COMPILATION OF JUDGMENT NOTES

LIST OF SOME CASES WHICH CAN BE GROUPED TOGETHER:

I. **Basic Structure cases:** Item 1, 3, 8, 23, 33 (RTE Act does not alter basic structure), 36
II. **Other aspects of basic structure:** Item 6 (challenge to 10th schedule on the basis of violation of basic structure - taking away the power of judicial review) and 59 (Speaker failing to exercise powers in reasonable time)
III. **Article 21:** Item 2 (impounding of passport - article 14, 19 and 21 interplay), 17 (Speedy trial and speedy justice), 26 (Narco-analysis and right against self-incrimination) and 44 (right to die with dignity)
IV. **Right of Privacy**: Item 32, 43, 47 (striking of S.377 IPC) and 48
V. **Power of Supreme Court to correct its own mistake and also curative power:** Item 5 (Correction of error) and 15 (Curative power)
VI. **Power of Court to legislate/give directions to fill up the lacuna where there is no legislation (Honouring International Conventions):** Items 11 (Directions in respect of arrest and interrogation), 13 (Directions regarding Sexual harassment in workplace) and 46 (directions in regard to Honour Killing)
VII. **Tribunalization - Independence of judiciary:** Item 9, 55 and 64
VIII. **Right of admission and fees fixation of private unaided institutions:** Items 18 and 19
IX. **Criminal Law - Essential Principles - Appreciation of Circumstantial Evidence:** Item 4
X. **FIR - when and how to register - Principles:** Item 31
XI. **Arrest, Custodial Torture and Custodial Interrogation - No directions by the court to legislature but court directions issued:** Item No. 11 and 54
XII. **Principles in grant of Anticipatory Bail:** Item 60

1. SHARAD BIRDHICHAND SARDA V. STATE OF MAHARASHTRA, (1984) 4 SCC 116

(Before S. Murtaza Fazal Ali, A. Varadarajan & Sabyasachi Mukharji, JJ) *Date: 19.07.1984*

Paras 1-182 - S.Murtaza Fazal Ali.

Paras 183-210 - Varadarajan, J (Concurring)

Para 211-219 - Sabyasachi Mukharji (Concurring)

FACTS:

The Accused/Appellant (Sharad) and the deceased (Manju) got married on 11.02.1982 and deceased immediately started residing with the Appellant in Takshila Apartments Pune. She found that the treatment of her husband and his parents towards her was cruel and harsh. She kept hoping and was always willing to forgive and forget. She complained "she was treated in her husband's house as a labourer or as an unpaid maidservant". She was made to do all sorts of odd jobs and despite her protests to her husband nothing seems to have happened. She seldom complained this to her parents or her husband except sometimes. On finding things unbearable she did protest and expressed her feelings in clearest possible terms, in a fit of utter desperation and frustration, that he hated her. She narrated her woeful tale to her sister Anju in letters where she took abundant caution of requesting Anju not to reveal her said plight to her parents lest they may get extremely upset, worried and distressed.

Manju was called to one Pearl Hotel on 17.03.1982 by her husband where he introduced her to one Ujvala and told her that she must act according to the dictates and orders of Ujvala, if she wanted to lead a comfortable life with her husband. She then left for her maternal home and came back to Pune. This happened a couple of times. When for the last time she was at her parent's house she was called by her father-in-law because the betrothal ceremony of Shobha (Appellant's sister) was going to be held on 13.06.1982.

When Manju, accompanied by Anuradha (Wife of A-2) and her children returned to the flat on 11.06.1982 near about 11 p.m. Appellant was not in the apartment at that time and returned soon after and administered her potassium cyanide, as alleged by the prosecution. She was found dead in her bed on the morning of 12.06.1982, nearly four months after her marriage. As to the cause of death, there appears to be a very serious divergence between the prosecution version (murder) and the defence case (suicide). Doctors were called and apprehending unnatural death, body was sent for postmortem.

FINDINGS OF HC AND TC:

Both the High Court and the Trial Court rejected the theory of suicide and found that Manju was murdered by her husband, the Appellant by administering her a strong dose of potassium cyanide and relied on the medical evidence as also that of a chemical examiner to show that it was a case of pure and simple homicide rather than that of suicide as alleged by the defence. The HC while confirming the judgment of the TC affirmed the death sentence and hence SLP was filed.

DISCUSSION ON DIFFERENT ASPECTS:

Para 10- Law regarding the nature and character of proof of circumstantial evidence settled by several authorities. Locus classicus - ***Hanumant v. State of Madhya Pradesh AIR 1952 SC 343; 1952 SCR 1091 -*** *"Circumstances should be of a conclusive nature"*

Ratan Gond v. State of Bihar - *Section 32 Evidence Act- statements made by persons as to the cause of death.*

Arguments of Mr. Jethmalani for the Appellant:

- *Strong possibility of the deceased having committed suicide due to the circumstances mentioned in her own letters.* ***Para 10***
- *Questioned the legal admissibility of the statements contained in the written and oral dying declarations.* ***Para 10***
- *So-called dying declarations are admissible neither under Section 32 nor under Section 8 of the Evidence Act.* ***Para 10***
- *Present Case not at all covered by clause (1) of Section 32 of Evidence Act.* ***Para 10***

Leading decisions on Circumstances and Section 32 - ***Pakala Narayana Swami v. Emperor*** *(where Lord Atkin has laid down few tests for circumstances for cause of death)****; Shiv Kumar v. State of U.P.; Manohar Lal v. State of Punjab; Onkar v. State of M.P.; Allijan Munshi v. State; Chinnavalayan v. State of Madras; Gokul Chandra Chatterjee v. State - Para 11 - 15***

Para 16-17 - Gokul Chandra Chatterjee v. State - Calcutta HC - *Not good law. HC not properly interpreted the tenor and spirit of ratio laid down by Privy Council.*

Para 18 - Distinction between Indian and English law on the question fo the nature and scope of dying declaration (English law - where only the statements which directly relate to the cause of death are admissible). Second part of Sec.32(1) viz "the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question" is not to be found in the English law. This distinction clearly pointed out in - ***Rajindra Kumar v. State -*** *In English Law the declaration should have been made under the sense of impending death whereas under the Indian Law it is not necessary for the admissibility of a dying declaration that the deceased at the time of making it should have been under the expectation of death. (Also see* ***State v. Kanchan Singh - Para 19).*** *Futile to refer to English Cases on the subject* ***Para 20.***

Para 21 - *Propositions emerging from the review of all the authorities cited and language of Sec.32(1).*

Para 22: *Close consideration of contents of letters written by Manju to her sister and friend for purpose of finding out her mental and psychological attitude, her attitude towards her husband, the amount of tension and frustration which seems to be expressed in letters and her personal traits and psychological approach to life to determine if she was capable or prone to committing suicide.*

<u>Interpretation of letters by Manju:</u>

Para 23-32 - Letter dt.08.05.1982 (Ex.30) addressed to her sister Anju concludes that she was highly emotional and sensitive woman, she got shock of her while due to ill-treatment by her husband and in-laws thus, depressed and disappointed woman, constantly ill-treated and her position in house was nothing but an unpaid maidservant. Also, she wanted to keep all her troubles and worries to herself and not disclose to her parents or sister, lest they also get depressed and distressed. No serious allegation of cruelly had been made and she thought that she herself should suffer out of sheer frustration.

Para 33-35 - Letter ***dt.08.08.1982 (Ex.32)*** by Manju to her sister Anju. Perhaps last letter to Anju and very important for decision of case. - depicts her real feeling and perhaps a tentative decision which she may have already taken but did not want to disclose for obvious reasons.

Para 36-39 - Letter ***dt.23.04.1982 (Ex.33)*** by Manju to her friend Vahini which shows her exact feelings, changing mood and emotions. Only letter where she made clear complaints against her husband. Letter reveals that after going to marital home, she felt completely lost and took even minor things to her heart and on the slightest provocation she became extremely sentimental and sensitive, exhibited mixed feelings of optimism and pessimism at the same time. Although no serious allegation against husband but sad because she was not getting proper attention. No indication that she expected any danger from her husband. Last few lines she said that she might not be alive.

Para 40 & 41- From the lettes, clear possibility and a tendency on her part to commit suicide due to desperation and frustration. Tired of married life but hoped that the situation would improve. Possibility of her committing suicide cannot be safely concluded or eliminated. Possible that husband murdered her. Benefit should go to accused. Referred to passages of ***Robert J. Kastenbaum,*** eminent psychiatrist from his book - ***Death, Society and Human Experience*** wherein he analyses causes, circumstances, emotions and mood which may drive a person to commit suicide - a person suffering from depression and frustration more prone to commit suicide than any other person - Completely applicable to present case. She was sensitive, unhappy, lonely. Letters show constant conflict between her mind and body.

Para 42-45 - Book ***Melancholy Marriage by Mary K. Hinchliffe, Douglas Hooper and F. John Robers. -*** *Studies of attempted suicide cases have revealed high incidence of marital problems which lie behind the act - depression, hopelessness - ruptured relationships played a major part.* Observations mentioned in this book aptly and directly apply to the nature of mood and circumstances of unfortunate life of Manju which came to end within 4 months of marriage.

Para 46- Pointed out circumstances because HC ruled out the possibility of suicide.

<u>ORAL DYING DECLARATION BY MANJU</u>

Para 47-48- Oral dying declaration given by Manju to her close people - General tendency of witnesses who were in close relationship with her tend to exaggerate or add facts which may not have stated due to love and affection. Such exaggeration done unintentionally - human psychology and no one can help it.

Courts must examine such evidence with very great care and caution. Even if witness speaking a part of truth or perhaps the whole of it, it would be guided by spirit of revenge against accused person.

Para 49 - Narrations of troubles by Manju made only during her last visit - alleged by Rameshwar Chitlange (Manju's father -PW2), Rekha (Manju's friend and referred to as 'Vahini' in letter - PW3), Anju (Manju's sister - PW6). Evidence by Bai (Manju's mother - PW5) is of no credence because 1. she does not figure anywhere in any of the letters written by Manju and 2. nothing was told to her by Manju directly but merely informed by PW2.

EVIDENCE BY PROSECUTION WITNESSES:

Para 50-63 - Evidence of PW2- Manju's father. - She was not very happy. But even after hearing his daughter's plight, he asked her to get herself adjusted to new home. He told grievance to accused/appellant's father who told his son but doesn't seem to have seriously impacted him - Might be merely he did not want to react infront of his father-in-law and cannot conclude that he desired to take her life.

Further stated that she was weeping every now and then. When she had come to Beed at her parent's house, she was totally disturbed and frightened. Her father-in-law came to receive her on 02.06.1982. When they were talking, she was standing at the stairs and called her father and expressed her fear of not going back with him. And when after the meals, they left for Pune, she was continuously crying right from inside the house till the bus left. She was in state of extreme fear. Difficult to believe this part of testimony for following reasons:

- When two elders talking, how will she call her father and tell him about her not wanting to go. Moreover, in her letters, she had requested that her parents should not be informed of her plight. This conduct appears to be directly opposed not only to the tenor & spirit of the letters but also against her mental attitude and noble nature.
- She was aware of her sister-in-law's betrothal ceremony and if she was not willing to go, she wouldn't have went at all. Also, she was making arrangements for the function. It is extremely difficult for a person to change particular bent of mind or a trait of human nature unless there are compelling circumstances to do so. No such circumstances here.

Further the witness stated that upon her death when he went to accused's house in Pune, he found accused lying/sleeping on bed and upon seeking him, accused started crying vigorously and told that the night before they had most enjoyable sexual act. However, on her usual time at 5:30, Manju did not wake up and he found her dead. Not credible because he jumped at conclusion that he was fake crying. Also, he would not have been so frank with his father-in-law about the sexual activity - ***clearly shows that witness was extremely prejudiced against sharad/accused.***

Correct statement that he was aware that letters were sent by Manju to Anju and Rekha and he does not know the contents because it was specifically requested by Manju in the letters.

Para 64-66 - Great reliance placed by Addl. Solicitor General on behalf of resp. on relevance of statements of PW 2, 3, 6 and 20 for two purposes - primary evidence of what they saw with their eyes and felt the mental agony and distress of Manju and secondly, relied for statements meted out to her by her husband during her stay at Pune and furnishes clear motive for accused to murder her.

As regard the first part, no doubt that undoubtedly admissible as revealing the state of mind of deceased. As regard the second aspect, it would be admissible u/S.32 as relating circumstances that led to her death. No doubt that these statements would fall in second part of Sec.32 relating directly to transaction resulting in her death and would be admissible. However, before examining this aspect, character, temperament and conduct of Manju from her letters is imp. These letters demonstrate that it is most unlikely, if not impossible, for Manju to have related in detail the facts which the aforesaid witnesses deposed. If this conclusion is correct, then no reliance can be placed on this part of the statement of aforesaid witnesses.

Para 67-72 - Testimony of PW 20 - Manju's mother. Most of the testimony similar to that of PW2. Only relevant is that she stated that Manju was cheerful and happy during her visit for 8-10 days. However, later on she contradicted by saying that Manju complained about her husband not taking interest in her. Whatever Manju said does not appear to be of any consequence because the witness herself admits that

she did not take it seriously and told Manju that she might take some time to acclimatise herself with the new surroundings.

She further stated that when they went to Pune, they stayed at her brother's place when Manju hugged at her neck and having lost her control, started weeping profusely and requested to take her to Beed as it was not possible for her to stay in marital house where she was not only bored but extremely afraid and scared. Manju's mother convinced her that there was nothing to worry and everything will be alright. Witness narrated facts to her husband and he requested appellant's father to allow her to come to Beed. Details about the sufferings and mental condition of Manju were not mentioned by this witness even to her husband as he does not say anything about this matter. Her statement is frighfully vague.

Also contradictory to letters of Manju to have narrated her tale of woe to her mother on the occasion of death of her grandfather-in-law. When Manju went to Beed, was accompanied by her cousin Kavita and therefore, she was not able to talk to her mother. In absence of Kavita, she told her mother that she was receiving a very shabby treatment from her husband and narrated two incidents: 1. She found love letter by Ujvala and 2. On one occasion, appellant told Manju that he was tired of his life and did not want to live anymore and commit suicide. When Manju asked for the reason, he did not give any so she volunteered for committing suicide. He put forth a proposal that both of them will commit suicide leaving a note behind. Manju denied to this by stating that she did not want to commit suicide and had not lost hope in life. Accused prepared two notes. But witness failed to tell what happened to those notes. This testimony is hard to believe having regard to temperament of Manju as on one breath she agreed to suicide pact and next moment she made a complete volte-face. Nothing but fairy tale and to castigate appellant for his shabby treatment towards Manju.

Para 73-78 - Testimony not believable because if PW2 (her father) knew about her plight, he would have spoken to her father-in-law about her fear. Moreover, he would not have sent her to go to Pune where accused was bent on forcing her to commit suicide or even murder as PW20 admitted that she learnt these things from Manju and informed her husband. Story about Manju and Ujvala's encounter is unbelievable because Manju's mother stated that Manju had mentioned about invitation by the appellant to Hotel Pearl with one Shobha who was not available and when Manju went alone, whe was introduced with Ujvala and she told Manju that he was a short-tempered man and they were in love. Manju resisted by stating that she was his lawfully wedded wife. This story is not believable because if appellant wanted to insult Manju, he would not have invited Shobha to make it public. Also, if Manju's parents were aware of her fear, they would not have asked her to go with appellant's father. Evidence of her parents PW2 and PW20 is not credible.

Para 79-81- testimony of Anju, PW6 Manju's sister - Testimony more or less similar to Manju's mother. When Manju's father in law had come, there were other two people present. Her father told her father in law that she was not prepared to go with him. Manju's father not that foolish to let the secret matters of the house known to others thann the parties concerned. Anju proved the letters. When she was asked that Manju told you not to disclose to her parents, why would Manju disclose it to them, no satisfactory answer was received. She stated that she did not disclose any information to anyone and she did not ask Manju why she was disclosing these things to her mother. Her evidence taken as whole is infirmity as that of PW20 and must suffer the same fate.

Para 82-85- Testimony of Rekha PW3 (Vahini)- Stated that she travelled with Manju, she narrated her story of suicidal pact and broke down. Evidence is clear pointer to the frame of mind and psychotic nature of Manju. Manju's feelings of death and despair clear from her letters.

Para 86-87- Testimony of PW4 - Hiralal Ramlal Sarda - Not important. Reiteration of ill treatment by husband, suicide pact, sexual activity with wife. Already disbelieved these stories which may be introduced in order to give a colour or orientation to the prosecution story.

88-89- Testimony of PW5 - Meena Mahajan - Boost up the story of PW2. Went ahead to say that Manju was terrified and afraid of her life. No witness has stated so nor the letters reveal so.

Para 90-91 - unable to agree with HC and TC ruling out the possibility of Suicide. Considering whole episode - reasonable possibility of suicide.

Para 92-95 - *what has happened seems to be Cumulative effect and sum total of incidences -* ***Sanford H. Kadish and book - Social Origins of Depression by George W.Brown, Book Death Society, and Human Experience by Robert J. Kastenbaum.***

Para 96 - Conclusion on Point No. 1 - based on discussion and evidence

Para 97 - Re-appreciated evidence because HC completely overlooked imp facts.

<u>Circumstances when Appellant last seen with Deceased before her death para 98 onwards</u>
Para 100-102: 3 stages on the question that appellant last seen with deceased. - to constitute a motive for murder - HC made computerised and mathematical approach.
Para 103: Witnesses examined to ascertain the time of return of Manju to apartment and that of appellant arriving 15-20 mins later in the apartment. - However, time is approximate time - difficult to fix exact time. -HC not justified in fixing time - According to Doctor, she must have died around 2 a.m. - However, it can be at any time after 12. Cannot ascertain fix time.
However, these facts do not prove that accused killed the deceased.
Para 108 - Testimony of Dr. Lodha - Eventhough family doctor of Appellants, did not try to support defence case. Gave frank answers. He apprehended unnatural death and therefore, called Dr. Gandhi. Such conduct of appellant and his family is inconsistent with prosecution case that appellant murdered the deceased.
Para 110-119 testimony of PW 30 - Mohan Asava - not reliable. Afterthought. ***Para 116-*** Reasons for disbelieving statements of PW 30 (constable). Time of death given as 05:30 - Not possible. Falst statements by witness.

Last part of case - Whether alleged sexual activity was possible - from clinical examination there was no positive evidence of having any recent sexual intercourse just prior to death. HC did not give benefit of doubt to accused. ***Para 120-123***

Para 124-125 - Position of prosecution case taking an overall picture on part of prosecution case.
Para 126 - Reasonable possibility of deceased having committed suicide.

Para 128-133 - Important chapter of case which great reliance appears to have been placed by Mr. Jethmalani - Postmortem reports. Dr Banerjee - can be a case of sucidal death. HC did not give serious attention to this aspect which goes in favour of the accused. - Dr. Banerjee tried to introduce additional facts regarding position of the tongue - HC accepted the case of mechanical suffocation when it was not proved by the doctor.

Para 134-145 - Circumstances under Para 90 of HC's judgment: - HC wrong in treating these circumstances as an incriminating conduct of the appellant. Vital effect to some circumstances mentioned. AS these were not put to appellant in his statement u/s 313 CrPC, they must be completely excluded from consideration because the appellant did not have any chance to explain hem. Consistently held in ***Hate Singh Bhagat Singh v. State of MP, Shamu Balu Chaugule v. State of Maharashtra, Harijan Megha Jesha v. State of Gujarat.*** - circumstances not put to accused have to be completely excluded from consideration.

Para 146 - Argument by appellant countered by ASG - HC relied on it. Why did accused choose to murder her after betrothal ceremony of his sister to bring shame to his family. They wen on honeymoon, he could have done it there and showed as natural death. Unable to follow HC's reasoning that one the appellant got opportunity he must have clung to it. Further argument by ASG that she was 4-6 weeks pregnant before murdering her - he would have realised that after child was born, it would have affected his illicit relation with Ujvala.
Para 150 - *The High Court was greatly impressed by the view taken by some courts, including this Court, that a false defence or a false plea taken by an accused would be an additional link in the various chain of circumstantial evidence and seems to suggest that since the appellant had taken a false plea that would be conclusive, taken along with other circumstances, to prove the case. We might, however, mention at the outset that this is not what this Court has said.*
Para 151 - Prosecution must stand or fall on its own legs. Cannot derive strength from weakness of defence.
Para 152. Before discussing the cases relied upon by HC few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most

fundamental and basic decision of this Court is ***Hanumant v. State of Madhya Pradesh [AIR 1952 SC 343]*** . This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of ***Tufail (Alias) Simmi v. State of Uttar Pradesh 1970 SCC (Cri) 55*** and ***Ramgopal v. State of Maharashtra (1972) 4 SCC 625***.

Para 153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in ***Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793; 1973 SCC (Cri) 1033*** where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

Para 154 - These five golden principles, if we may say so, constitute the panchseel of the proof of a case based on circumstantial evidence.

Para 155-157 - cases discussed

Para 158-159 - Forceful argument of ASG - relied on ***Deonandan Mishra v. State of Bihar -*** If defence case if false it would constitute an additional link so as to fortify the prosecution case. Cannot agree with this contention. To do so, essential conditions must be fulfilled:

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved,

(2) the said circumstance points to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation.

In present case, these conditions do not appear to be fulfilled.

Para 161 - This court in no way departed from the conditions laid down in ***Hanumant Case.*** HC misconstrued decision and used so-called false defence to connect the chain. Vital difference between incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the court. ***Where the prosecution is unable to prove any of the essential principles laid down in Hanumant case, HC cannot supply the weakness or the lacuna by taking aid of or recourse to a false defence or a false plea. Therefore, unable to accept the argument of the ASG.***

Principles reiterated in ***MG Agarwal*** case and ***Shankarlal*** case.

<u>BENEFIT OF DOUBT</u>: Para 163: HC missed. Well settled where there are two possibilities, benefit of doubt to accused - ***Kali Ram v. State of Himachal Pradesh (1973) 2 SCC 808***

MODE AND MANNER OF PROOF OF CASES OF MURDER BY ADMINISTRATION OF POISON:

Para 164-169 - Ramgopal case (1972) 4 SCC 625. *So far as this matter is concerned, in such cases the court must carefully scan the evidence and determine the four important circumstances which alone can justify a conviction:*

(1) there is a clear motive for an accused to administer poison to the deceased,

(2) that the deceased died of poison said to have been administered,

(3) that the accused had the poison in his possession,

(4) that he had an opportunity to administer the poison to the deceased.

In present case, two circumstances proved, two are not. Vague and untenable findings of HC. Facts of Ramgopal very similar to present case. Covered by ratio of this case.

JUDGMENTS RELIED BY HC - *distinguishable and not relevant or helpful for prosecution****: Paras 170-175***

Paras 176-179 - Sumarizing legal and factual position. ***IMP Para 176*** Fit case where HC should have given at least the benefit of doubt to appellant. Normally SC does not interfere with concurrent findings of courts below - but gross errors of law committed by HC. - Case ugly - however, moral conviction however strong or genuine cannot amount to a legal conviction supportible in law.
Para 180 - Fouler the crime higher the proof. - life and liberty at stake in present case. Capital sentence awarded. Careful approach to be given.
Para 182 - Prosecution failed to prove beyond reasonable doubt. HC order set aside.

CONCURRING VIEWS BY VARADRAJAN, J. -
Para 197- Unless the prosecution excludes the possibility of the deceased having committed suicide by consuming poison, no adverse inference of guilt can be drawn against the appellant from the fact that he was last seen together with his deceased wife on the fateful night, a situation which is otherwise natural.
On circumstantial evidence - at least 5 out of 17 circumstances held by the HC against the appellant cannot be said to point to nothing but the guilt of the accused. The rule for circumstantial evidence is not satisfied.
Paras 199-204 - While conferring with Fazal Ali's formulation of the rule for admissibility of statements, oral and written, as "circumstances of the transaction which resulted in the death" udner Sec.32(1), disagrees with him regarding its application to certain statements and letters in the present case. No evidence to show that the appellant or his parents ill treated Manju or that appellant had intimacy with Ujvala.
Testimony of PWs 2, 3, 5, 6 and 20 as to what the deceased allegedly told them and her letters are inadmissible under Sec.32(1) in view of ***Pakala Narayana Swammi*** case of the Privy Council.
Circumstances not put to appellant u/s 313 CrPC - have to be completely excluded from consideration.

