the sai[illegible]e

Electricity Regulatory Commission was constituted by the Government of Jharkhand vide Notification No.1763 dated August 22, 2002. Its functions and duties were notified by the Government as per Section 22 of the Electricity Regulatory Commission Act.

8. On the passing of the Electricity Act, 2003, Electricity Act 1910, Electricity (Supply) Act 1948 and Electricity Regulatory Commission Act, 1998 have been repealed. At the same time, Act 2003 recognizes the SERCs constituted under the 1998 Act. The object clause of this Act reads as under:

> "An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto."

9. It is also not in dispute that 2004 Tariff Schedule framed by the SERC is in exercise of powers conferred upon it under Section 86 (a) of the Act. In *PTC India Ltd. V. Central Electricity Regulatory Commission* (2010) 4 SCC 603 this Court has categorically held that Act, 2003 is an exhaustive code on all matters concerning electricity which also provides for "unbundling" of State Electricity Boards into separate utilities for generation, transmission and distribution. Further, Regulatory regime is entrusted to the State Electricity Regulatory Commissions which are given vide ranging responsibilities. This Act has distanced the Government from all forms of regulations, including tariff regulation which is now specifically assigned to SERC. Relevant observations, outlining the scheme of this Act, are reproduced below:

> "The 2003 Act is enacted as an exhaustive code on all matters concerning electricity. It provides for unbundling" of SEBs into separate utilities for generation, transmission and distribution. It repeals the Electricity Act, 1910: the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. The 2003 Act, in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 (the 1998 Act), mandated the establishment of an independent and transparent regulatory mechanism, and has entrusted wide-ranging responsibilities with the Regulatory Commissions. While the 1998 Act provided for independent regulation in the area of tariff determination: the 2003 Act has distanced the Government from all forms of regulation, namely, licensing, tariff regulation, specifying Grid Code, facilitating competition through open access, etc."[Paragraph 17]

The 2003 Act contains separate provisions for the performance of dual functions by the Commission. Section61 is the enabling provision for framing of regulations by the Central Commission: the determination of terms and conditions of tariff has been left to the domain of the Regulatory Commissions under Section 61 of the Act whereas actual tariff determination by the Regulatory Commissions is covered by Section 62 of the Act. This aspect is very important for deciding the present case. Specifying the terms and conditions for determination of tariff is an exercise which is different and distinct from actual tariff determination in accordance with the provisions of the Act for supply of electricity by a generating company to a distribution licensee or for transmission of electricity or for wheeling of electricity or for retail sale of electricity.

26. The term "tariff" is not defined in the 2003 Act. The term "tariff" includes within its ambit not only the fixation of rates but also the rules and regulations re[illegible]ls

Section 61 with Section 62 of the 2003 Act, it becomes clear that the appropriate Commission shall determine the actual tariff in accordance with the provisions of the Act, including the terms and conditions which may be specified by the appropriate Commission under Section 61 of the said Act. Under the 2003 Act, if one reads Section 62 with Section 64, it becomes clear that although tariff fixation like price fixation is legislative in character, the same under the Act is made applicable vide Section 111. These provisions, namely, Sections 61, 62 and 64 indicate the dual nature of functions performed by the Regulatory Commissions viz. decision-making and specifying terms and conditions for tariff determination."[Paragraph 25,26] [Emphasis supplied]

10. It is, thus, beyond the pale of doubt that the State Electricity Boards have no power whatsoever to frame tariff which is under the exclusive domain of the Commission. This legal position has been judicially recognized. [See *Gujarat Urja Vikas Nigam Ltd. V. Essar Power Ltd.,* (2008) 4 SCC 755 and *A.P. TRANSCO v. Sai Renewable Power (P) Ltd.* (2011) 11 SCC 34.

11. Notwithstanding the aforesaid legal position, JSEB contends that agreement entered into with the consumers in the year 1994 is saved and the JSEB has right to charge the tariff as per Clause 4 (c) thereof. According to the JSEB this is the position because of the reason that Clause 1.4 of the 2004 Tariff Schedule framed by the SERC provides for such a position and further that even Section 186 of the Act 2003 saves this agreement. On these twin aspects, we have already framed question Nos. 2 and 3 above and would now proceed to deal with them.

2. Re: Whether the Agreement dated 26.4.1994 is saved by the 2004 Tariff Schedule?

Mr. Sinha, learned senior counsel for the JSEB submitted

that in the 2004 Tariff Schedule there was no such provision which is contained in the agreement dated 26.4.19994 particularly in Clause 4(c) and in the absence thereof in the tariff schedule energy bills raised on the basis of 75 % contract demand was saved. It was submitted that the Agreement dated 26.4.1994 is a statutory agreement as it was under the Act of 1948. The learned senior counsel further submitted that it had never been the case of consumers that the aforesaid provision was repealed, repudiated or destroyed. It has not happened either. For this purpose, Mr. Sinha sought to rely upon averments made in the Writ Petitions filed by the consumers and on the basis it was contended that even the consumers admitted that the provision of 75% of contract demand is absent and not provided in the 2004 Tariff Schedule. He also placed strong reliance on Clause 1.4 of 2004 Tariff Schedule of SERC which reads as under:

> "All other Terms and Conditions in respect of Meter Rent, Supply at Lower Voltage, Capacitor Charge, Electricity Duty, Rebate, Security Deposit, Surcharge for exceeding **contract demand** etc., shall remain the same as existing in the State."

Further, the tariff order 2003-04, in Clause 5 under the heading Design of Tariff Structure and Analysis of Tariff, particularly at Clause 5.4 has dealt with the two part tariff structure and Minimum Guarantee Charges wherein it was stated that "Ideally, the fixed/demand charge should be levied in proportion to the demand placed by an individual consumer on the system. This is so because it facilitates the utility in designing an appropriate system to cater to the supply needs of a consumer and is therefore a just and fair mechanism for recovering fixed costs of the system."

Mr. Sinha further argued that Clause 4 (c) of the High Tension Agreement dated 26.8.2004 which the Respondent Consumer has signed with the Board much after 1.1.2004, when the Tariff Order 2003-04 came into

that after commencement of power supply, the respondent shall be liable to pay KVA/Maximum Demand Charges on actual consumption basis in the first 12 months and after that on the basis of 75% of the contract demand or recorded demand, whichever is higher. This is uniformly applied to similarly situated all the HTS-1 consumers.

12. In order to appreciate this argument, we will have to construe relevant provision of 2004 Tariff Schedule as framed by the SERC. It would be pertinent to observe that the SERC fixed the tariff on the request of the JSEB itself when it approached the SERC for this purpose. We find that in the Tariff Petition filed by the JSEB before the SERC, the JSEB did not propose to continue the manner of 75% of contract demand and the SERC allowed the demand charge 140-KV-Month. On perusal of the Tariff Order, it becomes apparent that this is divided in different sections viz., section 1 is the chapter containing 'introduction', section 2 is the chapter containing 'ARR' i.e. the Annual Revenue Requirement and tariff proposal submitted by the Board, section 3 is the chapter containing 'objections' received from the stake holders, section 4 is the chapter containing 'Commission's analysis on ARR', Section 5 is the chapter containing 'design of tariff structure and analysis of tariff', section 6 is the chapter containing 'Directions to the JSEB' and finally there is Annexure 5.1 containing the 'Tariff Schedule'. This Tariff Schedule which is the final outcome of the tariff process is binding on the State as well. The relevant portion of the Annexure 5.1 of the tariff order wherein the State Commission has dealt with the tariff applicability upon the High Tension Service (HTS) consumers i.e. category applicable to Respondent No.1 is reproduced below:

"Category: High Tension Service (HTS)

1. Applicability

For consumers having contract demand above 100 kVA

2. Character of service

50 cycles, 3 Phase at 6.6. KV/11 Kv/33 kV or 132 kV.

3. Tariff

Tariff for HTS

DESCRIPTION	**TARIFF***
RS./kVA/month	**DEMAND CHARGE**
HTS	**140**
	ENERGY CHARGE
KWh/month	**Rs/KWh**
All consumption	**4.00**
	Monthly minimum charge
For Supply at 11 and 33 kV	**Rs.250/kVA**
For Supply at 132 KV	**Rs.400/kVA**

13. However, as stated above, the JSEB itself in its application/reference to the SERC did not ask for fixing any minimum guarantee charges. It would be relevant to mention that the JSEB in its proposal for fixation of tariff for 2003-04, submitted before the Regulatory Commission, indicated both the existing tariff and the tariff proposed by it in respect of all consumers, including all categories of HTS (High Tension Service) consumers. The SERC after undertaking the necessary exercise, fixed the tariff of all categories. The tariff proposed by the Board for HTS-I consumers alor s

reproduced in Tables 5.28 and 5.29 of the 2004 Tariff Schedule which will clearly reflect that the aspect of minimum guarantee charges was duly considered by the SERC. To demonstrate it, we reproduce the said two tables hereunder:

5.28 Tariff for HTS-II Consumers (Existing/Proposed)

DESCRIPTION	TARIFF

DEMAND CHARGE

	Existing	Proposed
Rs./KVA/Month	115	200

ENERGY CHARGE

Rs./KWH	Existing	Proposed
All Consumption	1.72	4.30

FUEL SURCHARGE CHARGE

Rs./KWH	2.44	-

Annual Minimum Guarantee (AMG) Charge

	Subject to minimum contract demand for this category, monthly minimum demand charge as per appropriate tariff based on actual maximum demand of that month or 75% of the contract demand whichever is higher. Energy charges	The following AMG charge shall be realized from the consumer as per appropriate tariff. **AMG Charge** based on load factor of 30% and power factor 0.9 on contract demand payable at the rate of energy charge applicable to HTS-II category.

	based on load factor of 30% and power factor 0.85 on contracted demand payable at the rate of Rs.1.72/KWH	

5.29 Tariff for EHTS Consumers (Existing/Proposed)

DESCRIPTION	TARIFF

DEMAND CHARGE

	Existing	Proposed
Rs./KVA/Month	110	200

ENERGY CHARGE

Rs./KWH	Existing	Proposed
All Consumption	4.13	4.15

FUEL SURCHARGE

Rs./KWH	2.44 -	

Annual Minimum Guarantee (AMG) Charge

	Subject to minimum contract demand for this category, monthly minimum demand charge as per appropriate tariff based on actual maximum demand of that month or 75% of the contract demand whichever is higher	The following AMG charge shall be realized from the consumer as per appropriate tariff. **AMG Charge** based on load factor of 50% and power factor 0.9 on contract demand payable at

	Energy charges based on load factor of 50% and power factor 0.85 on contracted demand payable at the rate of Rs.1.69/KWH	charge applicable to EHTS category.

14. The tariff order further reveals that the SERC had even compared the proposal of JSEB with the tariff prevailing in other States in India and after detailed analysis thereof, it approved the tariff for HTS consumers which is mentioned in table 5.31 of the 2004 Tariff Schedule. Therefore, it cannot be said that the SERC was oblivious of the clause relating to minimum guarantee charges which JSEB was charging from its consumers as per the earlier agreements entered into with them. The position would become crystal clear from the following discussion in the 2004 Tariff Schedule wherein the SCRC gave specific reasons for revising and approving the tariff for HTS consumers.

The SERC has filed its response to these appeals, wherein the provision in this behalf is explained in the manner noted below: "It is evident from the above table that there is no common approach towards minimum charge. However, if we compare neighbouring States like Orissa, West Bengal and Madhya Pradesh (supply at less than 132 KVA), there is no minimum charge. As mentioned earlier, the Commission would ideally like to scrap this charge, but for current year it has retained this charge due to lack of information and data to ascertain the true impact of this charge. The Commission has already directed the Board to provide details in this regard in the next petition.

For the current year, the Commission would not like to increase the burden on the industries on account of minimum charge and has therefore attempted to keep it at the existing level. The Commission has assumed a

minimum level of supply and a minimum level of consumption. For this, the Commission has considered 10% load factor for HTS-I and HTS-II categories considering an average consumption of two (2) hours in a day. For EHTS and HT Special load factor of 20% and 30% respectively has been taken by considering an average consumption of four (4) hours and seven (7) hours in a day respectively. The Commission observes that if these categories of industries are not able to maintain this minimum load factor, than they should reduce their contracted load. **The Commission would like to explicitly mention that if the consumption exceeds the mentioned load factor, no minimum charge would be applicable.**

For encouraging consumption, the Commission has also introduced a load factor rebate for all industries consumers. For the entire consumption in excess of this defined load factor, a rebate is provided on the energy charges for such excess consumption. The Commission would have liked to align the tariff structure towards cost of supply during the current year itself, but it was constrained due to the huge tariff shock that it would translate into for other consumes and consequent increase that would have been required in tariff for other categories. Thus as a principle the Commission has taken the first step towards reducing this distortion in the tariff structure. The Commission is conscious of the fact that HT industry in Jharkhand has borne the brunt of cross subsidy in the past and the tariff applicable to them is above the cost of supply. The significance of this step should not, however, be judged by the quantitative decline but the signal and intent whereby the Commission intends to further rationalize the tariff in the future."

15. We would like to reproduce the following discussion in the impugned judgment of the High

agreement therewith the observations made in those paragraphs:

"……10.We are concerned with the Demand Charge only, rather to say not concerned with the Demand Charge itself but the manner in which the Demand Charge can be calculated for the purpose of raising demand against the consumer charging of the Demand Charge "has been allowed in Tariff Order 2003-04 @ Rs.140/- as mentioned at page 141 of the Tariff Order. As we have already noticed that a formula was given in Clause 15.2 in the tariff of 1993 as well as in the contract on the basis of which the Board was charging the Demand Charge on the basis of the actual consumed units but was charging the said amount irrespective of the consumption of the units of electricity. Now the contention of the respondent-writ petitioners is that they are liable only according to the units consumed by them and not according to the formula. We found from Board's proposal contained in Table 5.27 that the Electricity Board consciously (or may inadvertently) submitted its proposal only to the effect that existing annual Demand Charge is Rs.125/- per KVA per month. This proposal of the Board was considered and ultimately the Demand Charge was allowed by the Tariff Order of 2003-04 which is mentioned at page 141by which only it has been approved that the Electricity Board shall be entitled to charge Rs.140/- per KVA per month as proposed by the Board, the Tariff Order of 2003-04 increased it to Rs.140/-only.

11. In view of the above reasons, we cannot hold that the Electricity Regulatory Commission has not considered the proposal of the Electricity Board with respect to their claim for Demand Charge and the manner in which it will be charged……"

12.In view of the above facts, we are of the considered opinion that the appellant-Board cannot take

help of Clause 5.1. wherein Electricity Regulatory Commission wherein it has been observed that some of the matters have not been dealt with and they shall continue to be the same as they were in existence in the State because of the reason that there is a specific proposal made by the Electricity Board for the Demand Charge as well as the manner in which it will be charged and this proposal was considered by the Electricity Regulatory Commission and thereafter Tariff Order has been issued…"

16. To put the matter beyond the pale of controversy, we would like to highlight another fact, namely the JSEB had even filed clarification applications before the SERC contending that having regard to the Clause 4(c) of the Agreement with the HT-I consumers, the maximum demand charges would be those prescribed under Clause 4(c) of the Agreement. These applications were specifically rejected by the Commission. No appeal was preferred by the JSEB challenging those orders. It is, therefore, too late in the day for the JSEB to now argue that this aspect of minimum guarantee charge has not been dealt with by the SERC in the 2004 Tariff Schedule.

3. Re.: Effect of Section 185 of the Electricity Act 2003.

Submission of Mr. Sinha, learned senior counsel, predicated on Section 185 (2)(a) of the Electricity Act and Section 6 (B) of the General Clauses Act, was that by virtue of the aforesaid provision the earlier Agreement of 1994, including Clause 4(c) thereof entered into between the Electricity Board and the consumers was saved. Section 185(2)(a) of the Act reads as under:

"anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any license, permission, authorization o

any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act."

We also reproduce Section 6(B) of the General Clauses Act hereinbelow:

"affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or"

17. It was the submission that since all the actions deemed to have been done or taken under the corresponding provision of the earlier Act are saved, the Agreement in question which was entered into by the Electricity Board in exercise of statutory power and was having legal force, had been saved under the aforesaid provisions. To prop this submission, Mr. Sinha also referred to the judgment of this Court in the case of *Himachal Pradesh State Electricity Regulatory Commission & Anr. v. Himachal Pradesh State Electricity Board* (2013) 12 SCALE 397 with the plea that this very aspect had been specifically dealt with in the aforesaid judgment and therefore the issue was no longer res-integra. Mr. Sinha pointed out that in that case the courts specifically dealt with the effect of repealed provision contained in Section 185 of the Act, 2003 read with Section 6(B) of the General Clauses Act and held that the previous agreements were saved unless it could be pointed out that there was a manifest intention to destroy them. He referred to the following passage from the earlier judgment in the case of *State of Punjab vs. Mohar Singh* 1955 (1) SCR 893 which is quoted in the aforesaid judgment and reads as under:

"Whenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary

opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore subscribe to the broad proposition that section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material. It is in the light of these principles that we now proceed to examine the facts of the present case."

(underlining is ours)

He also banked upon the following discussion in the said judgment:

"We have referred to the aforesaid paragraphs as Mr.Gupta has contended that when there is repeal of an enactment and substitution of new law, ordinarily the vested right of a forum has to perish. On reading of Section 185 of the 2003 Act in entirety, it is difficult to accept the submission that even if Section 6 of the General Clauses Act would apply, then also the same does not save the forum of appeal. We do not perceive any contrary intention that 6 of the General Clauses Act would not be applicable. It is also to be kept in mind that the distinction between what is and what is not a right by the provisions of the Section 6 of the General Clauses Act is often one of great fitness. What is unaffected by the repeal of a statute is a right acquired or accrued under it

or expectation of, or liberty to apply for, acquiring right (See *M.S.Shivanand v.Karnataka State Road Transport Corporation and Ors.* MANU/SC/0371/1979: (1980) 1 SCC 149)."

18. In order to appreciate this argument, we will have to traverse through some salient provision of the agreement of 1994 entered into with the consumers. These are paras 4(c) and 11 of the HT agreement:

"4..(c) Maximum demand charge for supply in any month will be based on the maximum KVA demand for the month of 75% of the contract demand whichever is higher, subject to provision of clause 13……..

11. This agreement shall be read and construed as subject to the provisions of the Indian Electricity Act, 1910, rules framed thereunder, the Electricity (Supply) Act 1948 together with rules, regulations (if any) tariffs and terms and conditions for supply of electricity framed and issued thereunder and for the time being in force as far as the same may respectively be applicable and all such provisions shall prevail in case of any conflict or inconsistency between them and the terms and conditions of this agreement."

19. It is also to be borne in mind that the tariff in force during the period was Tariff Order dated 27.12.2003 for the period 2003-04 which was having force of law under the Electricity Act 2003. Thus, what follows from the above is that even if we proceed on the basis that the statutory agreements entered into earlier were saved, the agreement in question stands replaced by 2004 Tariff Schedule. At this juncture, we would like to refer to the judgment of this Court in the case of *BSES v. Tata Power Co.Ltd.* (2004) 1 SCC 195 wherein following pertinent observations were made.

"16. The word "tariff" has not been defined in the Act.

"Tariff" is a cartel of commerce and normally it is a book of rates. It will mean a schedule of standard prices or charges provided to the category or categories of customers specified in the tariff. Sub-section (1) of Section 22 clearly lays down that the State Commission shall determine the tariff for electricity (wholesale, bulk, grid or retail) and also for use of transmission facilities. It has also the power to regulate power purchase of the distribution utilities including the price at which the power shall be procured from the generating companies for transmission, sale, distribution and supply in the State. "Utility" has been defined in Section 2(*1*) of the Act and it means any person or entity engaged in the generation, transmission, sale, distribution or supply, as the case may be, of energy. Section 29 lays down that the tariff for the intra-State transmission of electricity and tariff for supply of electricity — wholesale, bulk or retail — in a State shall be subject to the provisions of the Act and the tariff shall be determined by the State Commission. Sub-section (2) of Section 29 shows that the terms and conditions for fixation of tariff shall be determined by Regulations and while doing so, the Commission shall be guided by the factors enumerated in clauses (*a*) to (*g*) thereof. The Regulations referred to earlier show that generating companies and utilities have to first approach the Commission for approval of their tariff whether for generation, transmission, distribution or supply and also for terms and conditions of supply. They can charge from their customers only such tariff which has been approved by the Commission. Charging of a tariff which has not been approved by the Commission is an offence which is punishable under Section 45 of the Act. The provisions of the Act and Regulations show that the Commission has the exclusive power to determine the tariff. The tariff approved by the Commission is final and binding and it is not permissible for the licensee, utility or anyone else to charge a different tariff."

20. In view of the above, we are of the opinion that even the argument based on Section 185 of the Electricity Act, 2003 would not bring any change to the results of this case. We, thus, do not fault with the judgment of the High Court appealed against.

21. Before we part with, it is necessary to deal with one more argument of the appellant. It was submitted that there was delay in filing the Writ Petitions inasmuch as bills raised by the JSEB on the basis of Clause 4(c) of the 1994 Agreement, even after the formulation of 2004 Tariff Schedule were being paid by the consumers and they approached the Court by filing Writ Petitions only in the year 2010. Thus, there was a delay and latches of 5 years. It is further argued that in such scenario, the High Court at least should not have directed the appellants to refund the excess amount charged under the bills raised for earlier period. Other related submission was that it would be unjust enrichment to the consumers who would have recovered the amount from the user of the electricity.

22. In so far as delay in filing the Writ Petition is concerned, it appears from the chronology of events that the same has been duly explained. It is not in doubt that the consumers had paid the amount of bills raised by JSEB under protest because of the threat of disconnection. While doing so, they had raised specific plea with the JSEB that it was now supposed to raise the bills in accordance with the 2004 Tariff Schedule. The matter remained under consideration at the level of JSEB which kept approaching the Court as well as SERC seeking clarification of 2004 Tariff Schedule. As already pointed out above, clarification applications were filed which were dismissed by the Commission. However, as the JSEB did not judge from its stand even after the dismissal of these applications, the consumers approached the Court and filed the Writ Petitions. The Writ Petitioners have thus furnished satisfactory explanation for approach the Court.

23. The plea of unjust and enrichment will not be available to the appellants. In the first place, no such plea was raised before the High Court either before the learned Single Judge or the Division Bench. In the Special Leave Petition, this submission was made for the first time at the time of hearing of the present appeals. Moreover, it is not a case of payment of tax which is a burden passed on the consumers. It is only in such cases that was held in *Mafatlal Industries Ltd. vs. Union of India* (1997) 5 SCC 536 that the question of unjust enrichment would arise for consideration. As far as issue like the present is concerned, such a question was left open in para 107 of the aforesaid judgment. The Court had made it clear the concept of unjust enrichment had no application for refunds other than taxes, as is clear from the reading thereof.

> "107. A Clarification: The situation in the case of captive consumption has not been dealt with by us in this opinion. We leave that question open."

24. As a result, we find that the appeals are bereft of any merit and are accordingly dismissed. No costs.

D.G. Appeals dismissed.

NISHA DEVI

v.

STATE OF H.P. & ORS.

(Civil Appeal Nos. 2915-2917 of 2014)

FEBRUARY 28, 2014

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

Service Law: Appointment as Anganwadi worker - Income tax certificate issued to the appellant to the effect that her income was less than Rs.12000 p.a. making her eligible for appointment as Anganwadi worker - Cancellation of appointment by placing reliance on the report of Tehsildar that the appellant was owner of 1-19 Bighas of land which was in addition to her father's ownership of 6 Bighas of land - High Court also accepted the report without hearing the appellant - On appeal, Held: High Court has acted upon this one sided or unilateral Report of the Tehsildar in arriving at the conclusion that the appellant indeed had an income in excess of Rs. 12000 p.a. and, accordingly, was ineligible for appointment as an Anganwadi Worker - Before arriving at any decision which has serious implications and consequences to any person, such person must be heard in his defence - High Court did not notice the violation and infraction of this salutary principle of law - Accordingly, on this short ground, the impugned judgment is set aside - Matter remanded to the Divisional Commissioner for taking a fresh decision after giving due notice to the appellant and affording her an opportunity of being heard - Rule of natural justice.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2915-17 of 2014.

From the Judgment & Order dated 14.12.2009, 23.03.2010 & 27.04.2011 of the High Court of Himachal Pradesh at Shimla in C.W.P. No. 4169 of 2009, Civil Review

No. 9 of 2010 & C.W.P. No. 4169 of 2009.

Arun K. Sinha, Sumit Sinha, Rakesh Singh, Ajay for the Appellant.

Suryanarayana Singh, AAG, Pragati Neekhra, Sandeep Narain for the Respondents.

The Order of the Court was delivered by

VIKRAMAJIT SEN, J. 1. Leave granted.

2. Delay condoned.

3. By means of these Appeals the Appellant/ Petitioner assails the decision of the High Court of Himachal Pradesh at Shimla in C.W.P.No.4169 of 2009, whereby her appointment as an Anganwadi Worker, on 11.04.2007, was set aside. The Appeals present a picture of protracted litigation. It appears that Respondent No.5 had successfully challenged the Appellant's appointment before the Deputy Commissioner. The Appellant's consequent Appeal had limited success before the Divisional Commissioner as he, by Order dated 13.05.2008, had remanded the matter to the Deputy Commissioner, Kullu, for fresh consideration. This time around the Appellant had succeeded upto the level of the Divisional Commissioner resulting in filing of C.W.P.No.1570 of 2009 before the High Court. The previous writ proceedings filed by Respondent No.5 succeeded inasmuch as it was held that the Divisional Commissioner had no power to review his own Order under the Scheme and Guidelines relating to 'Anganwadi Workers'. The narration of the complicated and convoluted sequence of events is not essential for deciding the present Appeals for the simple reason that the impugned Judgments accept the Report of the Tehsildar, Kullu, which was itself predicated only on the revenue records and was arrived at without hearing the Appellant. In the said Report the Income Certificate issued to the Appellant, to the effect that her income was less than Rupees twelve thousand per annum, thereby r[illegible]or

appointment as a Anganwadi Worker, was cancelled on the predication that she was the owner of 1-19 Bighas of land which was in addition to her father's ownership of 6 Bighas of land.

4. In the course of arguments addressed before us, the fervent submission of counsel of the Appellant that she was not afforded any opportunity of being heard has not been controverted, inasmuch as it has been contended that the Report of the Tehsildar was based on revenue records, which, therefore, was presumed to be correct. The High Court has acted upon this one sided or unilateral Report of the Tehsildar in arriving at the conclusion that the Appellant indeed had an income in excess of Rupees twelve thousand per annum and, accordingly, was ineligible for appointment as an Anganwadi Worker.

5. Trite though it is, we may yet again reiterate that the principle of audi alteram partem admits of no exception, and demands to be adhered to in all circumstances. In other words, before arriving at any decision which has serious implications and consequences to any person, such person must be heard in his defence. We find that the High Court did not notice the violation and infraction of this salutary principle of law. Accordingly, on this short ground, the impugned Judgments and Orders require to be set aside, and are so done. The matter is remanded back to the Divisional Commissioner for taking a fresh decision after giving due notice to the Appellant and affording her an opportunity of being heard. The Divisional Magistrate, Kullu, shall complete the proceedings expeditiously, and not later than six months from the date on which a copy of this Order is served on him.

6. The appeals are allowed in the above terms.

7. The parties to bear their respective costs.

D.G. Appeals allowed.

COMMISSIONER OF CENTRAL EXCISE, JAIPUR-II
v.
M/S. SUPER SYNOTEX (INDIA) LTD. AND OTHERS
(Civil Appeal Nos. 9154-9156 of 2003)

FEBRUARY 28, 2014

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

Central Excise Act, 1944: s.4(4)(d) - Transaction value - Inclusion of sales tax in transaction value - Held: The amount paid or payable to the State Government towards sales tax, VAT etc. is excludible from the assessable value because it is not an amount paid to the assessee-manufacturer towards the price but an amount paid or payable to the State Government for the sale transaction i.e. transfer of title from the manufacturer to a third party - However, if a part of sales tax collected is retained by the assessee towards incentive then the amount retained becomes profit or effective cost paid to assesssee by the purchaser and assessee is bound to pay excise duty on the said sum - Therefore, amount of sales tax retained is includible in transaction value of goods - Rajasthan Sales Tax Incentive Scheme, 1989 - CBEC circular no. 378/11-98-CX dated 12.03.1998.

Circular/government order/Notification: Circulars issued by CBEC - Binding effect of - Discussed.

Tax/Taxation: Exemption and incentive - Distinction between - Discussed.

The respondent-assessee has been engaged in the manufacture of yarn. A show cause notice was issued on the assessee alleging that it has not paid the excise duty on the additional consideration collected towards the sales tax. The assessee placed reliance on CBEC circular no. 378/11-98-CX dated 12.03.1998 and claimed that sales

tax collected was not includible in the assessable value and deduction was admissible under the Central Excise Act, 1944. The claim of assessee was not accepted and the adjudicating authority confirmed demand and penalty. The Tribunal accepted the appeal of the assessee and held that the assessee being entitled to the benefit of the Sales Tax New Incentive Scheme for Industries, 1989 had availed the same w.e.f. 03.12.1996 and under the scheme it was entitled to retain with it 75% of the sales tax collected and pay only 25% to the Government and that sales tax was deductible from the wholesale price for determination of assessable value under Section 4 of the Central Excise Act. In the instant appeals, the revenue and the assessee challenged the order of the Tribunal.

Disposing of the appeals, the Court

HELD. 1. Rajasthan Sales Tax Incentive Scheme 1989 is a pure and simple incentive scheme, in view of the language employed therein. In fact, by no stretch of imagination, it can be construed as a Scheme pertaining to exemption. Thus, analysed, though 25% of sales tax is paid to the State Government, the State Government instead of giving certain amount towards industrial incentive, grants incentive in the form of retention of 75% sales tax amount by the assessee. In a case of exemption, sales tax is neither collectable nor payable and if still an assessee collects any amount on the head of sales tax, that would become the price of the goods. Therefore, an incentive scheme of the present nature has to be treated on a different footing because the sales tax is collected and a part of it is retained by the assessee towards incentive which is subject to assessment under the local sales tax law and, as a matter of fact, assessments have been accordingly framed. In this factual backdrop, it is held that circular entitles an assessee to claim deduction towards sales tax from the assessable value. [Para 19]

[503-B-F]

Modipon Fibre Company, Modinagar, U.P. v. Commissioner of Central Excise, Meerut. **(2007) 10 SCC 3: 2007 (11) SCR 688 - Distinguished.**

2. After the substitution of the old Section 4 of the Act by Act 10 of 2000, the Central Board of Excise and Customs, New Delhi, issued certain circulars and by circular No. 671/62/2000-CX dated 9.10.2002 clarified the circular issued on 1.7.2000. In the said circular reference was made to the earlier circular No. 2/94-CX 1 dated 11.1.1994. It was observed in the circular that after coming into force of new Section 4 with effect from 1.7.2000 wherein the concept of transaction value has been incorporated and the earlier explanation has been deleted, the circular had lost its relevance. It is evincible from the language employed in the said circular that set off is to be taken into account for calculating the amount of sales tax permissible for arriving at the "transaction value" under Section 4 of the Act because the set off does not change the rate of sales tax payable/ chargeable, but a lower amount is in fact paid due to set off of the sales tax paid on the input. Thus, if sales tax was not paid on the input, full amount is payable and has to be excluded for arriving at the "transaction value". That was not the factual matrix in the instant case. The assessee in the instant case has paid only 25% and retained 75% of the amount which was collected as sales tax. 75% of the amount collected was retained and became the profit or the effective cost paid to the assessee by the purchaser. The amount payable as sales tax was only 25% of the normal sales tax. Purpose and objective in defining "transaction value" or value in relation to excisable goods is obvious. The price or cost paid to the manufacturer constitutes the assessable value on which excise duty is payab[illegible]s

that the excise duty payable has to be excluded while calculating transaction value for levy of excise duty. Sales tax or VAT or turnover tax is payable or paid to the State Government on the transaction, which is regarded as sale, i.e., for transfer of title in the manufactured goods. The amount paid or payable to the State Government towards sales tax, VAT, etc. is excluded because it is not an amount paid to the manufacturer towards the price, but an amount paid or payable to the State Government for the sale transaction, i.e., transfer of title from the manufacturer to a third party. Accordingly, the amount paid to the State Government is only excludible from the transaction value. What is not payable or to be paid as sales tax/VAT, should not be charged from the third party/ customer, but if it charged and is not payable or paid, it is a part and should not be excluded from the transaction value. This is the position after the amendment, for as per the amended provision the words "transaction value" mean payment made on actual basis or actually paid by the assessee. The words that gain signification are "actually paid". The situation after 1.7.2000 does not cover a situation which was covered under the circular dated 12.3.1998. The question of "actually payable" did not arise in this case. [Paras 21, 22] [504-E-G; 506-C-H; 507-A-D]

3. In view of the said legal position, unless the sales tax is actually paid to the Sales Tax Department of the State Government, no benefit towards excise duty can be given under the concept of "transaction value" under Section 4(4)(d), for it is not excludible. As is seen from the facts, 25% of the sales tax collected has been paid to the State exchequer by way of deposit. The rest of the amount has been retained by the assessee. That has to be treated as the price of the goods under the basic fundamental conception of "transaction value" as substituted with effect from 1.7.2000. Therefore, the

assessee is bound to pay the excise duty on the said sum after the amended provision had brought on the statute book. [Para 23] [507-D-F]

4. If there are circulars issued by CBEC which placed different interpretation upon a phrase in the statute, the interpretation suggested in the circular would be binding on the Revenue, regardless of the interpretation placed by this Court. [Para 24] [508-C]

CCE v. Dhiren Chemicals Industries **(2002) 2 SCC 127: 2001 (5) Suppl. SCR 607;** *CCE v. Ratan Melting & Wire Industries* **(2008) 13 SCC 1: 2008 (14) SCR 653 - relied on.**

5. The assessees in all the appeals are entitled to get the benefit of the circular dated 12.3.1998 which protects the industrial units availing incentive scheme as there is a conceptual book adjustment of the sales tax paid to the Department. But with effect from 1.7.2000 they shall only be entitled to the benefit of the amount "actually paid" to the Department, i.e., 25%. The set off shall operate only in respect of the amount that has been paid on the raw material and inputs on which the sales tax/ purchase tax has been paid. That being the position the adjudication by the tribunal is not sustainable. Similarly the determination by the original adjudicating authority requiring the assessees to deposit or pay the whole amount and the consequential imposition of penalty also cannot be held to be defensible. The matters are remitted to the respective tribunals to adjudicate as far as excise duty is concerned. As far as imposition of penalty is concerned, it shall be dealt with in accordance with law governing the field. In any case, proceeding relating to the period prior to 1.7.2000 would stand closed and if any amount has been paid or deposited as per the direction of any authority in respect of the said period, shall be refunded. [Para 26] [509-B-G]

State of Tamil Nadu and Anr. v. India Cement Ltd. **(2011) 13 SCC 247: 2011 (7) SCR 395 - reli**

6. Coming to the appeals preferred by the assessees, the challenge pertains to denial of benefit of the Central Sales Tax Act, the said reasoning will equally apply. The submission that the concession of excise duty is granted by the Excise Department of the Central Government is not acceptable. Circulars dated 12.3.1998 and 1.7.2002 do not relate to any exemption under the Central Sales Tax imposed on the goods. [Para 27] [509-H; 510-A-B]

Tata Oil Mills Co. Ltd. v. Union of India **1980 (6) ELT 768 (Bom);** *B.K. Paper Mills Pvt. Ltd. v. Union of India* **1984 (18) ELT 701 (Bom);** *Central India Spinning Weaving and Manufacturing Co. Ltd. v. Union of India* **1987 (30) ELT 217 (Bom) - referred to.**

Case Law Reference:

2007 (11) SCR 688	**Distinguished**	**Para 8**
1980 (6) ELT 768 (Bom)	**Referred to**	**Para 13**
1984 (18) ELT 701 (Bom)	**Referred to**	**Para 13**
1987 (30) ELT 217 (Bom)	**Referred to**	**Para 14**
2001 (5) Suppl. SCR 607	**Relied on**	**Para 24**
2008 (14) SCR 653	**Relied on**	**Para 24**
2011 (7) SCR 395	**Relied on**	**Para 25**

CIVIL APPELLATE JURISDICITON : Civil Appeal No. 9154-9156 of 2003.

From the Judgment & Order dated 05.07.2011 of the High Court of Jharkhand at Ranchi in LPA No. 466 of 2010.

WITH

C.A. No. 2912 of 2014, 4621 of 2008, 2008-2009 of 2010, 335-336 of 2005, 4003 of 2009, 4076 of 2007, 5987 of 2010, 6033 of 2011, 778-779 of 2009, 8095-8103 of 2013, 8105 of 2013.

K. Radhakrishnan, Kavin Gulati, Sunita Rani, Shalini Kumar, B. Krishna Prasad, Anil Katiyar, S.N. Terdal, Rashmi Singh, Anupam Mishra, Rohit, Sunaina Kumar, Praveen Kumar, Alok Yadav, Amar Pratap Singh, M.P. Devanath, Kunal Chatterjee, Maitrayee Banerjee, Ghanshyam Joshi, Partha Sil, Kartik Kurmy, Anand Jaluka, Praveen Kumar for the appearing parties.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted in Special Leave Petition (C) No. 16248 of 2009.

2. This batch of appeals preferred under Section 35L of the Central Excise Act, 1944 (for brevity, the Act) being inter-connected and inter-linked was heard together and is disposed of by a common judgment. It is necessary to clarify that the Revenue has preferred the appeals against the decisions rendered by the Customs, Excise & Gold (Control) Appellate Tribunal (for short "the Tribunal") at various Benches whereby the assessee-manufacturers have been extended the benefit of deduction of excise duty in respect of sales tax imposed by the State Government but not entirely paid to the State exchequer while determining the assessable value for the purpose of central excise, and some of the assessee-manufacturers have preferred appeals being grieved by the rejection for grant of similar relief pertaining to the payment made under the Central Sales Tax Act. For the sake of convenience, the facts from Civil Appeal Nos. 9154-9156 of 2003 are adumbrated herein as far as appeals by the Revenue are concerned. In respect of the challenge made by the assessee-manufacturers we shall take the facts from Civil Appeal No. 4621 of 2008.