CONCURRING VIEWS BY SABYASACHI MUKHERJEE, J -
Expressed strong reservations regarding many inferences drawn by Fazal Ali from the evidence admitted u/s 32(1).
Concurred regarding appreciation of evidence and conclusions on two issues: 1. Ill-treatment of the deceased by appellant and 2. Intimacy of the appellant with Ujvala.
Differs in judging conduct of doctor who carried out the autopsy and in condemning him for interpolations made in his report. ***Para 214***

Paras 212 and 218 - there is not direct evidence of administering poisom. There is no evidence either way that either the deceased or the acused had in her or his possession any potassium cyanide. The guit of hte accused has not been proved beoynd reasonable doubt - on basis of entire evidence and letters by deceased and also other circumstances.
Para 214: Agreeing with Fazal Ali, J regarding ill-treatment of the deceased by appellant and latter's intimacy with another girl.
Para 215: Agree with Fazal Ali, J. that the test of proximity cannot and should not be too literally construed and be reduced practically to a cut-and-dried formula of universal application, it must be emphasised that whenever it is extended beyond the immediate, it should be the exception and must be done with very great caution and care. As a general proposition, it cannot be laid down for all purposes that for instance where a death takes place within a short time of marriage and the distance of time is not spread over three or four months, the statement would be admissible under Section 32 of the Evidence Act. This is always not so and cannot be so. In very exceptional circumstances like the circumstances in the present case such statements may be admissible and that too not for proving the positive fact but as an indication of a negative fact, namely, raising some doubt about the guilt of the accused as in this case.

Para 216: Though I do not agree with several inferences drawn by Fazal Ali, from several exhibits, I agree with the inference that the deceased was extremely depressed and that there was a clear tendancy resulting from her psychotic nature to end her life or to commit suicide.

Para 217 - From English rendering of one of the letters of the deceased, it appears that the deceased was sensing some “foul” (not dirty) atmosphere in the appellant’s house. Read in that light and in the content of other factors, this letter causes some anxiety. If the deceased was sensing foul atmosphere, why was it? But this again is only a doubt. It does not prove the guilt of the accused.

2. D.K. BASU V. STATE OF WEST BENGAL - (1997) 1 SCC 416

BACKGROUND: The Executive Chairman, Legal Aid Services, West Bengal, a non-political organisation registered under the Societies Registration Act, on 26-8-1986 addressed a letter to the CJI drawing his attention to certain news items published news papers regarding deaths in police lock-ups and custody. He submitted that it was imperative to examine the issue in depth and to develop "custody jurisprudence" and formulate modalities for awarding compensation to the victim and/or family members of the victim for atrocities and death caused in police custody and to provide for accountability of the officers concerned. Also stated that efforts are often made to hush up the matter of lock-up deaths and thus the crime goes unpunished and "flourishes". *Requested that the letter along with the news items be treated as a writ petition under "PIL" category.* Considering the importance of the issue, notices were issued. Sate of WB filed counter stating that police was not hushing up any matter of lock-up death and that wherever police personal were found responsible for such death, action was being initiated against them. During the pendancy of the WP, letter received for another death. Therefore, notice issued to all state Govts. and Law Commission pursuant to which few states filed affidavits. Dr.AM Singhvi appointed as amicus curiae.

HELD: ***Para 9:*** Custodial violence, including torture and death in the lock-ups, strikes a blow at the rule of law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law. Custodial violence is a matter of concern. It is aggravated by the fact that it is committed by persons who are supposed to be the protectors of the citizens. It is committed under the shield of uniform and authority in the four walls of a police station or lock-up, the victim being totally helpless. The protection of an individual from torture and abuse by the police and other law-enforcing officers is a matter of deep concern in a free society. These petitions raise important issues concerning police powers, including whether monetary compensation should be awarded for established infringement of the Fundamental Rights guaranteed by Articles 21 and 22. The issues are fundamental.

Paras 10, 11 and 12: "Torture" of a human bieng by another human being is essentially an instrument to impose the will of the "strong" over the "weak" by suffering. The word torture today has become synoymous with the darker side of human civilisation. In all custodial crimes what is of real concer is not only infliction of body pain but the mental agony which a person undergoes within the four walls of police station or lock-up. Violation of human rights.

Para 13-16 : Custodial voilence not only in this country but is widespread. Concern of international community. Article 5 of UDHR. Report of Royal Commission recommends that power to arrest without a warrant must be related to and limited by the object to be served by the arrest merely as a preventive measure in case of a suspect. Royal Commission suggested restrictions. Power of arrest, interrogation and detention has been streamlined in England on basis of suggestions of Royal Commission incorporated in Police and Criminal Evidence Act, 1984.

Para 17 & 18: Fundamental rights occupy a place of pride in Indian Constitution. Various provisions safeguarding various rights. Articles in newspapers almost everyday. Increasing alarm. Society's cry for justice becomes louder.

Para 19: Third Report of the National Police Commission in India - expressed deep concerns about custodial violence and death. Recommendations provided but not acquired statutory status so far.

Para 20-21: Discussed ***Joginder Kumar v. State of U.P. [(1994) 4 SCC 260*** wherein Court has considered dynamics of misuse of police power of arrest. Court voiced its concern regarding complaints of violations of human rights during and after arrest and also set down certain procedural "requirements" in cases of arrest.

Para 23: Discussed ***Nilabati Behera v. State of Orissa [(1993) 2 SCC 746*** wherein Court pointed out that prisoners and detenus are not denuded of their fundamental rights u/Art.21 and it is only such restrictions as are permitted by law, which can be imposed on the enjoyment of fundamental rights of the arrestees and detenus.

Para 28-29: Police under a legal duty and has legitimate right to arrest a criminal and to interrogate during investigation. But it must be remembered that law does not permit use of third-degree methods of torture. Forbidded. How to check the abuse of police power? - Transparency, accountability, attention, training methodology to police, human right approach etc. Presence of counsel fo the arestee at some point of time during the interrogation may deter the police from using third-degree methods during interrogation.

Para 34. *In addition to the statutory and constitutional requirements to which we have made a reference,* ***we are of the view that it would be useful and effective to structure appropriate machinery for contemporaneous recording and notification of all cases of arrest and detention to bring in transparency and accountability. It is desirable that the officer arresting a person should prepare a memo of his arrest at the time of arrest in the presence of at least one witness who may be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. The date and time of arrest shall be recorded in the memo which must also be countersigned by the arrestee.***

Para 35: REQUIREMENTS TO BE FOLLOWED: *as preventive measures in cases of arrest and detention till legal provisions are made in this behalf:*

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may either be a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be countersigned by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the State or Union Territory concerned. Director, Health Services should prepare such a panel for all tehsils and districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and State headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

Para 36: Failure to comply with the requirements shall apart from rendering the official concerned liable for departmental action, also render him liable to be punished for contempt of court and the proceedings for contempt of court may be instituted in any High Court of the country, having territorial jurisdiction over the matter.

Para 30 and 37: Requirements, referred to above flow from Art.21 and 22(1) and need to be strictly followed. These would apply with equal force to other governmental agencies also like Directorate of

Revenue Intelligence, Directorate of Enforcement, Coastal Guard, CRPF, BSF, CISF, the State Armed Police, Intelligence Agencies like the Intelligence Bureau, RAW, CBI, Traffic Police, Mounted Police and ITBP.

Para 38: These requirements are in addition to the constitutional and statutory safeguards and do not detract from various other directions given by the courts from time to time in connection with the safeguarding of the rights and dignity of the arrestee.

Para 39. The requirements mentioned above shall be forwarded to the DGP and the Home Secretary of every State/UT and it shall be their obligation to circulate the same to every police station under their charge and get the same notified at every police station at a conspicuous place. It would also be useful and serve larger interest to broadcast the requirements on All India Radio besides being shown on the National Network of Doordarshan any by publishing and distributing pamphlets in the local language containing these requirements for information of the general public. ***Creating awareness about the rights of the arrestee would in our opinion be a step in the right direction to combat the evil of custodial crime and bring in transparency and accountability.*** It is hoped that these requirements would help to curb, if not totally eliminate, the use of questionable methods during interrogation and investigation leading to custodial commission of crimes.

Para 40-42 - Ubi jus, ibi remedium - Punitive Measures: The law wills that in every case where a man is wronged and endamaged he must have a remedy. A mere declaration of invalidity of an action or finding of custodial violence or death in lock-up, does not by itself provide any meaningful remedy to a person whose fundamental right to life has been infringed. Much more needs to be done. There is indeed no express provision in the Constitution for grant of compensation for violation of a fundamental right to life, nonetheless, the SC has judicially evolved the right to compensation in cases of established unconstitutional deprivation of personal liberty of life. *(judgments referred)*

Para 44, 45: Grant of compensation in proceedings u/Art.32 and 226 for established violation of fundamental rights u/Art.21 is an exercise of the courts under the public law jurisdiction for penalising the wrongdoer and fixing the liability for the public wrong on the State which failed in the discharge of its public duty to protect the fundamental rights of the citizens. Court - protector and custodian of indefeasible rights of the citizens. A court of law cannot close its consciousness and aliveness to start realities. Mere punishment of the offender cannot give much solace to the family of the victim - civil action for damages is a long drawn and a cumbersome judicial process. Monetary compensation for redressal by the court finding the infringement of the indefeasible right to life of the citizen is, therefore, useful and at time perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victimm, who may have been the breadwinner of the family.

Para 54. Awarding appropriate punishment for the offence (irrespective of compensation) must be left to the criminal courts in which the offender is prosecuted, which the State, in law, is duty bound to do. The award of compensation in the public law jurisdiction is also without prejudice to any other action like civil suit for damages which is lawfully available to the victim or the heirs of the deceased victim with respect to the same matter for the tortious act committed by the functionaries of the State. The quantum of compensation will, of course, depend upon the peculiar facts of each case and no strait-jacket formula can be evolved in that behalf. The relief to redress the wrong for the established invasion of the fundamental rights of the citizen, under the public law jurisdiction is, thus, in addition to the traditional remedies and not in derogation of them. The amount of compensation as awarded by the Court and paid by the State to redress the wrong done, may in a given case, be adjusted against any amount which may be awarded to the claimant by way of damages in a civil suit.

3. VISHAKA V. STATE OF RAJASTHAN - (1997) 6 SCC 241

BACKGROUND:

Para 1-3: WP filed for enforcement of fundamental rights of working women u/Articles 14, 19 and 21. Brought as a class action by certain social activist and NGOs with an aim of bringing "gender equality" and to prevent sexual harassment at workplace through judicial process and to fill the vacuum in existing legislation.

Immediate cause/need of filing the Petition was an incident of alleged brutal gang rape of a social worker in a village of Rajasthan. Matter of a separate criminal action and no further mention of it is necessary here. However, incident mentions of hazards to working women. Clear violation of fundamental rights especially Art.14, 19 and 21 and needed to be dealt in a petition under Art.32.

Para 4: Notice of petition was sent to State of Rajasthan and UOI. Solicitor General who appeared for UOI and other counsels who appeared before the Court rendered needed assistance to the Court to deal with the matter.

Writ Petition disposed of.

HELD:

Paras 5 & 6: Apart from Art.32, other provisions envisaging judicial intervention for eradication of thhis social evil are - Art.14, 19(1)(g), 21, Art.15, Art.42 *(provision for just and humane conditions for work and maternity relief),* Art.51-A *(fundamental duties).* International Conventions on this topic can be referred under Art.51 *(Promotion of international peace and security),* Art. 253 *(Legislation for giving effect to international agreements)* read with Seventh Schedule *(List I - Union List)* Entry 14.

Para 7: Article 73 also relevant - provides that the executive power of the Union shall extend to the matters with respect to which the Parliament has power to make laws.

Para 8: Power of SC u/Article 32 for enforcement of Fundamental Rights and the executive power of the Union have to meet the challenge to protect the working women from sexual harassment and to make their fundamental rights meaningful. Governance of the society by the rule of law mandates this requirement as a logical concomitant of the constitutional scheme. The exercise performed by the Court in this matter is with this common perception shared with the learned Solicitor General and other members of the Bar who rendered valuable assistance in the performance of this difficult task in public interest.

Para 11: Obligation of court u/Art.32 for enforcement of fundamental rights in absence of legislation must be viewed with the role of judiciary envisaged in Beiging Statement of Principles of the Independence of the Judiciary in LAWASIA region. *Objective 10 to the Beiging Statement*

Para 12: Article 11 and 24 of the "Convention of the Elimination of All Forms of Discrimination against Women" significant.

Para 13: General recommendations of CEDAW - *Violence and equality in employment. - Reg.22, 23, 24.* Govt. of India has ratified the above resolution on 25.06.1993. No hesitation in place reliance on the above for the purpose of construing the nature and ambit of constitutional guarantee of gender equality in our Constitution.

Para 16 & 18: In view of the above and in absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at workplaces, ***guildeles and norms are hereby laid down for strict observance at all workplaces, until a legilsation is enacted for the purpose . This is done in exercise of power under Article 32 for enforcement of fundamental rights and it is further emphasized that this would be treated as the law declared by the Supreme Court under Article 141 of the Constitution.***

Para 17: The Guidelines and Norms prescribed as under and in the following heads:

Having Regard to the definition of "human rights" in Section 2(d) of the Protection of Human Rights Act, 1993,

Taking Note of the fact that the present civil and penal laws in India do not adequately provide for specific protection of women from sexual harassment in workplaces and that enactment of such legislation will take considerable time,

It is necessary and expedient for employers in workplaces as well as other responsible persons or institutions to observe certain guidelines to ensure the prevention of sexual harassment of women:

1. Duty of the employer or other responsible persons in workplaces and other institutions:

2. Definition:

3. Preventive steps:

4. Criminal proceedings:

5. Disciplinary action:

6. Complaint mechanism:

7. Complaints Committee:

8. Workers' initiative:

9. Awareness:

10. Third-party harassment:

11. The Central/State Governments are requested to consider adopting suitable measures including legislation to ensure that the guidelines laid down by this order are also observed by the employers in private sector.

12. These guidelines will not prejudice any rights available under the Protection of Human Rights Act, 1993.

JUDGMENTS REFERRED:

1. ***in Minister for Immigration and Ethnic Affairs v. Teoh [128 Aus LR 353]:*** *The High Court of Australia has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia.*
2. ***Nilabati Behera v. State of Orissa [(1993) 2 SCC 746]*** *a provision in the ICCPR was referred to support the view taken that "an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right", as a public law remedy under Article 32, distinct from the private law remedy in torts.*

4. PRADEEP KUMAR BISWAS V. INDIAN INSTITUTE OF CHEMICAL BIOLOGY AND OTHERS REPORTED IN (2002) 5 SCC 111

[Coram: *S. P. Bharucha, C.J. and Syed Shah Mohammed Quadri, R.C. Lahoti, N. Santosh Hegde, Doraiswamy Raju, Ruma Pal and Arijit Pasayat, JJ.*]

Facts:

Appellants had challenged the termination of their services by Respondent No. 1, a unit of Council of Scientific and Industrial Research (hereinafter, "**CSIR**"), before the Calcutta High Court. The Appeal was dismissed in view of the decision of a 5-judges Bench of the Supreme Court in ***Sabhajit Tewary v. Union of India*** **[(1975) 1 SCC 485].** Appellants challenged the same by way of a Special Leave Petition and a Division Bench by order dated 05.08.1986 referred the matter to a Constitution Bench being of the view that the decision in ***Sabhajit Tewary*** required reconsideration.

Sabhajit Tewary, a Junior Stenographer with the CSIR filed a Writ Petition under Article 32 in 1972 claiming parity of remuneration with the Stenographers who were newly recruited to CSIR. A Bench of 5-judges in ***Sabhajit Tewary*** rejected the Writ Petition on the ground of maintainability as CSIR was not an "authority" under Article 12.

**CSIR is a society registered under the Societies Registration Act.*

Question: Is CSIR a State within the meaning of Article 12 and if it is, should the Court reverse a decision which has stood for over a quarter of a century?

Findings:

As per majority *(Bharucha, C. J., Quadri,J., Hegde,J ., Ruma Pal, J. and Pasayat, J.) -*

- **Para 19-** In ***Sabhajit Tewary***, the Court noted that it was the Government which was taking "special care" in respect of the activities of CSIR but dismissed the Writ Petition on the basis of the following:
  - Society does not have statutory character like ONGC or LIC.
  - Employees of companies incorporated under Companies Act do not enjoy protection under Article 311. Companies have been held to have independent existence of the Government and by the law relating to corporations. They could not be held to be department of the Government.
- **Para 20**- Both the premises were not relevant and contrary to the "voice and hands" approach in ***Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi*** [**(1975) 1 SCC 421**]
- **Para 23**- Noting the decision in ***Ramana Dayaram Shetty v. International Airport Authority of India*** **[(1979) 3 SCC 489**], it was opined that the logical sequitur is that the guise adopted by the State whether by corporation established by statute or incorporated under a law (Companies Act or Societies Registration Act) does not matter. Neither the form of the corporation nor its ostensible autonomy would take away the character as "State" if it were in fact acting as an instrumentality or agency of the Government.
- **Para 25 and 26**- Tests propounded by Justice Mathew in ***Sukhdev Singh*** were elaborated in ***Ramana Dayaram Shetty*** and reformulated 2 years later by a Constitution Bench in ***Ajay Hasia v. Khalid Mujiv Sehravardi*** [(1981) 1 SCC 722]. ***Ajay Hasia*** made clear that the genesis of the corporation was immaterial and that the concept of instrumentality or agency of the Government is not limited to a corporation created by a statute.
- **Para 27** – Test laid down in ***Ajay Hasia.***
- **Para 28 and 29** - The Court in ***Ajay Hasia*** read ***Sabhajit Tewary*** as implicitly assenting to the proposition that CSIR could have been an instrumentality or agency as the conclusion did not rest on the ground that CSIR was a society under Societies Registration Act. In ***Ajay*** *Hasia* it was held that the Society in question was an authority falling within the definition of "State".
- **Para 40** – Tests formulated in ***Ajay Hasia*** are not a rigid set of principles so that if a body falls within any one of them, it must, ex hypothesi, be considered to be a State. Question in **each case would be whether in the light of cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government**. Such control must be pervasive. When the control is merely regulatory whether under statute or otherwise, it would not fall within the meaning of State.
- **Para 41** – CSIR is well within the range of Article 12.

- **Para 43**- Board of Scientific and Industrial Research and Industrial Research Utilisation Committee were set up by the Department of Commerce, Government of India in 1940 and 1941 respectively. The Legislative Assembly had passed a Resolution in 1941 to constitute Industrial Research Fund for fostering industrial development. For coordinating and exercising administrative control over the working of the 2 research bodies and the Fund, the Government decided to set up a Council of Industrial Research vide Resolution dt. 26.09.1942 on a permanent footing which would be a registered society under the Societies Registration Act, 1860. **Unquestionably this shows that CSIR was "created" by the Government to carry on in an organised manner what was being done earlier by the Department of Commerce.** The two research bodies have since been subsumed in CSIR.
- **Para 45 and 47** – **Objects incorporated in the memorandum of association of CSIR manifestly demonstrate that CSIR was set up in national interest to further economic welfare of society**. Such a function is fundamental to the governance of the country as held by the Constitution Bench in ***Rajasthan SEB v. Mohan Lal*** [(1967) 3 SCR 377].
- **Para 50** – **Dominant role played by the Government of India in the Governing Body of CSIR is evident**. Members who are not there *ex officio* are nominated by the President and their membership can also be terminated by him. Prime Minister is the *ex officio* President. Reasoning in ***Sabhajit Tewary*** that though the Prime Minister is the *ex officio* President, he exercised the power as a President of the Society is erroneous. *Ex officio* appointment means that the appointment is by virtue of the office; without any other warrant or appointment than that resulting from the holding of a particular office. Powers are necessarily implied in the office as Prime Minister.
- **Para 51** – **Control of the Government in CSIR is ubiquitous.** Governing Body is required to administer, direct and control the affairs and funds of the Society. It also has powers to frame, amend or repeal the bye-laws of CSIR but only with the sanction of the Government of India.
- **Para 52 to 53** – Rule 41 provides that President may review/amend/vary any of the decision of the Governing Body and his orders are binding on the Governing Body. The decision of the President in respect of any question referred to him by the Chairman is also binding on the Governing Body. **Given the fact that the President of CSIR is the Prime Minister, the subjugation of the Governing Body to the will of the Central Government is complete**.
- **Para 54** – The **Central Civil Services Rules** are applicable to the employees of CSIR. Rules/orders framed by the Government of India regarding pay scales, service conditions, reservation of posts are made applicable to the employees of CSIR. CSIR cannot lay down or change the terms and conditions of service of its employees; any alteration in bye-laws can be carried out only with the Government of India's approval.
- **Para 56**: **Financial contribution** - Initial capital was made available by the Central Government. 70% funds of CSIR are available form grants made by the Government of India. Some contributions are also made by the State Governments. Non-governmental contributions are a pittance.
- **Para 57 and 58** - CSIR both historically and in its present operation is subject to the **financial control** of Government of India. Assets and finds of CSIR though nominally owned by the Society are actually owned by the Government.
- **Para 62** – New fact relating to CSIR has come to light since the decision in ***Sabhajit Tewary*** – Central Govt. by a notification specified 17.11.1986 as the date on and from which the provisions of Administrative Tribunals Act, 1985 would apply to CSIR "being the Society owned and controlled by Government". Notification removes any residual doubt as to the nature of CSIR and decisively concludes the issues against it.
- **Para 66 (also Para 59 and 61)- Conclusion in *Sabhajit Tewary* was erroneous and is overruled. Matter remitted back to be dealt with in light of the decision.**

Dissenting View *(Justice R. C. Lahoti and Justice Doraiswamy Raju)-*

- Para 72 – Expanding dimension of "the State" doctrine through judicial wisdom ought to be accompanied by wise limitations.
- Para 94 - It is the functional test devised and utilised by J. Mathew in *Sukhdev Singh.* Functional tests became necessary because of the State having chosen to entrust its own functions to an instrumentality or

agency in the absence whereof that function would have been a State activity on account of its public important and being fundamental to the life of people.