3. First we shall advert to the issue involving the appeals preferred by the Revenue. The respondent herein is engaged in the manufacture of yarn of manmade fibers falling under Chapter 55 of the Schedule to the Ce t,

1985, chargeable to duty. A show-cause notice was issued to the respondent-assessee on the ground that for certain period it had contravened the various provisions of the Act, and the Central Excise Rules, 1944 which had resulted in evasion of Central Excise Duty. The fulcrum of the show-cause notice was that the assessee had not paid the duty on the additional consideration collected towards the sales tax. The case of the Revenue was that though the assessee was availing exemption from payment of sales tax, it was showing sales tax in the invoices but assessable value was shown separately for payment of Central Excise Duty as a consequence of which the net yarn value was invariably higher than the assessable value and excise duty paid thereon. This led to the difference between the two amounts which was almost equal to the amount of sales tax applicable during the relevant time. The explanation of the assessee was that it was extended the benefit of the incentive scheme and not granted any exemption and, therefore, the sales tax collected was not includible in the assessable value and deduction was admissible under the Act.

4. The Commissioner of Excise repelled the stand of the assessee, interpreted the benefit granted to the assessee as partial exemption and, taking certain other facts into consideration, came to hold that the assessee had deliberately with an intent to evade payment of duty had suppressed the fact that though it was availing partial sales tax exemption under the Sales Tax Incentive Scheme of 1989 for the relevant period upto 75% of tax liability, yet it was paying only 25% of the tax leviable despite collecting additional consideration to the extent of the amount of sales tax and, therefore, the additional amount collected under the camouflage of incentive tax had to be taken note of and, accordingly, price was to be declared and formed as a part of the value for the levy of excise duty.

5. Be it noted, in its reply the assessee had placed reliance on C.B.E. & C Circular No. 378/11-98-CX dated 12.3.1998 and claimed that one of the situations as stipulated therein covered

the likes of the assessee and hence, it was not liable to be fastened with any further liability. The Commissioner distinguished the said circular and came to hold that the assessee, with an intention to evade payment of duty, had wilfully suppressed the facts that it was availing partial exemption of sales tax and collecting additional consideration to the extent of the amount of sales tax not payable by it. In this backdrop, the Commissioner treated it as short payment by the assessee and directed for recovery of duty and imposed penalty under Sections 11A, 11AC and 11AB of the Act and further imposed penalty on the persons responsible for the said suppression and evasion.

6. Being grieved by the order passed by the Commissioner of Central Excise, Jaipur, the assessee preferred three appeals, namely, Appeal NO. E/2279-2281 of 2002. The Tribunal posed the question whether the assessee was entitled to claim deduction under Section 4(4)(d)(ii) of the Act in respect of full amount of sales tax payable at the rate of 2%. The Tribunal took note of the fact that the assessee, being entitled for the benefit under the Sales Tax New Incentive Scheme for Industries, 1989 (for short "the Scheme"), had availed the same with effect from 3.12.1996 and under the said Scheme it was entitled to retain with it 75% of the sales tax collected and pay only 25% to the Government and, accordingly claimed the deduction for the entire amount of sales tax payable at the rate of 2% and, accordingly, it did not approve the view adopted by the adjudicating authority that the benefit granted to the assessee in respect of the sales tax was in the nature of an exemption and not an incentive and, therefore, not deductible under Section 4(4)(d)(ii) of the Act. The Tribunal referred to the circular dated 12.3.1998 issued by the Central Board of Excise and Customs (CBEC) and came to hold that sales tax was deductible from the wholesale price for determination of assessable value under Section 4 of the Act for levy of Central Excise Duty. Being of this view, it set aside the order passed by the Commissioner of Excise and dir e

deposits made during investigation and the deposit made in pursuance of the order passed by the Tribunal.

7. We have heard Mr. K. Radhakrishnan, learned senior counsel, appearing for the Revenue and learned counsel appearing for the respondents in the appeals preferred by the Revenue.

8. Mr. Radhakrishnan, learned senior counsel, questioning the legal pregnability of the impugned order, has contended that the tribunal has clearly erred in applying the circular dated 12.3.1998 as the stipulations in the said circular do not cover the cases of the present nature inasmuch as the assessee was extended the benefit of incentive scheme. It is his further stand that in the obtaining circumstances sales tax was collected but not paid to the State exchequer and, therefore, it would be includible in assessable value. Learned senior counsel would contend that the Tribunal has not dealt with the issue pertaining to "payable", for the issue of "payability" depends on the language employed in the statute. Mr. Radhakrishnan has urged that, in any case, after the amendment has come into force effecting "transaction value" under Section 4(3)(d) of the Act with effect from 1.7.2000 there is a schematic change but unfortunately the same has not been addressed to by the tribunal which makes the order absolutely vulnerable. He has commended us to the decision in *Modipon Fibre Company, Modinagar, U.P. v. Commissioner of Central Excise, Meerut.*[1]

9. Learned counsel appearing for the assessee submitted that the order passed by the tribunal is absolutely inexceptionable inasmuch as it has correctly applied the circular issued by the CBEC and the respondent being exempted under the incentive scheme issued by the State Government is entitled to avail the benefit. He has commended us to the Scheme issued by the State Government and brought on record the assessment orders passed by the sales tax

1. (2007) 10 SCC 3.

authorities. Learned counsel would further submit that as per the Scheme they are entitled to retain 75% of the sales tax collected and pay only balance 25% to the State Government and despite the same being the admitted position, the adjudicating authority has committed grave illegality by treating it as an exemption which has been appositely corrected by the tribunal and hence, the order impugned is impeccable. It is propounded that the amended provision that came on the statute book with effect from 1.7.2000 does not change the situation and, in fact, the earlier circular on principle has been reiterated by the subsequent circular dated 9.10.2002.

10. Having regard to rivalised submissions raised at the Bar, we deem it appropriate to first refer to the ratio and principle stated in *Modipon Fibre Company* (supra). In the said case, the show cause notice was dated 19th March, 1999 and related to the period March, 1994 to March, 1997. Section 4(4)(d)(ii) as applicable was as under:-

> *"4. Valuation of excisable goods for purposes of charging of duty of excise.—(1) to (3)* * * *
>
> *(4) For the purposes of this section,—*
>
> *(a) to (c)* * * *
>
> *(d) 'value', in relation to any excisable goods,—*
>
> *(i)* * * *
>
> *(ii) does not include the amount of the duty of excise, sales tax and other taxes, if any, payable on such goods and, subject to such rules as may be made, the trade discount (such discount not being refundable on any account whatsoever) allowed in accordance with the normal practice of the wholesale trade at the time of removal in respect of such goods sold or c*

Explanation.—For the purposes of this sub-clause, the amount of the duty of excise payable on any excisable goods shall be the sum total of—

(*a*) the effective duty of excise payable on such goods under this Act; and

(*b*) the aggregate of the effective duties of excise payable under other Central Acts, if any, providing for the levy of duties of excise on such goods under each Act referred to in Clause (*a*) or Clause (*b*) shall be,—

(*i*) in a case where a notification or order providing for any exemption [not being an exemption for giving credit with respect to, or reduction of duty of excise under such Act on such goods equal to, any duty of excise under such Act, or the additional duty under Section 3 of the Customs Tariff Act, 1975 (51 of 1975), already paid on the raw material or component parts used in the production or manufacture of such goods] from the duty of excise under such Act is for the time being in force, the duty of excise computed with reference to the rate specified in such Act, in respect of such goods as reduced so as to give full and complete effect to such exemption; and

(*ii*) in any other case, the duty of excise computed with reference to the rate specified in such Act in respect of such goods."

11. The contention of the assessee was that they were entitled to deduction in respect of Turnover Tax (TOT) at the rate of 2% though Government of Gujarat by notification dated 19th October, 1993 had exempted sale of yarn under certificate in Form 26 to the extent of TOT exceeding .5% of the total turnover if the processed yarn was sold in the State of Gujarat. Thus, there was dual rate of 2% and .5% TOT in the State of Gujarat, with the lower rate being applicable to sales in backward area. Relying upon the word/expression "payable" used in Section

4(4)(d)(ii), it was submitted by the assessee that it refers to the duty payable in the tariff and not any concession or exemption. The contention was rejected by the Court observing that the word "payable" was descriptive and one has to see the context in which the said word finds place and accordingly proceeded to opine: -

"As can be seen from the abovequoted section, excise duty can be deducted if it had not been included in the invoice price. According to the Explanation, what is deductible is the effective rate of duty. Where any exemption has been granted, that exemption has to be deducted from the ad valorem duty. In other words, it is only the net duty liability of the assessee that can be deducted in computing the assessable value. The said principle stands incorporated in the Explanation. For example, if the assessee recovers duty at the tariff rate but pays duty at concessional rate, then excise duty has to be a part of the assessable value. Similarly, refund of excise duty cannot be treated as net profit and added on to the value of clearances. There is no provision in Section 4 of the 1944 Act to treat refund as part of assessable value. If excise duty paid to the Government is collected at actuals from the customers and if, subsequently, exemption becomes available, such excise duty which is not passed on to the assessee (sic customer), would become part of assessable value under Section 4(4)(d)(ii)."

12. The aforesaid observations were made in the context of TOT which could be deducted, if it had not been included in the invoice price. The excise duty, it was observed, was the effective rate of duty and where any exemption was granted, the exemption was to be deducted from *ad valorem duty*. Only the net duty liability of the assessee was to be reduced from the invoice price for computing the assessable value. Thus, where an assessee had recovered duty at a higher rate but was paying duty at a concessional rate, th[illegible]d

excise duty was to be part of taxable or assessable value. But refund of excise duty was not to be added to the value of clearances and similarly if subsequently an exemption had become available it could not be reduced to lower to the assessable value.

13. After so stating the bench referred to the decisions of the Bombay High Court in *Tata Oil Mills Co. Ltd. v. Union of India*[2] and *B.K. Paper Mills Pvt. Ltd. v. Union of India*[3] and approving the principle laid down therein, observed thus: -

> "In our view, the above two judgments of the Bombay High Court lay down the correct principle underlying the Explanation to Section 4(4)(*d*)(*ii*). As held in *TOMCO case* the exemption was not by way of a windfall for the manufacturer assessee but on account of cotton seed oil used by TOMCO in the manufacture of Pakav. Similarly, in *B.K. Paper Mills* the Bombay High Court has correctly analysed Section 4(4)(*d*)(*ii*) with the Explanation to say that only the reduced rate of duty can be excluded from the value of the goods and that Explanation explains what was implicit in that section. That, the said Section 4(4)(*d*)(*ii*) did not refer to duty leviable under the relevant tariff entry without reference to exemption notification that may be in existence at the time of clearance/removal. That, Section 47 of the Finance Act, 1982 which inserted the Explanation expressly sets out what is meant by the expression "the amount of duty of excise payable on any excisable goods". By the amount of duty of excise what is meant is the effective duty of excise payable on such goods under the Act and, therefore, effective duty of excise is the duty calculated on the basis of the prescribed rate as reduced by the exemption notification. This alone is excluded from the normal price under Section 4(4)(*d*)(*ii*)."

2. 1980 (6) ELT 786 (Bom).

3. 1984 (18) ELT 701 (Bom).

After so stating the Court stated: -

> Therefore, the test to be applied is that of the "actual value of the duty payable" and, therefore, there is no merit in the argument advanced on behalf of the assessee that the Explanation is restricted to the duty of excise. This principle can therefore apply also to actual value of any other tax including TOT payable. Even without the Explanation, the scheme of Section 4(4)(*d*)(*ii*) shows that in computing the assessable value, one has to go by the actual value of the duty payable and, therefore, only the reduced duty was deductible from the value of the goods.

14. It is seemly to note that the Court approved the ratio laid down in the judgment of Bombay High Court in *Central India Spinning Weaving and Manufacturing Co. Ltd. v. Union of India*[4] by reproducing the following observations: -

> "*9*. … It is true that according to Section *4(4)(d)(ii)* of the Central Excise Act, the value does not include the amount of duty of excise, if any payable on such goods, but in view of Explanation to Section *4(4)(d)(ii)*, the 'duty of excise' means the duty payable in terms of the Central Excise Tariff read with exemption notification issued under Rule 8 of the Central Excise Rules. In this view of the matter, the only deduction that is permissible is of the actual duty paid or payable while fixing the assessable value. Thus, where the company/manufacturer whose goods were liable to excise duty at a reduced rate in consequence of an exemption notification, while paying duty at reduced rate collected duty at a higher rate i.e. tariff rate from its customers the authorities were justified in holding that what was being collected by the company as excise duty was not excise duty but the value in substance of the goods and, therefore, the excess value collected by the petitioner from the customers was recoverable under Section 11-A of the Central Excises and Salt Act, 1944."

4. 1987 (30) ELT 217 (Bom).

After explaining as aforesaid the Court ruled that though in respect of backward areas sales, the rate of TOT was .5%, whereas TOT rate in normal area sales was 2%, yet the assessee had suppressed the aforesaid data to claim TOT deduction @ 2% to compute the assessable value on the entire sales including sales made in backward area. This was wrong and the department was justified in calling upon the assessee to pay the differential excise duty.

15. The Court in the said decision has observed that by claiming higher deduction @ 2% instead of .5%, the assessee was gaining a windfall and this was not justified. It was further observed that TOMCO's case was decided on 24th July, 1980 and at that time there were conflicting decisions and thereafter the Legislature had inserted explanation to Section 4(4)(d)(ii) of the Act by using the words "the effective duty of excise payable on goods under this Act".

16. In the case at hand, the assessee has claimed that there is difference between grant of incentive and extension of benefit of exemption, and the scheme, i.e., the "Rajasthan Sales Tax Incentive Scheme 1989" does not relate to exemption but incentive. To elaborate, the assessee, under the said Scheme, is permitted to retain 75% of the sales tax collected as incentive and is liable to pay 25% to the department. 75% of the amount retained has been treated as incentive by the State Government. It is pointed out that such retention of sales tax is a deemed payment of sales tax to the State exchequer and for the said purpose reliance is placed on Circular No. 378/11/98-CX dated 12.3.1998 issued by C.B.E.C.

17. In the aforesaid circular, three situations were envisaged, viz., (i) exemption from payment of sales tax for a particular period; (ii) deferment of payment of sales tax for a particular period; and (iii) grant of incentive equivalent to sales tax payable by the unit. The aforestated three situations had been examined by the Board in consultation with the Ministry of Law. As far as situation (iii) is concerned, the circular stated

thus: -

"6. Examination of the situation, mentioned above in para 2(ii) & (iii), in the referring note give an indication that sales tax is payable by the assessee in both the situations. It is payable after a particular period in the second case. On the other hand, in the third situation, the sales tax is considered payable by the assessee even though it is paid by the State Government, the assessee keeping the said amount as cash incentive. In this situation sales tax would be considered as payable within the meaning of the provisions of Section 4(4)(d)(ii) of the Act.

7. We are therefore, of the opinion that in the category of cases mentioned in para 2(i), sales tax is not deductible whereas in the category of cases mentioned at (ii) and (iii) sales tax is deductible from the wholesale price for determination of assessable value under Section 4 of the Act for levy of Central Excise duty."

18. To understand the purpose of the aforesaid two paragraphs it is also necessary to refer to the note given by the Board seeking opinion of the Ministry of Law in respect of situation (iii) which is a part of the said circular. It reads as follows: -

"In situation (iii), the manufacturer collects the sales tax from the buyers and retains the same with him instead of paying it to the State Government. The State Government on the other hand grants a cash incentive equivalent to the amount of sales tax payable and instead of the case incentive being paid to the manufacturer, is credited to State Government account as payment towards sales tax by the manufacturer. In such a situation sales tax is also considered payable by the assessee within the meaning of the provisions of Section 4(4)(d)(ii) of the Central Excise Act, 1944. Therefore, sales tax is deductible from the wholesale price for determination o

levy of Central Excise duty in category of cases mentioned in para (ii) & (iii) above."

19. On perusal of the assessment orders brought on record, it is quite clear that in pursuance of the Scheme 75% of the sales tax amount was credited to the account of the State Government as payment towards sales tax by the manufacturer. On a studied scrutiny of the scheme we have no scintilla of doubt that it is a pure and simple incentive scheme, regard being had to the language employed therein. In fact, by no stretch of imagination, it can be construed as a Scheme pertaining to exemption. Thus, analysed, though 25% of sales tax is paid to the State Government, the State Government instead of giving certain amount towards industrial incentive, grants incentive in the form of retention of 75% sales tax amount by the assessee. In a case of exemption, sales tax is neither collectable nor payable and if still an assessee collects any amount on the head of sales tax, that would become the price of the goods. Therefore, an incentive scheme of the present nature has to be treated on a different footing because the sales tax is collected and a part of it is retained by the assessee towards incentive which is subject to assessment under the local sales tax law and, as a matter of fact, assessments have been accordingly framed. In this factual backdrop, it has to be held that circular entitles an assessee to claim deduction towards sales tax from the assessable value. The fact situation in *Modipon Fibre Company* (supra), as is manifest, was different. In our considered opinion what has been stated in *Modipon Fibre Company* (supra) cannot not be extended to include the situation (iii). We are inclined to think so as the definition of term "value" under Section 4(4)(d) was slightly differently worded and the CBEC had clarified the same in the circular dated 12.3.1998 and benefits were granted.

20. The question that would still remain alive is that what would be the effect of amendment of Section 4 which has come into force with effect from 1.7.2000. The Section 4(3)(d) which defines "transaction value", reads as follows: -

"**4. Valuation of excisable goods for purposes of charging of duty of excise.** –

(1) & (2) * *

(3) For the purposes of this section, -

(a) to (cc) * * *

(d) "transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods."

21. After the substitution of the old Section 4 of the Act by Act 10 of 2000 as reproduced hereinabove, the Central Board of Excise and Customs, New Delhi, issued certain circulars and vide circular No. 671/62/2000-CX dated 9.10.2002 clarified the circular issued on 1.7.2000. In the said circular reference was made to the earlier circular No. 2/94-CX 1 dated 11.1.1994. It has been observed in the circular that after coming into force of new Section 4 with effect from 1.7.2000 wherein the concept of transaction value has been incorporated and the earlier explanation has been deleted, the circular had lost its relevance. However, after so stating the said circular addressed to the representations received from the Chambers of Commerce, Associations, assessees as well as the field formations and in the context stated thus: -

"5. The matter has been examined in the Board. It is observed that assessees charge and collect sales tax from their buyers at rates notified by the State Government for different commodities. For manufacture of excisable goods assessees procure raw materials, in some State, by paying sales tax/ purchase tax on them (in some States, like New Delhi), raw materials are purchased against forms ST-1/ST-35 without paying any tax). While depositing sales tax with the Sales Tax Deptt. (on a monthly or quarterly basis), the assessee deposits only the net amount of sales tax after deducting set off/rebate admissible, either in full or in part, on the sales tax/ purchase tax paid on the raw materials during the said month/quarter. The sales tax set off in such cases, therefore, does not work like the central excise set off notifications where one to one relationship is to be established between the finished product and the raw materials and the assessee is allowed to charge only the net central excise duty from the buyer in the invoice. The difference between the set off operating in respect of central excise duty and that for sales tax can be best illustrated through an example. If the sales tax on a product 'A' of value Rs.100/- is, say 5% and the set off available in respect of the purchase tax/ sales tax paid on inputs going into the manufacture of the product is, say, Re.1/-, then the sales tax law permits the assessee to recover sales tax of Rs.5/-. But while paying to the sales tax deptt. be deposits an amount of Rs.5-1 = Rs.4 only. On the central excise duty payable would have been Rs.5-1 = Rs.4, in view of the set off notification, and the assessee would recover an amount of Rs.4 only from the buyer as Central Excise duty. Thus, it is seen that the set off scheme in respect of sales tax operate in these cases somewhat like the CENVAT Scheme which does not have the effect of changing the rate of duty payable on the finished product.

6. Therefore, since the set off scheme of sales tax does not change the rate of sales tax payable/ chargeable on the finished goods, the set off is not to be taken into account for calculating the amount of sales tax permissible as abatement for arriving at the assessable value u/s 4. In other words only that amount of sales tax will be permissible as deduction under Section 4 as is equal to the amount legally permissible under the local sales tax laws to be charged/billed from the customer/ buyer."

[Emphasis added]

22. It is evincible from the language employed in the aforesaid circular that set off is to be taken into account for calculating the amount of sales tax permissible for arriving at the "transaction value" under Section 4 of the Act because the set off does not change the rate of sales tax payable/ chargeable, but a lower amount is in fact paid due to set off of the sales tax paid on the input. Thus, if sales tax was not paid on the input, full amount is payable and has to be excluded for arriving at the "transaction value". That is not the factual matrix in the present case. The assessee in the present case has paid only 25% and retained 75% of the amount which was collected as sales tax. 75% of the amount collected was retained and became the profit or the effective cost paid to the assessee by the purchaser. The amount payable as sales tax was only 25% of the normal sales tax. Purpose and objective in defining "transaction value" or value in relation to excisable goods is obvious. The price or cost paid to the manufacturer constitutes the assessable value on which excise duty is payable. It is also obvious that the excise duty payable has to be excluded while calculating transaction value for levy of excise duty. Sales tax or VAT or turnover tax is payable or paid to the State Government on the transaction, which is regarded as sale, i.e., for transfer of title in the manufactured goods. The amount paid or payable to the State Government towards sales tax, VAT, etc. is excluded because it is not an amount paid to the manufacturer towards the price, but an a e

to the State Government for the sale transaction, i.e., transfer of title from the manufacturer to a third party. Accordingly, the amount paid to the State Government is only excludible from the transaction value. What is not payable or to be paid as sales tax/VAT, should not be charged from the third party/ customer, but if it charged and is not payable or paid, it is a part and should not be excluded from the transaction value. This is the position after the amendment, for as per the amended provision the words "transaction value" mean payment made on actual basis or actually paid by the assessee. The words that gain signification are "actually paid". The situation after 1.7.2000 does not cover a situation which was covered under the circular dated 12.3.1998. Be that as it may, the clear legislative intent, as it seems to us, is on "actually paid". The question of "actually payable" does not arise in this case.

23. In view of the aforesaid legal position, unless the sales tax is actually paid to the Sales Tax Department of the State Government, no benefit towards excise duty can be given under the concept of "transaction value" under Section 4(4)(d), for it is not excludible. As is seen from the facts, 25% of the sales tax collected has been paid to the State exchequer by way of deposit. The rest of the amount has been retained by the assessee. That has to be treated as the price of the goods under the basic fundamental conception of "transaction value" as substituted with effect from 1.7.2000. Therefore, the assessee is bound to pay the excise duty on the said sum after the amended provision had brought on the statute book.

24. What is urged by the learned counsel for the assessee is that paragraphs 5 and 6 of the circular dated 9.10.2002 do protect them, as has been more clearly stated in paragraph 5. To elaborate, sales tax having been paid on the inputs/raw materials, that is excluded from the excise duty when price is computed. Eventually, the amount of tax paid is less than the amount of tax payable and hence, the concept of "actually paid" gets satisfied. Judged on this anvil the submission of the

learned counsel for the assessee that it would get benefit of paragraph 6 of the circular, is unacceptable. The assessee can only get the benefit on the amount that has actually been paid. The circular does not take note of any kind of book adjustment and correctly so, because the dictionary clause has been amended. We may, at this stage, also clarify the position relating to circulars. Binding nature of a circular was examined by the Constitution Bench in *CCE v. Dhiren Chemicals Industries*[5], and it was held that if there are circulars issued by CBEC which placed different interpretation upon a phrase in the statute, the interpretation suggested in the circular would be binding on the Revenue, regardless of the interpretation placed by this Court. In *CCE v. Ratan Melting & Wire Industries*[6], the Constitution Bench clarifying paragraph 11 in *Dhiren Chemicals Industries* (supra) has stated thus: -

> "7. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the court to declare what the particular provision of statute says and it is not for the executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law."

25. The legal position has been reiterated in the *State of Tamil Nadu and Anr. v. India Cement Ltd.*[7] Therefore, reliance

5. (2002) 2 SCC 127.
6. (2008) 13 SCC 1.
7. (2011) 13 SCC 247.

placed on the circular dated 9.10.2002 by the tribunal is legally impermissible for two reasons, namely, the circular does not so lay down, and had it so stated that would have been contrary to the legislative intention.

26. In view of the aforesaid analysis, we are of the considered opinion that the assessees in all the appeals are entitled to get the benefit of the circular dated 12.3.1998 which protects the industrial units availing incentive scheme as there is a conceptual book adjustment of the sales tax paid to the Department. But with effect from 1.7.2000 they shall only be entitled to the benefit of the amount "actually paid" to the Department, i.e., 25%. Needless to emphasise, the set off shall operate only in respect of the amount that has been paid on the raw material and inputs on which the sales tax/ purchase tax has been paid. That being the position the adjudication by the tribunal is not sustainable. Similarly the determination by the original adjudicating authority requiring the assessees to deposit or pay the whole amount and the consequential imposition of penalty also cannot be held to be defensible. Therefore, we allow the appeals in part, set aside the orders passed by the tribunal as well as by the original adjudicating authority and remit the matters to the respective tribunals to adjudicate as far as excise duty is concerned in accordance with the principles set out hereinabove. We further clarify that as far as imposition of penalty is concerned, it shall be dealt with in accordance with law governing the field. In any case, proceeding relating to the period prior to 1.7.2000 would stand closed and if any amount has been paid or deposited as per the direction of any authority in respect of the said period, shall be refunded. As far as the subsequent period is concerned, the tribunal shall adjudicate as per the principles stated hereinbefore.

27. Coming to the appeals preferred by the assessees, the challenge pertains to denial of benefit of the Central Sales Tax Act, the aforesaid reasoning will equally apply. The

submission that the concession of excise duty is granted by the Excise Department of the Central Government is not acceptable. On a perusal of the circulars dated 12.3.1998 and 1.7.2002 we do not find that they remotely relate to any exemption under the Central Sales Tax imposed on the goods. What is argued by the learned counsel for the assessees is that the benefit should be extended to the Central Sales Tax as the tax on sales has a broader concept. The aforesaid submission is noted to be rejected and we, accordingly, repel the same. In view of the aforesaid, the appeals preferred by the assessees stand dismissed.

28. In the result, both sets of appeals stand disposed of accordingly. There shall be no order as to costs.

D.G. Appeals disposed of.

MUNICIPAL CORPORATION OF GREATER MUMBAI, THROUGH COMMISSIONER
v.
ANIL SHANTARAM KHOJE & ORS.
(Civil Appeal No. 2918 of 2014)

FEBRUARY 28, 2014

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

SERVICE LAW:

Promotions made according to Rules prior to its publication in Official Gazette - Held: Such promotions could not have been effected in the absence of publication of the Rules in Official Gazette - However, keeping in view the fact that promotions of employees concerned and retiral and other consequential benefits would be adversely impacted by the judgment, it is directed that the promotion effected prior to the date of publication of Rules in Official Gazette and consequential retiral and other benefits should not be altered to their detriment - Mumbai Municipal Corporation Act, 1888 - ss.55 and 80B - Bombay General Clauses Act, 1904 - s.23.

The Municipal Corporation by Resolution No. 531 dated 21.09.2000 and subsequently by Resolution No. 752 dated 20.11.2003, proposed to amend the Rules for promotion to the post of Deputy Commissioner. The State Government accorded its approval by its letter dated 04.10.2006. The Resolution required 75% of the posts of Deputy Commissioner to be filled in by promotion from the Assistant Municipal Commissioners/ Ward Officers and 25% to be filled in by promotion of HOD by direct recruitment or by deputation. The writ petition filed by respondent nos. 1 and 5 in CA. No. 2918 of 2014, who were holding the post of Assistant Municipal Commissioners, was allowed by the High

Court, directing the Mumbai Municipal Corporation to effect promotions to the post of Deputy Municipal Commissioner strictly in accordance with the Resolution No. 752 dated 20.11.2003, sanctioned by the State Government in terms of its letter dated 04.10.2006 and the Roster point determined therein. Accordingly, prior to the gazetting of the extant Rules that came to be gazetted on 28.04.2011, the Corporation had promoted three persons to the post of Deputy Municipal Commissioner including respondent No. 1 and respondent No. 5. The appellant in C.A. No. 2919 of 2014, being the senior most HOD, was promoted as Deputy Municipal Commissioner on 16.8.2013.

In the instant appeals, it was contended by the appellants that the modified Rules would become operative not from the date on which they were sanctioned by the State Government by letter dated 04.10.2006, but from the date of their publication in the Official Gazette as required by law and as specifically stipulated in s. 80B(5) of the Mumbai Municipal Corporation Act, 1888.

Allowing the appeals, the Court

HELD: 1.1 Section 23 of the Bombay General Clauses Act, 1904 provides, "Where, in any Bombay Act (or Maharashtra Act), or in any Rule passed under such Act, it is directed that any order, notification or other matter shall be notified or published, then such notification or publication shall, unless the establishment or Rule otherwise provides, be deemed to be tailor made if it is published in Official Gazette." [para 9] [520-C-D]

1.2 The extant Rules would become operative only from the date of its promulgation by publication in the Official Gazette, i.e. on 28.04.2011. Promotions made prior to 28.04.2011 under the extant

respondent No. 1, respondent No. 5 and another to the post of Deputy Municipal Commissioner could not have been effected in the absence of publication of the extant Rules in the Official Gazette. [para 11] [520-G-H; 521-A]

Rajendra Agricultural University vs Ashok Kumar Prasad **2009 (15) SCR 1168 = 2010 (1) SCC 730 - relied on.**

Harla vs State of Rajasthan, **1952 SCR 110 = AIR 1951 SC 467;** *B.K. Srinivasan vs State of Karnataka* **1987 (1) SCR 1054 = 1987 (1) SCC 658;** *I.T.C. Bhadrachalam Paper Boards vs Mandal Revenue Officer, A.P.* **1996 (5) Suppl. SCR 643 = 1996 (6) SCC 634;** *Sammbhu Nath Jha vs Kedar Prasad Sinha* **1973 Crl.L.J. 453;** *S.K. Shukla vs State of U.P.* **2005 (5) Suppl. SCR 172 = 2006 (1) SCC 314; and** *Babu Verghese vs Bar Council of Kerala* **(1999) 1 SCR 1121- referred to.**

Taylor vs Taylor **(1875)1 ChD 426 and** *Nazir Ahmad vs King Emperor* **AIR 1936 PC 253 - referred to.**

1.3 Since respondents nos. 1 and 5 have already retired from the post of Deputy Municipal Commissioner while the other officer who was promoted on 05.07.2010 to the post of Deputy Municipal Commissioner, is still holding the post, being mindful of the fact that their promotion and retiral and other consequential benefits would be adversely impacted by the judgment, it is directed that the promotion effected prior to 28.04.2011 and consequential retiral and other benefits should not be altered to their detriment. [para 11] [521-A-C]

1.4 However, this Court upholds the view of the High Court that, keeping the nature of the reliefs in the writ petition in perspective, the Roster has to be determined by the Mumbai Municipal Corporation in accordance with the extant Rules and all officers concerned would then be entitled to challenge the fixation, if they are aggrieved and if so advised. [para 12] [521-C-D]

Case Law Reference:

1952 SCR 110	**referred to**	**para 7**
1987 (1) SCR 1054	**referred to**	**para 7**
1996 (5) Suppl. SCR 643	**referred to**	**para 8**
1973 Crl.L.J. 453	**referred to**	**para 8**
5 (5) Suppl. SCR 172	**referred to**	**para 8**
2009 (15) SCR 1168	**relied on**	**para 8**
(1999) 1 SCR 1121	**referred to**	**para 10**
(1875)1 ChD 426	**referred to**	**para 10**
AIR 1936 PC 253	**referred to**	**para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2918 of 2014.

From the Judgment & Order dated 07.10.2009 of the High Court of Judicature at Mumbai in Writ Petition No. 2191 of 2008.

WITH

C.A. No. 2919 of 2014.

Pallav Shishodia, Atul Y. Chitale, P.P. Rao, Sanyukta Mukherjee, Jayati Chitale, Suchitra Atul Chitale, J.J. Xavier, U. Deshpande, S.N. Pillai, E.C. Vidya Sagar, Kheyali Sarkar, Akshat Kulshreshtha for the Appellant.

T.R. Andhiyarujina, P.S. Patwalia, Pallav Shishodia, Shakar Chillarge, AGA SOM, Susheel Mahadeshwar, Uday B. Dube, Soumik Ghosal, E.C. Vidya Sagar, Amit Yadav, Sujata Kurdukar, Atul Y. Chitale, Sanyukta Mukherjee, Jayati Chitale, Suchitra Atul Chitale, J.J. Xavier, U. Deshpande, Asha G. Nair

for the Respondents.

The Judgment of the Court was delivered by

VIKRAMAJIT SEN, J. 1. Leave granted in both these petitions.

2. Although interim orders have not been granted in the appeal arising out of SLP(C) No.15868 of 2010, in the accompanying matter it had been ordered on 01.07.2011 that any promotion that may be made would be subject to the result of the petition.

3. The writ petitioners before the High Court of Bombay were working in the Mumbai Municipal Corporation of Greater Mumbai as Assistant Municipal Commissioners and had prayed that their promotion to the vacant posts of Deputy Municipal Commissioner may be effected in accordance with the Rules framed under the Mumbai Municipal Corporation Act, 1888 (hereinafter referred to as the "M.M.C. Act"). The relevant provisions are Sections 55 and 80B of the M.M.C. Act. Section 55 authorizes the Corporation to appoint Deputy Municipal Commissioner subject to confirmation by the State Government whereas sub-Section (4) of Section 80B of the M.M.C. Act requires the Corporation to frame Rules stipulating the eligibility and qualification criteria for the post of Deputy Municipal Commissioner in the Mumbai Municipal Corporation; sub-Section (5) thereafter requires the Rules so framed to be published in the Official Gazette. It appears that the previous Rules were framed in the year 1988 and were duly published in the Official Gazette on 18.08.1988, according to which the post of Deputy Municipal Commissioner was to be filled in by way of promotion from the post of Heads of Major Department (hereinafter referred to as "HOD") or holders of equivalent posts having administrative experience of not less than 10 years or Ward Officers on the one hand and by selection through the Maharashtra Public Service Commission on the other in the ratio of 1:1, the vacancies being filled in by promotion and

selection alternatively. The Roster points indicated in the Rules were: A/C/B/C/A/C (A – promotion of Ward Officer, B – promotion from HODs and C – selection through MPSC). It was further clarified that the appointing authority will decide whether the post earmarked for promotion is to be filled in by promoting HOD or Ward Officer. Thereafter, the Corporation proposed modifications in the then existing Rules in terms of Resolution No. 531 dated 21.09.2000, which were duly submitted to the State Government for according its approval. The State Government, however, neglected to grant sanction to the said Resolution and as a consequence the Commissioner addressed a letter dated 19.08.2003 to the Corporation suggesting other modifications in the Rules relating to promotions. These suggested amendments came to be approved by the Corporation leading to the passing of Resolution No. 752 dated 20.11.2003 amending the then existing Recruitment Rules and these were then forwarded to the State Government for its approval. The State Government accorded its approval with certain modifications with respect to the chronology to be followed in the Roster and appointment by way of deputation/transfer, unfortunately almost three years later vide its letter dated 04.10.2006. The said Resolution required 75% of the said posts to be filled in by promotion from the Assistant Municipal Commissioners/Ward Officers and 25% to be filled in by promotion of HOD, direct recruitment or by deputation. The Roster fixation indicated that the first and second vacancy has to be filled in by promotion from amongst Assistant Municipal Commissioners whereas the third vacancy would be filled up by promotion of HODs or direct recruitment or by deputation and the fourth vacancy would go to the Assistant Municipal Commissioner and so on and so forth.

4. The petitioners before the High Court, namely, Shri Anil Shantaram Khoje and Shri Prakash Krishnarao Thorat who are the contesting Respondents before us, were holding the post of Assistant Municipal Commissioners. Shri Ram B. Dhus was holding the post of HOD, and has file[illegible]al

along with the Mumbai Municipal Corporation for the reason that the impugned judgment dated 07.10.2009 has allowed the writ petitions, directing the Mumbai Municipal Corporation to effect promotions to the post of Deputy Municipal Commissioner strictly in accordance with the Resolution No. 752 dated 20.11.2003, sanctioned by the State Government in terms of its letter dated 04.10.2006 and the Roster point determined therein. We clarify that Shri Ram B. Dhus was the senior-most amongst HODs, whilst the writ petitioners are Shri Anil Shantaram Khoje and Shri Prakash Krishnarao Thorat, who belonged to the cadre of Assistant Municipal Commissioner/ Ward Officer. These two respondents, we reiterate, had sought issuance of directions to the Mumbai Municipal Corporation to fill in the 16 vacant posts of Deputy Municipal Commissioner according to the modified Rules, i.e., by assigning 75% quota for Assistant Municipal Commissioners/Ward Officers and 25% to the other categories. Prior to the gazetting of the extant Rules that came to be gazetted on 28.04.2011, Corporation had promoted three persons to the post of Deputy Municipal Commissioner including Shri Anil Shantaram Khoje (Contesting Respondent No. 1) and Shri Babusaheb Pandurang Kolekar (Contesting Respondent No. 5).

5. It also requires to be elucidated that Shri Ram B. Dhus was promoted as Deputy Municipal Commissioner on 16/8/13. Under the old Rules, 10 years experience in the post of Head of Department was required as eligibility for promotion to the next higher post of Deputy Municipal Commissioner whereas in the subsequent Rules, this eligibility had been lowered by three years, now requiring only 7 years experience. When the writ petitions came to be filed before the High Court, Shri Ram B. Dhus did not possess the stipulated 10 years experience.