- Para 96 – In different judicial pronouncements, any company, corporation, society or any other entity having a juridical existence if it has been held to be an instrumentality or agency of the State, it has been so held only on having been found to be an alter ego, a double or a proxy or a limb or an offspring or a mini-incarnation or a vicarious creature or a surrogate – by whatever name called – of the State. Material available must justify holding of entity wearing a mask or a veil worn only legally and outwardly which on piercing fails to obliterate the true character of the State in disguise.
- **Conclusion @Para 98**:
  (i) Simply by holding an entity to be an instrumentality or agency of the State, it does not necessarily become an authority within the meaning of "other authorities" in Article 12. Entity should have been created either by a statute or under a statute. Should have power to make law or issue binding directions amounting to law within the meaning of Article 13(2) governing its relationship with other people or affairs of other people. It should have been entrusted with such function as are governmental or closely associated therewith by being of public importance or being fundamental to the life of the people and hence governmental. **It is this strong statutory flavour and clear indica of power – constitutional or statutory, and its potential or capability to act to the detriment of fundamental rights of the people which makes it an authority.**
  Tests laid down in ***Ajay Hasia*** cannot answer whether an entity is an "authority" - a) Tests 1, 2 and 4 in ***Ajay Hasia*** relate to determination of governmental ownership or control; b) Tests 3, 5 and 6 are functional tests for finding out if an entity was instrumentality or agency of the State. Thereafter, the tests were considered relevant for testing if an authority is the State. **This fallacy occurred because the different between "instrumentality and agency" of the State and an "authority" was lost sight of.**
  (ii) Tests laid down in *Ajay Hasia* are relevant for determining whether an entity is an instrumentality or agency of the State. Neither all the tests are required to be answered in the positive nor a positive answer to one or two tests would suffice. It will depend upon a combination of one or more of the relevant factors. **Brooding presence of the Government or deep and pervasive control of the Government** must be satisfied.
  (iii) CSIR is not an "authority" so as to fall within the meaning of "other authorities" under Article 12. It has no statutory flavour – neither created by a statue nor is there any other statute conferring it with such powers as would enable it being branded an authority. Indica of power is absent. Functions discharged are not governmental or closely associated therewith or being fundamental to the life of the people.
- **Para 100** – Government does not hold the entire share capital of CSIR. Only about 70%. Financial assistance from the Government does not meet all the expenditure of CSIR and apparently it fluctuates. No monopoly status. Governing Body consists of private individuals. Functions entrusted to CSIR can be carried out by any private person or organisation. Governing Body is headed by the Director General of CSIR and not by the President of the Society (Prime Minister). **No governmental or sovereign functions, CSIR does not and cannot make law.**
- **Para 101** – Some element of control exercised by Government in matters of expenditure so as to see that the financial assistance granted by it is properly used. The control of the Government is not deep and pervasive. Government's presence/participating in the Society is not a brooding presence. Test is ***Ajay Hasia*** not satisfied to call CSIR an instrumentality or agency of the State. Mere governmental patronage, encouragement, push or recognition would not make an "entity" the State.
- **Para 102** – *Tekraj Vasandi v. Union of India* (Institute of Constitutional and Parliamentary Studies) and Chander *Mohan Khanna v. NCERT* (NCERT) correctly decided.
- **Para 104** – ***Sabhajit Tewary* was correctly decided. Appeal dismissed.**

5. STATE OF WEST BENGAL AND ORS V. COMMITTEE FOR PROTECTION OF DEMOCRATIC RIGHTS, WEST BENGAL AND ORS REPORTED IN (2010) 3 SCC 571

Coram: *K.G.Balakrishnan, C.J., R.V.Raveendran, D.K.Jain, P.Sathasivam, and J.M.Panchal*

Facts: An attack took place on 4 January 2001 whereby Abdul Rahaman Mondal and other members of the political party were attacked by a mob of 50 to 60 people near his residence. A written complaint was filed in the Garbeta Police Station on the same day. **An FIR** was lodged for the following offences Indian Penal Code – sections 148, 149, 448, 436, 364, 302, 201, The Arms Act, 1959 – sections 25 and 27, The Explosives Act, 1884 – section 9 (B). On 8 January 2001 the CID was directed to take over the investigation in the case by the Director General of Police, West Bengal.

The Committee for Protection of Democratic Rights filed a writ petition under Article 226 of the Constitution in the Calcutta High Court. It was alleged that more than three months had passed when the incident happened but the State Police took no substantial step. It was pleaded that the investigation be handed over to the CBI as the State Police is under the influence of the party in power. The CBI was established under the Delhi Special Establishment Act, 194. The High Court passed the order in favor of the appellant and directed that the CBI should take over the investigation. A special leave petition was filed by the State of West Bengal in the Supreme Court challenging the order passed by the Calcutta High Court. The case was referred before the Constitution Bench. (**Para 3,4 & 6**)

Issue: Whether the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, can direct the CBI to investigate a cognizable offence, which is alleged to have taken place within the territorial jurisdiction of another State, without the consent of that State Government? (Para 1)

Contentions on behalf of State of West Bengal:

- The Ld Counsel referred to Entry 80 List 1 of 7th Schedule, Entry 2 List 2 of 7th Schedule, Sections 5 and 6 of the Special Police Act and argued that based on the provisions mentioned herein, that Parliament is strictly prohibited to enact any law that permits the police of one state to investigate an offence committed in another state, without the consent of that particular state. (Para.7)
- The state legislature has exclusive jurisdiction regarding the police under entry 2 list 2 of 7th schedule. This exclusive jurisdiction cannot be taken away by any act of Parliament.(Para 8)
- The three organs of the State i.e the legislature, the executive and the judiciary have been entrusted with certain functions by the Constitution. These organs should not interfere within the functioning of other organs and should not act beyond the scope of its functions. (Para 9)
- The main argument on behalf of the state of West Bengal was that the federal structure as well as the principle of the separation of powers forms a part of the basic structure of the Constitution. Hence, the Central Government and the Constitutional Courts cannot interfere with the exclusive jurisdiction conferred on the state legislature by list 2. (Para 10)
- It was urged that Parliament cannot enact a law that authorises the Police of one state to investigate into another state without the consent of that State, and that would be invalid. (Para 11)
- It was contended that Article 142 of the Constitution cannot be used by the Courts in contrary to the express provisions of law and that the High Court cannot issue any direction ignoring the statutory and constitutional provisions. (Para 12)
- Article 226(2) of the Constitution limits the jurisdiction of the High Courts. It restricts the High Courts to issue directions to the authorities that fall outside the territories over which it has jurisdiction. In the present case, the CBI being an outsider in connection with the incident had no valid authority to conduct the investigation. (Para 15)

Contentions on behalf of Union Government

- The Ld. counsel strongly criticized the contention of the State of West Bengal that entry 80 List 1 of 7th schedule restricts the Parliament's legislative power and section 6 of the Special Police Act, restricts the Central Government's power also the Constitutional Courts are to be restricted from the same provisions is without foundation. Because the Supreme Court and the High Courts are under obligation to protect the citizens and enforce their fundamental rights under Articles 32 and 226 of the Constitution respectively. (Para 16)

- It was further argued that the contention of the appellants that the Courts by handing over the investigation to the CBI without the consent of the concerned State Government violate the federal structure of the Constitution, is misrepresented as it overlooks the basic fact that in a federal structure, it is the duty of the Courts to support the constitutional values and to enforce the limitations set out in the Constitution. (Para 17)
- The learned counsel stated that the power of judicial review conferred on the Supreme Court and the High Courts is a part of basic structure. Therefore, no limitation can be imposed on such power. The courts are discharging their duties under Articles 32 or 226 as the case may be. Hence, it is wrong to say that it is overriding the doctrine of separation of power. (Para 18)

  Finding: Though, undoubtedly, the Constitution exhibits supremacy of Parliament over State Legislatures, yet the principle of federal supremacy laid down in Article 246 of the Constitution cannot be resorted to unless there is an irreconcilable direct conflict between the entries in the Union and the State Lists. Thus, there is no quarrel with the broad proposition that under the Constitution there is a clear demarcation of legislative powers between the Union and the States and they have to confine themselves within the field entrusted to them. It may also be borne in mind that the function of the Lists is not to confer powers; they merely demarcate the Legislative field. But the issue we are called upon to determine is that when the scheme of Constitution prohibits encroachment by the Union upon a matter which exclusively falls within the domain of the State Legislature, like public order, police etc., can the third organ of the State viz. the Judiciary, direct the CBI, an agency established by the Union to do something in respect of a State subject, without the consent of the concerned State Government? (Para 27)
- The fundamental rights, enshrined in Part III of the Constitution, are inherent and cannot be extinguished by any Constitutional or Statutory provision. Any law that abrogates or abridges such rights would be in violation of the basic structure doctrine. (Para 68 (i))
- Article 21 of the Constitution seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said Article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. (Para 68 (ii))
- In a federal structure, there is a distribution of power between the Parliament and the State Legislature. Such distribution imposes limitations on legislative power. To ascertain whether such limitation is just or unjust, requires an authority other than the Parliament. The Constitutional Courts play such a role through the power of judicial review. (Para 68(iii))
- If the federal structure is or likely to be violated by any legislative action, the Constitution takes care to protect the federal structure by ensuring that Courts act as guardians and interpreters of the Constitution and provide effective remedy under Articles 32 and 226. Under such circumstances, any direction, order or writ issued by the Supreme Court or the High Courts cannot be said as violating the federal structure. (Para 68 iv))
- Any restrictions on the Parliament by Constitution, or restriction on executive by Parliament do not amount to restriction on the power of judiciary under Articles 32 and 226 of the Constitution. (Para 68 v))
- If according to the provisions of entry 2 list 2 of 7th schedule, entry 2A and entry 80 of list 1, an investigation by another agency is permissible subject to grant of consent by the State concerned and in an exceptional situation, court would be precluded from exercising the same power which the Union could exercise in terms of the provisions of the Statute. According to the Court, exercise of such power by the constitutional courts would not violate the doctrine of separation of powers. In fact, if in such a situation the court fails to grant relief, it would be failing in its constitutional duty (Para 68 vi))
- When the Special Police Act itself provides that the CBI can take up investigation of the case which is outside its jurisdiction only on the consent of the concerned State, the court can also exercise its constitutional power of judicial review and direct the CBI to take up the investigation within the jurisdiction of the State. Section 6 of the Special Police Act cannot take away the constitutional power of the High Court under Article 226. Therefore, exercise of power of judicial review by the High Court, would not amount to infringement of either the doctrine of separation of power or the federal structure. (Para 68 vii))
- Finally, the answer to the question referred is that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to the CBI to investigate a cognizable offence alleged

to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly. (Para 69)

6. BALRAM PRASAD V. KUNAL SAHA AND ORS REPORTED IN (2014) 1 SCC 384

Coram: *Chandramauli K.R Prasad and V. Gopala Gowda J.J*

Facts: The claimant filed a Petition 1999 before the National Commission (NCDRC) alleging medical negligence on the part of Appellant doctors (Dr.P, M and H) and Appellant Hospital claiming compensation for Rs.77 crores and in 2006, the National Commission dismissed the Complaint, aggrieved by this, the Claimant approached Supreme Court and by disposing the appeal in *Malay Kumar Ganguly Vs. Dr. Sukumar Mukherjee* (2009) 9 SCC 221, found that A's death was caused due to cumulative effect of giving treatment contrary to the established medical treatment protocols thereby holding the Appellant doctors and Hospital negligent in the Treatment of the Deceased (A aged 36 years old). The matter was then remanded by this Court to the National Commission to award just and reasonable compensation to the claimant and later amended the claim for awarding Rs.97 lakhs as compensation (Additional 20lakhs). The National Commission rejected the claim. Therefore, this Court directed the National Commission to determine just and reasonable compensation payable to the claimant. However, the claimant, the appellant-Hospital and the doctors were aggrieved by the amount of compensation awarded by the National Commission and also the manner in which liability was apportioned amongst each of them. (A total of Rs.1.5 crores) and also held that the claimant was contributing to negligence. While the claimant was aggrieved by the inadequate amount of compensation, the appellant-doctors and the Hospital found the amount to be excessive and too harsh. They further claimed that the proportion of liability ascertained on each of them is unreasonable.

Issues (Para 94): 1. Whether the claim of the claimant for enhancement of compensation in his appeal is justified. If it is so, for what compensation he is entitled to?
2. Whether the claimant seeking to amend the claim of compensation under certain heads in the original claim petition has forfeited his right of claim under Order II Rule 2 of CPC as pleaded by the AMRI Hospital?

3 Whether the claimant is justified in claiming additional amount for compensation under different heads without following the procedure contemplated under the provisions of the Consumer Protection Act and the Rules?

4. Whether the National Commission is justified in adopting the multiplier method to determine the compensation and to award the compensation in favour of the claimant?

5. Whether the claimant is entitled to pecuniary damages under the heads of loss of employment, loss of his property and his traveling expenses from U.S.A. to India to conduct the proceedings in his claim petition?

6. Whether the claimant is entitled to the interest on the compensation that would be awarded?

7. Whether the compensation awarded in the impugned judgment and the apportionment of the compensation amount fastened upon the doctors and the hospital requires interference and whether the claimant is liable for contributory negligence and deduction of compensation under this head? **(Para 94)**

Findings:

Guidelines issued by Supreme Court (Para 74)

The National Commission has erroneously rejected the claim of the claimant for "inflation" made by him without assigning any reason whatsoever. The claim has been pending before the National Commission and the Supreme Court for the last 15 years and the value of money that was claimed in 1998 has been devalued to a great extent. Using the CII (Cost Inflation Index) as published by the Government of India, the original claim of Rs 77 crores preferred by the claimant in 1998 would be equivalent to Rs 188.6 crores as of 2013 and **therefore the enhanced claim preferred by the claimant before the National Commission and before the Supreme Court is legally justifiable as the Supreme Court is required**

to determine fair and reasonable compensation. **The decision of the National Commission to confine the compensation amount to Rs.70 crores is unsustainable in law**. (Para 98, Para 100)

The claimant has sought for additional compensation of about Rs 20 crores in addition to his initial claim of 77 crores to include the economic loss. The claimant made a claim under specific heads in great details in justification for each one of the claim made by him. The National Commission, despite taking judicial notice of the claim made by the claimant in its judgment, has rejected the entire claim solely on the ground that the additional claim of Rs 20 crores was not pleaded earlier, therefore, none of the claims made by him can be considered. **The rejection of the additional claims by the National Commission is contrary to the decisions of the Supreme Court rendered in catena of cases**. (Para 101 & 102)

Therefore, in view of various decisions of the Supreme Court wherein the Court has awarded "just compensation" more than what was claimed by the claimants initially, **the contention that the additional claim made by the claimant was rightly not considered by the National Commission for the reason that the same is not supported by pleadings by filing an application to amend the same regarding the quantum of compensation and the same could not have been amended as it is barred by the limitation provided under Section 23 of the Consumer Protection Act and the claimant is also not entitled to seek enhanced compensation in view of Order 2 Rule 2 CPC as he had restricted his claim at Rs 77 crores is not sustainable in law.** The claimant has appropriately placed reliance upon the decisions of the Supreme Court in justification of his additional claim and the finding of fact on the basis of which the National Commission rejected the claim is based on untenable reasons. Also, the Supreme Court has got the power under Article 136 of the Constitution and the duty to award just and reasonable compensation to do complete justice to the attested claimant. Therefore, the claimant is justified in claiming additional claim (of Rs20 crores) for determining just and reasonable compensation under different heads. Hence, the decision of the National Commission in confining the grant of compensation to the original claim of Rs 77 crores preferred by the claimant under different heads and awarding meagre compensation under the different heads in the impugned judgment, is wholly unsustainable in law as the same is contrary to the settled legal principles**. (Para 104, 116 & 117)**

As regards the loss of income of deceased, the status, future prospects and educational qualifications of the deceased must be judged for deciding adequate, just and fair compensation. However, the National Commission has calculated the entire compensation and prospective loss of income solely based on a pay receipt showing a paltry income of only $30,000 per year which she was earning as a graduate student. Therefore, the National Commission has committed grave error in taking that figure to determine compensation under the head of loss of dependency. **The claimant is entitled to enhanced compensation under the heading of loss of future prospects of income of the deceased**. As per the evidence on record, the deceased was earning $30,000 per annum at the time of her death. Therefore, while determining income of the deceased the evidence on record is relied upon for the purpose of giving compensation in favour of the claimant. Hence, it would be just and proper to take her earning at $40.000 per annum on a regular job. Also, based on the precedents laid down by this court, **one third of total income is required to be deducted under the head of personal expenses of deceased.to arrive at the multiplicand**. (Para 106, Para 166)

As regards the multiplier, the Supreme Court is sceptical about using a multiplier method for determining the quantum of compensation in medical negligence claims. Supreme Court has chosen to deviate from the standard multiplier method to avoid overcompensation and also relied upon the quantum of multiplicand to choose the appropriate multiplier Therefore, submission made in this regard by based on sound logic and is reasonable as the Court requires to determine just, fair and reasonable compensation on the basis of the income that was being earned by the Deceased at the time of her death and other related claims on account of death of the Wife of the claimant. **Accordingly the Court held that the multiplier method cannot be accepted and the contentions of Appellant Doctor and Hospital is not accepted**. (Para 124, 125)

While estimating the life expectancy of a healthy person in the present age as 70 years, the compensation to be awarded is by multiplying total loss of income by 30 (Para 167)

Under the head of loss of income of missed work, the claim for Rs.1.12 crores is not allowed. Under the head of travel expense for over 12 years was claimed for Rs.70 lakhs, Court awarded Rs.10 lakhs compensation. **(Para 127)**. The Claimant argues that he has spent Rs.1.65 Crores towards litigation over 12 years, therefore a total amount of Rs.11 lakhs was granted as compensation for 'cost of litigation'**.(Para 128)**. A total amount of Rs.7 lakhs claimed for travel and expenses in Mumbai for treatment of his Wife. Under this head, the Court found it fit to give 1.5 Lakhs as compensation was awarded. (**Para 172)**

The National Commission in not awarding interest on the compensation amount from the date of filing of the original complaint up to the date of payment of entire compensation by the appellant doctors and Hospital to the claimant is most unreasonable and the same is opposed to the provisions of the Interest Act, 1978. Therefore, **the interest is awarded on the compensation that is determined by the Supreme Court in the appeal filed by the claimant i.e. 6 crores at the rate of 6% per annum from the date of complaint/ application till the date of payment of such compensation.**(Para 131)

The claim of Rs 4.5 crores by the claimant for the pain and suffering endured by the deceased during her treatment is excessive It is acknowledged and empathised that the deceased had gone through immense pain, mental agony and suffering in course of her treatment which ultimately could not save her life **but award of amount more than the conventional amount set by the Supreme Court on the basis of the economic status of the deceased cannot be made**. Therefore, a lump sum amount of Rs 10 lakhs is awarded to the claimant by applying the principles laid in *Kemp and Kemp on the Quantum of Damages* under the head of "pain and suffering of the claimant's wife during the course of her treatment". **(Para 174, Para 180)**

However, regarding claim of Rs 13.5 crores by the claimant **under the head of 'emotional distress and suffering for the claimant' himself, no compensation is awarded** since this claim bears no direct link with the negligence caused by the appellant doctors and the Hospital in treating the claimant's wife**. (Para 174, Para 181)**

As regards allegation of contributory negligence, the Claimant had acted in an overanxious way and did what was necessary to the Patient as part of treatment. It is therefore, concluded that the National Commission erred in holding that the claimant had contributed to the negligence of the appellant doctors and Hospital which resulted in the death of his wife when the Supreme Court in Malay Kumar Ganguly case clearly absolved the claimant of such liability and remanded the matter back to the National Commission only for the purpose of determining the quantum of compensation. Hence, **the finding of the National Commission is set aside and the finding of the Supreme Court is re-emphasised that the claimant did not contribute to the negligence of the appellant doctors and Hospital which resulted in the death of his wife.** (Para 156, 157, 159)

The Court confined itself to **determine the extent to which the Appellant Doctors and Hospital are liable to pay compensation awarded to the Claimant for their acts of negligence** in giving treatment to the deceased wife of the Claimant. **(Para 132)**

The Appellant hospital (AMRI) is vicariously liable for its doctor, directed that the Hospital would pay a total amount of Rs.25 lakhs as compensation. **(Para 133, Para 139)**

Liability of Dr.Mukherjee- the appellant Dr M is directed to pay a compensation of Rs 10 lakhs to the claimant in lieu of his negligence and sincerely hoped he would uphold his integrity as a doctor in furture and not be casual about his patients' lives**.(Para 144)**

Liability of Dr.Haldar- Dr H had conducted with utmost callousness in giving treatment to the claimant's wife which led to her unfortunate demise. Accordingly. Dr H is directed to Day Rs 10 lakhs as compensation to the claimant in lieu of his negligence in treating the wife of the claimant. **(Para 147)**

Liability of Dr.Prasad - Dr P being a junior doctor, might have acted on the direction of the senior doctors who undertook the treatment of the claimant's wife in the appellant Hospital. Since he is a junior doctor

whose contribution to the negligence is far less than the senior doctors involved, therefore the appellant Dr P is directed to pay a compensation of Rs 5 lakhs to the claimant. **(Para 154)**

The right to health of a citizen is a fundamental right guaranteed under **Article 21 of the Constitution of India.** All the government hospitals, nursing homes, polyclinics are liable to provide treatment to the best of their capacity to all the patients. **(Para 183)**

The Central and the State Governments may consider enacting laws wherever there is absence of one for effective functioning of the private hospitals and nursing homes. Since the conduct of doctors is already regulated by the Medical Council of India, an impartial and strict scrutiny from the body is expected. Finally, it is expected that the institutions and individuals providing medical services to the public at large educate and update themselves about any new medical discipline and rare diseases so as to avoid tragedies such as the instant case. **(Para 185)**

7. PRAMATI EDUCATIONAL AND CULTURAL TRUST (REGISTERED) AND OTHERS VS. UNION OF INDIA AND OTHERS; (2014) 8 SCC 1

(***Coram**: R.M Lodha, CJ., A.K Patnaik, S.J Mukhopadhaya, Dipak Misra, F.M Ibrahim Kalifulla, JJ.)*

Facts: This was a reference made by a three-judge bench of the Apex Court by order dt. 06.09.2010 in *Society for Unaided Private Schools of Rajasthan vs. Union of India* to a Constitution Bench. As per the aforesaid order, the court was called upon to decide on the validity Clause 5 of Article 15 and Article 21-A.

In ***Ashoka Kumar Thakur v. Union of India*** **2008 6 *SCC* 1** the Constitution Bench held that clause (5) of Article 15 is valid and does not violate the "basic structure" of the Constitution so far as it relates to the State-maintained institutions and aided educational institutions. However, the Constitution Bench left open the question whether clause (5) of Article 15 was constitutionally valid or not so far as "private unaided" educational institutions are concerned, as such "private unaided" educational institutions were not before the Court. **One batch of writ petitions** have been filed by private unaided educational institutions and the Court is called upon to decide whether clause (5) of Article 15 of the Constitution so far as it relates to "private unaided" educational institutions is valid and does not violate the basic structure of the Constitution.

The constitutional validity of the Right of Children to Free and Compulsory Education Act, 2009 (for short "the 2009 Act") (the law contemplated by Article 21-A) was considered by a three- Judge Bench of the Court in ***Society for Unaided Private Schools of Rajasthan v. Union of India*** **2012 6 *SCC* 1**. Two of the three Judges have held the 2009 Act to be constitutionally valid, but they have also held that the 2009 Act is not applicable to unaided minority schools protected under Article 30(1) of the Constitution. However, the three-Judge Bench did not go into the question of constitutional validity of (5) of Article 15 or Article 21-A. In the second batch of writ petitions filed by the private unaided institutions, the constitutional validity of clause (5) of Article 15 and of Article 21-A has to be decided.

Questions of law: (**Para 5**)

1. Whether the Constitution (93rd Amendment) Act which amends Article 15 by inserting clause (5) alters the basic structure or framework of the Constitution and is therefore illegal, invalid, unconstitutional.
2. Whether the Constitution (86th Amendment) Act which inserts Article 21-A into the Constitution, alters the basic structure of the Constitution and hence is invalid and unconstitutional.