6. Shri Ram B. Dhus and the Corporation submit in these appeals that the modified Rules would become operative not from the date on which they were sanctioned by the State Government vide letter dated 04.10.2006, but from the date of

their publication in the Official Gazette as required by law and as specifically stipulated in Section 80B(5) of the M.M.C. Act.

7. The opinion of the High Court is that the publication in the Official Gazette was not mandatory, but only desirable or directory. A plethora of precedents prevails on this vexed question which continues to exhaust judicial time. In *Harla vs State of Rajasthan,* 1952 SCR 110 [AIR 1951 SC 467], the Court's conscience appears to have been shocked by the "thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilised man." However, what this Court was confronted with in that case was the failure of the publication of the Jaipur Opium Act, which led to the conviction of the petitioner. It can certainly be argued that imposition of criminal liability is not akin to provisions determining the eligibility for promotions. In *B.K. Srinivasan vs State of Karnataka* 1987 (1) SCC 658, this Court was concerned with the Outline Development Plan and Regulations pertaining to the construction of high-rise buildings in one of the residential extensions of Bangalore. This Court observed that it is necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, regardless of whether the statutes so prescribed, the subordinate legislation would then take effect only from the date of publication. However, a caveat was articulated to the effect that where subordinate legislation is concerned only with a few individuals or is confined to small local areas, publication or promulgation by other means may meet the mandates of law.

8. In *I.T.C. Bhadrachalam Paper Boards vs Mandal Revenue Officer, A.P.* 1996 (6) SCC 634, the question was whether the petitioner assessee could claim the exemption from payment of tax on non-agricultura[illegible]y

virtue of one GOM issued by the Government, but which had not been published or notified at the relevant point of time in the Official Gazette. This Court declined to grant the benefits of the exemption to the assessee holding that that provision would have to be implemented only when finality attached to it which would be contemporaneous to its publication in the Official Gazette; that the dissemination of the substance of the exemption in the newspapers or in other media was irrelevant. Reference was made to Section 83 of the Evidence Act. The Court did not agree that such publication was only a directory requirement and accordingly a dispensable one and reiterated the observations earlier made in *Sammbhu Nath Jha vs Kedar Prasad Sinha* 1973 Crl.L.J. 453, which is to the effect that publication in the Official Gazette "is an imperative requirement and cannot be dispensed with. This view further finds adoption in *S.K. Shukla vs State of U.P.* 2006 (1) SCC 314, wherein the Court was concerned with unauthorized possession of arms and ammunitions under the Prevention of Terrorism Act, 2002. It was observed by this Court that the notification notifying the State of U.P. as a notified area, thereby prohibiting and criminalizing possession of certain arms in the notified area under Section 4(a) of the Prevention of Terrorism Act, 2002, would become effective from the date of its publication and reasserted that publication is essential as it affects the rights of the public. *Rajendra Agricultural University vs Ashok Kumar Prasad* 2010 (1) SCC 730, is directly relevant to the conundrum before us inasmuch as it pertains to promotions in the university, in contra-distinction to criminal culpability. Even in those circumstances, this Court had opined that publication in the Official Gazette was a mandatory requirement, although the Statute in question providing for a time-bound promotion Scheme was assented to by the Chancellor, and pursuant to which a notification was also issued by the Petitioner University. The respondents made a failed attempt to distinguish a legislation imposing obligations or creating liabilities from those intended to benefit a specific and limited class of persons inasmuch as publication would be a mandatory requirement in

the former case while directory in the latter. The Court disagreeing with the proposition held that the fact that a particular Statute may not concern the general public, but may affect only a specified class of employees, is not a ground to exclude the applicability of the mandatory requirement of publication in the Official Gazette in the absence of any exception included in the Statute itself.

9. It is relevant for us to mention Section 23 of the Bombay General Clauses Act, 1904, which provides thus: "Where, in any Bombay Act (or Maharashtra Act), or in any Rule passed under such Act, it is directed that any order, notification or other matter shall be notified or published, then such notification or publication shall, unless the establishment or Rule otherwise provides, be deemed to be tailor made if it is published in Official Gazette."

10. We are immediately reminded of the observations made in *Babu Verghese vs Bar Council of Kerala* (1999) 1 SCR 1121, when this Court was called upon to consider a case under the Advocates Act. While doing so, we applied the principles earlier enunciated in *Taylor vs Taylor* (1875)1 ChD 426 and in *Nazir Ahmad vs King Emperor* AIR 1936 PC 253. The Court observed as follows: "It is the basic principles of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all".

11. In this conspectus we find ourselves unable to accept the position favoured by the High Court in the impugned Judgment. The extant Rules would become operative only from the date of its promulgation by publication in the Official Gazette, i.e. on 28.04.2011. Promotions made prior to 28.04.2011 under the extant Rules promoting Shri Anil Shantaram Khoje (Contesting Respondent No. 1), Shri B.P. Kolekar (Contesting Respondent No. 5) and Shri P.J. Patil to the post of Deputy Municipal Commissioner could not have been effected in the absence of publication of the extant

Gazette. We note that Shri Anil Shantaram Khoje and Shri B.P. Kolekar have already retired from the post of Deputy Municipal Commissioner while Shri P.J. Patil who was promoted on 05.07.2010 to the post of Deputy Municipal Commissioner, is still holding the post. Being mindful of the fact that their promotion and retiral and other consequential benefits would be adversely impacted by our Judgment, we direct that the promotion effected prior to 28.04.2011 and consequential retiral and other benefits should not be altered to their detriment.

12. We, however, uphold the view of the High Court that, keeping the nature of the reliefs in the writ petition in perspective, the Roster has to be determined by the Mumbai Municipal Corporation in accordance with the extant Rules and all concerned officers would then be entitled to challenge the fixation, if they are aggrieved and if so advised.

13. The Appeals are allowed in the above terms, leaving all the parties to bear their respective costs.

R.P. Appeals allowed.

STATE OF RAJASTHAN
v.
PARMANAND & ANR.
(Criminal Appeal No. 78 of 2005)

FEBRUARY 28, 2014

[RANJANA PRAKASH DESAI AND MADAN B. LOKUR, JJ.]

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985:

s.50 - Non-compliance of - Respondents-accused caught carrying opium which was recovered from the bag in the hands of one of them - Respondents given a written common notice that they had a right to be searched before a nearest Gazetted Officer, or a Magistrate or before the Superintendent of raiding party - One of them signed for both agreeing to be searched by the Superintendent - Held: Bag of one of the respondents was searched and opium was recovered - His personal search was also carried out - Personal search of other respondent was carried out - Therefore, s.50 will have application - Accused persons must be communicated individually of their right - Further it was improper to tell the respondents that a third alternative was available and they could be searched before the Superintendent who was part of the raiding party - He could not be called an independent officer - Thus, breach of s.50 has vitiated the search - Conviction of respondents was illegal and they were rightly acquitted by High Court.

The respondents were prosecuted for offences punishable u/s 8 read with s.18 and u/s 8 read with s.29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 on the allegation that at about 4 A.M. on 14.10.1997 the respondents were caught carrying 9 Kg. 600 gms of opium. The said opium was recovered from the bag in the

hands of respondent no. 1. The Special Judge convicted respondent No.1 u/s 8 read with s.18 of the NDPS Act and respondent No.2 u/s 8 read with s.28 of the NDPS Act. They were sentenced to 10 years rigorous imprisonment and a fine of Rs.10 lakhs each. However, the High Court acquitted the respondents holding that provisions of s.50 of the Act had not been complied with.

Dismissing the appeal, the Court

HELD: 1.1 In the instant case, the conviction is solely based on recovery of opium from the bag of respondent No.1. A bag, briefcase or any such article or container etc. can under no circumstances be treated as a body of a human being. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in s. 50 of the NDPS Act. If merely a bag carried by a person is searched without there being any search of his person, s. 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, s. 50 of the NDPS Act will have application. In the instant case, bag of respondent No.1 was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 was also conducted. Therefore, in light of judgments of this Court s. 50 of the NDPS Act will have application. [para 9 and 12] [530-G; 531-B-C; 532-B-C]

Dilip & Anr. v. State of Madhya Pradesh **2006 (9) Suppl. SCR 390 = (2007) 1 SCC 450;** *Union of India v. Shah Alam* **(2009) 16 SCC 644 - relied on.**

Kalema Tumba v. State of Maharashtra **1999 (2) Suppl. SCR 670 = (1999) 8 SCC 257;** *State of Himachal Pradesh v. Pawan Kumar* **2005 (3) SCR 417 = (2005) 4 SCC 350 - referred to.**

1.2 The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5, the Superintendent. They were given a written notice. However, there was no individual communication of the right. A common notice was given on which only respondent No.2 is stated to have signed for himself and for respondent No.1. A joint communication of the right available u/s 50(1) of the NDPS Act to the accused would frustrate the very purport of s. 50. Communication of the said right to the person who is about to be searched is not an empty formality. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be individually informed that u/s 50(1) of the NDPS Act, that he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Therefore, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated. [para 13-14] [532-D-H; 533-A, B-C, E-F]

State of Punjab v. Balbir Singh **(1994) 3 SCC 299;** *State of Punjab v. Baldev Singh* **1999 (3) SCR 977 = (1999) 6 SCC 172 - relied on.**

Paramjit Singh and Anr. v. State of Punjab **1997 (1) CRIMES 242;** *Dharamveer Lekhram Sharma and Another v. The State of Maharashtra and Ors.* **2001 (1) CRIMES 586 - stood approved.**

State of Himachal Pradesh v. Pirthi Chand **(1996) 2 SCC 37 - stood disapproved.**

1.3 The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10, SI, to tell the respondents that a third alternative was available and that they could be searched before PW-5, the Superintendent, who was part of the raiding party. PW-5 cannot be called an independent officer. PW-10 could not have given a third option to the respondents when s. 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of s. 50(1) of the NDPS Act. On this ground also, the search conducted by PW-10 is vitiated. Breach of s. 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. [para 15] [533-G-H; 534-A-D]

Case Law Reference:

1997 (1) CRIMES 242	**approved**	**Para 6**
2001 (1) CRIMES 586	**approved**	**Para 6**
(1994) 3 SCC 299	**relied on**	**para 8**
(1996) 2 SCC 37	**stood disapproved**	**para 8**
1999 (3) SCR 977	**relied on**	**para 8**
1999 (2) Suppl. SCR 670	**referred to**	**para 9**
2005 (3) SCR 417	**referred to**	**para 9**
2006 (9) Suppl. SCR 390	**relied on**	**para 10**
(2009) 16 SCC 644	**relied on**	**para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 78 of 2005.

From the Judgment & Order dated 14.11.2003 of the High Court of Judicatue for Rajasthan at Jaipur Bench, Jaipur in S.B.

Criminal Appeal No. 788 of 1998.

Imtiaz Ahmed, Naghma Imtiaz, Milind Kumar, S.S. Shamshery, Bharat Sood, Varun Punia, Sandeep Singh, Ritesh Prakash Yadav, Harshvardhan Singh Rathore, Amit Sharma, Ruchi Kohli for the Appellant.

Nidhi, D.K. Thakur, Devendra Jha, Debasis Misra for the Respondents.

The Judgment of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. The respondents were tried by the Special Judge (NDPS Cases), Chhabra, District Baran for offences under Section 8 read with Section 18 and under Section 8 read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (**the NDPS Act).**

2. The case of the prosecution was that on 13/10/1997 during Kota Camp at Iklera, P.N. Meena, Sub-Inspector, Office of the Narcotics Commissioner, Kota received information at 1900 hours in the evening that the respondents were to handover about 10 Kg opium on 14/10/1997 in the morning between 4.00 a.m. to 6.00 a.m. at Nangdi-Tiraha, Iklera, Chhipabaraud Road to a smuggler. This information was entered by SI Meena in the diary and he forwarded it to the Investigating Officer J.S. Negi, Superintendent. J.S. Negi sent this information through Constable B.L. Meena to Assistant Narcotic Commissioner, Kota. Thereafter, raiding party was formed. The raiding party was headed by Superintendent J.S. Negi. The raiding party reached Nangdi-Tiraha by a Government vehicle. Independent witnesses Ramgopal and Gopal Singh were called by SI Qureshi. Their consent was obtained. At about 4.25 a.m., the respondents came from the village Rajpura. On seeing the raiding party, they tried to run away but they were stopped. Enquiry was made with both the respondents in the presence of the inde y

SI Qureshi. The respondents gave their names. Respondent No. 1 Parmanand had one white colour gunny bag of manure in his left hand. SI Qureshi told the respondents that he had to take their search. They were told about the provisions of Section 50 of the NDPS Act. They were told that under Section 50(1) of the NDPS Act, they had a right to get themselves searched in the presence of any nearest Magistrate or any gazetted officer or in the presence of Superintendent J.S. Negi of the raiding party. One written notice to that effect was given to them. On this notice, appellant Surajmal gave consent in writing in Hindi for himself and for appellant Parmanand and stated that they are ready to get themselves searched by SI Qureshi in the presence of Superintendent J.S. Negi. He also put his thumb impression. Thereafter, bag of respondent No. 1 Parmanand was searched by SI Qureshi. Inside the bag in a polythene bag some black material was found. The respondents told him that it was opium and they had brought it from the village. The weight of the opium was 9 Kg. 600 gms. Necessary procedure of drawing samples and sealing was followed. The respondents were arrested. After completion of the investigation, respondent no. 1 Parmanand was charged for offence under Section 8 read with Section 18 of the NDPS Act and respondent No.2 Surajmal was charged for offence under Section 8 read with Section 18 and for offence under Section 8 read with Section 29 of the NDPS Act. The prosecution examined 11 witnesses. The important witnesses are PW-5 J.S. Negi, the Superintendent, PW-9 SI Meena and PW-10 SI Qureshi. The respondents pleaded not guilty to the charge. They contended that the police witnesses had conspired and framed them. The case is false.

3. Learned Special Judge convicted respondent No.1 Parmanand under Section 8 read with Section 18 of the NDPS Act and respondent No.2 Surajmal under Section 8 read with Section 28 of the NDPS Act. They were sentenced for 10 years rigorous imprisonment each and a fine of Rs.10 lakhs each. In default of payment of fine, they were sentenced to undergo rigorous imprisonment for two years.

4. Aggrieved by the said judgment and order, the respondents preferred an appeal to the Rajasthan High Court. By the impugned order, the Rajasthan High Court acquitted the respondents. Hence, this appeal by the State.

5. Mr. Imtiaz Ahmed, learned counsel for the State of Rajasthan submitted that the High Court was wrong in coming to the conclusion that there was no compliance with Section 50 of the NDPS Act. Counsel submitted that PW-10 SI Qureshi has clearly stated that the respondents were communicated their right under Section 50(1) of the NDPS Act. A written notice was also given to them and only after they consented to be searched by PW-10 SI Qureshi in the presence of PW-5 J.S. Negi, the Superintendent, that the search of their person and search of bag of respondent No.1 Parmanand was conducted. Counsel submitted that the High Court was also wrong in disbelieving independent pancha witnesses. Counsel urged that the impugned order is perverse and deserves to be set aside.

6. Ms. Nidhi, learned counsel for the respondents, on the other hand, submitted that admittedly notice under Section 50 of the NDPS Act was a joint notice. The respondents were entitled to individual notice. The search is, therefore, vitiated. In this connection, counsel relied on judgment of the Punjab and Haryana High Court in *Paramjit Singh and Anr. v. State of Punjab*[1] and judgment of the Bombay High Court in *Dharamveer Lekhram Sharma and Another v. The State of Maharashtra and Ors.*[2]. Counsel submitted that search was a farce. The High Court has, therefore, rightly acquitted the respondents.

7. The question is whether Section 50 of the NDPS Act was complied with or not. Before we go to the legalities, it is

1. 1997 (1) CRIMES 242.
2. 2001 (1) CRIMES 586.

necessary to see what exactly the important police witnesses have stated about compliance of Section 50 of the NDPS Act. The gist of the evidence of the police witnesses PW-5 J.S. Negi, the Superintendent, PW-9 SI Meena and PW-10 SI Qureshi is that the respondents were informed that they have a right to be searched in the presence of a gazetted officer or a nearest Magistrate or before J.S. Negi, the Superintendent, who was present there. They were given a written notice. On that notice, respondent No.2 gave his consent in Hindi in his handwriting that he and respondent No.1 Parmanand are agreeable to be searched by PW-10 SI Qureshi in the presence of PW-5 J.S. Negi, the Superintendent. He signed on the notice in Hindi and put his thumb impression. Respondent No.1 Parmanand did not sign. There is nothing to show that respondent No.1 Parmanand had given independent consent. Search was conducted. PW-10 SI Qureshi did not find anything on the person of the respondents. Later on, he searched the bag which was in the left hand of respondent No.1 - Parmanand. In the bag, he found black colour material which was tested by chemical kit. It was found to be opium.

8. In *State of Punjab v. Balbir Singh,*[3] this Court held that Section 50 of the NDPS Act is mandatory and non-compliance thereof would vitiate trial. In *State of Himachal Pradesh v. Pirthi Chand,*[4] this Court held that breach of Section 50 does not affect the trial. There were divergent views on this aspect and, therefore, a reference was made to the Constitution Bench. Out of the three questions of law, which the Constitution Bench dealt with in *State of Punjab v. Baldev Singh,*[5] the question which is relevant for the present case is whether it is the mandatory requirement of Section 50 of the NDPS Act that when an officer duly authorized under Section 42 of the NDPS Act is about to search a person, he must inform him of his right under sub-section (1) thereof of being taken to the nearest gazetted officer

3. (1994) 3 SCC 299.
4. (1996) 2 SCC 37.
5. (1999) 6 SCC 172.

or nearest Magistrate. The conclusions drawn by the Constitution Bench, which are relevant for this case could be quoted.

> *"(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.*
>
> *(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.*
>
> *(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act."*

9. In this case, the conviction is solely based on recovery of opium from the bag of respondent No.1 - Parmanand. No opium was found on his person. In *Kalema Tumba v. State of Maharashtra,*[6] this Court held that if a person is carrying a bag or some other article with him and narcotic drug is recovered

6. (1999) 8 SCC 257.

from it, it cannot be said that it was found from his person and, therefore, it is not necessary to make an offer for search in the presence of a gazetted officer or a Magistrate in compliance of Section 50 of the NDPS Act. In *State of Himachal Pradesh v. Pawan Kumar,*[7] three-Judge Bench of this Court held that a person would mean a human being with appropriate coverings and clothing and also footwear. A bag, briefcase or any such article or container etc. can under no circumstances be treated as a body of a human being. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 of the NDPS Act. The question is, therefore, whether Section 50 would be applicable to this case because opium was recovered only from the bag carried by respondent No.1 - Parmanand.

10. In *Dilip & Anr. v. State of Madhya Pradesh,*[8] on the basis of information, search of the person of the accused was conducted. Nothing was found on their person. But on search of the scooter they were riding, opium contained in plastic bag was recovered. This Court held that provisions of Section 50 might not have been required to be complied with so far as the search of the scooter is concerned, but keeping in view the fact that the person of the accused was also searched, it was obligatory on the part of the officers to comply with the said provisions, which was not done. This Court confirmed the acquittal of the accused.

11. In *Union of India v. Shah Alam,*[9] heroin was first recovered from the bags carried by the respondents therein. Thereafter, their personal search was taken but nothing was recovered from their person. It was urged that since personal search did not lead to any recovery, there was no need to comply with the provisions of Section 50 of the NDPS Act. Following Dilip, it was held that since the provisions of Section

7. (2005) 4 SCC 350.
8. (2007) 1 SCC 450.
9. (2009) 16 SCC 644.

50 of the NDPS Act were not complied with, the High Court was right in acquitting the respondents on that ground.

12. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.

13. It is now necessary to examine whether in this case, Section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in *Baldev Singh*, it is not necessary to inform the accused person, in writing, of his right under Section 50(1) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only respondent No.2 – Surajmal is stated to have signed for himself and for respondent No.1 – Parmanand. Respondent No.1 Parmanand did not sign.

14. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards ava d

against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in ***Paramjit Singh*** and the Bombay High Court in ***Dharamveer Lekhram Sharma*** meets with our approval. It bears repetition to state that on the written communication of the right available under Section 50(1) of the NDPS Act, respondent No.2 Surajmal has signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorized respondent No.2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 Parnanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.

15. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer.

Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated. We have, therefore, no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is, therefore, dismissed.

R.P. Appeal dimissed.

UNION OF INDIA

v.

M/S. CONCRETE PRODUCTS & CONST. CO. ETC.

(Civil Appeal Nos. 2950-2951 of 2014)

MARCH 3, 2014

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

Arbitration and Conciliation Act, 1996: s.37(1) - Interest for the amount withheld by the railway administration - Grant of - Held: Arbitrator passed an award directing the railway administration to refund the amount along with interest and subsequent interest @ 18% PA. - Arbitrator in awarding interest to the contractors failed to take into account the provisions contained in Indian Railways Standard Conditions of Contract which disentitled the contractors from claiming any interest or damages for withholding or retention under lien by railway administration - Also, as per s.37(1), the arbitrator could not have awarded any interest from the date when the recovery was made till the award was made - Interest would have been payable from the date when the award was made till the money was deposited in the court - Upon the amount being deposited, no further interest could be paid to the contractors - Interest.

The appellant-Railway administration and the contractor-respondents entered into contract for supply of concrete sleepers. By letter dated 12 July 1997, appellant-Railway administration informed the respondents that the excess payments had been made to the respondents and, therefore, certain amount was recoverable from the respondents and that said amount would be recovered from sum due or payable from

running contract. This gave rise to dispute which was referred to arbitrator. The arbitrator passed an award directing the appellant to refund the amount along with interest and subsequent interest @ 18% PA. The respondents filed an application seeking direction to the appellant to pay amount awarded from the amount deposited by the appellant with the High Court along with the accrued interest as on date on the said amount. The application was allowed. The appellant filed intra court appeals challenging the order of the single judge principally on the ground that the appellant was not liable to pay any interest for the period subsequent to the deposit of the principal amount into the court. The Division Bench of the High Court dismissed the appeal holding that appellant had not questioned the power of the sole arbitrator to award interest; that the said issue was also not raised before the single judge and a plea was raised for the first time before the Division Bench that the award of interest was contrary to Clause No. 2401 of the Indian Railways Standard Conditions of Contract.

The question which arose for consideration in the instant appeals was whether the contractors are entitled to interest for the amount withheld.

Allowing the appeals, the Court

HELD: 1.1. Clause 2401 provides that the railways shall be entitled to withhold and also have a lien to retain any amount deposited as security by the contractor to satisfy any claims arising out of or in the contract. In such circumstances, the railways can withhold the amount deposited by the contractors as security and also have lien over the same pending finalization or adjudication of the claim. In case, the security deposit is insufficient to cover the claim of the railways, it is entitled to withhold and have lien to the extent of the amount claimed from any sum payable for any works do[illegible]r

thereafter under the same contract or any other contract. This withholding of the money and the exercise of the lien is pending finalization or adjudication of any claim. This clause further provided that the amount withheld by the railways over which it is exercising lien will not entitle the contractor to claim any interest or damages for such withholding or retention under lien by the railways. [Para 15] [548-D-G]

1.2. Clause 2403 provides that any sum of money due and payable to the contractor under the contract may be withheld or retained by way of lien by the railway authorities or the Government in respect of payment of a sum of money arising out of or under any other contract made by the contractor with the railway authority or the Government. Clause 2403(b) further provides that it is an agreed term of the contract that against the sum of money withheld or retained under lien, the contractor shall have no claim for interest or damages whatsoever provided the claim has been duly notified to the contractor. [paras 16, 17] [548-H; 549-A-B]

2. The sole arbitrator in awarding interest to the contractors has failed to take into account the provisions contained in the said two clauses. The award of interest at-least from the date when the amount was deposited in Court was wholly unwarranted. Therefore, the High Court as well as the arbitrator have committed an error of jurisdiction in this respect. As per section 37(1), the arbitrator could not have awarded any interest from the date when the recovery was made till the award was made. However, interest would have been payable from the date when the award was made till the money was deposited in the High Court and thereafter converted to fixed deposit receipts. Upon the amount being deposited in the High Court, no further interest could be paid to the respondents. The respondents shall not be entitled to any

interest on the amount which was recovered by the appellant, till the date of award and thereafter till the date when the amount awarded was deposited in the High Court. [paras 18, 20, 21] [549-C-D; 550-B-E]

Sayeed Ahmed & Company v. State of Uttar Pradesh & Ors. **(2009) 12 SCC 26: 2009 (10) SCR 841;** *Sree Kamatchi Amman Construction v. Divisional Railway Manager (Works), Palghat & Ors.* **(2010) 8 SCC 767: 2010 (10) SCR 487 - relied on.**

Himachal Pradesh Housing and Urban Development Authority & Anr. v. Ranjit Singh Rana **(2012) 4 SCC 505: 2012 (2) SCR 427;** *Union of India v. Krafters Engineering and Leasign Private Limited* **(2011) 7 SCC 279: 2011 (8) SCR 196;** *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa & Ors. v. N.C. Budharaj (Deceased) by LRs. & Ors.* **(2001) 2 SCC 721: 2001 (1) SCR 264;** *Secretary, Irrigation Department, Government of Orissa & Ors. v. G.C. Roy* **(1992) 1 SCC 508: 1991 (3) Suppl. SCR 417 - referred to.**

Case Law Reference:

2012 (2) SCR 427	**referred to**	**Para 10**
2010 (10) SCR 487	**relied on**	**Para 11**
2009 (10) SCR 841	**relied on**	**Para 11**
2011 (8) SCR 196	**referred to**	**Para 11**
2001 (1) SCR 264	**referred to**	**Para 12**
1991 (3) Suppl. SCR 417	**referred to**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2950-2951 of 2014.

From the Judgment & Order dated 21.03.2012 of the High Court of Madras in OSA No. 44 and 45

Mohan Jain, ASG, D.S. Thakur, Prachi Bajpai, Shreekant N. Terdal for the Appellant.

C.S. Vaidyanathan, G. Umapathy, Rakesh K. Sharma for the Respondents.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. Leave granted.

2. These appeals impugn the final judgment and decree dated 21st March, 2012 passed by the High Court of Judicature at Madras in OSA No. 44 & 45 of 2012 and M.P. No. 1 of 2012, whereby the letters patent appeals of the Union of India were dismissed. The appellant had entered into agreements with the respondents on 30th January, 1983 and 30th March, 1984 for supply of mono block concrete sleepers (in short "Sleepers"). The agreements were renewed from time to time under which the Union of India agreed to pay specified rates for supply of each sleeper. The agreements/contracts also provided that the rates payable shall be based on certain standard rates of principal raw materials, such as cement, High Tensile Steel (HTS) wires, molded steel, etc. The contracts further provided that whenever the cost of the principal raw materials increased or decreased, the contract price for sleepers shall also correspondingly be increased or decreased with effect from the date of such increase or decrease. The agreements/contracts also provided for escalation, subject to certain conditions prescribed under Clause 11 of the Contract. The contracts/agreements further provided that the respondents must exercise utmost economy in the purchase of raw materials and that the escalation will be admitted on the basis of actual price paid for the respective raw material. This was subject to the ceiling on the price. As per Clause 12.2(c), ceiling was fixed "in the case of raw materials not covered by either of the above, the lowest price (for destination) arrived at on the basis of at least three quotations obtained by the Contractor for each supply from various established sources of supply of the

respective raw materials".

3. The respondents/contractors purchased HTS wires from established sources in terms of the various clauses of the contract. The material was used in the manufacture of sleepers. Payment for the sleepers was made by the contractors at the lowest price quoted by the suppliers. The quotation was also scrutinized alongwith the supporting documents. The Railway authorities release the payment to the respondent contractors only upon their satisfaction, upon scrutiny of all the relevant documents.

4. A new contract was entered into between the parties in May, 1997. The railway administration changed the policy and allowed the respondents/contractors to purchase the HTS wires, subject to escalation as noticed above. By letter dated 12th July, 1997, the railways administration informed the respondents that the Railway Board had found that excess payments had been made between 1989 and November, 1994 under escalation clause for HTS wires. It was stated that the amounts paid to the contractors were more than the prevalent market price. Therefore, a sum of Rs. 1,80,92,462/- was recoverable from M/s Concrete Products and Construction Company, respondent in C.A. No. _____ (arising out of SLP(C) No. 5384 of 2013) and a sum of Rs.1,78,09,789/- was recoverable from M/s. Kottukulam Engineers Private Limited, respondent in C.A. No. _____ (arising out of SLP(C) No. 5385 of 2013). It was also pointed out that the aforesaid sums would be recoverable from the sums due and payable to them in the current/running contracts.

5. The contractors (respondents herein) challenged the aforesaid recovery by filing Writ Petition No. 11805 and 10814 of 1999, before the High Court of Madras. The railway administration took up the preliminary objection, pleading that the writ petition is not maintainable as the dispute has to be referred to arbitration. The objection of the appellant was

accepted. The High Court appointed a Former Judge of the Madras High Court as the arbitrator to adjudicate the dispute. The contractors/respondents herein challenged the aforesaid order of the learned Single Judge by filing Writ Appeal Nos. 251 and 252 of 2000, on the plea that the arbitrator had to be appointed in terms of the agreement. By order dated 22nd March, 2000, the writ appeals were allowed, and the order of the learned Single Judge was set aside. The matter was remanded back to the Single Judge for disposal in terms of the agreement.

On remand, the learned Single Judge, instead of referring matter to arbitration in terms of the contract between the parties allowed the writ petitions filed by the respondents herein and directed the railway authorities to refund the sum of Rs.1,69,78,883/- and Rs.1,78,09,789/- to the respondent firms, respectively with interest thereon from the date of withholding till the date the same is refunded. The order was directed to be complied within a period of 4 week from the date of the receipt of the order. This order was again challenged by the railway administration by filing, first of all, Writ Appeal Nos. 2822 and 2823 of 2001. Subsequently, writ appeal miscellaneous petition No. 21103 and 21104 of 2001 were also filed in the aforesaid two writ appeals, seeking stay of the judgments under appeal. On 30th April, 2004, the Division Bench dismissed the writ appeals as well as the miscellaneous petitions.

6. The railway administration challenged the aforesaid order of the Division Bench, before this Court by filing SLP No. 18244 and 18245 of 2004. Special leave was granted in both the special leave petitions and the same were converted to Civil Appeal Nos. 2999 and 3000 of 2005. By a short order passed on 2nd May, 2005, the disputes between the parties were referred by this court for adjudication by an Arbitration Tribunal consisting solely of Mr. Justice K. Venkataswami, a former Judge of this Court. This order was passed without going into

the merits of the disputes and the submissions made by the learned Solicitor General on behalf of the railways, that in view of the specific condition contained in the contract, the dispute cannot be referred to an arbitrator other than the authority referred to in the contract. This Court directed that the matter shall be referred to Mr. Justice Venkataswami. It was, however, made clear that the order shall not be treated as a precedent. Pursuant to the aforesaid order of this Court, the matter ultimately reached the arbitrator. At the conclusion of the arbitral proceedings, the final award was rendered on 24th June, 2006. The sole arbitrator directed the appellants to refund the amount awarded as follows:-

> "In the result I direct the Respondents to refund a sum of Rs.1,78,09,789/- recovered from the Claimants and interest of Rs.2,38,28,960/- and subsequent interest at 18% P.A from 1.9.2005 on Rs. 1,78,09,789/- till date of payment in Kottukulam Engineers Pvt. Ltd. matter. Ana a sum of Rs.1,69,78,883/- and interest of Rs.2,25,25,513/- and subsequent interest at 18% P.A from 1.09.2005 till date of payment in m/s Concrete Product & Construction Company Trivalam."

The counter claims made by the appellants were dismissed. The railway administration challenged the common arbitration award in O.P. No. 142 & 143 of 2007 under Section 33 of the Arbitration and Conciliation Act, 1996 before High Court of Madras. The learned Single Judge dismissed the arbitration petitions filed by the railway administration by its order dated 30th November, 2010. Thereafter the contractors filed applications before the High Court for direction to the railways to make payments of the amount. Thereafter Application Nos. 780 & 781 of 2011 were filed in the O.P. Nos. 142 & 143 of 2007 by the contractors seeking a direction from the Court directing that the amounts awarded by the learned Sole Arbitrator be paid from the amount deposited by the railway administration with the High

accrued interest as on date on the aforesaid amount. These applications were allowed by order dated 24th February, 2011. The High Court directed that the awarded amount deposited by the railways in the Court for satisfying the outcome of the original petitions which was subsequently converted into fixed deposit receipts, be dispersed to the respondent contractors.

7. Again the railway administration filed intra court appeals challenging the order of the learned Single Judge principally on the ground that the railway administration was not liable to pay any interest for the period subsequent to the deposit of the principal amount into Court. The appeals filed by the railway administration were dismissed by the High Court by the impugned order dated 21st March, 2012. The High Court held that railway administration had not questioned the power of the sole arbitrator to award interest. The issue with regard to the award of interest was also not raised before the learned Single Judge. For the first time before the Division Bench, a plea was raised that the award of interest was contrary to Clause No. 2401 of the Indian Railways Standard Conditions of Contract. The Division Bench of the High Court came to the conclusion that the aforesaid clause has no application at all as it applies only to amounts, which have been withheld or retained under lien. The amounts having already been paid were sought to be illegally recovered from the contractors. The sole arbitrator found that such order of recovery can not be sustained in law and the recoveries affected were illegal. The High Court, however, concluded that Clause No. 2401 would have application only in respect of amounts which had not been paid to the contractors. The railway administration can not exercise lien over the amounts already paid to the contractors. Therefore, award of the arbitrator did not suffer from any error apparent. It was further held that the learned Single Judge having upheld the award, the appeals deserve to be dismissed.

8. The appeals having been dismissed, the Union of India has approached this Court in these Civil Appeals.

9. We have heard Mr. Mohan Jain, learned Additional Solicitor General, appearing for the appellants.

10. It is submitted that the only question which arises for consideration of this Court is whether the contractors are entitled to interest for the amount withheld and if so at what rate. The contractors had claimed interest @18 per cent from the date of recovery till payment. Mr. Jain submitted that the High Court has wrongly held that the appellant had no authority to exercise lien on the current payments in relation to the amount already released to the contractors. It is submitted by Mr. Jain that the arbitrator had no authority to award interest in view of the prohibition contained under Section 31(7) of the Arbitration Act, 1996. Learned Additional Solicitor General pointed out that the contract entered into between the parties did not provide for any payment of interest. Mr. Jain also pointed out that under Clause 2403, the railway administration has a lien on all the amounts of money that may be due to the contractors, *in praesenti* or *in the futuro*. Therefore, when the contractors were paid in excess of the amounts actually due, the appellants were fully justified in recovering the amount from the respondents by exercising the *lien* over the future bills in terms of Clause No. 2403. He submits that the sole arbitrator was wholly unjustified in awarding interest, as under Clause No. 2403(b), it is specifically provided that the contractors shall have no claim for interest or damages whatsoever, for the amount so retained even in case the arbitration award or any other legal proceeding subsequently holds that the amount was withheld illegally. Mr. Jain submits that the learned Single Judge erred in holding that the award did not suffer from an error apparent on this short ground. In support of the submission, he relies on judgment of this Court in the case of *Himachal Pradesh Housing and Urban Development Authority & Anr. Vs. Ranjit Singh Rana*[1].

1. (2012) 4 SCC 505.

11. Mr. Jain further submitted that the principal amount awarded was deposited in Court in 2007. This amount was released to the contractors on 24th April, 2011 alongwith the interest, but 30 per cent of the amount was duly withheld. This was in agreement with the respondents. He also pointed out that in fact the recovery of the amount was deferred after discussions with the respondents. In view of the agreements, the respondents had no justification for claiming any interest and the award granting such relief suffer from an error apparent as it was contrary to the contract. In support of this submission, he relies on judgment of this Court in *Sree Kamatchi Amman Construction Vs. Divisional Railway Manager (Works), Palghat & Ors.*[2] He also relied on *Sayeed Ahmed & Company Vs. State of Uttar Pradesh & Ors.*[3] and *Union of India Vs. Krafters Engineering and Leasign Private Limited.*[4]

12. Mr. C.S. Vaidyanathan, learned senior counsel appearing for the respondents, on the other hand, submitted that the payments have been made to the contractors from 1989 till November, 1994. The High Court judgment in the writ petitions challenging the recovery notice were set aside by the High Court. The respondents had agreed to the deduction of 30 per cent only because the contractors required the money for execution of further works. He submitted that the appellants can not possibly be permitted to claim that the respondents had agreed to the deduction of 30 per cent of the amount due. He pointed out that the recovery was made against the supplies made under the agreements of 9th December, 1991 in relation to the contracts which were being performed in the year 1996. In such circumstances, the appellants had no authority to exercise lien on the amounts that accrued due to the works performed subsequent to 9th December, 1991 under Clause(s) 2401 or 2403 of the Contract. Mr. Vaidyanathan emphasized that such recovery of the time barred claims is clearly without

2. (2010) 8 SCC 767.
3. (2009) 12 SCC 26.
4. (2011) 7 SCC 279.

any justification. The appellants having failed to notify that 30 per cent of the amount due had been withheld, the invocation of Clause No. 2401 or 2403 would be wholly illegal. Learned senior counsel further submitted that the appellant can not justify the recovery on the basis of the letter dated 22nd October, 1997 as it was written without prejudice to the rights of the contractors. The counter claims made by the appellant were clearly time barred and hence, disallowed by the sole arbitrator. Mr. Vaidyanathan relied on a Constitution Bench decision of this Court in *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa & Ors. Vs. N.C. Budharaj (Deceased) by LRs. & Ors.*[5] Reliance was also placed upon *Secretary, Irrigation Department, Government of Orissa & Ors. Vs. G.C. Roy*[6] in support of the submission that a person deprived of his money is entitled to be compensated by way of interest, therefore, any provision in the contract which seeks to take away such a right has to be strictly construed. The ratio in the aforesaid judgment has been subsequently reiterated, according to Mr. Vaidyanathan, in the case of *Sree Kamatchi Amman Construction* (supra). Mr. Vaidyanathan submitted that the railway administration had no authority either under Clause 2401 or 2403 of the contract to recover the amounts allegedly overpaid for the work done prior to 1991 from the amounts due to the contractors for the works done subsequently.