Held:

A] Validity of Article 15(5)

1. As the object of clause (5) of Article 15 of the Constitution is to provide equal opportunity to a large number of students belonging to the socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes to study in educational institutions and equality of opportunity is also the object of clauses (1) and (2) of Article 15 of the Constitution, it **cannot be held that clause (5) of Article 15 of the Constitution is an exception or a proviso overriding Article 15 of the Constitution, but an enabling provision to make equality of opportunity promised in the Preamble in the Constitution a reality**. **@ Para 22**
2. ***State of Kerala v. NM Thomas (1976) 2 SCC 310*** **and** ***Indra Sawhney v. Union of India 1992 Supp (3) SCC 217*** have held that Clause (4) of Article 16 [which has similar opening words as clause (5) of Article 15] is not an exception to clause (1) of Article 16, but an enabling provision to give effect to equality of opportunity in matters of public employment. These authorities were cited by K.G. Balakrishnan, C.J. in his judgment in ***Ashoka Kumar Thakur*** to hold that clause (5) of Article 15 is **not an exception to clause (1) of Article 15** but an enabling provision. **@Para 23**
3. The content of the right under Article 19(1)(g) of the Constitution to establish and administer private educational institutions, as per ***T.M.A Pai Foundation***, includes the right to admit students of their choice and autonomy of administration but this right and autonomy will not be affected if a small percentage of students belonging to weaker and backward sections of the society were granted freeships or scholarships, if not granted by the Government. **@Para 25**
4. In ***P.A. Inamdar v. State of Maharashtra (2005) 6 SCC 537***, the Court was of the view that ***TMA Pai Foundation*** held that there was no power vested in the State under Article 19(6) to regulate or control

admissions in the unaided educational institutions so as to compel them to give up a share of the available seats to the State or to enforce reservation policy of the State on available seats in unaided professional institutions. The reasoning adopted by this Court in ***P.A Inamdar***, is that the appropriation of seats by the State for enforcing a reservation policy was not a regulatory measure and not reasonable restriction within the meaning of clause (6) of Article 19 of the Constitution. **@ Para 26-27**

5. Clause (5) in Article 15 of the Constitution, vests a power on the State, independent of and different from the regulatory power under clause (6) of Article 19, and it is to be examined whether this new power vested in the State which enables the State to force the charitable element on a private educational institution destroys the right under Article 19(1)(g) of the Constitution. **@ Para 27**
6. As this Court has held in ***T.M.A Pai Foundation*** and ***P.A Inamdar*** the State can under clause (6) of Article 19 make regulatory provisions to ensure the maintenance of proper academic standards, atmosphere and infrastructure (including qualified staff) and the prevention of maladministration by those in charge of the management. **@ Para 28**
7. However, as this Court held in the aforesaid two judgments that nominating students for admissions would be an unacceptable restriction in clause (6) of Article 19 of the Constitution, Parliament has stepped in and in exercise of its amending power under Article 368 of the Constitution inserted clause (5) in Article 15 to enable the State to make a law making special provisions for admission of socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes for their advancement and to a very limited extent affected the voluntary element of this right under Article 19(1) (g) of the Constitution. Therefore, **no merit in the submission of the learned counsel for the petitioners that the identity of the right of unaided private educational institutions under Article 19(1)(g) of the Constitution has been destroyed by clause (5) of Article 15 of the Constitution**. **@ Para 28**
8. If State makes a law which is not related to admission in educational institutions and relates to some other aspects affecting the autonomy and right of private educational institutions as defined in ***TMA Pai Foundation,*** such a law would not be within the power of the State under clause (5) of Article 15. Power under clause (5) of Article 15 is a guided power to be exercised for the limited purposes stated in the clause. **The width of the power vested in the State under clause (5) of Article 15 is not such as to destroy the right under Article 19(1)(**g). **@Para 29**
9. As and when a law is made under Article 15(5), such a law would have to be examined whether it has taken into account the fact that private unaided educational institutions are not aided by the State and has made provisions in the law to ensure that private unaided educational institutions are compensated for the admissions made from amongst socially and educationally backward classes or SC or ST. Article 15(5) does not say that such a law will not comply with other requirements of equality as provided in Article 14. Hence, **no merit in the contention that Article 15(5) violates Article 14 so far as it treats aided and unaided private educational institutions alike**. **@Para 30**
10. As held by a CB in ***Ashoka Kumar Thakur***, the minority educational institutions, by themselves, are a separate class and their rights protected under Article 30. Therefore, **exclusion of minority educational institutions from Article 15(5) is not violative of Article 14.** @Para 34
11. Secularism is no doubt a basic feature of the Constitution. In ***TMA Pai Foundation***, this Court has held that the essence of secularism in India is the recognition and preservation of different types of people with diverse languages and different beliefs and Article 29 and 30 seek to preserve such differences. Therefore, **by excluding minority institutions referred to in Article 30(1), secular character of India is maintained and not destroyed**. @Para 35
12. Contention that excellence will be compromised by admission from amongst the backward classes of citizens and the Scheduled Castes and the Scheduled Tribe in private educational institutions is contrary to the Preamble of the Constitution which promises to secure to all citizens "fraternity assuring the dignity of the individual and the unity and integrity of the nation". The goals of fraternity, unity and integrity of the nation cannot be achieved unless the backward classes of citizens and the Scheduled Castes and the Scheduled Tribes, who for historical factors, have not advanced are integrated into the mainstream of the nation. Therefore, no merit in the submission that Article 15(5) violates the right under Article 21 of the Constitution. **@ Para 37**
13. **None of the rights under Article 14, 19(1)(g) and 21 have been abrogated by Article 15(5). View taken by Bhandari, J. in Ashoka Kumar Thakur that imposition of reservation on unaided**

institutions by the 93rd Amendment has abrogated by Article 19(1)(g), a basic feature, is not correct. 93rd Amendment inserting clause (5) of Article 15 is valid. @Para 38

B] Validity of Article 21-A

1. The word "State" in Article 21-A can only mean the "State" which can make the law. Hence, Constitutional obligation under Article 21-A of the Constitution is on the State and not on private unaided educational institutions. Article 21- A has to be harmoniously construed with Article 19(1)(g) and Article 30(1) of the Constitution. **The law made by the State to provide free and compulsory education to the children of the age of 6 to 14 years should not be such as to abrogate the right of unaided private educational schools under Article 19(1) (g) of the Constitution or the right of the minority schools, aided or unaided, under Article 30(1) of the Constitution. @ Para 49**
2. A new power was made available to the State under Article 21-A of the Constitution to make a law determining the manner in which it will provide free and compulsory education to the children of the age of six to fourteen years as this goal contemplated in the directive principles in Article 45 before the 86th constitutional amendment could not be achieved for fifty years. This additional power is independent and different from the power of the State under Article 19(6) and has affected the voluntariness of the right under Article 19(1)(g). By exercising this additional power, State can by law impose admission on private unaided schools so long as the law made by the State is for the purpose of providing free and compulsory education to children of the age 6-14 years and so long as such law forces admission of children of poorer, weaker and backward sections of the society to a small percentage of the seats in private educational institutions, such a law would not be destructive of right of private unaided educational institutions under Article 19(1)(g). **@ Para 51**
3. The Statement of Objects and Reasons of the Bill which was enacted as the 2009 Act makes it clear that the 2009 Act intended that private unaided schools should also take the responsibility of providing free and compulsory education. **@Para 52**
4. Under 12(2) of the 2009 Act provides that an unaided school which is required to admit in class I, to the extent of 25% of the strength of the class, children belonging to the weaker/disadvantaged section, **shall be reimbursed for the expenditure so incurred by the State. Thus, ultimately it is State which is funding the expenses**. **@Para 53**
5. If the 2009 Act is made applicable to minority schools, aided or unaided, the right of the minorities under Article 30(1) of the Constitution will be abrogated. Therefore, the **2009 Act insofar it is made applicable to minority schools referred in clause (1) of Article 30 of the Constitution** is ***ultra vires*** the Constitution. **@ Para 55**

<u>Conclusion:</u>

1. The Constitution (93rd Amendment) Act, 2005 inserting clause (5) of Article 15 of the Constitution and the Constitution (86th Amendment) act, 2002 inserting Article 21-A of the Constitution do not alter the basic structure or framework of the Constitution and are constitutionally valid.
2. The Right of Children to Free and Compulsory Education Act, 2009 is not ultra-vires Article 19(1)(g) of the Constitution.
3. The 2009 Act insofar as it applies to minority schools, aided or unaided, covered under clause (1) of Article 30 of the Constitution is ultra vires the constitution.

8. LALITA KUMARI V. GOVERNMENT OF UTTAR PRADESH & ORS., (2014) 2 SCC 1

*(Before **P. Sathasivam, C.J.,** and B.S. Chauhan, Ranjana P. Desai, Ranjan Gogoi and S.A. Bobde, JJ)*

IMP ISSUE* -** Whether a police officer is bound to register an FIR upon receiving information relating to commission of a cognizable offence u/s 154 of CrPC (Code) or the Police officer has the power to conduct a 'preliminary inquiry' in order to test the veracity of such information before registering the same? ***Para 1.

IMP PARAS*: *31-36, 37-39, 44-56, 57-67, 69, 70, 72, 73, 83-86, 87, 88, 89- 92, 93-96, 97, 106-107, 101-105, 109-112, 113-114, 115-119 CONCLUSION at Para 120.1 to 12.8

FACTS:

- WP u/Article 32 filed by Lalita Kumari (minor) through her father Shri. Bhola Kamat for the issuance of writ of habeas corpus or direction(s) of like nature against the respondents herein for the protection of his minor daughter who has been kidnapped.
- Grievance - on 11.05.2008, a written report was submitted by petitioner before the officer in charge of the police station concerned who did not take any action on the same. Thereafter, when Superintendent of Police was moved, an FIR was registered, however, no steps taken for either apprehending the accused or for recovery of minor girl child.

- ***REFERENCE TO A LARGER BENCH:***

- 2 judge bench in ***Lalita Kumari v. State of UP***[1] after noticing the disparity in registration of FIRs by police officers on a case-to-case basis across the country, issued notice to UOI, the Chief Secretaries of all States and UTs and DGPs/Commr. of Police to the effect that if steps are not taken for registration of FIRs immediately and the copies thereof are not handed over to the complainants, they may move the Magistrates concerned by filing complaint petitions for appropriate direction(s) to the police to register the case immediately and for apprehending the accused persons, failing which, contempt proceedings must be initiated against such delinquent police officers if no sufficient cause is shown.
- S. B. Upadhyay, Sr. Counsel for petitioner stating that it is imperative to register a case u/s 154 CrPC upon receipt of information relied on decisions of 2 judges' bench - ***State of Haryana v. Bhajan Lal***[2]***, Ramesh Kumari v. State (NCT of Delhi)***[3] and ***Parkash Singh Badal v. State of Punjab***.[4]
- On the other hand, Mr Shekhar Naphade, Sr. Counsel for the State of Maharashtra submitted that an officer in charge of a police station is not obliged under law, upon receipt of information, to register a case rather the discretion lies with him, in appropriate cases, to hold some sort of preliminary inquiry in relation to the veracity or otherwise of the accusations made in the report. He relied on judgmetns of 2 judges bench - ***P. Sirajuddin v. State of Madras***,[5] ***Sevi v. State of T.N.***[6], ***Shashikant v. CBI***[7] and ***Rajinder Singh Katoch v. Chandigarh Admn.***[8]
- In view of the conflicting decisions of this Court on the issue, the said Bench, vide order dated 16-9-2008 [9], referred the same to a larger Bench of 3 judges who then referred the same to Constitution Bench upon hearing various counsel representing UOI, States and UTs and also after adverting to all the conflicting

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[1] (2008) 7 SCC 164

[2] 1992 Supp (1) SCC 335

[3] (2006) 2 SCC 677

[4] (2007) 1 SCC 1

[5] (1970) 1 SCC 595

[6] 1981 Supp SCC 43

[7] (2007) 1 SCC 630

[8] (2007) 10 SCC 69

[9] (2008) 14 SCC 337

decisions extensively. [UOI referred to ***State of MP v. Santosh Kumar[10] and Suresh Gupta v. Govt. of NCT of Delhi[11]*** where preliminary inquiry has been postulated before registering an FIR. Some counsel also submitted that the CBI Manual also envisages some kind of preliminary inquiry before registering FIR ***Para 5]***

ONLY QUESTION BEFORE CONSTITUTION BENCH: interpretation of Sec.154 and incidentally to consider Sec.156 and 157 also.

Appearance of counsels - Para 7

<u>CONTENTIONS - Para 9 onwards.</u>

- ***BY SB UPADHYAY for Petitioner: (Paras 9 and 10)***
  - Use of word "shall" in Section 154(1) - mandatory nature. No discretion left to police officer except to register FIR. Relied on ***B. Premanand v. Mohan Koikal[12] Hiralal Rattanlal v. State of U.P.***[13] and ***Govindlal Chhaganlal Patel v. Agricultural Produce Market Committee, Godhra***[14].
  - Mere use of word "information" without prefixing words "reasonable" or "credible". Relied on ***State of Haryana v. Bhajan Lal, Ganesh Bhavan Patel v. State of Maharashtra[15]***, ***Aleque Padamsee v. Union of India***[16], ***Ramesh Kumari v. State (NCT of Delhi)***, ***Ram Lal Narang v. State (Delhi Admn.)***[17] and ***Lallan Chaudhary v. State of Bihar[18]***.
  - Besides, he also brought to light various adverse impacts of allowing police officers to hold preliminary inquiry before registering an FIR.

- ***BY KV Vishwanathan ASG for UOI: (Para 11 & 12)***
  - In all cases where information is received u/S. 154, it is mandatory for the police to enter the same into the register maintained for the said purpose, if the same relates to coznizable offence. No discretion or authority with police, whatsoever, to ascertain the veracity of such information before deciding to register it.
  - Police who proceeds to the spot u/s 156-157 on basis of information, rumor etc, has to immediately, after gathering information, send report (ruqa) to police station so that the same can be registered as FIR.
  - Relied on ***Bhajan Lal***, ***Ramesh Kumari*** and ***Aleque Padamsee (all supra)***.
  - Also deliberated upon distinguishable judgments in conflict with the mandatory proposition viz. ***State of U.P. v. Bhagwant Kishore Joshi***[19], ***P. Sirajuddin v. State of Madras***,[20] ***Sevi v. State of T.N***. [21] ***Shashikant v. CBI***,[22] ***Rajinder Singh Katoch v. Chandigarh Admn.,[23]*** and ***Jacob Mathew v. State of Punjab[24]***.
  - Emphasized upon various safeguards provided under the Code against filing a false case.

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[10] (2006) 6 SCC 1

[11] (2004) 6 SCC 422

[12] (2011) 4 SCC 266

[13] (1973) 1 SCC 216

[14] (1975) 2 SCC 482

[15] (1978) 4 SCC 371

[16] (2007) 6 SCC 171

[17] (1979) 2 SCC 322

[18] (2006) 12 SCC 229

[19] (1964) 3 SCR 71

[20] (1970) 1 SCC 595

[21] 1981 Supp SCC 43

[22] (2007) 1 SCC 630

[23] (2007) 10 SCC 69

[24] (2005) 6 SCC 1

- ***By Dr. Ashok Dhamija for CBI: (Para 13 & 14)***

- Use of word "shall" u/s 154 mandates that police should register FIR. No discretion. "Shall" unmistakably indicative of the statutory intent.
- Only necessary is that information given must disclose commission of cognizable offence.
- Use of word "information" simplicitor and no prefix "credible" or reasonable". Intention of parliament unequivocal and clear.
- Relied on the same authorities as by counsel for Petitioner.
- Registering FIR mandatory. Clarified that preliminary inquiry conducted by CBI, under certain situations, as provided under the CBI Crime Manual, stands on a different footing due to the special provisions relating to CBI contained in Delhi Special Police Establishment Act, 1946 which is saved under Sec.4(2) & 5 of the Code.

- ***By Kalyan Bandopadhyay for State of WB: (Para 15)***

- Whenever information received, duty of officer to record the same and provide the informat u/s 154(2) of Code a copy thereof free of cost. No other alternative but to do so.
- Highlighted various subsequent steps to be followed by police officer pursuant to the registration of FIR.
- Relied on the same authorities as by other counsels.

- ***By Dr. Manish Singhvi, Addl. Adv. General for State of Rajasthan: (Para 16)***

- Mandatory registration of FIR u/s 154.
- Highlighted various safeguards inbuilt in Code for lodging false FIRs.
- Only exception relates to cases arising out of Prevention of Corruption Act as, in those cases, sanction is necessary before taking cognizance by the Magistrates and the public servances are accorded some king of protection so that vexatious cases cannot be filed to harass them.

- ***By Mr. G. Sivabalamurugan for the appellant in Cri. Appeal No.1410 of 2011: (Para 17)***

- After tracking the earlier history viz. Relevant proivsions in Code of 1861, 1872 1882, 1898, stressed as to why the compulsory registration of FIR is mandatory.
- Also highlighted recommendations of Report of 41st Law Commission and insertion of Sec.13 of Criminal Law (Amendment) Act, 2013 w.e.f 03.02.2013.

- ***By Mr. R.K. Dash for State of U.P.: (Para 18)***

- Commenced by asserting that in order to check unnecessary harassment to innocent persons at behelst of unscrupulous complainants, desirable to conduct preliminary inquiry.
- But subsequently after considering salient features of the Code, various provisions like Sec.2(4)(h), 156(1), 202(1), 164 and various provisions of UP Police Regulations contended that in no case registering FIR should be deferred till verification of its truth or otherwise.
- Concluded that when the statutory provisions, as envisaged in Chapter XII of Code, are clear and unambiguous, not legally permissible to allow police make a preliminary inquiry into allegations before registering FIR.
- Relied on the same authorities as by other counsels.

- ***By Mr. Siddharth Luthra ASG for State of Chattisgarh: (Paras 19, 20 & 21)***

- Elaborated on various judgments which held that an investigating officer, on receiving information of commission of a cognizable offence under Section 154 of the Code, has power to conduct preliminary inquiry before registration of FIR. ***Bhagwant Kishore Joshi, P. Sirajuddin***, ***Sevi v.. State of T.N.,*** and ***Rajinder Singh Katoch***.
- He also cited ***Bhajan Lal***, ***Ramesh Kumari***, ***Parkash Singh Badal*** and ***Aleque Padamsee***, - police officer is duty-bound to register an FIR, upon receipt of the information disclosing and power of preliminary inquiry does not exist under the mandate of Section 154.

- Put forth a comparative analysis of S. 154 of Code of 1898 and of 1973. Highlighted that every activity which occurs in a police station [S.2(s)] is entered in a diary maintained at the police station viz. General Diary [***CBI* v. *Tapan Kumar Singh***[25], ***Subbaratnam,***[26]], Station Diary or Daily Diary.
- Pointed out that, presently, throughout the country, in matrimonial, commercial, medical negligence and corruption related offences, there exist provisions for conducting an inquiry or preliminary inquiry by the police, without/before registering an FIR under S 154.
- Referred to various police rules prevailing in the States of Punjab, Rajasthan, U.P., Madhya Pradesh, Kolkata, Bombay, etc., for conducting an inquiry before registering an FIR.
- Attempted to draw an inference from the Crime Manual of CBI to highlight that a preliminary inquiry before registering a case is permissible and legitimate in the eye of the law. ***(Court dealt with this contention in Paras 89-92)***
- Emphasised that the power to carry out preliminary inquiry, which precedes registration of FIR will eliminate misuse of the process, as registration of FIR serves as an impediment against a person for various important activities like applying for a job or a passport, etc.
- Requested to frame guidelines for certain category of cases in which preliminary inquiry should be made.

- ***By Mr. Shekhar Naphade for State of Maharashtra: (Paras 22-28)***

- Ordinarily the SHO should record and FIR upon receiving a complaint disclosing the ingredients of cognizable offence, but in certain situations, in case of doubt regarding correctness or credibility of information, should have discretion of holding a preliminary inquiry and thereafter, if satisfied that there is a prima facie case for investigation, register the FIR. Mandatory duty of registering FIR should not be cast upon him.
- This interpretation would harmonize two extreme positions viz. The moment complaint received, FIR to be registered contrary to mandate of Art.21 of Consti. and second that police officer must investigate case substantially before registering FIR. - Thus, there should not be these extremes and middle path must be chosen.
- ***Bhajan Lal, Ramesh Kumari, Parkash Singh Badal and Aleque Padamsee*** need reconsideration as they have interpreted Sec.154 dehors other provisions of Code and failed to consider impact of Art. 21 on Sec.154 of the Code.
- ***Rajinder Singh Katoch, P. Sirajuddin, Bhagwant Kishore Joshi and Selvi*** - S.154 forms part of chain of statutory provisions relating to investigation. Therefore, Sec.41, 157, 167, 169 etc. must have a bearing on interpretation of Sec.154.
- Giving iteral interpretation would reduce the registration of FIR to mechanical act.
- Impact of Art. 21 - ***Maneka Gandhi*** where Art. 21 applied to several provisions relating to Criminal Law. Art. 21 postulates law whicch is reasonable and not merely statutory provisions. ***(Court dealt with this in Para 86, 106-107, 113-114)***
- Criminal Law (Amendment) Act, 2013 Sec.166-A - as far as other cognizable offices (apart from those mentioned in Sec.166A) are concerned, police has discretion to hold preliminary inquiry if there is some doubt about the correctness of information.
- Medical negligence on part of doctors - ***Tapan Kumar Singh, Jacob Mathews -*** no medical professional should be prosecuted on mere allegations.
- Legislative intent clear from Sec.154 (3) (approach higher police officer) and Sec.190 (approach Magistrate) if FIR not registered. Police not bound to register FIR. “Shall” not always means absence of discretion.
- Court preferred rule of purposive interpretation to the rule of literal interpretation - ***Board of Mining Examination v. Ramjee***[27], ***Lalit Mohan Pandey v. Pooran Singh***[28] and ***Prativa Bose v. Kumar Rupendra Deb Raikat***[29]**.**

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[25] (2003) 6 SCC 175

[26] In re AIR 1949 Mad 663

[27] [(1977) 2 SCC 256

[28] (2004) 6 SCC 626

[29] AIR 1965 SC 540

- Impossible to put Sec.154 into straight jacket formula. Prayed for framing guidelines. Art. 21 - procedure should not be arbitrary and unreasonable.

- ***By Ms. Vibha Datta Makhija for State of M.P.: (Paras 29-30)***

- Plain reading of S.154 - may not be mandatory but absolutely obligatory.
- Some preliminary inquiry permissible within statutory framework.
- An investigation, culminating into a final report u/S 173 of the Code, cannot be called into question and be quashed due to the reason that a part of the inquiry, investigation or steps taken during investigation are conducted after receiving the first information but prior to registering the same unless it is found that the said investigation is unfair, illegal, mala fide and has resulted in grave prejudice to the right of the accused to fair investigation.
- Traced earlier provisions of the Code and current statutory framework - Criminal Law (Amendment) Act, 2013 w.r.t. various decisions.
- S.154 leaves no doubt that where a cognizable offence is disclosed, there is no discretion to record or not the same, however, it may differ from case to case.
- Issues before Constitution Bench arise out of two main conflicting areas of concern: ***Para 30.1 & 30.2*** *(i) Whether immediate non-registration of FIR leads to scope for manipulation by the police which affects the right of the victim/complainant to have a complaint immediately investigated upon allegations being made; and*

(ii) Whether in cases where the complaint/information does not clearly disclose the commission of a cognizable offence but the FIR is compulsorily registered then does it infringe the rights of an accused.

DISCUSSION: Para 31-43

- FIR pertinent document. Main object - from point of view of complainant - to set criminal law in motion and from point of view of investigating authorities is to obtain information about alleged criminal activity to take steps for bringing to book the guilty.
- History shows both - valid grievance of victing of non-registering FIR and accused being unnecessarily harassed upon false charges.
- ***State of Maharashtra v. Sarangdharsingh Shivdassingh Chavan***[30] and ***Aleque Padamsee -*** Code itself provides several checks for refusal on part of police authorities u/S 154.
- No of cases which exhibit that there are instances of misuse of power of police to register FIR and initiate investigation ***Preeti Gupta v. State of Jharkhand***[31] (misuse of 498-A - court expressed desire that legislature must take into consideration the informed public opinion and the pragmatic realities to make necessary changes in law). This judgment resulted in ***243rd Report of Law Commission of India submitted on 30.08.2012.*** 498A could not be made compoundable, however, the extent of misuse was not established. Thus, could not be ground to denue the provision of its efficacy. Question of postponed registering of FIR can be crystalized only upon this Court putting rest the present controversy. ***See Para 36***
- Diverging views - necessary to see historical background ***See Para 37.*** *A perusal of the abovesaid provisions manifests the legislative intent in both old Codes and the new Code for compulsory registration of FIR in a case of cognizable offence without conducting any preliminary inquiry.* ***See Para 37.6***
- Objective of placement of provision clear - ***FIR starting point of investigation by police.***

INTERPRETATION OF SECTION 154: Para 44-72

- ***Para 44-47 -*** First and foremost principle of interpretation - Literal interpretation - Sec.154 - Mandatory to reduce into writing - no ambiguity in language of Sec.154 ***- Hiralal Rattanlal v. State of U.P.***[32] & ***B. Premanand v. Mohan Koikal.***[33]
- ***Para 48*** Legislative Intent of Sec.154 vividly elaborated in ***Bhajan Lal - (****para 31-33)****.***

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[30] (2011) 1 SCC 577

[31] (2010) 7 SCC 667

[32] (1973) 1 SCC 216

[33] (2011) 4 SCC 266

- ***Para 49*** Sine qua non for recording FIR u/s 154 - ***INFORMATION -*** disclosing cognizable office. Mandatory to register a case on basis of information. Plain words of S.154(1) of Code have to be given their literal meaning.