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

14. Clause Nos. 2401 and 2403 are as under:-

"**2401.** Whenever any claim or claims for payment of a sum of money arises out of or under the contract against the Contractor, the Purchaser shall be entitled to withhold and also have a lien to retain such sum or sums in whole or in part from the security, if any, deposited by the Contractor

5. (2001) 2 SCC 721.
6. (1992) 1 SCC 508.

and for the purpose aforesaid, the Purchaser shall be entitled to withhold the said cash security deposit or the security, if any, furnished as the case may be and also have a lien over the same pending finalization or adjudication of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the Contractor, the Purchaser shall be entitled to withhold and have lien to retain to the extent of the such claimed amount or amounts referred to supra, from any sum or sums found payable or which at any time-thereafter may become payable to the Contractor under the same contract or any other contract with the Purchaser or the Government pending finalization or adjudication of any such claim.

It is an agreed term of the contract that the sum of money or moneys so withheld or retained under the lien referred to above, by the Purchaser will be kept withheld or retained as such by the Purchaser till the claim arising out of or under the contract is determined by the Arbitrator (if the contract is governed by the arbitration clause) or by the competent court as prescribed under Clause 2703 hereinafter provided, as the case may be, and that the Contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to supra and duly notified as such to the contractor."

"**2403.** Lien in respect of Claims in other Contracts:

(a) Any sum of money due and payable, to the Contractor (including the security deposit, returnable to him) under the contract may withhold or retain by way of lien by the Purchaser or Government against any claim of the Purchaser or Government in respect of payment of a sum of money arising out of or under any other contract made by the Contractor with the Purchaser or Government.

(b) It is an agreed term of the contract that the sum of money so withheld or retained under this clause by the Purchaser or Government will be kept withheld or retained as such by the Purchaser or Government till his claim arising out of the same contract or any other contract is either mutually settled or determined by the arbitrator, if the contract is governed by the arbitration clause or by the competent court under Clause 2703 hereinafter provided, as the case may be, and that the Contractor shall have no claim for interest or damages whatsoever on this account or on any other ground in respect of any sum of money withheld or retained under this clause and duly notified as such to the Contractor."

15. Clause 2401 provides that the railways shall be entitled to withhold and also have a lien to retain any amount deposited as security by the contractor to satisfy any claims arising out of or in the contract. In such circumstances, the railways can withhold the amount deposited by the contractors as security and also have lien over the same pending finalization or adjudication of the claim. In case, the security deposit is insufficient to cover the claim of the railways, it is entitled to withhold and have lien to the extent of the amount claimed from any sum payable for any works done by the contractor thereafter under the same contract or any other contract. This withholding of the money and the exercise of the lien is pending finalization or adjudication of any claim. This clause further provided that the amount withheld by the railways over which it is exercising lien will not entitle the contractor to claim any interest or damages for such withholding or retention under lien by the railways.

16. Clause 2403 again provides that any sum of money due and payable to the contractor under the contract may be withheld or retained by way of lien by th[illegible]or

the Government in respect of payment of a sum of money *arising out of or under any other contract* made by the contractor with the railway authority or the Government.

17. Clause 2403(b) further provides that it is an agreed term of the contract that against the sum of money withheld or retained under lien, the contractor shall have no claim for interest or damages whatsoever provided the claim has been duly notified to the contractor.

18. We are of the opinion that the sole arbitrator in awarding interest to the contractors has failed to take into account the provisions contained in the aforesaid two clauses. We find merit in the submission made by learned Additional Solicitor General that award of interest at-least from the date when the amount was deposited in Court was wholly unwarranted. Therefore, the High Court as well as the arbitrator, in our opinion, have committed an error of jurisdiction in this respect. This view of ours will find support from the judgment of this Court in the case of *Sayeed Ahmed & Company* (supra), wherein it has been held as follows:-

> "**16.** In view of clause (a) of sub-section (7) of Section 31 of the Act, it is clear that the arbitrator could not have awarded interest up to the date of the award, as the agreement between the parties barred payment of interest. The bar against award of interest would operate not only during the pre-reference period, that is, up to 13-3-1997 but also during the pendente lite period, that is, from 14-3-1997 to 31-7-2001."

19. This view has been reiterated by this Court in *Sree Kamatchi Amman Construction* (supra), wherein it has been held as follows:-

> **"19.** Section 37(1) of the new Act by using the words "unless otherwise agreed by the parties" categorically clarifies that the arbitrator is bound by the terms of the contract insofar as the award of interest from the date of cause of action to the date of award. Therefore, where the parties had agreed that no interest shall be payable, the Arbitral Tribunal cannot award interest between the date when the cause of action arose to the date of award."

20. From the aforesaid it becomes apparent that the arbitrator could not have awarded any interest from the date when the recovery was made till the award was made. However, interest would have been payable from the date when the award was made till the money was deposited in the High Court and thereafter converted to fixed deposit receipts. Upon the amount being deposited in the High Court, no further interest could be paid to the respondents.

21. In view of the aforesaid, the appeals are allowed and it is directed that the respondents shall not be entitled to any interest on the amount which was recovered by the appellant, till the date of award and thereafter till the date when the amount awarded was deposited in the High Court, i.e. from 12th July, 1997.

22. The appeals are allowed in the aforesaid terms.

D.G. Appeals allowed.

PHULA SINGH
v.
STATE OF HIMACHAL PRADESH
(Criminal Appeal No. 2271 of 2011)

MARCH 3, 2014

[DR. B.S. CHAUHAN AND J. CHELAMESWAR, JJ.]

PREVENTION OF CORRUPTION ACT, 1988:

ss.7 and 13(2) -- Demand and acceptance of illegal gratification -- Trap laid --Appellant caught red handed -- Acquittal by trial court -- Conviction by High Court and sentence of one year imprisonment with fine -- Held: Appellant has not denied his visit to house of complainant nor has he furnished any explanation in respect of recovery of chemically treated currency notes from his pocket and the test of his fingers being positive --There is no perversity in the judgment of High Court.

CODE OF CRIMINAL PROCEDURE, 1973:

s.313-Power to examine accused -- Held: Accused has a duty to furnish an explanation in his statement u/s 313 regarding any incriminating material that has been produced against him, failing which court would be entitled to draw an adverse inference against him.

APPEAL

Appeal against acquittal -- Power of appellate court -- Held: In exceptional cases where there are compelling circumstances and judgment under appeal is found to be perverse, appellate court can interfere with the order of acquittal.

The appellant a Kanungo, was prosecuted for

committing offences punishable u/ss 7 and 13(2) of the Prevention of Corruption Act, 1988, as he was caught red handed in a trap laid at the instance of the complainant. The trial court acquitted him, but the High Court convicted him of the offences charged and sentenced him to one year RI with a fine of Rs. 10,000/-.

Dismissing the appeal, the Court

HELD: 1. The accused has a duty to furnish an explanation in his statement u/s 313 Cr.P.C. regarding any incriminating material that has been produced against him. If he chooses to maintain silence or even remain in complete denial, the court would be entitled to draw an adverse inference against him as may be permissible under the law. In the instant case, the appellant could not have maintained complete silence particularly, with regard to his visit to the house of the complainant, his fingers test being positive and recovery of chemically treated currency notes of Rs.1,000/- from the pocket of his pant. [para 6, 8 and 9] [555-G-H; 556-E-F, G-H]

Ramnaresh & Ors. v. State of Chhattisgarh, **2012 (3) SCR 630 = AIR 2012 SC 1357;** *Munish Mubar v. State of Haryana,* **2012 (9) SCR 193 = AIR 2013 SC 912; and** *Raj Kumar Singh alias Raju @ Batya v. State of Rajasthan,* **AIR 2013 SC 3150 - relied on.**

2. In exceptional cases where there are compelling circumstances and judgment under appeal is found to be perverse, appellate court can interfere with the order of acquittal. In the instant case, it cannot be said that it was not a fit case where the High Court ought to have reversed the judgment of acquittal. There is no perversity in the judgment of the High Court. [para 9-11] [557-A-C, D]

Case Law Reference:

2012 (3) SCR 630 relied on

2012 (9) SCR 193	**relied on**	**para 8**
AIR 2013 SC 3150	**relied on**	**para 8**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2271 of 2011.

From the Judgment & Order dated 24.08.2011/07.09.2011 of the High Court of Himachal Pradesh at Shimla in Criminal Appeal No. 358 of 2009.

Dinesh Kumar Garg, M.S. Bakshi, L.S. Bakshi for the Appellant.

Promila for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. I. This appeal has been preferred against the impugned judgment and order dated 24.8.2011/ 7.9.2011, passed by the High Court of Himachal Pradesh at Shimla in Criminal Appeal No.358 of 2009 reversing the judgment and order dated 19.2.2009, passed by Ld. Special Judge, Hamirpur in Corruption Case No.1 of 2008 acquitting the appellant from the Charges under Sections 7 and 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as 'the Act'). The High Court has awarded the appellant sentence of one year RI and a fine of Rs.10,000/- and in default of payment of fine to undergo further RI for a period of six months.

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

A. That on 20.6.2007, the appellant was working as Kanungo of the particular area and one Vakil Chand filed a complaint against the father of the complainant that he encroached upon the land thus, asked for demarcation. The appellant investigated the matter and found that one and half kanals of the land of Vikil Chand had been encroached upon by the complainant's father.

B. The complainant raised the objection about this demarcation and at that time the appellant met the complainant at village Kheri and demanded "Chai Pani" to cancel the demarcation report. It was in view thereof that the complainant contacted the appellant on 10.7.2007 on his mobile and the appellant demanded the bribe of Rs.5,000/- from the complainant. The complainant Prabhat Chand lodged an FIR with the Police Station of State Vigilance and Anti-Corruption Department, Hamirpur alleging demand of bribe by the appellant.

C. The appellant informed the complainant that he would visit his residence and he should pay the said amount. In the negotiation the deal was struck to the tune of Rs.1,000/-. The appellant came to the residence of the complainant on 10.7.2007 and demanded the bribe. In view of the complaint already lodged by Prabhat Chand, the trap was laid and the appellant was arrested and after investigating the matter the chargesheet was filed which ultimately culminated into Corruption Case No.1 of 2008 under Sections 7 and 13(2) of the Act. After conclusion of the trial by judgment and order dated 19.2.2009 the Ld. Sessions Judge, Hamirpur acquitted the appellant of all the charges.

D. Aggrieved, the State of Himachal Pradesh filed an appeal which has been allowed vide impugned judgment and order.

Hence, this appeal.

3. Shri D.K. Garg, learned counsel appearing for the appellant has submitted that demarcation had already been made and the report had been submitted before the Tahsildar, therefore, there was no occasion for the appellant to demand any amount. As the complainant's father had encroached upon the land of Vakil Chand to the tune of one and half kanals and the appellant had shown this fact in his report the complainant

was having the grudge against him. Therefore, he has falsely been enroped. The High Court failed to appreciate that there are different parameters to reverse the judgment of acquittal and in this respect failed to apply the law laid down by this Court in a catena of judgments. There is no evidence of demand or acceptance of the bribe. Hence, the appeal deserves to be allowed.

4. Per contra, Ms. Shikha Bhardwaj, learned counsel for the respondent has opposed the appeal contending that there was sufficient material against the appellant on the basis of which the High Court has rightly reversed the acquittal though there was no direct evidence of demand of bribe. The appellant visited the house of the complainant though there was no relationship between the two. He removed his shirt and hanged in the house of the complainant though the money was recovered from the pocket of the pant. After recovery when the hands of the appellant were washed, the same turned pink. Therefore, there was a duty cast upon the appellant to explain all the circumstances while his statement under Section 313 Cr.P.C. was being recorded. The appellant kept mum and did not lead any evidence in defence. The High Court was justified to draw the adverse inference against the appellant in view of the presumption enshrined under Section 20 of the Act. Hence, the appeal is liable to be dismissed.

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

6. The admitted facts remain that the appellant had no relationship or acquaintance with the complainant whatsoever and the appellant failed to furnish any explanation about his visit and staying in the house of the complainant. The appellant has not denied visit to the house of the complainant. More so, he did not furnish any explanation in respect of recovery of Rs.1,000/- from the pocket of his pant nor he could furnish any information as how his fingers turned pink on being washed, with sodium carbonate solution as the currency notes already

found in pocket of his pant had been treated with phenolphthalein. On being washed, part of his pant also turned pink.

Even in the statement under Section 313 Cr.P.C., the appellant answered every question saying "I do not know" or "it is incorrect" but when he was asked as to whether he wanted to say anything else, he answered as under:-

> "I am innocent and Prabhat Chand had lodged a false case against him, because he had encroached the land of Shri Vakil Chand as per his demarcation".

7. We do not find any force in the submission advanced by Shri D.K. Garg that it is the prosecution which has to establish each and every fact and the accused has a right only to maintain silence.

8. The accused has a duty to furnish an explanation in his statement under Section 313 Cr.P.C. regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the court, then the accused may choose to maintain silence or even remain in complete denial when his statement under Section 313 Cr.P.C. is being recorded. However, in such an event, the court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law. (Vide: *Ramnaresh & Ors. v. State of Chhattisgarh,* AIR 2012 SC 1357; *Munish Mubar v. State of Haryana,* AIR 2013 SC 912; and *Raj Kumar Singh alias Raju @ Batya v. State of Rajasthan,* AIR 2013 SC 3150).

9. In the instant case, we fail to understand as under what circumstances the appellant could maintain complete silence particularly, in view of the fact that he did not deny his visit to the house of the complainant or that his shirt was found hanging on the peg in the wall and that his hand[illegible]g

washed with sodium carbonate water. We do not find any force in the submission advanced by Shri D.K. Garg that it was not a fit case where the High Court ought to have reversed the well reasoned judgment of acquittal as it was based on evidence on record.

10. We are fully aware of limitations of the appellate court to interfere with an order of acquittal. In exceptional cases where there are compelling circumstances and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial Court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference.

11. In the instant case, there is no perversity in the judgment of the High Court as it cannot be said that the judgment is not based on evidence or the evidence on record has not properly been re-appreciated by the appellate court, which may warrant interference by this court.

12. In view of the above, the appeal is dismissed. The appellant has been enlarged on bail. The bail bonds are cancelled. He must surrender before the Ld. Special Judge, Hamirpur, Shimla within a period of four weeks, failing which the said Court shall secure his presence and send him to jail to serve the remaining part of the sentence.

A copy of the judgment be sent to the aforesaid learned Court for information and compliance.

R.P. Appeal dismissed.

LALITKUMAR V. SANGHAVI (D) TH. LRS. NEETA LALIT KUMAR SANGHAVI & ANR.

v.

DHARAMDAS V. SANGHAVI & ORS.

(Civil Appeal No. 3148 of 2014)

MARCH 04, 2014

[DR. B.S. CHAUHAN, J. CHELAMESWAR AND M.Y. EQBAL, JJ.]

ARBITRATION AND CONCILIATION ACT, 1996: ss.14, 32 - Termination of arbitration proceedings by arbitrator on the ground that the claimant did not take interest in the matter and did not pay the fees - Fresh application u/s.11 for appointment of arbitrator - Dismissed as not maintainable on the ground that remedy lies in invoking writ jurisdiction and not application u/s.11 - Held: The order by which the Arbitral Tribunal terminated the arbitral proceedings could only fall within the scope of s.32(2)(c) i.e. the continuation of the proceedings has become impossible - By virtue of s.32(3), on the termination of the arbitral proceedings, the mandate of the Arbitral Tribunal also comes to an end - Having regard to the scheme of the Act and more particularly on a cumulative reading of s.32 and s.14, the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the court as provided u/s.14(2) - The apprehension of the appellant that they would be left remediless is without basis in law - The appellants are at liberty to approach the appropriate court for the determination of the legality of the termination of the mandate of the Arbitral Tribunal.

On an application under Section 11 of Arbitration and Conciliation Act, 1996, the Arbitral Tribunal was constituted. On 29.10.2007, the Presiding Arbitrator terminated the arbitration proceedings on the ground that

the claimant did not take interest in the matter and did not pay the fees. The original applicant filed arbitration application for appointment of the arbitrator. The application was held to be not maintainable and it was held that the remedy was filing a writ petition. Aggrieved, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1. Chapter III of the Arbitration and Conciliation Act, 1996 deals with the appointment, challenge to the appointment and termination of the mandate and substitution of the arbitrator etc. Section 11 provides for the various modes of appointment of an arbitrator for the adjudication of the disputes which the parties agree to have resolved by arbitration. Arbitrators could be appointed either by the agreement between the parties or by making an application to the Chief Justice of the High Court or the Chief Justice of India, as the case may be, as specified under Section 11 of the Act. Section 12(3) provides for a challenge to the appointment of an arbitrator on two grounds. They are - (a) "that circumstances exist" which "give rise to justifiable doubts as to" the "independence or impartiality" of the arbitrator; (b) that the arbitrator does not "possess the qualification agreed to by the parties". Section 14 declares that "the mandate of an arbitrator shall terminate" in the circumstances specified therein. Section 14(2) provides that if there is any controversy regarding the termination of the mandate of the arbitrator on any of the grounds referred to in the clause (a) then an application may be made to the Court - "to decide on the termination of the mandate". Section 32 of the Act, on the other hand, deals with the termination of arbitral proceedings. From the language of Section 32, it can be seen that arbitral proceedings get terminated either in the making of the final arbitral award or by an order of the

arbitral tribunal under sub-Section 2. Sub-section (2) provides that the arbitral tribunal shall issue an order for the termination of the arbitral proceedings in the three contingencies mentioned in sub-clauses (a) to (c) thereof. The contingencies are (a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in, obtaining a final settlement of the dispute, (b) the parties agree on the termination of the proceedings, or (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible. [Paras 10, 11, 12 and 13] [565-C-F; 566-B-C, G-H]

1.2. On the facts of the instant case, the applicability of sub-clauses (a) and (b) of Section 32(2) is clearly ruled out and the order by which the Tribunal terminated the arbitral proceedings could only fall within the scope of Section 32, sub-Section (2), sub-clause (c) i.e. the continuation of the proceedings has become impossible. By virtue of Section 32(3), on the termination of the arbitral proceedings, the mandate of the arbitral tribunal also comes to an end. Having regard to the scheme of the Act and more particularly on a cumulative reading of Section 32 and Section 14, the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the court "as provided under Section 14(2). [Para 14] [567-A-C]

2. The apprehension of the appellant that they would be left remediless is without basis in law. The appellants are at liberty to approach the appropriate court for the determination of the legality of the termination of the mandate of the arbitral tribunal which in turn is based upon the order by which the arbitral proceedings were terminated. [Paras 16 and 17] [567-F-G]

S.B.P. & Co. v. Patel Engineering Ltd. **(2005) 8 SCC 618: 2005 (4) Suppl. SCR 688 - relied on.**

Case Law Reference:

2005 (4) Suppl. SCR 688 Relied on Para 8

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3148 of 2014.