- ***"SHALL" -*** Clearly shows legislative intent that it is mandatory to register and FIR if the information to police discloses commission of a cognizable offence - ***Khub Chand v. State of Rajasthan[34]. Para 50-51***
  Para 52- Object of using "shall" - to ensure all information is promptly registered
  Para 53- Investigation of offences and prosecution are duties of State - if option left, it may have serious consequences. Can serious affect the rights including fundamental rights of victims.
  Para 54-56 - Shall to be read as mandatory and should not be read as "may". No ambiguity in provision. Settled position of law that the legislative intent is clear if no ambiguity. Sec.39 of Code - Statutory duty of evey person to inform about commission of offences. It would be incongruous to suggest that thought it is the duty of citizens to inform, it is not obligatory on officer in charge to register the report. "Shall" to have same meaning in S.39 and S.154.

- ***BOOK/DIARY Paras 57-72:*** Contention that recording of first information u/s 154 is subsequent to entry in the General Diary/station diary. Interpretation wholly unfounded that if any inquiry is needed the police may conduct the same and thereafter the first information will be registered as FIR. ***First information is infact information received first in point of time which is either given in writing or reduced in writing. It is not the "substance" of it, which is to be entered in the diary.***
- *"General Diary" or "station diary" or "daily diary" under Sec.44 of Police Act, 1861 in states where it applies or under the Police Manual of a state, as the case maybe.*
- Police Act and CrPC, 1861 of the same year i.e. 1861. ***Sec.139*** of CrPC refers to word "diary" similar to Police Act. CrPC 1872 u/s 112 made departure and word "book" used in place of "diary". "Book" clearly referred to FIR book under Code for registration of FIRs.
- Que. whether FIR is to be recorded in FIR book or in General Diary, is no more res integra. This issue has already been decided authoritatively by this Court - In ***Madhu Bala v. Suresh Kumar***,[35] - held that FIR must be registered in FIR register (a book consisting of 200 pages). Substance of the information also to be mentioned in Daily Diary. Even in ***Bhajan Lal***, SC held that FIR o be entered in a book in a form commonly called the first information report.
- General diary entry reference also mentioned simultaneously in FIR book, while FIR no. is mentioned in General Diary since both are prepared simultaneously. ***Para 64***
- Each FIR has unique annual number given to it. Thus possible to keep strict control and track ot it. Copy of each FIR sent to superior officers and to Judicial Magistrate concerned. ***Para 65***
- On other hand, General Diary contains other huge details. Copy not sent to magistrate ***Para 66***
- Signature of complainant taken on FIR, unlike in General Diary. Complaint detailed unline in General diary containing only few paras. ***Para 67***
- Code enacted under Entry 2 of Concurrent List of Seventh Schedule of Constitution whereas Police Act enacted under Entry 2 of State List of Seventh Schedule of Constitution. ***Para 68***
- Provisions of Code to prevail over the Police Act according to Article 254(1) of Constituion. Thus Sec.154 of Code will prevail over Sec.44 of Police Act and FIR to be recorded in FIR Book and not General Diary or only after preliminary inquiry. ***Para 69-70***
- ***CBI v. Tapan Kumar Singh -*** GD entry may be treated as FIR in appropriate case ***Para 71***

- ***INFORMATION: Paras 73-79***
- Legislature consciously used expression "information" in S.154(1) unline in Sec.41(1)(a) and (g) where expression used for arresting a person without warrent is "reasonable complaint" or "credible information" - These are therefore, not the conditions precedent for registration of a case.
- Discussion about ***Bhajan Lal, Parkash Singh Badal, Ramesh Kumari, Ram Lal Narang, Lallan Chaudhary -*** No doubt that provision of S.154 is mandatory and officer concerned is duty-bound to

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[34] AIR 1967 SC 1074

[35] (1997) 8 SCC 476

register the case on basis of such information disclosing cognizable offence. Reasonableness and credibility of information is not a condition precedent for registration of a case.

- ***PRELIMINARY INQUIRY Paras 80-***
- ***Para 80-82 -*** Reiteration of contentions of Mr. Shekhar Naphade, Sr.Counsel for State of Maharashtra.
- ***Para 83-84 -*** Legislative intent clear - Insertion of Sub-Sec.(3) of Sec.154 by way of amendment reveals the intention of legislature to ensure that no information of commission of a cognizable offence must be ignored or not acted upon whcih would result in unjustified protection of the alleged offender/accused.
- ***Para 85 -*** Maxim - *expressio unius est exclusio alterius* (expression of one thing is the exclusion of another) applies in interpretation of S.154 where the mandate of recording information in writing excludes possibility of not recording an information of commission of a cognizable crime in special register.
- ***Para 86 -*** Conducting investigation after registration of FIR is *"procedure established by law"* and in conformity with Art.21 of Consitution. Right of accused under Art.21 is protected if FIR registered first and then investigation is conducted in accordance with provision of law.
- ***Para 87-88 -*** *"**2. (g) 'inquiry'** means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court."* Hence, inquiry under the Code is relatable to a judicial act and not to the steps taken by the police which are either investigation after the stage of Sec.154 or termed as "preliminary inquiry" and which are prior to the registration of FIR, even though, no entry in the General Diary/Station Diary/Daily Diary has been made. Though there is reference to the terms "preliminary inquiry" and "inquiry" under Sec 159 and Sections 202 and 340 of the Code, that is a *judicial exercise undertaken by the court and not by the police* and is not relevant for the purpose of the present reference.
- ***Para 89-92 -*** Reference to CBI Manual - not a statute and not enacted by legislature. Set of administrative orders issued for internal guidance of CBI officers. Cannot supersede Code. CBI constituted under special Act - Delhi Special Police Establishment Act, 1946 and derives power to investigate from this Act. Sec.4(2) and 5 of Code permit special procedures to be followed for Special Acts. - in view of these special provisions in the Code, the powers of CBI under DSPE Act cannot be equated with the powers of the regular State Police under the Code.

SIGNIFICANCE OF COMPELLING REASONS FOR REGISTRATION OF FIR AT THE EARLIEST: Paras 93-105.

- Object sought to be achieved by registering earliest information as FIR is inter alia two fold:
- one, that criminal process is set into motion and is well documented from the very start;
- second, that the earliest information received in relation to the commission of a cognizable offence is recorded so that there cannot be any embellishment, etc. later.
- Principles of democracy and liberty demand a regular and efficient check on police powers. Therefore, documenting every action of theirs. In Code provided u/Sec. 41(1)(b), Sec. 55 Sec. 91, Sec. 160, 172, 155 etc.
- Purpose not only transparency bu to ensure "judicial oversight". Sec.157(1) deploys word "forthwith" - thus, not only brought to knowledge of investigation agency but also to the subordinate judiciary.
- ***Para 97 -*** Code contemplates 2 kinds of FIRs: First duly signed u/s 154(1) is by informant to police officer and second which is registered by police itself on any information received [Sec.157(1)] - obligation to register FIR has inherent advantages:

(a) "Access to justice" for victim
(b) Upholds "rule of law" ordinary bringing crime to knowledge of State
(c) Facilitates swift investigation and sometimes even prevention of crime. In both cases, effecuates regime of law
(d) Leads to less manipulation in criminal cases and lessens incidents of 'antedated' FIRs or deliberately delayed FIR.

- ***Para 98-100 -*** Reproduced relevant paras of ***Thulia Kali v. State of T.N[36]., Tapan Kumar Singh & Madhu Bala.***

[36] (1972) 3 SCC 393

- ***Para 101***- protection of the interests of the poor is one of the main objects of the Code. Making registration of information relating to commission of a cognizable offence mandatory would help the society, especially, the poor in rural and remote areas of the country.
- ***Para 102- Justice VS Malimath Committee report -*** Plight faced by several people due to non-registration of FIRs and recommended that action should be taken against police officers who refuse to register such information.
- ***Para 103-105-*** Large number of FIRs not registered every year. Violation of rights of victims. Number of FIRs registered is equivalent to number of FIRs not registered. NCRB figures. Not registering FIRs - lawlessness in society. Thus, reading of Sec.154 in any other form would be only detrimental to scheme of Code. Court repeatedly held that it is mandatory to register FIR.

IS THERE A LIKELIHOOD OF MISUSE OF PROVISION?

- ***Para 106-108-*** FIR registration mandatory but arrest of accused immediately is not mandatory. These are two different things. Safeguard of "Anticipatory Bail" to accused u/S 438. - ***Joginder Kumar v. State of U.P.***[37] SC held that arrest cannot be made by police in a routine manner. Some reasonable justification necessary and justified and except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend Station House and not to leave the Station without permission would do.
- ***Para 109-*** Registration of FIR u/S 154 and arrest of accused u/S 41 are two entirely different things. Imaginary fear of arrest and loss of reputation. Remedy lies in strictly enforcing safeguards available against arbitrary arrests made by police.
- ***Para 110-*** Sec.151 allows police officer to arrest person even before commission of cognizable offence in order to prevent commission of offence. Such preventive arrest only valid for 24 hours. Mah. State Amendment to Sec.151 allows custody of person in that State for upto 30 days with order of Magistrate. ***Registering FIR and arrest of person operate on completely different parameters.*** If police officer misuses his power of arrest, he can be tried and punished u/Sec. 166 IPC.
- ***Para 111 -*** Police not liable to launch an investigation in every FIR mandatorily registered on receiving information relating to commission of a cognizable offence. Police officer can foreclose an FIR before investigation u/Sec.157 or after investigation file a final report u/Sec.173 seeking closure of matter.
- ***Para 112 -*** Giving power to the police to close an investigation, Sec.157 also acts like a check on the police to make sure that it is dispensing its function of investigating cognizable offences. This has been recorded in the 41st Report of the Law Commission of India. Therefore, the scheme of Code not only ensures that time of police should not be wasted on false and frivolous information but also that police should not intentionally refrain from doing their duty of investigating. As a result, ***the apprehension of misuse of the provision of mandatory registration of FIR is unfounded and speculative in nature.***
- ***Para 113-114-*** Contention of Mr. Naphade regarding conformity of Sec.154 and Art.21 - Delicate Balance has to be maintained between interest of society and protecting the liberty of an individual - Sec.154 not contravening Art.21.

EXCEPTIONS: Paras 115-119

- Cases of Medical Negligence ***Jacob Mathew.*** Unfair and inequitable to prosecute a medical professional only on the basis of allegations in the complaint. Corruption cases ***Sirajuddin*** Preliminary inquiry before proceeding against public servants. ***Tapan Kumar Singh*** Court validated a preliminary inquiry prior to registering an FIR only on the ground that at the time information is received, the same does not disclose a cognizable offence.
- Ex-facie complaint for cognizable offence. If information found to be false, there is always an option to prosecute complainant for filing a false FIR.

CONCLUSION AND DIRECTIONS: Para 120.1 to 120.8

- Registration of FIR mandatory u/S 154, if information discloses commission of cognizable offence and no preliminary inquiry permissible in such situation.
- If information received does not disclose cognizable offence, preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

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[37] (1994) 4 SCC 260

- If inquiry discloses commission of a cognizable offence, FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.
- The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.
- The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.
- As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

  (*a*) Matrimonial disputes/family disputes

  (*b*) Commercial offences

  (*c*) Medical negligence cases

  (*d*) Corruption cases

  (*e*) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

  Mere illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.
- While ensuring and protecting rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.
- Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.

  REFERENCE MADE TO CONSTITUTIONAL BENCH DISPOSED OF. List matters before appropriate Bench for disposal on merits.

9. MUKESH AND ANOTHER V. STATE (NCT OF DELHI) AND OTHERS REPORTED IN (2017) 6 SCC 1 (NIRBHAYA GANGRAPE)

[Coram: Dipak Misra, R. Banumathi and Ashok Bhushan, JJ.]

Dipak Misra, J. delivered the judgment of the Court for himself and Ashok Bhushan, J.
Banumathi, J. delivered a separate concurring judgment.

Facts:

- The Appellant accused persons (Akshay, Vinay, Mukesh and Pawan) were convicted by the Ld. Sessions Judge under sections 120-B, 365/366 IPC r/w 120-B, 307 r/w 120-B, 376(2)(g), 377 r/w 120-B, 302 r/w 120-B, 395, 397 r/w 120-B, 201 r/w 120-B, 412 IPC. They were *inter alia* sentenced to death for offence u/S 302 IPC (Accused Ram Singh committed suicide and proceedings against him stood abated). The High Court *vide* judgment dated 13.03.2014, affirmed the conviction and confirmed the death penalty and appeals preferred by the 4 accused were dismissed.
- On 16.12.2012, the deceased prosecutrix "Nirbhaya" had gone with her friend, PW1 the informant, to watch a movie and after the show boarded a chartered bus. 6 persons were already inside the bus, 4 in the cabin of the driver and 2 behind the driver's cabin. The accused persons did not allow anyone else to board and the lights inside were put off. Some of the accused got into an altercation with PW1 who was assaulted with iron rods. Two accused persons, Pawan and Vinay, robbed both the victims of their belongings including mobile phones. Accused persons – Ram Singh, Akshay and the juvenile in conflict with law (hereinafter "JCL") took the prosecutrix to the rear ride of the bus and she was raped by them, one after the other. After that, the said 3 accused persons came towards the PW1 informant and nailed him down. Then the other 2 accused persons – Vinay and Pawan – went to the rear side of the bus and committed rape on the prosecutrix, one by one. PW1 saw that speed of the bus had reduced and the accused Mukesh (driver) came near him and hit him with the rod. Mukesh also went to the rear side and raped the prosecutrix. Prosecutrix's private parts and her internal organs were seriously injured by inserting iron rod and hand in the rectal and vaginal region. The accused had stripped the prosecutrix and the informant of their clothes and threw them out of the moving bus from the front door. The prosecutrix and PW1 were noticed by PW72 Raj Kumar, who was on night patrol. PW72 saw them sitting naked having blood all around and immediately informed PW70 Ram Pal, who was in the Control Room, to call PCR. PW73 Head Constable Ram Chander reached the spot and took them to Safdarjung Hospital, New Delhi. On the way, the victims gave their names to PW73 and informed him about the rape and assault. Thereafter they were admitted and MLCs were prepared.
- PW1 informant gave his first statement to the police at 3:45 AM on 17.12.2012 which culminated into the recording of the FIR at 5:40 AM dt 17.12.2012. FIR was lodged u/S 120-B and 365, 466, 376(2)(g), 377, 307 and 302 IPC.
- In the **test identification parade** conducted by PW17 Metropolitan Magistrate, PW1 identified the accused Mukesh. Accused Akshay was also identified by PW1 in the test identification parade.
- The prosecutrix had to under **3 surgeries** – one on the same night i.e. 16/17.12.2012, the second and third on 19.12.2012 and 23.12.2012 respectively.
- **Dying declarations:**
  1. 1st dying declaration was recorded on 16.12.2012 by PW49 doctor.
  2. On 21.12.2012, on being declared fit, a 2nd dying declaration was recorded by PW27, SDM which was elaborate and one where the prosecutrix has described the incident in details including the insertion of rods in her private parts. She also stated the names of the accused.
  3. On 25.12.2012, PW30 Metropolitan Magistrate recorded the 3rd dying declaration of the prosecutrix at the hospital. The attending doctors opined that the prosecutrix was not in a position to speak but was otherwise conscious and responded by gestures. Questions were put in the nature of multiple-choice questions and the prosecutrix gave her statement through gestures and writings.
- Upon examination on 26.12.2012, her health condition looked critical and she was shifted to Singapore on 27.12.2012 for further treatment where she died on 29.12.2012.
- The **prosecution carried out DNA analysis and finger/palm prints, footprints and bite mark analysis to ascertain the identity of the accused persons**.

FINDINGS:

A] As per Dipak Misra, J. (for himself and Ashok Bhushan, J.; Banumathi, J. concurring) -

- **Para 52 and 55: Delayed registration of FIR**– No delay. Victim was seriously injured and was in a critical condition. As a natural conduct, giving medical treatment to her was of prime importance. PW 1 himself was injured and admitted to the hospital.
- **Para 56-57 and 63-64**: **Non-mentioning of assailants, the description of the bus and the use of iron rods in the FIR** – FIR is not an encyclopaedia of facts. Omission is not fatal and has to be considered in the backdrop of the entire factual scenario, materials brought on record and objective weighing of the circumstances. In the statement recorded in the early hours of 17.12.2012, PW1 has broadly made reference to the accused persons and also to the overt acts. **The injuries on PW1 and gruesome acts on the prosecutrix must have put PW1 in a traumatic condition. Merely because names of accused persons are not mentioned, it cannot be said that it raises serious doubts about the prosecution case.**
- **Paras 79, 81, 91, 94, 96 and 97: Evidentiary value of the testimony of PW1** – Evidence of a witness is not to be disbelieved simply because he is a partisan witness or related to the prosecution. Evidence of an injured witness is entitled to greater weight. Firm cogent and convincing ground is required to discard the evidence of an injured witness. Evidence of PW1 is not to be disbelieved simply because there were certain omissions. FIR, supplementary statements u/S 164 CrPC and testimony before the Court show that there is no justification to treat the version of PW1 as inconsistent. Contradictions in the statement are not material enough to destroy the substratum of the prosecution case.
- **Para 136 and 137** – Established with certainty that recoveries were made when the accused persons were in custody. On scrutiny of the arrest memo, statements under S. 27 Evidence Act and the disclosure made in pursuance thereof, **the recoveries of articles belonging to the informant and the victim from the custody of the accused persons cannot be discarded**. The items that have been seized are within the special knowledge of the accused persons and no explanation has come on record from the accused persons explaining as to how they had got into possession of the said articles. Argument that that recoveries have not really been made form the accused persons and are planted is not tenable.
- **Para 142, 146-147: Test Identification Parade** - (Vinay and Pawan refused to participate in TIP and Akshay and Mukesh were identified by PW in TIP) In ***Manu Sharma v. State (NCT of Delhi)*** this Court held that the proposition of law is quite clear that even if there is no previous TIP, the court may appreciate the dock identification as being above board and more than conclusive. In the case at hand, the informant, apart from identifying the accused who had made themselves available in the TIP, has also identified all of them in Court. TIP is not dented.

- **Dying Declaration:**

- **Para 168** – In the **1st dying declaration** made to PW 49 doctor, due to her medical condition, though the prosecutrix broadly described the incident of gang rape committed on her and injuries caused to her and PW-1, yet she failed to vividly describe the incident of inserting iron rod, etc. As soon as the prosecutrix was brought to the hospital, she gave a brief description of the incident to PW-49 doctor. As it appears from the record, the prosecutrix had lost sufficient quantity of blood due to which she was drowsy and could only give a brief account of the incident and injuries caused to her and the informant. Even though the prosecutrix has given only a brief account of the occurrence, yet she was responding to verbal command and hence, the same is natural and trustworthy and furthermore, and is also consistent with the other dying declarations.
- **Para 169** – **2nd dying declaration** was recorded by PW27 SDM. The prosecutrix not only signed it but even wrote the date and time in this statement. She narrated the entire incident specifying the role of each accused; gang rape/unnatural sex committed upon her; the injuries caused in her vagina and rectum by use of iron rod and by inserting of hands by the accused; description of the bus, robbery and lastly throwing of both the victims out of the moving bus, in naked condition at the footfall of Mahipalpur flyover. During cross-examination, PW-27 has stated that she had herself overwritten the date and, thus, overruled the possibility of any falsification of the document at the behest of the investigating team. PW-27 explained the overwriting of date as a 'human error' and the same has been rightly construed by the trial court and accepted by the High Court as a complete explanation.
- **Para 172- 3rd dying declaration** before PW30 Metropolitan Magistrate cannot be discarded on account of meagre technical errors.

- **Para 173** – Argument of the Appellants that due to failure on the part of the prosecutrix to disclose the names of any of the accused persons in the 1st dying declaration, the other 2 dying declarations where she had given names are tutored and cannot form basis of conviction – completely unjustified in light of the medical condition when she was brought to the hospital. The 2nd and 3rd dying declarations stand corroborated by the medical evidence and PW1's testimony.
- **Para 174** - If a dying declaration is found to be voluntary and made in fit mental condition, it can be relied upon even without any corroboration.
- **Para 175** – ***Laxman v. State of Maharashtra*** **[(2002) 6 SCC 710]** succinctly put down the law regarding dying declaration.
- **Para 176** – ***Atbir v. Govt. (NCT of Delhi)*** **[(2010) 9 SCC 1]** has exhaustively laid down certain guidelines with respect to admissibility of dying declaration.
- **Para 180** – Value of dying declaration in evidence is stated in ***Babulal v. State of M.P. [(2003) 12 SCC 490]***.
- **Para 182** – Judgment in ***Vijay Pal v. State (Govt. of NCT of Delhi) [(2015) 4 SCC 749]*** referred to.
- **Para 183** – No inconsistency in the dying declarations. Prosecutrix was under constant medical attention. Considering the facts and circumstances and the law laid down, **a mere omission on the part of the prosecutrix to state the entire factual details of the incident in her very first statement does not make her subsequent statements unworthy especially when her statements are duly corroborated by other PWs and medical evidence.**
- **Para 188 –** Contention that the 3rd dying declaration made through gestures lacks credibility and ought to have been videographed, is without substance. The dying declaration inspires confidence. Failure to videograph would not be fatal.
- **Para 189 and 190 –** ***Meesala Ramakrishnan v. State of A.P.*** **[(1994) 4 SCC 182] – this Court admitted dying declaration made through gestures. Also considered observation in** ***B. Shashikala v. State of A.P.*** **[(2004) 13 SCC 249]**
- **Para 191 –** Dying declaration made through signs, gestures or by nods are admissible as evidence, if proper care was taken at the time of recording the statement. The only caution the court ought to take is that the person recording the dying declaration is able to notice correctly as to what the declarant means by answering by gestures or nods. In the present case, this caution was aptly taken.
- **Para 192 - All the three dying declarations are consistent with each other and well corroborated with other evidence**, Both Courts have correctly placed reliance upon the dying declarations of the prosecutrix to record the conviction.

DNA report

- **Para 228 –** The decisions in *Santosh Kumar Singh v. State, Inspector of Police v. David, Krishan Kumar Malik v. State of Haryana, Krishan Kumar Malik v. State of Haryana, Surendra Koli v. State of U.P., Mohd. Ajmal Amir Kasab v. State of Maharashtra, Sandeep v. State of U.P, Rajkumar v. State of M.P.* and N*andlal Wasudeo Badwaik v. Lata Nandlal Badwaik* make it clear that DNA report deserves to be accepted unless it is absolutely dented. For non-acceptance of the same, it has to be established that there had been no quality control or quality assurance. **If the sampling is proper and if there is no evidence as to tampering of the samples, DNA test report should be accepted.**
- **Para 233 –** Defense counsel did not raise any substantial ground to challenge the DNA report during cross-examination of PW45 doctor who has submitted the DNA analysis report. **No reason to declare the DNA report as inaccurate especially when it clearly links the accused persons with the incident.**
- **Para 246 –** Bite mark analysis report is credible.

Alibi

- **Para 269 –** Settled in law that while raising a plea of "alibi" the burden lies upon the accused person to establish the plea convincingly by adducing cogent evidence. The plea of alibi that accused Vinay and accused Pawan had attended a musical programme was rightly rejected by the trial court and approved by the High Court.

Criminal conspiracy

- **Para 286 –** In criminal conspiracy, meeting of minds of two or more persons for doing an illegal act is the sine qua non but proving this by direct proof is not possible. Hence, conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused.
- **Para 287 –** Principles relating to criminal conspiracy summarised by a 3-judge Bench of this Court in ***State v. Nalini (1999) 5 SCC 253***.
- **Para 288 and 289 –** In ***Firozuddin Basheeruddin v. State of Kerala*** **and** ***Suresh Chandra Bahri v. State of Bihar*****,** it was observed that for criminal conspiracy, there must be an agreement to commit the offence.
- **Para 290 –** For criminal conspiracy, the prosecution must adduce evidence to prove that a) the accused agreed to do or caused to be done an act; b) such an act was illegal or was to be done by illegal means within the meaning of IPC; c) irrespective of whether some overt act was done by one of the accused in pursuance of the agreement.
- **Para 310 –** In the present case, the prosecution has been able to unfurl the case relating to criminal conspiracy by placing the materials on record and connecting the chain of circumstances.

- **SUMMARY OF CONCLUSIONS @Para 311**
- **Para 312** – Prosecution has proved the charges beyond reasonable doubt.