From the Judgment & Order dated 24.09.2010 of the High Court of Bombay in AA No. 44 of 2008.

Shyam Divan, Nirman Sharma, Manasi Kumar, Mahesh Agarwal, Rishi Agarwala, E.C. Agrawala, Manisha Ambwani for the Appellant.

C.U. Singh, Gopal Singh, Satyan Vaishnav, R.S. Bobde, Pallavi Sharma (for Parekh & Co.) for the Respondents.

The Judgment of the Court was delivered by

J. CHELAMESWAR, J. 1. Aggrieved by an order dated 24th September, 2010 in Arbitration Application No. 44/2008 on the file of the High Court of Bombay, the instant SLP is filed by the two children of the applicant (hereinafter referred to as "the original applicant") in the above mentioned application. The SLP is filed with a delay of 717 days. Therefore, two IAs came to be filed, one seeking substitution of the legal representatives of the deceased appellant and the other for the condonation of delay in filing the SLP.

2. The 1st respondent is the brother of the original appellant and the other respondents are the children of another deceased brother of the original applicant. Respondents are served and they have contested both the IAs.

3. Accepting the reasons given in the applications, we deem it appropriate to condone the delay in preferring the instant SLP and also substitute the original appellant (since deceased) by his legal representatives. Both the IAs are allowed. Delay condoned. Substitution allowed. Leave

granted.

4. The undisputed facts are that the parties herein are carrying on some business in the name and style of a partnership firm constituted under a partnership deed dated 20th October 1962. The partnership deed provided for the resolution of the disputes arising between the partners touching the affairs of the partnership by means of an arbitration. In view of certain disputes between the partners (details of which are not necessary for the present purpose) the original applicant filed arbitration application No.263/2002 under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act', for short) before the Chief Justice of the Bombay High Court which was disposed of by an order dated 21st February, 2003 by a learned Judge of the Bombay High Court, who was the nominee of the Chief Justice under the Act. The relevant portion of the order reads as follows:

> "Considering that applicant respondent No.1 have appointed two arbitrators, Justice H. Suresh, Retired Judge of this Court is appointed as presiding arbitrator. The arbitral tribunal so constituted to decide all disputes including claims and counter claims of the parties arising from the controversy. In case respondents do not cooperate with the matter of appointment of third arbitrator, applicant initially to bear the made part of final award in the position, application disposed of accordingly."

5. By his order dated 29th October, 2007, the presiding arbitrator informed the appellants that the arbitration proceedings stood terminated. The relevant portion of the order reads as follows:

> "The matter is pending since June, 2003 and though the meeting was called in between June, 2004 and 11th April, 2007, the Claimant took no interest in matter. Even the fees directed to be given is not paid.

In these circumstances please note that the arbitration proceedings stands terminated. All interim orders passed by the Tribunal stand vacated."

6. In response to the said communication, the original applicant, through his lawyer, communicated to the arbitrators and also the advocates of the respondents herein that the order of the arbitrators dated 29th October, 2007 does not reflect the true factual position of the matter. The relevant portion of the letter reads as follows:

"The Hon'ble Arbitral Tribunal is therefore requested to kindly revoke the said letter dated 29th October 2007 and modify the same and kindly record that the proceedings are being terminated due to non compliance of orders/directions as also non payment of fees and charged by the Respondent No.1"

7. On 17.1.2008, the original applicant filed arbitration application No.44/2008 with prayers (insofar as they are relevant for the present purpose) as follows:

(a) this Hon'ble Court be pleased to appoint some fit and proper person as arbitrator for entering reference and adjudicating upon the disputes in respect of M/s. Sanghavi Brothers.

(b) the Respondent No.1 to 4 be directed to deposit a sum of Rs.1,00,000/- towards costs of arbitration and fees of the Arbitrator."

That application came to be dismissed by the order under appeal in substance holding that such an application invoking Section 11 of the Act is not maintainable - with an observation that "the remedy of the application is by filing a writ petition not an application under Section 11 of the Act".

8. Within a couple of weeks thereafter, the original

applicant died on 7.10.2012. The question is whether the High Court is right in dismissing the application as not maintainable. By the judgment under appeal, the Bombay High Court opined that the remedy of the appellant lies in invoking the jurisdiction of the High Court under Article 226 of the Constitution. In our view, such a view is not in accordance with the law declared by this Court in *S.B.P. & Co. v. Patel Engineering Ltd.*, (2005) 8 SCC 618. The relevant portion of the judgment reads as under:

"45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible."

That need not, however, necessarily me[illegible]n

such as the one on hand is maintainable under Section 11 of the Act.

9. Learned senior counsel for the appellants, Shri Shyam Divan, submitted that if application under Section 11 is also held not maintainable, the appellants would be left remediless while their grievance subsists. On the other hand, learned senior counsel for the respondents Shri C.U. Singh submitted that the appellant's only remedy is to approach the arbitral tribunal seeking a recall of its decision to terminate the arbitration proceedings.

10. Chapter III of the Act deals with the appointment, challenge to the appointment and termination of the mandate and substitution of the arbitrator etc. Section 11 provides for the various modes of appointment of an arbitrator for the adjudication of the disputes which the parties agree to have resolved by arbitration. Broadly speaking, arbitrators could be appointed either by the agreement between the parties or by making an application to the Chief Justice of the High Court or the Chief Justice of India, as the case may be, as specified under Section 11 of the Act. Section 12(3) provides for a challenge to the appointment of an arbitrator on two grounds. They are - (a) "that circumstances exist" which "give rise to justifiable doubts as to" the "independence or impartiality" of the arbitrator; (b) that the arbitrator does not "possess the qualification agreed to by the parties". Section 14 declares that "the mandate of an arbitrator shall terminate" in the circumstances specified therein. They are-

> "14. Failure or impossibility to act.—(1) The mandate of an arbitrator shall terminate if—
>
> (a) he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay; and

> (b) he withdraws from his office or the parties agree to the termination of the mandate."
>
> (2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate."

11. Section 14(2) provides that if there is any controversy regarding the termination of the mandate of the arbitrator on any of the grounds referred to in the clause (a) then an application may be made to the Court – "to decide on the termination of the mandate".

12. Section 32 of the Act on the other hand deals with the termination of arbitral proceedings[1].

13. From the language of Section 32, it can be seen that arbitral proceedings get terminated either in the making of the final arbitral award or by an order of the arbitral tribunal under sub-Section 2. Sub-section (2) provides that the arbitral tribunal shall issue an order for the termination of the arbitral proceedings in the three contingencies mentioned in sub-clauses (a) to (c) thereof.

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1. Section 32 - Termination of proceedings.

(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub- section (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where-

(a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in, obtaining a final settlement of the dispute,

(b) the parties agree on the termination of the proceedings, or

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other mason become unnecessary or impossible.

(3) Subject to section 33 and sub- section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.

14. On the facts of the present case, the applicability of sub-clauses (a) and (b) of Section 32(2) is clearly ruled out and we are of the opinion that the order dated 29th October, 2007 by which the Tribunal terminated the arbitral proceedings could only fall within the scope of Section 32, sub-Section (2), sub-clause (c) i.e. the continuation of the proceedings has become impossible. By virtue of Section 32(3), on the termination of the arbitral proceedings, the mandate of the arbitral tribunal also comes to an end. Having regard to the scheme of the Act and more particularly on a cumulative reading of Section 32 and Section 14, the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the court "as provided under Section 14(2)".

15. The expression "Court" is a defined expression under Section 2(1)(e) which reads as follows:-

> "Section 2(1)(e) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not- include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;"

16. Therefore, we are of the opinion, the apprehension of the appellant that they would be left remediless is without basis in law.

17. The appellants are at liberty to approach the appropriate court for the determination of the legality of the termination of the mandate of the arbitral tribunal which in turn is based upon an order dated 29th October, 2007 by which the arbitral proceedings were terminated.

18. The appeal is dismissed.

D.G. Appeal dismissed.

RUPAK KUMAR

v.

STATE OF BIHAR & ANR.

(Criminal Appeal Nos. 541-542 of 2014)

MARCH 04, 2014

[CHANDRAMAULI KR. PRASAD AND PINAKI CHANDRA GHOSE, JJ.

CODE OF CRIMINAL PROCEDURE, 1973: s.482 - Quashing of criminal proceedings - Food inspector found the articles stored for consumption of prisoners in the jail premises to be adulterated - Case registered against the Superintendent of Jail u/s.16(1)(a) of Prevention of Food Adulteration Act, 1954 - Petition for quashing of issuance of summons - High Court dismissed the petition - Held: s.7 prohibits a person to manufacture for sale or store, sell or distribute any adulterated food - Contravention of s.7 by any person is punishable u/s.16 - Expression 'store' as used in s.7 and s.16 means storage of adulterated article of food for sale - Storage of adulterated article other than for sale does not come within the mischief of s.16 of the Act - Therefore, criminal proceedings quashed - Prevention of Food Adulteration Act, 1954 - s.16.

The appellant was posted as Superintendent of District Jail. Food Inspector visited the jail premises and collected samples of various materials including Haldi and Rice. Those articles were stored for consumption of the prisoners. The Public Analyst held these samples to be adulterated. A case was registered against the appellant under Section 16 of the Prevention of Food Adulteration Act, 1954. The Magistrate took cognizance of offence under Section 16(1)(a) of the Act and directed issuance of process. The revision petitions thereagainst were dismissed. Thereafter, the appellant filed applications

under Section 482, Cr.P.C. for quashing of proceedings. The High Court dismissed the applications. Hence, the instant appeals.

Allowing the appeals, the Court

HELD: 1. Section 7 of the Prevention of Food Adulteration Act, 1954 prohibits a person to 'manufacture for sale' or 'store' or 'sell' or 'distribute', inter alia, any adulterated food. Contravention of Section 7 by any person is punishable under Section 16 of the Act. Section 10 of the Act talks about the power of Food Inspector and under this Section, he is empowered to take sample of any article of food from any person selling such article. A conjoint reading of provisions makes it clear that the Food Inspector has the power to take sample of any article of food from any person selling such article under sub-section (1) whereas sub-section (2) confers on him the power to enter and inspect any place where any article of food is manufactured, stored or exposed for sale and take samples of such articles of food for analysis. Section 16 provides for penalties. According to section 16(1), any person, who by himself or by any other person on his behalf, manufactures for sale or stores or sells any adulterated article is liable to be punished. In the instant case, according to the prosecution, the appellant, a Superintendent of Jail, had stored Rice and Haldi and, therefore, his act comes within the mischief of Section 7 and 16 of the Act. In view of the said, what needs to be decided is as to whether the expression 'store' as used in Section 7 and Section 16 of the Act would mean storage simplicitor or storage for sale. Conjoint reading of Section 7, Section 10 and Section 16 of the Act shows that the Act is intended to prohibit and penalise the sale of any adulterated article of food. The term 'store' shall take colour from the context and the collocation in which it occurs in Section 7 and 16 of the Act. Applying the

aforesaid principle, 'storage' of an adulterated article of food other than for sale does not come within the mischief of Section 16 of the Act. [Para 6, 7, 9] [572-H; 573-A-B; 574-B-D, H; 575-A-D]

Municipal Corporation of Delhi v. Laxmi Narain Tandon, **(1976) 1 SCC 546 - relied on.**

2. In the case in hand, it is not the allegation that the appellant had stored adulterated food article (Haldi and Rice) for sale. The allegations made did not constitute any offence and, hence, the prosecution of the appellant for an offence under Section 16(1)(a) of the Act would be an abuse of the process of the Court. The appellant's prosecution in both the cases is quashed. [Para 10, 11] [575-G-H; 576-A-B]

Case Law Reference:

(1976) 1 SCC 546	**relied on**	**Para 9**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 541-542 of 2014.

From the Judgment & Order dated 3.1.2011 of the High Court of Patna in CRLM No. 15471 and 15527 of 2010.

Nagendra Rai, Shantanu Sagar, Smarhar Singh, Gopi Raman (for T. Mahipal) for the Appellant.

Chandan Kumar (for Gopal Singh), Samil Ali Khan for the Respondents.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. The petitioner is aggrieved by the order whereby his prayer for quashing the order taking cognizance under Section 16(1)(a) of the Prevention of Food Adulteration Act and issuing process has been declined.

2. Short facts giving rise to the present special leave petitions are that when the petitioner was posted as the Superintendent of District Jail, Bihar Sharif, the Food Inspector visited the jail premises and collected samples of various materials including Haldi and Rice. Those articles were stored for consumption of the prisoners. The samples so collected were sent for examination and analysis and, according to the report of the Public Analyst, Haldi and Rice were not found in conformity with the prescribed standard and, therefore, held to be adulterated. Accordingly, two separate prosecution reports were submitted alleging commission of an offence under Section 16 of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as 'the Act'). The learned Chief Judicial Magistrate took cognizance of the offence under Section 16(1)(a) of the Act and by order dated 18th of March, 2006 directed for issuance of process in both the cases. The petitioner assailed both the orders in separate revision applications filed before the Sessions Judge; but both were dismissed. Thereafter, the petitioner preferred two separate applications, being Criminal Miscellaneous No. 15527 of 2010 and Criminal Miscellaneous No. 15471 of 2010 under Section 482 of the Code of Criminal Procedure before the High Court. The High Court, by the orders impugned in the present special leave petitions, has dismissed both the criminal miscellaneous applications. It is in these circumstances the petitioner has filed the present special leave petitions.

3. Leave granted.

4. Mr. Nagendra Rai, senior counsel appearing on behalf of the appellant raises a very short point. He submits that the appellant at the relevant time was the Superintendent of Jail and food items which have been found to be adulterated were not stored for sale but were meant for consumption of the inmates. He submits that according to the prosecution report, these food items were not stored for sale and, therefore, the allegations made do not come within the mischief of Section

16(1)(a) of the Act.

5. We have bestowed our consideration to the submission advanced and we find substance in the same. Section 7 of the Act, inter alia, prohibits manufacture and sale of certain articles of food, the same reads as follows:

> **"Section 7. Prohibitions of manufacture, sale, etc. of certain articles of food. –** No person shall himself or by any person on his behalf manufacture for sale, or store, sell or distribute-
>
> (i) any adulterated food;
>
> (ii) any misbranded food;
>
> (iii) any article of food for the sale of which a licence is prescribed, except in accordance with the conditions of the licence;
>
> (iv) any article of food the sale of which is for the time being prohibited by the Food (Health) Authority in the interest of public health;
>
> (v) any article of food in contravention of any other provision of this Act or of any rule made thereunder; or
>
> (vi) any adulterant.
>
> Explanation-For the purposes of this section, a person shall be deemed to store any adulterated food or misbranded food or any article of food referred to in clause (iii) or clause (iv) or clause (v) if he stores such food for the manufacture therefrom of any article of food for sale."

6. From a plain reading of the aforesaid provision, it is evident that Section 7 prohibits a person to 'manufacture for sale' or 'store' or 'sell' or 'distribute', inter alia, any adulterated food. Contravention of Section 7 by an[illegible]e

under Section 16 of the Act. Section 10 of the Act talks about the power of Food Inspector and under this Section, he is empowered to take sample of any article of food from any person selling such article. It is apt to reproduce Section 10(1) and 10(2), which read as follows:

"**Section 10. Powers of food inspectors.** - (1) A Food Inspector shall have power-

(a) to take samples of any article of food from-

(i) any person selling such article;

(ii) any person who is in the course of conveying, delivering or preparing to deliver such article to a purchaser or consignee;

(iii) a consignee after delivery of any such article to him; and

(b) to send such sample for analysis to the public analyst for the local area within which such sample has been taken;

(c) with the previous approval of the Local (Health) Authority having jurisdiction in the local area concerned, or with the previous approval of the Food (Health) Authority, to prohibit the sale of any article of food in the interest of public health.

Explanation-For the purposes of sub-clause (iii) of clause (a), "consignee" does not include a person who purchases or receives any article of food for his own consumption.

(2) Any food inspector may enter and inspect any place where any article of food is manufactured, or stored for sale, or stored for the manufacture of any other article of food for sale, or exposed or exhibited for sale or where

any adulterant is manufactured or kept, and take samples of such article of food or adulterant for analysis:

Provided that no sample of any article of food, being primary food, shall be taken under this sub-section if it is not intended for sale as such food."

7. A conjoint reading of the aforesaid provisions makes it clear that the Food Inspector has the power to take sample of any article of food from any person selling such article under sub-section (1) whereas sub-section (2) confers on him the power to enter and inspect any place where any article of food is manufactured, stored or exposed for sale and take samples of such articles of food for analysis. Section 16 provides for penalties. Section 16(1)(a)(i) and 16(1)(a)(ii), which are relevant for the purpose read as follows:

"**Section 16. Penalties.** -(1) Subject to the provisions of sub-section (IA) if any person-

(a) whether by himself or by any other person on his behalf, imports into India or manufactures for sale or stores, sells or distributes any article of food—

(i) which is adulterated within the meaning of sub-clause (m) of clause (ia) of section 2 or misbranded within the meaning of clause (ix) of that section or the sale of which is prohibited under any provision of this Act or any rule made thereunder or by an order of the Food (Health) Authority;

(ii) other than an article of food referred to in sub-clause (i), in contravention of any of the provisions of this Act or of any rule made thereunder ; or

xxx xxx xxx"

8. According to this section any person, who by himself or by any other person on his behalf, ma or

stores or sells any adulterated article is liable to be punished.

9. In the present case, according to the prosecution, the appellant, a Superintendent of Jail, had stored Rice and Haldi and, therefore, his act comes within the mischief of Section 7 and 16 of the Act. In view of the aforesaid, what needs to be decided is as to whether the expression 'store' as used in Section 7 and Section 16 of the Act would mean storage simplicitor or storage for sale. We have referred to the provisions of Section 7, Section 10 and Section 16 of the Act and from their conjoint reading, it will appear that the Act is intended to prohibit and penalise the sale of any adulterated article of food. In our opinion, the term 'store' shall take colour from the context and the collocation in which it occurs in Section 7 and 16 of the Act. Applying the aforesaid principle, we are of the opinion, that 'storage' of an adulterated article of food other than for sale does not come within the mischief of Section 16 of the Act. In view of the authoritative pronouncement of this Court in the case of *Municipal Corporation of Delhi v. Laxmi Narain Tandon,* (1976) 1 SCC 546, this submission does not need further elaboration. In the said case it has been held as follows:

> "**14**. From a conjoint reading of the above referred provisions, it will be clear that the broad scheme of the Act is to prohibit and penalise the sale, or import, manufacture, storage or distribution for sale of any adulterated article of food. The terms "store" and "distribute" take their colour from the context and the collocation of words in which they occur in Sections 7 and 16. "Storage" or "distribution" of an adulterated article of food for a purpose other than for sale does not fall within the mischief of this section……"

10. In the case in hand, it is not the allegation that the appellant had stored Haldi and Rice for sale. Therefore, in our opinion, the allegations made do not constitute any offence

and, hence, the prosecution of the appellant for an offence under Section 16(1)(a) of the Act shall be an abuse of the process of the Court.

11. In the result we allow these appeals, set aside the impugned orders and quash the appellant's prosecution in both the cases.

D.G. Appeals allowed.