Quantum of sentence – death penalty

- **Para 340 to 343** – Decision in ***Bachan Singh v. State of Punjab*** **(1980) 2 SCC 684** – aggravating and mitigating circumstances reproduced.
- **Para 344 to 347** – Decision in ***Machhi Singh v. State of Punjab*** **(1983) 3 SCC 470** explained the concept of "the rarest of the rare cases". Stress was laid on certain aspects, namely, the manner of commission of the murder, the motive for commission of the murder, anti-social or socially abhorrent nature of the crime, magnitude of the crime and personality of the victim of murder. Court had upheld the death penalty in this case.
- **Para 348** – The Court in ***Haresh Mohandas Rajput v. State of Maharashtra (2011) 12 SCC 56*** referred to guidelines/principles laid down in ***Bachan Singh*** and ***Macchi Singh.***
- **Para 349** – In ***Dhananjoy Chatterjee v. State of W.B. (1994) 2 SCC 220***, this Court took note of the principles stated in Bachan Singh and the rise of violent crime against women. Appreciating the manner in which the barbaric crime (rape and murder) was committed on a school going girl of 18 years, death penalty was affirmed.
- **Para 351 to 354** – Death penalty was also upheld in ***Laxman Naik v. State of Orissa (1994) 3 SCCC, Kanta Tiwari v. State of M.P. (1996) 6 SCC 250, Bantu v. State of U.P. (2008) 11 SCC*** 113 and ***Rajendra Pralhadrao Wasnik v. State of Maharashtra (2012) 4 SCC 37***.
- **Para 355 to 357**– Reference to authorities where in case of rape and murder, death penalty was not awarded – ***State of T.N. v. Suresh (1998) 2 SCC 372, Akhtar v. State of U.P. (1999)*** 6 SCC 60, ***State of Maharashtra v. Bharat Fakira Dhiwar (2002) 2 SCC 684***.
- **Para 358 to 361**– ***Vasanta Sampat Dupare v. State of Maharashtra (2015) 1 SCC 253*** concerned the raped of a minor girl and death penalty was upheld. Relied on to explain the duty of the Court when **collective conscience** is shocked.
- **Para 362** – Mitigating factors highlighted by filing affidavits pertain to the strata to which the Appellants belong, the aged parents, marital status and the young children and the suffering they would go through, their conduct while in custody and their transformation and possibility of reformation. Emphasis was also laid on their young age and rehabilitation.
- **Para 364** - The brutal, barbaric and diabolic nature of the crime is evincible from the acts committed by the accused persons.
- **Para 365** - It is manifest that the wanton lust, the servility to absolutely unchained carnal desire and slavery to the loathsome beastility of passion ruled the mindset of the appellants to commit a crime which can summon with immediacy **"tsunami" of shock in the mind of the collective and destroy the civilised marrows of the milieu in entirety.**
- **Para 366 – Aggravating circumstances outweigh the mitigating circumstances. Death penalty confirmed.**

B| As per R. Banumathi, J. (concurring) -

Court's duty while appreciating evidence in rape cases

- **Para 382** – Like other cases, the onus is always on the prosecution to prove affirmatively each and every ingredient of the offence. This onus never shifts.
- **Para 383** – At the same time, while dealing with rape cases, the Court must act with utmost sensitivity. The Court should not be swayed with minor contradictions and discrepancies in appreciation of evidence of victims which are not of substantial character.
- **Para 285** – There is no legal compulsion to look for corroboration of the prosecutrix's testimony unless the evidence of the victim suffers from serious infirmities, thereby seeking corroboration.
- **Para 391** – Observation that once the statement of the prosecutrix inspires confidence, conviction can be based on the solitary evidence of the prosecutrix and that corroboration of testimony of a prosecutrix is not a requirement of law but only a rule of prudence.

Dying declaration

- **Para 396** – The victim was gangraped and she must have been pushed to deep emotional crisis. Rape deeply affects the entire psychology of the woman and humiliates her, apart from leaving her in a trauma. The testimony of the victim must be appreciated in the background of the entire case and the trauma which the victim had undergone. Omission in the 1st dying declaration not a material one.
- **Para 397** – Each case of dying declaration has to be considered in its own facts and circumstances in which it is made. However, there are some well-known tests to ascertain as to whether the statement was made in reference to cause of death of its maker and whether the same could be relied upon or not. Once Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.
- **Para 398** – Principles governing dying declarations laid down in ***Paniben v. State of Gujarat (1992) 2 SCC 474*** enunciated.

Multiple dying declarations

- **Para 399** – Where there are multiple dying declarations, the Court should consider whether they are consistent with each other. If there are inconsistencies, the nature of the inconsistencies must be examined as to whether they are material or not.
- **Para 406** – When a dying declaration is recorded voluntarily, pursuant to a fitness report of a certified doctor, nothing much remains to be questioned unless it is proved that the during declaration was tainted with animosity and a result of tutoring.
- **Para 407** – Though there was a time-gap between the three dying declarations in this case, all three were held to be consistent with each other and there are no material contradictions. All three being voluntary, consistent and trustworthy, satisfy the test of reliability.

Dying declaration by gestures and nods

- **Para 408 to 409** – Nothing on record to show that the mental capacity of the victim was impaired so as to doubt the third dying declaration. It was recorded through nods and gestures and also by the victim's own writing (names of accused written). It inspires confidence and was rightly relied upon by Courts below. It is admissible in evidence.

Corroboration of dying declaration by medical evidence

- **Para 413 and 416 –** Dying declarations amply corroborated by medical evidence depicting injuries**.** Extensive injuries found on the vagina/private parts of the body of the victim and injuries caused to the internal organs and all over the body clearly show that the victim was ravished.

Corroboration of dying declaration by scientific evidence

- **Para 417 –** DNA profiles generated from the clothes of the accused recovered at their behest are consistent with that of the victim and is unimpeachable evidence incriminating the accused.
- **Para 418** - Odontology Report which links 2 accused persons also strengthens the case of the prosecution.

- **Para 419 – Dying declarations are corroborated in material particulars by medical evidence, evidence of injured witness PW1, matching of DNA profiles, recovery of belongings of the victim at the behest of the accused. Conclusively connect the accused with the crime.**

PW1's testimony

- **Para 426 to 427 –** PW1's testimony being that of an injured witness lends credibility to his evidence and the prosecution's case. [Mano Dutt v. State of U.P. (2012) 4 SCC 79 referred to]
- **Para 428 to 431** – Recoveries of articles of PW1 and other scientific evidence (like DNA analysis) establishes the presence of PW1 at the crime scene.
- **Para 433** – PW1 and the victim faced a traumatic experience and it cannot be expected for them to give minute details immediately after the incident.

Arrest and recovery u/S 27 Evidence Act

- **Para 442 –** Recovery of articles of PW1 and the victim at the behest of the accused is a strong incriminating circumstance implicating the accused. Accused have not offered any cogent or plausible explanation as to how they came in possession of those articles.
- **Para 452** – Recoveries are duly proved.

DNA Report

- **Para 461** – **DNA report** and the findings thereon being scientifically accurate clearly establish the link involving the accused persons in the incident.

Criminal Conspiracy

- **Para 468** – Unlike other offences, criminal conspiracy in most of the cases is proved by circumstantial evidence only.
- **Para 470** - n the present case, there is ample evidence proving the acts, statements and circumstances, establishing firm ground to hold that the accused who were present in the bus were in prior concert to commit the offence of rape. The prosecution has established that the accused were associated with each other.
- **Para 471** - In this case, the existence of conspiracy is sought to be drawn by an inference from the circumstances: (i) the accused did not allow any other passenger to board the bus after PW-1 and the prosecutrix boarded the bus; (ii) switching off the lights; pinning PW-1 down by some while others commit rape/unnatural sex with the prosecutrix at the rear side of the bus; (iii) exhortation by some of the accused that the victim be not left alive; and (iv) their act of throwing the victim and PW-1 out of the running bus without clothes.
- **Para 474** – So far as the offence u/S 376(2)(g) IPC is concerned, the sharing of common intention and the jointness in commission of rape is established by the presence of all accused in the bus.

Quantum of sentence – death penalty

- **Para 486 –** Awarding sentence is a matter of discretion and must be exercised on consideration of aggravating and mitigating circumstances in the individual cases. Court should impose such sentence which reflects the social conscience of the society by considering the collective conscience or society's cry for justice.
- **Para 495** – After referring to a catena of judgments post ***Bachan Singh*** and ***Macchi Singh***, this Court tried to lay down a nearly exhaustive list of aggravation and mitigating circumstances in ***Ramnaresh v. State of Chattisgarh (2012) 4 SCC 257.***
- **Para 511 –** When a crime is committed with extreme brutality and the **collective conscience of the society** is shocked, Courts must award death penalty irrespective of their personal opinion. By not imposing death sentence, Court may do injustice to the society at large.
- **Para 513** – **Aggravating circumstances**: diabolic nature of the crime and the manner of committing the crime; brazenness and coldness with which acts were committed reflects that there is no scope for reform; horrific acts reflecting inhumanity of the accused; acts committed shook the conscience of the society.

- **Para 514** – **Mitigating circumstances** placed on record by way of individual affidavits of the accused – poverty and rural background, young age, responsibilities towards parents and other family members, absence of criminal antecedents, conduct in jail, likelihood of reformation.
- **Para 517** – **Factors like young age, poor background, post crime remorse and post crime good conduct, age, absence of criminal antecedents etc cannot be taken as mitigating circumstances to take the cause out of the "rarest of rare cases" category**.
- **Para 518** – Death sentence affirmed.

10. NAVTEJ SINGH JOHAR V. UNION OF INDIA, (2018) 10 SCC 1

Constitution Bench comprising of – *Chief Justice Dipak Misra, J. Rohington Fali Nariman, J. D Y Chandrachud, J. A M Khanvilkar, & J. Indu Malhotra*

Decision- The judgment in *Suresh Koushal vs. Naz Foundation* upholding the constitutional validity of S-377 was unanimously overruled. The Constitution Bench on 06.09.2018 while answering the reference and allowing the Writ Petitions cited fundamental rights violations in reading down Section 377. Held that Section 377 discriminates against individuals on the basis of their sexual orientation and/or gender identity, violating Articles 14 and 15 of the Constitution. Section 377 violated the rights to life, dignity and autonomy of personal choice under Article 21. Finally, it held that it inhibits a LGBT individual's ability to fully realize their identity, by violating the right to freedom of expression under Article 19(1)(a). Section 377 will continue to apply to non-consensual sexual acts against adults, sexual acts against minors and acts of bestiality.

ISSUES –

- Was the rationale of the Supreme Court judgment in the Suresh Kaushal case sound in its understanding of morality as social morality?
- Whether Section 377 violates the fundamental right to expression under Article 19(1)(a) by criminalizing the gender expression of persons belonging to the LGBTQI+ community?
- Whether Section 377 violates Article 14 and 15 by allowing discrimination on the basis of "sexual orientation" and "gender identity"?
- Whether Section 377 violates right to autonomy and dignity under Article 21 by penalizing private consensual acts between same-sex persons?

BACKGROUND –

Introduction of Section 377 - The Buggery Act, 1533 - this act defined homosexual acts, sodomy, sexual activities involving animals as unnatural offences. The Parliament of England passed this Act in 1533 under the kingship of King Henry VII. This act defined buggery as an act which is against the will of God. Under this act, unnatural offences were punishable by death. The very first law commission of India which was under Thomas Macaulay brought this law in India and drafted it as *sec-377* of Indian Penal Code of 1860.

Challenges to Section-377 - Section 377 of the IPC categorised consensual sexual intercourse between same sex people as an "unnatural offence" which is "against the order of nature". It prescribed a punishment of 10 years imprisonment. The provision is a Victorian-era law, which survived into the 21st century.

I. NGO- AIDS Bhedbhav Virodhi Abhiyan (ABVA)

The very first challenge faced by S*ec 377* was in 1994. This NGO filed a petition in the Delhi High Court for decriminalizing this section. The facts were that after observing homosexuality in the Tihar Jail the workers of the NGO wanted to distribute condoms among the male inmates. The then superintendent of Tihar Jail, Kiran Bedi disapproved this as according to her, this would have encouraged homosexuality. This petition was then dismissed in 2001.

II. NAZ Foundation vs. Govt. of NCT & ors (2009) 111 DRJ 1

Naz Foundation (India) Trust challenged the constitutionality of Article 377 under Article 14, 15, 19 and 21 before the Delhi High Court. The Foundation contended that Section 377 reflects an antiquated understanding of the purpose of sex, namely as as means of procreation, and has no place in a modern society. Further, the police had weaponized the provision, which impeded efforts aimed at preventing the spread of HIV/AIDS. The Foundation cited an instance in 2001 in Lucknow where HIV prevention workers, who were distributing condoms to homosexual men, were arrested on the allegation that they

were conspiring to commit an offence. The Naz Foundation also argued that the provision was being misused to punish consensual sex acts that are not peno-vaginal .
This NGO was working for the prevention of HIV/AIDS and therefore, had interaction with such sections which also included homosexuals. According to the NGO, this section of society was extremely vulnerable to HIV as this particular section faced discrimination, abused from public and was also neglected by public authorities. According to the petitioner sec-377 of IPC was violative of some of the fundamental rights of homosexuals such as Article 14, 15 and 21.
The Delhi High Court ruled in 2009 that Section 377 cannot be used to punish sex between two consenting adults – this violates the right to privacy and personal liberty under Article 21 of the Constitution. The Court held that classifying and targeting homosexuals violates the equal protection guarantee under Article 14 of the Constitution. Section 377 thus violated human dignity which forms the core of the Indian Constitution.

Several organizations and individuals challenged the Delhi High Court judgment in the Supreme Court. They argued that: the right to privacy does not include the right to commit any offence; decriminalizing homosexuality would be detrimental to the institution of marriage and would lure young people towards homosexual activities.

The Supreme Court in 2013 reversed the Delhi High Court verdict in **Suresh Kumar Koushal and Ors. Vs. NAZ Foundation and ors.** and held that the decision of decriminalizing homosexuality can only be done by the Parliament and not the Court. It also held that Section 377 criminalises certain acts and not any particular class of people. Reference was made to the minuscule number of people who were members of the LGBTI community and the fact that only a fraction amongst them had been prosecuted under Section 377 (since less than 200 cases had arisen in 150 years) and thus, there cannot be any basis for declaring the Section ultra-virus of provisions of Articles 14, 15 and 21 of the Constitution.
Several curative petitions were filed challenging the Supreme Court judgement.

III. **Navtej Singh Johar V. UOI -** While the curative petitions against *Suresh Koushal* were pending, in 2016 five individuals from the LGBTQ communities – namely Bharatnatyam dancer Navtej Singh Johar, restaurateurs Ritu Dalmia and Ayesha Kapur, hotelier Aman Nath and media person Sunil Mehra filed a fresh writ a petition.

The Petition challenged the judgment in *Suresh Kumar Koushal* case and sought recognition of the right to sexuality, right to sexual autonomy and right to choice of a sexual partner to be part of the right to life guaranteed by Art. 21 of the Constitution and to declare Section 377 unconstitutional.

In light of several factors including the progressive development of the right to privacy and its intrinsic link to dignity and personal autonomy as elucidated in the cases of *NALSA vs. Union of India & Ors. ((2014) 5 SCC 438)* and *K.S. Puttaswamy & Anr. vs. Union of India & Ors. ((2017) 10 SCC 1),* a three Judge Bench of the Supreme Court referred the petition to a larger bench observing that the decision in *Suresh Kumar Kaushal's* case required re-consideration.
In the matter certain non-governmental organizations, religious bodies and other representative bodies also filed applications to intervene in the case.

The Constitution Bench - J. Dipak Misra for himself and J. A M Khanvilkar, while J. Rohington Fali Nariman, J. D Y Chandrachud, & J. Indu Malhotra rendered 4 separate but concurrent judgments.

CONTENTIONS

- **Petitioner's Contentions: - @Pg 79 - 85, Para 20 – Para 44**

1. Homosexuality, bisexuality and other sexual orientations are equally natural to all persons and are founded on consent of two legally qualified persons; the orientations are neither a physical illness nor a mental disease;
2. Making the sexual orientations of a person criminal, was offensive to the well- established principles of individual dignity and autonomy; sexual orientation is an essential attribute of one's privacy;
3. Lesbian, gay, bisexual and transgender (LGBT) community comprise 7-8% of India's population and they need to be recognized irrespective of their minority and they need legal protection;
4. Section 377 violates Article 14 as it is vague regarding the term "carnal intercourse against order of nature" and no intelligible differentia or reasonable classification exists as long as sex is consensual;
5. Section 377 is contrary to Article 15 and has a chilling effect on Article 19(1)(a) as LGBT persons cannot express their sexual identity and orientation freely;
6. Sexual autonomy and right to choose a partner of one's choice is inherent under Article 21 of the Constitution; a person's right to reputation is also taken away under Section 377, which is a facet of Article 21
7. Section 377 hampers the ability of the LGBTs to realize their constitutional right to shelter; LGBTs seek assistance of private sources such as Gay Housing Assistance Resources (GHAR) in order to access safe shelter and this is an indication that the members of this community are in a dire need of immediate care and protection of the government and judiciary;

- **Contentions of the Respondents And other Intervenors @Pg 85 - 90, Para 20 – Para 45-75**

1. No person has any liberty to abuse one's organs and that the offensive acts as mentioned in Section 377 are committed by abusing one's organs;
2. Acts mentioned in Section 377 are undignified and derogatory to the constitutional concept of 'dignity' and thus, de-criminalising the Section would be wrong and constitutionally immoral;
3. Section 377 rightly makes the acts stated therein punishable as the Section was incorporated after taking note of the legal systems and principles which prevailed in ancient India and now in 2018, the said Section is more relevant legally, medically, morally and constitutionally;
4. If Section 377 was declared unconstitutional then the family system would be in shambles and institution of marriage would be affected;
5. Despite the de-criminalisation of various consensual acts of adults in other parts of world, they cannot be de-criminalised in India due to its different political, economic and cultural fabric;
6. In the event that consenting acts between two same sex adults are excluded from the ambit of Section 377, then a married woman would be rendered remediless against her bi-sexual husband and his consenting male partner and additionally would have a cascading effect on personal laws and legislations like the Special Marriages Act;
7. Doctrine of manifest arbitrariness is of no application as the law is not clearly or otherwise arbitrary, for Section 377 applies irrespective of one's gender or sexual orientation;
8. Consent could also be obtained by misconception, unsoundness of mind, intoxication or coercion;
9. Section 377 does not violate Article 14 as it merely defines a particular offence and its punishment and it is well within the power of the State to determine who should be regarded as a class for the purpose of a legislation and this is reasonable classification.

JUDGMENT

The Constitution Bench unanimously held that Section 377 of the Indian Penal Code, 1860 insofar as it applied to consensual sexual conduct between adults in private, was unconstitutional. With this, the Court overruled its decision in *Suresh Koushal v. Naz Foundation* ((2014) 1 SCC 1) that had upheld the constitutionality of Section 377.

The Court relied on its decision in *National Legal Services Authority v. Union of India* (NALSA case, (2014) 5 SCC 438)) to reiterate that gender identity is intrinsic to one's personality and denying the same

would be violative of one's dignity. Further reliance was placed in *K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1) and held that denying the LGBT community its right to privacy on the ground that they form a minority of the population would be violative of their fundamental rights. It held that Section 377 amounts to an unreasonable restriction on the right to freedom to expression since consensual carnal intercourse in private "does not in any way harm public decency or morality" and if it continues to be on the statute books, it would cause a chilling effect that would "violate the privacy right under Art. 19(1)(a)". The Court affirmed that "intimacy between consenting adults of the same sex is beyond the legitimate interests of the state" and sodomy laws violate the right to equality under Art. 14 and Art. 15 of the Constitution by targeting a segment of the population for their sexual orientation. Further, the Court also relied upon its decisions in *Shafin Jahan v. Asokan K.M.*(2018 (16) SCC 368) and *Shakti Vahini v. Union of India* ((2018) 7 SCC 192)) to reaffirm that an adult's right to "choose a life partner of his/her choice" is a facet of individual liberty.

Chief Justice Misra (on behalf of himself and J. Khanwilkar) - relied on the principles of transformative constitutionalism and progressive realization of rights to hold that the constitution must guide the society's transformation from an archaic to a pragmatic society where fundamental rights are fiercely guarded. He further stated, "constitutional morality would prevail over social morality" to ensure that human rights of LGBT individuals are protected, regardless of whether such rights have the approval of a majoritarian government.

J. Rohington Fali Nariman analysed the legislative history of Section 377 to conclude that since the rationale for Section 377, based on Victorian morality, "has long gone" there was no reason for the continuance of the law. He concluded his opinion by imposing an obligation on the Union of India to take all measures to publicize the judgment so as to eliminate the stigma faced by the LGBT community in society. He also directed government and police officials to be sensitized to the plight of the community so as to ensure favourable treatment for them.

J. D.Y Chandrachud in his opinion recognized that though Section 377 was facially neutral, its "effect was to efface identities" of the LGBT community. He stated that, if Section 377 continues to prevail, the LGBT community will be marginalized from health services and the "prevalence of HIV will exacerbate". He stated that not only must the law not discriminate against same-sex relationships, it must take positive steps to achieve equal protection and to grant the community "equal citizenship in all its manifestations".

J. Indu Malhotra affirmed that homosexuality is "not an aberration but a variation of sexuality". She stated that the right to privacy does not only include the right to be left alone but also extends to "spatial and decisional privacy". She concluded her opinion by stating that history owes an apology to members of the LGBT community and their families for the delay in providing redress for the ignominy and ostracism that they have suffered through the centuries.

Key Points on which the Judges based their judgment on:

- **Right to Equality and Non-Discrimination:**
- **Freedom of Expression:**
- **Right to Life and Personal Liberty:**
- **"the Order of Nature"**
- **Constitutional Morality**
- **Yogyakarta Principles**

The Litmus Test for Survival of Section 377

The Supreme Court tested the constitutionality of Section 377 against the principles of equality, liberty, dignity under Articles 14, 19 and 21.

1. **Right to Equality and Non-Discrimination:** The Court observed that Section 377 arbitrarily punishes individuals who engage in same sex relationships. To substantiate this, the Court noted that Section 377 classifies and punishes individuals who engage in carnal intercourse against the order of nature to protect women and children. However, this objective has no reasonable nexus with the classification, as unnatural offences have also been separately penalised under Section 375 and the POCSO Act. Therefore, the Court held that the unequal treatment of LGBT individuals violates Article 14. Further, the Court held that Section 377 is manifestly arbitrary as it does not distinguish between consensual and non-consensual

sexual acts between adults. It targeted people exercising certain choices and treated them as "less than humans" and encouraged prejudices and stereotypes accompanied by debilitating social effects. This violates Article 14, which is the very basis of non-discrimination.

2. **Freedom of Expression:** The Court acknowledged that all persons, including LGBT individuals, had the right to express their choices without any fear. It recognized same-sex sexuality as a normal variant of human sexuality. In particular, the Court noted that Section 377 stigmatises and discriminates against transgender persons. Next, the Court tested whether public order, decency and morality are reasonable grounds to restrict the right to freedom of expression of sexuality under Article 19(1)(a). It noted that Section 377 criminalises private consensual acts which neither disturb public order, nor injure public decency or morality. Sexual acts cannot be viewed solely from the lens of morality where they are seen to be purely for procreation. An unreasonable restriction on acts within a person's private space will have a chilling effect on freedom of choice. For these reasons, the Court held that Section 377 is disproportionate and violates the fundamental right to freedom of expression.

3. **Right to Life and Personal Liberty:** The Court held that Section 377 violates human dignity, decisional automony and the fundamental right to privacy. Every individual has the liberty to choose their sexual orientation, seek companionship and exercise it within their private space. As Section 377 inhibits the exercise of personal liberty to engage in voluntary sexual acts, it violates Article 21. It socially ostracises LGBT persons and does not permit full realisation of their personhood. Denying the right to determine one's sexual orientation curtails the right to privacy of an individual. Therefore, the Court held that the scope of the right to privacy must be widened to incorporate and protect 'sexual privacy'.

4. **"the Order of Nature" -** Section 377 criminalises 'unnatural sex' which is "*against the order of nature*". The Court held that such a classification between natural and unnatural intercourse is not legally valid. Naturalness should not determine the legality or acceptance of a phenomenon. Penal consequences for an act that is unnatural or wrong cannot be imposed without sufficient justification.

5. **Constitutional Morality -** The Court described 'constitutional morality' as the ideals and morals of the Constitution and the values that create an inclusive society. It recognized the Constitution as a tool to transform society. A decision on whether a penal provision violates fundamental rights must be guided by the principles of constitutional morality and not societal morality. Where a constitutional court finds that a provision violates constitutional morality, it must be struck down.

6. **Yogyakarta Principles -** The court referred and relied on progressive document - Yogyakarta Principles (a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity) which prohibits discrimination on the grounds of sexual orientation and gender identity. *NALSA vs. Union of India also relied on these principles, though they are not binding, to* uphold the right of non-discrimination on the grounds of gender identity. Relying on the Yogyakarta Principles and *NALSA*, the Court held that Section 377 does not conform with India's international obligations.

11. SHAKTI VAHINI V. UNION OF INDIA, (2018) 7 SCC 192

Background: WP been preferred under Art.32 of Constitution seeking directions to the respondent State Govts. and the Central Govt. to take preventive steps to combat honour crimes, to submit a National Plan of Action and State Plan of Action to curb crimes of the said nature and further to direct the State Governments to constitute special cells in each district which can be approached by the couples for their safety and well-being. That apart, prayers have been made to issue a writ of mandamus to the State Governments to launch prosecutions in each case of honour killing and take appropriate measures so that such honour crimes and embedded evil in the mindset of certain members of the society are dealt with iron hands.

Petitioner organisation was authorised for conducting Research Study on "Honour Killings in Haryana and Western Uttar Pradesh" by order dated 22-12-2009 passed by the National Commission for Women. Averred that there has been a spate of honour killings in Haryana, Punjab and Western Uttar Pradesh.

Para 1 - Assertion of choice is an insegregable facet of liberty and dignity which is crushed in the name of class honour and the person's physical frame is treated with absolute indignity and a chilling effect dominates over the brains and bones of the society at large. The question that poignantly emanates for consideration is whether the elders of the family or clan can ever be allowed to proclaim a verdict guided by some notion of passion and eliminate the life of the young who have exercised their choice to get married against the wishes of their elders or contrary to the customary practice of the clan. The answer has to be an emphatic "No". It is because the sea of liberty and the ingrained sense of dignity do not countenance such treatment inasmuch as the pattern of behaviour is based on some extra-constitutional perception. Class honour, howsoever perceived, cannot smother the choice of an individual which he or she is entitled to enjoy under our compassionate Constitution. And this right of enjoyment of liberty deserves to be continually and zealously guarded so that it can thrive with strength and flourish with resplendence. It is also necessary to state here that the old order has to give way to the new.

Para 5-6: Concept of Honour and honour based crimes - a. Loss of vriginity outside marriage, b. Pre-marital pregnancy; c. infidelity; d. Having unapproved relationships; e. Refusing an arranged marriage; f. demanding custody of children after divorce; g. leaving the family or marital home without permission; h. causing scandal or gossip in the community, and i. falling victim to rape.

Para 7 - Parallel law enforcement agency consists of leading men of a group having the same lineage caste which quite often meets to deal with problems that affect the group. Called as *Panchayats.*

Para 8 to 22 - Affidavits by different states and their contentions - *From the stand taken by the States concerned, it is perceivable that the authorities, while denying the incidences being visible, do not dispute the sporadic happenstance of such occurrences and speak in a singular voice by decrying such acts. It is also clear that some such panchayats take the positive stance demonstrating their collective effort as to how they cultivate in people the idea of inter-caste marriage and community acceptance. The duty of this Court, in view of the authorities in the field that deal with specific circumstances, is to view the scenario from the prism of pragmatic ground reality as has been projected and to act within the constitutional parameters to protect the liberty and life of citizens. Commitment to the constitutional values requires this Court to be sensitive and act in such a matter and we shall do so within the permissible boundaries and framework because as the guardian of the rights of the citizens, this Court cannot choose the path of silence.*

Para 23-26: 242nd Report by Law Commission of India - "Prevention of Interference with the Freedom of Matrimonial Alliances (in the Name of Honour and Tradition) : A suggested Legal Framework". A draft bill prepared by the Commission.

Para 27. The Report shows the devastating effect of the crime and the destructive impact on the right of choice of an individual and the control of the collective over the said freedom. The Commission has emphasised on the intense pressure of the powerful community and how they punish the "sinning couples" according to their socio-cultural perception and community honour and the action taken by them that results in extinction of the rights of individuals which are guaranteed under the Constitution. It has eloquently canvassed about the autonomy of every person in matters concerning oneself and the expression of the right which is integral to the said individual.

Para 29-39 - Different judgments and authorities discussed which show the distress with which the Court has perceived the honour crimes and also reflects the uneasiness and anxiety to curb such social symptoms. The observations were made and the directions were issued in cases where a crime based on honour was required to be dealt with. But, the present case, in contradistinction, centres around honour killing and its brutality and the substantive measures to be taken to destroy the said menace. The violation of the constitutional rights is the fulcrum of the issue. The protection of rights is pivotal. Though there has been constant social advancement, yet the problem of honour killing persists in the same way as history had seen in 1750 BC under the Code of Hammurabi. The people involved in such crimes become totally oblivious of the fact that they cannot tread an illegal path, break the law and offer justification with some kind of moral philosophy of their own. They forget that the law of the land requires that the same should be shown implicit obedience and profound obeisance. The human rights of a daughter, brother, sister or son are not mortgaged to the so-called or so-understood honour of the family or clan or the collective. The act of honour killing puts the rule of law in a catastrophic crisis.

Para 40-41 - Honour killing not singular type of offence associated with the action of Khap Panchayat. Honour crime is the genus and honour killing is the species although a dangerous facet of it. Any ill-treatment in name of honour is illegal and cannot be allowed. Khap panchayats cannot create dent in exercise of rights.

Para 41-42 - Right to marry - consent of family, community or clan not necesary when two adulty agree to enter into a wedlock.

Para 43-45 - Honour killing guilotines individual liberty, freedom of choice and one's own perception of choice. When 2 adults choose to marry, it is manifestation of their choice which is recognized under Art.19 and 21 - Constitutional rights and needs protection.

Para 46-48 - Submissions of various Khap Panchayats that they are spreading awareness - not tenable. Khap panchayats cannot take law into their hands.

Para 51: Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence addresses this issue. Article 42 reads thus: ***Unacceptable justification for crimes, including crimes committed in the name of so-called "honour".***

Para 52: Once the fundamental right is inherent in a person, the intolerant groups who subscribe to the view of superiority class complex or higher clan cannot scuttle the right of a person by leaning on any kind of philosophy, moral or social, or self-proclaimed elevation. Therefore, for the sustenance of the legitimate rights of young couples or anyone associated with them and keeping in view the role of this Court as the guardian and protector of the constitutional rights of the citizens and further to usher in an atmosphere where the fear to get into wedlock because of the threat of the collective is dispelled, it is necessary to issue directives and we do so on the foundation of the principle stated in ***Lakshmi Kant Pandey v. Union of India (1984) 2 SCC 244, Vishaka v. State of Rajasthan (1997) 6 SCC 241 and Prakash Singh v. Union of India (2006) 8 SCC 1 .***

Para 53. It is worthy to note that certain legislations have come into existence to do away with social menaces like "sati" and "dowry". It is because such legislations are in accord with our Constitution. Similarly, protection of human rights is the élan vital of our Constitution that epitomises humanness and the said conceptual epitome of humanity completely ostracises any idea or prohibition or edict that creates a hollowness in the inalienable rights of the citizens who enjoy their rights on the foundation of freedom and on the fulcrum of justice that is fair, equitable and proportionate. There cannot be any assault on human dignity as it has the potentiality to choke the majesty of law. Therefore, we would recommend to the legislature to bring law appositely covering the field of honour killing.

Para 54: In this regard, we may usefully refer to the authority wherein this Court has made such recommendation. In ***Samrendra Beura v. Union of India [Samrendra Beura v. Union of India, (2013) 14 SCC 672***, this Court held : (SCC p. 677, para 16)

"16. Though such amendments have been made by Parliament under the 1950 Act and the 1957 Act, yet no such amendment has been incorporated in the Air Force Act, 1950. The aforesaid provisions, as we perceive, have been incorporated in both the statutes to avoid hardship to persons convicted by the Court Martial. Similar hardship is suffered by the persons who are sentenced to imprisonment under various provisions of the Act. Keeping in view the aforesaid amendment in the other two enactments and regard being had to the purpose of the amendment and the totality of the circumstances, we think it apt to

recommend the Union of India to seriously consider to bring an amendment in the Act so that the hardships faced by the persons convicted by the Court Martial are avoided."

Para 55. Suggestions for issuing guidelines provided by Mr Raju Ramachandran, learned Senior Counsel being assisted by Mr Gaurav Agarwal, has filed certain. The Union of India has also given certain suggestions to be taken into account till the legislation is made. To meet the challenges of the agonising effect of honour crime, we think that there has to be preventive, remedial and punitive measures and, accordingly, we state the broad contours and the modalities with liberty to the executive and the police administration of the States concerned to add further measures to evolve a robust mechanism for the stated purposes:

Para 55.1 - Preventive steps - State govts. directed to identify areas where honour killing or assembly of Khap Panchayats took place in last five years - in such areas, directions should be issued to officers in charge of police stations to be extra cautious in case of inter-caste or inter-religious marriages - Specific guidelines issued as to how police would deal with a situation when any knowledge of proposal of gathering of any Khap Panchayat comes to their knowledge - in case of need and apprehension, police should invoke promulgation of prohibitory order u/S.144 CrPC and make arrests under S.151 CrPC - Central and State Govts. also directed to identify measures to prevent such violence associated with honour crimes and implement constitutional goals of social justice and rule of law - Said govt. also directed to work on sensitisation of law enforcement agencies towards such goals.

Para 55.2 - Remedial measures - Despite preventive steps, if any Khap panchayat passes any diktat to take action against any couple/family, police directed to register FIR under appropriate provisions - Police also directed with regard to effective investigation and providing security to ciuple/family and also if required, to arrange for conducting marriage of couple under police protection - State Govt. directed to make provision of safe house in each district where such young couples can safely stay under certain conditions - In case a complaint is lodged by couple/family or upon receiving information from independent source that such marriages are opposed by family members/local community/khaps, directions issued for manner of conduction a preliminary inquiry and lodging of an FIR - FIR and other action should be taken against persons threatening or involved without any exception.

Para 55.3 - Punitive measures - State Govt. directed to initiate and take disciplinary action against officers not complying with above directions - Such proceedings must be completed within six months - Special Cells and 24 hour helpline numbers should be created to receive and register complaints - Directions issued for speedy trial within 6 months of cases relating to honour killing or violence to couples and said direction for speedy trial also applies to pending cases.

Para 56: Measures to be carried out within 6 weeks by respondent States. Reports to be filed within the said period before the Registry.

Writ Petition Disposed of.

12. SWISS RIBBONS (P) LTD. & ANR. V. UNION OF INDIA & ORS.

(2019) 4 SCC 17 - *Dated 25.01.2019 - (Before* ***RF Nariman*** *and Navin Sinha, JJ)*

FACTS: All Petitions were filed assailing constitutional validity of various provisions of IBC - individual facts not gone into.

CONTENTIONS:

- Members of NCLT and certain members of NCLAT, apart from President, have been appointed contrary to Judgment in *Madras Bar Assn., (2015) 8 SCC 583*. Administrative support for all tribunals should be from Ministry of Law & Justice whereas, NCLTs & NCLAT were functioning under Ministry of Corporate Affairs. Since NCLAT, as an appellate court has a seat only at New Delhi, this would render the remedy inefficacious.
- There is no real difference between financial creditors (FC) and operational creditors (OC). No intelligible differentia, regard being had to the object sought to be achieved by the Code, namely, insolvency resolution, and if that is not possible, then ultimately liquidation.Such classification will not only be discriminatory but also manifestly arbitrary, as under Sec. 8 & 9, an operational debtor is not only given notice of default, but is entitled to dispute genuineness of the claim. In case of a financial debtor, no notice is given and financial debtor is not entitled to dispute the claim of FC. Secs 21 & 24 are manifestly arbitrary and discriminatory in that OCs do not have even a single vote in the Committee of Creditors which has very important functions to perform in the resolution process of corporate debtors.
- Certificate of an information utility is in nature of a preliminary decree issued without any hearing and without any process of adjudication. Sec. 12-A derailed settlement process by requiring approval of at least 90% of CoC voting share. Unbridled and uncanalised power to CoC.
- The RP, having been given powers of adjudication under the Code and Regulations, grant of adjudicatory power to a non-judicial authority was violative of basic aspects of dispensation of justice and access to justice.
- A four-fold attack was raised against Sec 29-A, in particular, clause (c) thereof. Vested rights of erstwhile promoters to participate in recovery process of a CD have been impaired by retrospective application of Sec. 29-A. Sec 29-A, in any case, was contrary to object of Code, speedy disposal.
- W.r.t. Sec 29-A(c), a blanket ban on participation of all promoters of CDs, without any mechanism to weed out those who are unscrupulous and have brought the company to the ground, as against persons who are efficient managers, but who have not been able to pay their debts due to various other reasons, would not only be manifestly arbitrary, but also be treating unequals as equals. Maximisation of value of assets is an important goal to be achieved in the resolution process. Sec 29-A is contrary to such goal as an erstwhile promoter, who may outbid all other applicants and may have the best resolution plan, would be kept out at the threshold, thereby impairing object of maximisation of value of assets.
- U/Sec 29-A(c), a person's account may be classified as NPA in accordance with guidelines of RBI, despite him not being a wilful defaulter. 1 year period referred in Cl. (c) was wholly arbitrary and without basis.
- Qua Sec. 29-A(j), persons who may be related parties in the sense that they may be relatives of erstwhile promoters are also debarred, despite the fact that they may have no business connection with the erstwhile promoters who have been rendered ineligible by Section 29-A.

HELD:

The pre-existing state of law: (Paras 14-16)

Para 16.2 - One of the important objectives of the Code is to bring the insolvency law in India under a single unified umbrella with the object of speeding up of the Insolvency process.

Para 16.3 - Relied on ***Arcelor Mittal -Paras 65-66*** *Previous legislation, namely, SICA and RDDBFIA, which made provision for rehabilitation of sick companies and repayment of loans availed by them, were found to have completely failed. These were followed by the SARFAESI…… amounts recovered under the said Act recorded improvement over the previous two enactments, but this was yet found to be inadequate.*

Judicial hands-off qua economic legislation: (Paras 17-24)

Para 19: To stay experimentation in things social and economic is a grave responsibility. Denial of right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. SC has the power to prevent an

experiment. The statute which embodies it may be struck down on the ground that the measure is arbitrary, capricious or unreasonable. Court has power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, the Court must be ever its guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

Para 20: Courts do not substitute their social and economic beliefs for judgment of legislative bodies, who are elected to pass law. Legislative bodies have broad scope to experiment with economic problems, and the SC does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Govt. and wholly beyond the protection which the general clause of the 14th Amendment was intended to secure.'

Para 21: The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Every legislation, particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method. Therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities In complicated experimental economic legislation but on that account alone it cannot be struck down as invalid.

Para 22: The system of checks and balances has to be utilised in a balanced manner with the primary objective of accelerating economic growth rather than suspending its growth by doubting its constitutional efficacy at the threshold itself.

Para 23: Laws, including executive action relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. that the legislature should be allowed some play in the joints because it has to deal with complex problems which do not admit of solution through any doctrine or straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where having regard to the nature of the problems greater latitude require to be allowed to the legislature.

Purpose of the Code.

Para 27: The Preamble gives an insight into what is sought to be achieved by the Code, which is first and foremost for reorganisation & insolvency resolution of CDs. Unless such reorganisation is effected in a time-bound manner, the value of the assets of such persons will deplete. Therefore, maximisation of value of the assets of such persons so that they are efficiently run as going concerns is another very important objective of the Code.

Para 28: Primary focus of legislation is to ensure revival & continuation of CD by protecting it from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the CD back on its feet, not being a mere recovery legislation for creditors. ***The interests of the CD have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests.*** The moratorium imposed by Sec. 14 is in the interest of the CD itself, thereby preserving its assets during the resolution process. The timelines within which the resolution process is to take place again protects the CD's assets from further dilution, and also protects all creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the CD to achieve all these ends.

Appointment of members of NCLT and NCLAT not contrary to the Supreme Court's judgments

Para 30: On 3-1-2018, the Companies Amendment Act, 2017 was brought into force by which Section 412 of the Companies Act, 2013 was amended.

Para 31: Selection Committee constituted to make appointments of NCLT Members in 2015 iself. By an order dt.27.07.2015, Justice Gogoi, Justice Ramana, Secretary, Dept. of Legal Affairs, Ministry of Law and Justice, and Secretary, Corporate Affairs were constituted as Selection Committee. Selection committee was reconstituted on 22.02.20217 to make further appointments. Advertisements dt.10.08.2015 were issued inviting applications for Members and all the present Members of NCLT and NCLAT have been appointed.

Classification between FCs and OCs neither discriminatory, nor arbitrary, nor violative of Art.14 of the Constitution.

(Paras 38 and 39): Where there is challenge to the constitutional validity of a law enacted by legislature, Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. The two dimensions of Art. 14 in its application to legislation and rendering legislation invalid are now well recognised and these are: (i) discrimination, based on an impermissible or invalid classification, and (ii) excessive delegation of powers; conferment of uncanalised and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders-if such conferment is without any guidance, control or checks, it is violative of Art.14. Court also needs to be mindful that legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is. Another development of law is that legislation can be struck down as being manifestly arbitrary. *Relied on Shayara Bano v. Union of India, (2017) 9 SCC 1: (2017) 4 SCC (Civ) 277; Joseph Shine v. Union of India, (2019) 3 SCC 39; K.S. Puttaswamy (Aadhaar-5 J.) v. Union of India, (2019) 1 SCC 1; Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, Lok Prahari v. State of U.P., (2018) 6 SCC 1; Nikesh Tarachand Shah v. Union of India, (2018) 11 SCC 1, amongst others.*

Para 42: A perusal of the definition of "financial creditor" and "financial debt" makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an "operational debt" would include a claim in respect of the provision of goods or services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority.

Para 49: As a general rule, it is correct to say that financial creditors, which involve banks and financial institutions, would certainly be smaller in number than operational creditors of a corporate debtor.

Para 50: Most financial creditors, particularly banks and financial institutions, are secured creditors whereas most OCs are unsecured, payments for goods and services as well as payments to workers not being secured by mortgaged documents and the like. The distinction between secured and unsecured creditors is a distinction which has obtained since the earliest of the Companies Acts both in UK and in this country. The nature of loan agreements with FCs is different from contracts with OCs for supplying goods and services. FCs generally lend finance on a term loan or for working capital that enables the CD to either set up and/or operate its business. On the other hand, contracts with OCs are relatable to supply of goods and services in the operation of business. Financial contracts generally involve large sums of money. By way of contrast, operational contracts have dues whose quantum is generally less. In the running of a business, OCs can be many as opposed to FCs, who lend finance for the set-up or working of business. Also, FCs have specified repayment schedules, and defaults entitle FCs to recall a loan in totality. Contracts with OCs do not have any such stipulations. Also, the forum in which dispute resolution takes place is completely different. Contracts with OCs can and do have arbitration clauses where dispute resolution is done privately. Operational debts also tend to be recurring in nature and the possibility of genuine disputes in case of operational debts is much higher when compared to financial debts. A simple example will suffice. Goods that are supplied may be substandard. Services that are provided may be substandard. Goods may not have been supplied at all. All these qua operational debts are matters to be proved in arbitration or in the courts of law. However, financial debts made to banks and financial institutions are well documented and defaults made are easily verifiable.

Notice, hearing, and set-off or counterclaim qua financial debts:

Para 52: The scheme of Sec.7 stands in contrast with the scheme under Sec. 8 where an operational creditor is, on the occurrence of a default, to first deliver a demand notice of the unpaid debt to the operational debtor in the manner provided in Section 8(1) of the Code. Under Section 8(2), the corporate debtor can, within a period of 10 days of receipt of the demand notice or copy of the invoice mentioned in sub- section (1), bring to the notice of the operational creditor the existence of such a dispute, the OC gets out of clutches of the Code.

Para 54: Information w.r.t. debts incurred by financial debtors is easily available through information utilities which, under the IBBI (Information Utilities) Regulations, 2017, are to satisfy themselves that information

provided as to the debt is accurate. This is done by giving notice to the corporate debtor who then has an opportunity to correct such information.

Para 58: At the stage of the adjudicating authority's satisfaction under Sec. 7(5), the CD is served with a copy of the application filed with the adjudicating authority and has the opportunity to file a reply before the said authority and be heard by the said authority before an order is made admitting the said application.

Para 59: What is also of relevance is that in order to protect the corporate debtor from being dragged into the corporate insolvency resolution process mala fide, the Code prescribes penalties (Sec 65 of the Code).

Para 60: Also, punishment is prescribed under Sec 75 for furnishing false information in an application made by a FC which further deters a FC from wrongly invoking the provisions of Sec.7.

Para 61: Insofar as set-off and counterclaim is concerned, a set-off of amounts due from FCs is a rarity. Usually, financial debts point only in one way- amounts lent have to be repaid. However, it is not as if a legitimate set-off is not to be considered at all. Such set-off may be considered at the stage of filing of proof of claims during the resolution process by the resolution professional, his decision being subject to challenge before the adjudicating authority under Sec. 60.

Para 63: Equally, counterclaims, by their very definition, are independent rights which are not taken away by the Code but are preserved for the stage of admission of claims during the resolution plan. Also, there is nothing in the Code which interdicts the CD from pursuing such counterclaims in other judicial fora.

Para 64: The trigger for a FC 's application is non-payment of dues when they arise under loan agreements. It is for this reason that Sec 433(e) of the Companies Act, 1956 has been repealed by the Code and a change in approach has been brought about. The legislative policy now is to move away from the concept of "inability to pay debts" to "determination of default". The said shift enables FC to prove, based upon solid documentary evidence. that there was an obligation to pay the debt and that the debtor has failed in such obligation.

Para 65: Whereas a "claim" gives rise to a "debt" only when it becomes "due", a "default" occurs only when a "debt" becomes "due & payable and is not paid by the debtor. It is for this reason that FC has to prove "default" as opposed to an OC who merely "claims a right to payment of a liability or obligation in respect of a debt which may be due. When this aspect is borne in mind, the differentiation in the triggering of insolvency resolution process by FCs U/Sec.7 and by OC u/Sec.8 of the Code becomes clear.

Sections 21 and 24 and Art.14 of Constitution: Operational Creditors have no vote in the CoC:

Para 71: Original Insolvency & Bankruptcy Bill did not allow OCs to attend CoCs. This Bill was amended.

Para 72: Expert Committees have been set up by Govt. to oversee the working of the Code. Thus, report of the Insolvency Law Committee of March 2018, after examining the working of the Code, thought it fit not to amend the Code so as to give OCs the right to vote.

Para 73-74 : CoC is entrusted with the primary responsibility of financial restructuring. It is equired to assess the viability of a CD by taking into account all available info. as well as to evaluate all alternative investment opportunities that are available. CoC is required to evaluate resolution plan on basis of feasibility and viability. Once resolution plan is approved by CoC and thereafter by adjudicating authority, it is binding on all stakeholders.

Para 75: Since FCs are in the business of moneyling banks and financial institutions are best equipped to assess viability and feasibility of CD's business. Even at the time of granting loans, these banks and financial institutions undertake a detailed market study which includes a techno-economic valuation report, evaluation of business, financial projection, etc. Since this detailed study has already been undertaken before sanctioning a loan, and since FCs have trained employees to assess viability and feasibility, they are in a good position to evaluate the contents of a resolution plan. On the other hand, OCs, who provide goods and services, are involved only in recovering amounts that are paid for such goods and services, and are typically unable to assess viability and feasibility of business. The BLRC Report, makes this abundantly clear.

Para 77: NCLAT has, while looking into viability and feasibility of resolution plans that are approved by the CoC, always gone into whether OCs are given roughly the same treatment as FCs, and if they are not, such plans are either rejected or modified so that OCs' rights are safeguarded. It may be seen that a resolution plan cannot pass muster under Sec.30(2)(b) r/w Sec.31 unless a minimum payment is made to OCs, being not less than liquidation value. On 5-10-2018, Regulation 38 of the CIRP Regulations, 2016 has been amended. Reg.38 further strengthens the rights of OCs by statutorily incorporating the principle of fair and equitable dealing of OCs' rights, together with priority in payment over FCs.

Para 78: For all the aforesaid reasons, operational creditors are not discriminated against, and Article 14 of the Constitution has not been infracted either on the ground of equals being treated unequally or on the ground of manifest arbitrariness.

Section 12-A is not violative of Article 14 of the Constitution

Paras 79 and 80: Sec. 12-A was inserted by the I&B (Second Amendment) Act, 2018 with retrospective effect from 6-6-2018. Before this section was inserted, the Court, under Art 142, was passing orders allowing withdrawal of applications after creditors' applications had been admitted by NCLT or NCLAT.

Para 81: Reg. 30-A(1) of CIRP Regulations is not mandatory but directory because on facts of a given case, withdrawal may be allowed in exceptional cases even after issue for expression of interest u/Reg.36-A.

Para 82: Once Code gets triggered by admission of a creditor's petition u/Sec 7 to 9, the proceeding that is before adjudicating authority, being a collective proceeding, is a proceeding in rem. Being a proceeding in rem, it is necessary that the body which is to oversee the resolution process must be consulted before any individual corporate debtor is allowed to settle its claim. At any stage where CoC is not yet constituted, a party can approach NCLT directly, which Tribunal may, in exercise of its inherent powers under Rule 11 of the NCLT Rules, 2016, allow or disallow an application for withdrawal or settlement. This will be decided after hearing all the parties concerned and considering all relevant factors on the facts of each case.

Para 83: The main thrust against the provision of Sec. 12-A is the fact that 90% of the CoC has to allow withdrawal. This high threshold has been explained in the ILC Report as all FCs have to put their heads together to allow such withdrawal as, ordinarily, an omnibus settlement involving all creditors ought, ideally, to be entered into. This explains why 90%, which is substantially all the FCs, have to grant their approval to an individual withdrawal or settlement. In any case, the figure of 90%, in absence of anything further to show that it is arbitrary, must pertain to the domain of legislative policy, which has been explained by the Report (supra). Also, it is clear that u/Sec.60, CoC do not have the last word on the subject.

Evidence provided by private information utilities: only prina facie evidence of default:

Para 85: Setting up of information utilities was preceded by a regime of information companies which were referred to as credit information companies (CICs) as recommended by Siddiqui Working Group in 1999.

Para 86: Information Utilities Regulations, in particular Reg. 20 and 21, make it clear that on receipt of information of default, an IU shall expeditiously undertake process of its authentication & verification.

Para 87: Clear from Regulations that apart from stringent requirements as to registration of such utility, the moment information of default is received, such information has to be communicated to all parties and sureties to the debt. Apart from this, utility is to expeditiously undertake the process of authentication and verification of information, which will include authentication and verification from the debtor who has defaulted. This being the case, coupled with the fact that such evidence, is only prima facie evidence of default, which is rebuttable by CD, makes it clear that the challenge based on this ground must also fail.

Resolution professional has no adjudicatory powers

Para 88: It is clear from the Code as well as Regulations that RP has no adjudicatory powers.

Para 89: Under CIRP Regulations, RP has to vet and verify claims made and determine the amount of each claim. It is clear from a reading of these Regulations (Reg.10, 12, 13 & 14) that the RP is given administrative as opposed to quasi-judicial powers. In fact, even when RP is to make a "determination" under Regulation 35-A, he is only to apply to the adjudicating authority for appropriate relief based on the determination.

Para 90: As opposed to this, liquidator, in liquidation proceedings under the Code, has to consolidate and verify the claims, and either admit or reject such claims under Secs.38-40.Clear from Sec.41 & 42 that when liquidator "determines value of claims admitted under Sec. 40, such determination is a “decision” which is quasi-judicial in nature, and which can be appealed against to the adjudicating authority u/Sec.42.

Para 91: Unlike liquidator, RP cannot act in no. of matters without approval of CoC u/Sec.28, which can, by 2/3 majority replace one RP with another, in case they are unhappy with his performance. Thus RP is really a facilitator of resolution process, whose administrative functions are overseen by CoC and by Adj. Authority.

Constitutional Validity of Sec.29-A:

Para 96: Referred to Chitra Sharma (2018) 19 SCC 575 v. UOI wherein SC observed:

Parliament has introduced Sec.29-A into IBC with a specific purpose. The provisions of Sec.29-A are intended to ensure that among others, persons responsible for insolvency of CD do not participate in resolution process. Court must bear in mind that Sec 29-A has been enacted in larger public interest and to facilitate effective corporate governance. Parliament rectified a loophole in the Act which allowed a backdoor entry to erstwhile managements in CIRP. Sec.30, as amended, also clarifies that a resolution plan of a person who is ineligible under Sec. 29-A will not be considered by the CoC.

Retrospective Application:

Para 97: It is settled law that a statute is not retrospective merely because it affects existing rights; nor is it retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing. A resolution applicant has no vested right for consideration orr approval of its resolution plan.

Section 29-A(c) not restricted to malfeasance:

Para 102: There is no vested right in an erstwhile promoter of a CD to bid for immovable and movable property of the CD in liquidation. Further, given the categories of persons who are ineligible under Sec 29-A, which includes persons who are malfeasant, or persons who have fallen foul of the law in some way, and persons who are unable to pay their debts in the grace period allowed, are further, by this proviso, interdicted from purchasing assets of the corporate debtor whose debts they have either wilfully not paid or have been unable to pay. The legislative purpose which permeates Sec. 29-A continues to permeate the section when it applies not merely to resolution applicants, but to liquidation also. Consequently, this plea is also rejected.

One year period in Sec.29-A (c) and NPAs:

Para 103: Sec 29-A goes to eligibility to submit a resolution plan. A wilful defaulter, in accordance with RBI guidelines, would be a person who though able to pay, does not pay. An NPA, on the other hand, refers to the account belonging to a person that is declared as such under guidelines issued by RBI.

Para 105: Accounts are declared NPA only if defaults made by a CD are not resolved. Post declaration of such NPA, a substandard asset would then be NPA which has remained as such for a period of 12 months. In short, a person is a defaulter when an instalment and/or interest on principal remains overdue for more than 3 months, after which, its account is declared NPA. During the period of 1 year thereafter, since it is now classified as a substandard asset, this grace period is given to such person to pay off the debt. During this grace period, it is clear that such person can bid along with other resolution applicants to manage the CD. Prior to this 1-year-3-month period, banks and financial institutions do not declare the accounts of CD to be NPAs. As a matter of practice, they first try and resolve disputes with the CD, after which, its account is declared NPA. As a matter of legislative policy, therefore, quite apart from malfeasance, if a person is unable to repay a loan taken, in whole or in part, within this period of 1 year and 3 months, it is stated to be ineligible to become a resolution applicant. The reason is not far to see. A person who cannot service a debt for the aforesaid period is obviously a person who is ailing itself.

Related party:

Para 109: Persons who act jointly or in concert with others are connected with the business activity of the resolution applicant. Similarly, all categories of persons mentioned in Sec.5(24-A) show that such persons must be "connected" with resolution applicant within meaning of Sec 29-A(j). This being the case, the said categories of persons who are collectively mentioned under the caption "relative" obviously need to have a connection with business activity of resolution applicant. In its absence, such person cannot possibly be disqualified under Section 29-A(j). All the categories in Section 29-A) deal with persons, natural as well as artificial, who are connected with the business activity of the resolution applicant. The expression "related party", therefore, and "relative" contained in the definition sections must be read noscitur a sociis with the categories of persons mentioned in Explanation I, and so read, would include only persons who are connected with the business activity of the resolution applicant.

Para 110: Explanation I clause (ii) to Sec.29-A(j) seeks to make it clear that if a person is otherwise covered as a "connected person", this provision would also cover a person who is in management or control of the business of the corporate debtor during the implementation of a resolution plan. Therefore, any such person is not indeterminate at all, but is a person who is in the saddle of the business of CD either at an anterior point of time or even during implementation of the resolution plan.

Section 53 of the Code does not violate Article 14 of the Constitution

Para 119: Reason for differentiating between financial debts (secured), and operational debts (unsecured), is in the relative importance of the two types of debts when it comes to the object sought to be achieved by the Code. Repayment of financial debts infuses capital into the economy inasmuch as banks and financial institutions are able, with the money that has been paid back, to further lend such money to other entrepreneurs for their businesses. This rationale creates an intelligible differentia between financial debts and operational debts, which are unsecured, which is directly related to the object sought to be achieved by the Code. In any case, workmen's dues, which are also unsecured debts, have traditionally been placed above most other debts. Thus, it can be seen that unsecured debts are of various kinds, and so long as there is some legitimate interest sought to be protected, having relation to the object sought to be achieved by the statute in question, Art.14 does not get infracted. For these reasons, challenge to Sec 53 of the Code must also fail.

13. K.S. PUTTASWAMY (AADHAAR-5J.) V. UNION OF INDIA

*(2019) 1 SCC 1 - Dated 26.09.2018 - (Before Dipak Misra, CJ and **Dr.AK Sikri,** AM Khanwilkar, **Dr. DY Chandrachud** and **Ashok Bhushan**, JJ)*

FACTS: Initiative spearheading the attack on Aadhaar structure was taken by Petitioners by filing WP. At that time Aadhaar scheme was not under legislative umbrella. Scheme challenged in WP on ground that it is violative of fundamental rights of the innumerable citizens of India especially Right to Privacy u/Art.21. Few others joined the race by filing connected petitions. Series of orders were passed from time to time. In 2016, with passing of the Aadhar Act, these very petitioners filed another WP challenging vires of the Act. Here again, some more WPs have been filed with same objective. All WPs clubbed together. Number of interventions filed opposing petitions and supporting Aadhaar scheme. **Para 4**

Petitioners' arguments were that it is a grave risk to rights and liberties of citizens which are secured by Constitution. It militates against constitutional values and its foundational morality and has the potential to enable an intrusive State to become a surveillance State of the basis of information that is collected in respect of each individual by creation of a joint electronic mesh. Act strikes at the very privacy of each individual thereby offending right to privacy which is elevated and given status of fundamental right by tracing it to Articles 14, 19 and 21.

It forces a person, who intends to enrol for Aadhaar, to part with his core information, namely, biometric information in the form of fingerprints and iris scan. There is the risk of misuse of vital information pertaining to an individual. At that stage, not only the individual parts with the biometric information again with the Requesting Entity (which may again be a private agency as well), the purpose for which such a person approaches the Requesting Entity would also be known i.e. the nature of transaction which is supposed to be undertaken by said person at that time. Such information relating to different transactions of a person across the life of the citizen is connected to a central database. This record may enable the State to profile citizens, track their movements, assess their habits and silently influence their behaviour. Over a period of time, the profiling would enable the State to stifle dissent and influence political decision-making. It may also enable the State to act as a surveillance State and there is a propensity for it to become a totalitarian State.

Respondents argued that in the first instance, minimal biometric information of the applicant, who intends to have Aadhaar number, is obtained which is also stored in CIDR for authentication purpose. Secondly, no other information is stored. There is no data collection in respect of religion, caste, tribe, language, records of entitlement, income or medical history of the applicant at time of Aadhaar enrolment. Thirdly, entire Aadhaar enrolment ecosystem is foolproof inasmuch as within few seconds of the biometrics having been collected by the enrolling agency, said information gets transmitted to the Authorities/CIDR, that too in an encrypted form, and goes out of reach of the enrolling agency. Same is the situation at time of authentication as biometric information does not remain with requesting agency. Fourthly, while undertaking process of authentication, the Authority simply matches biometrics and no other information is received or stored in respect of purpose, location or nature or transaction, etc. Therefore, question of profiling does not arise at all.

FINDINGS:

AK Sikri J writing for CJI Dipak Misra and AM Khanwilkar J delivered the majority judgment. Upheld the constitutionality of Aadhaar, but struck/read down certain provisions of the Aadhaar Act and the UIDAI Regulations. Crucially, the majority opinion did not strike down Sec 7, which makes Aadhaar mandatory for availing State subsidies and benefits.

On Privacy: Aadhaar does not create a Surveillance State: (See paras 184-186 and 398-400, 447, 510, 514)

- Addressed petitioners' concern that wide collection of biometrics and demographic data will lead to profiling of individuals and create a surveillance state, thus violating the fundamental right of privacy. Held that State obtains minimal possible amount of data — demographic and biometric — from Aadhaar holders. There are enough safeguards in place to protect data of Aadhaar holders, such as encryption and time limits on data storage.

- Relied on CEO, UIDAI's power-point presentation to emphasize that: from the provisions of Aadhaar Act and machinery which UIDAI has created for data protection, it is very difficult to create profile of a person simply on the basis of biometric and demographic information stored in CIDR. As far as authentication is concerned there are sufficient safeguard mechanisms. Pointed out that there were security technologies in place, 24/7 security monitoring, data leak prevention, vulnerability management programme and independent audits as well as Authority's defence mechanism. Also pointed out that Authority has taken appropriate proactive protection measures, which included disaster recovery plan, data backup & availability & media response plan. All security principles followed. Encryption is foolproof and impossible to decipher.
- The architecture of Aadhaar as well as provision of aadhaar do not tend to create a surveillance state. This is ensured by manner in which adhaar project operates. Furthermore, adhaar act meets concept of Limited Govt., Good Governance and Constitutional Trust.

<u>Aadhar is a Unique and Empowering Identification Document-</u> (See Paras 62-64 and 508.7-508.10)

Held that Aadhaar is unique and more foolproof than other identification documents (PAN, Ration Card). This is because Aadhaar Card is issued on basis of an individual's biometric information, he submitted. Emphasised that unlike other identification cards, the Aadhaar Card "cannot" be duplicated. Observed that the Aadhaar Card is rightly labeled "Unique Identification".

Besides being unparalleled as an identification document, the majority judgment termed it as "empowering" tool as it facilitates disbursal of state subsidies and benefits to the marginalized and disadvantaged sections of society.

(See paras 33-48 for aadhaar essentials - Sec.7 and 8 discussed)

<u>On Aadhaar & the Right to Privacy</u> (See Paras 294, 337,

One of the main claims made by the petitioners was that the Aadhaar project and Aadhaar Act infringe upon the right to privacy of citizens, specifically the right to live with dignity. Held that Aadhaar Act does not violate right to privacy, as it passes the three-fold test established in the landmark privacy judgment, *Puttaswamy*. Clarified that the standard of review to test privacy infringements by law is the "just, fair and reasonableness" standard (three-fold *Puttaswamy* test) and not the "strict scrutiny test".

The three-fold *Puttaswamy* test states that in order for legislation to violate the right to privacy, it must fail the following: **(reiterated at Para 975)**

1. legality, which postulates the existence of law
2. need, defined in terms of a legitimate state aim
3. proportionality, which ensures a rational nexus between the objects and the means adopted to achieve them

<u>On Aadhaar & the Right to Dignity:</u> (Paras 351 - 368, 511)

Held that Aadhaar helps disadvantaged sections lead a dignified life by assuring better targeting of subsidies and state benefits and helps in effective realization of a range of socio-economic rights. Held that there is a need for balance between two conceptions of dignity – one based on the right to personal autonomy and other based on right to live a dignified life. Held that Aadhaar Act, meets the test of balancing as well, however struck down certain provisions on the grounds that they violate dignity.

<u>The two facets of dignity:</u> (Para 145, 146, 339, 508.23, 511.9)

- *individ*ual dignity predicated on freedom of choice and autonomy
- *community approach to dignity*, which accounts for "common good" and "public good".

Relied *Puttaswamy* judgment to clarify that the right to dignity resides in Article 14 (right to equality), Article 19 (bouquet of freedoms) as well as Article 21 (right to life). **(Para 111)**

<u>On Striking /Reading Down Specific Provisions</u> (See Para 513)

While upholding the Aadhaar Act, the majority struck down and read down certain provisions.

- Sec 2(d) "authentication record" struck down as collection of metadata conducive to surveillance state **Para 513.1**
- State to ensure illegal immigrants to not be able to take benefits under Sec.2(b) **Para 513.2**

- Reg.27 of Adhaar (Authentication) Regulations, 2016 which provides archiving data for a period of 5 years struck down **Para 513.3**
- Section 33(1) of the Act which prohibited disclosure of Aadhaar information except by order of a court, read down by allowing an individual to appeal to disclosure of Aadhaar information. **Para 513.5**
- Section 33(2) which allowed disclosure of Aadhaar information in interest of "national security", struck down.
- Section 47, which allows for cognizance of an offence only when the UIDAI authority or any authorized person makes complaint, partially struck down. Recommended an amendment so that individual victim can file complaintSec.33(2) struck down, Sec.47 needs suitable amendments **Paras 513.6, 513.7**
- Para of Sec.57 which enables body corporate and individuals also to seek authentication, that too on basis of a contract between the individual and such body corporate or person, would impinge upon the right to privacy of such individuals, declared unconstitutional **Para 513.8.3**
- Other provisions of Aadhaar Act are valid, including Sec.59 which saves pre-enactment period of Adhaar Project i.e. from 2009-2016. **Para 513.9**
- Upheld Sec 7 which made Aadhaar mandatory for availing State subsidies, benefits and services.
- Held that Aadhaar could not be made mandatory by CBSE, NEET, UGC as they are neither services nor benefits by the State. Similarly, he held that Aadhaar could not be made mandatory for children under the Sarva Siksha Scheme, as elementary education is not a state benefit but an entitlement. **Para 378**
- On Aadhaar – PAN Linking – upheld - it is valid and satisfies three-fold Puttaswamy test. **Para 486 (also see paras 437-485 - Sec.139-AA of Income Tax Act, 1961)**
- On Aadhaar – Bank/SIM Linking – struck down – the majority judgment struck down Bank and SIM linking as compulsory linking does not meet the proportionality test and, further, it does not have legislative backing. **Para 503, Paras 498-504**
- On Aadhaar and Child enrollment – the majority judgment held that a parent's consent is essential for enrolling a child into the Aadhaar scheme. It specified that a child upon attaining adulthood, may choose to opt-out of the scheme. **Para 512**

<u>Prevention of Money Laundering Rules:</u> (Para 495, 495.1, 495.2 and 495.3)

Rules are disproportionate for following reasons:

- Mere ritualistic incantation of "money-laundering", "black money" does not satisfy the first test;
- No explanation given as to how mandatory linking of every bank account will eradicate/reduce problems of money-laundering and black money
- There are alternative methods of KYC which banks are already undertaking.

<u>Bhushan J's Concurring Opinion</u>

He concurred with the majority opinion in so far as he upheld the constitutionality of the Act. He differed on the constitutional validity of specific provision within the Act. He took a more conservative stance. Unlike the majority judgment, he upheld Sections 33, 47 and Rule 9 of the PLMA. upheld Sec.7 **Para 931**

<u>On Aadhaar as a Money Bill</u>

Held that Parliament was competent to pass the Aadhaar Act as a Money Bill under Article 110 of the Constitution. The main aim of the act is to deliver State subsidies and benefits, the expenditure of which falls under the Consolidated Fund of India. Article 110(1)(c) states that a Bill is a Money Bill if it '*contains only provisions dealing with…the custody of the Consolidated Fund of India*'. With reference to Article 110(3), he concluded that the Aadhaar Act can justifiably be passed as a Money Bill. **Para 907.** Nevertheless, he affirmed that matter is subject to future judicial review. **Para 901**

<u>On Aadhaar & the Right to Privacy</u>

On the question of whether the Aadhaar Act violates the fundamental right to privacy, he responded in the negative. He wrote that that the manner in which the Act prescribes the State to collect, store and use data is consistent with the right to privacy. He also stated that the Act in combination with the UIDAI's Compendium of Regulations provide citizens adequate control over their data. He concluded that the Act does not create an architecture for pervasive State surveillance. **Para 931**

He emphasised that the Act does not violate the right to privacy as it passes the three-fold test established in *Puttaswamy*. The three criteria to be met are: 'legality', 'need', and 'proportionality'. He found that the Act inherently meets 'legality', given that the Act was passed by Parliament. He finds that the Act meets the 'need' criteria. For him, the State has a legitimate claim to assigning unique identification numbers to citizens, in order to ensure the efficient enactment of welfare schemes. Finally, Bhushan concluded that the Act meets the 'proportionality' criteria. 'Proportionality' requires that there exists a 'rational nexus' between the aim of a piece of legislation and the means adopted to achieve them. He stated that the provisions in the Act and the UIDAI's regulations ensure that the means used are rationally proportional to the end intended, namely enrollment to ensure inclusion in the State.

<u>On Striking/Reading down Specific Provisions:</u>

Bhushan J struck down and read down certain provisions of the Aadhaar Act, related Acts and the UIDAI Regulations.

- Section 7: Upheld as constitutional. Bhushan held that the right to privacy cannot be given precedence over fundamental right to life under Article 21. He states that Section 7 aims to ensure that all citizens have adequate access to food and shelter. **Para 931.6**
- Section 29: Upheld as constitutional on the grounds that it sets reasonable restrictions on sharing information **Para 931.8**
- Section 33: Upheld as constitutional. Ruled that it is valid for two reasons - it provides a database for police investigation and does not violate the protections granted under Art 20(3). **Para 931.9**
- Section 47: Upheld as constitutional. **Para 931.10**
- Section 57: Read down to the extent which permits use of Aadhaar by State or any body corporate or person, in pursuance to any contract to this effect is unconstitutional and void. Thus, last phrase in main provision of Sec.57 i.e. "or any contract to this effect" is struck down. **Para 931.11**
- Section 59: Upheld as constitutional. **Para 931.12**
- Regulations 3 & 4: Read in parental consent provisions. Held that the Act can collect demographic and biometric data on children, as long as parental consent is given. **Para 931.13**
- Aadhaar & Bank Account Linking / 2017 Amendment to Rule 9 of PMLA: Upheld as constitutional. Rule 9 holds that banks and financial institutions must collect the Aadhaar numbers of their clients. Justice Bhushan ruled that the amendment is not arbitrary because it is consistent with the legitimate aim of the PMLA. He said that it is in the interest of the State to curb money laundering. And, he said that requiring individuals to submit a personal identifier to bank accounts and financial instruments is a rational means of achieving this end. **Para 931.14**
- Sec 139AA of Income Tax Act: Upheld as constitutional. Ruled that Sec 139AA does not violate the right to privacy. **Para 931.17**

<u>Chandrachud J's Dissenting Opinon</u>

"The entire Aadhaar programme, since 2009, suffers from constitutional infirmities and violations of fundamental rights. The enactment of the Aadhaar Act does not save the Aadhaar project. The Aadhaar Act, the Rules and Regulations framed under it, and the framework prior to the enactment of the Act are unconstitutional." ***Para 1547***

DY Chandrachud J delivered dissenting opinion. Held Aadhaar Act to be unconstitutional from the very stage of its enactment owing to procedure adopted in passing the law. The Aadhaar Act, he observed, could not have been passed as a Money Bill. Additionally, he also dealt with the arguments referring to specific provisions of the Act, particularly in the context of privacy, dignity and individual autonomy.

<u>On Aadhaar as a Money Bill:</u>

- The passing of the Aadhaar Act as a money bill is unconstitutional. For an act to be passed as a money bill, it must only contain such provisions that pertain to matters set out under Article 110(1) clauses (a) – (g) of the Constitution. A perusal of the Aadhaar Act will show that it governs several other aspects relating to the Aadhaar scheme, none of which lie within the scope of Article 110(1). **Para 1118**
- Additionally, Sec 7 does not declare expenditure to be incurred by the Consolidated fund of India, but only that the Aadhaar be made mandatory where such expenditure is incurred. **Para 1132**

- In the given circumstances, the passage of the Aadhaar Act as a money Bill results in the debasement of a constitutional institution i.e. the Rajya Sabha. The existence of the Rajya Sabha in a bicameral legislature forms an essential part of the basic structure of the Constitution.
- Decision of the speaker to certify an ordinary bill like as in case of Aadhaar limits role of Rajya Sabha, which is intrinsic to ensuring executive accountability and maintaining the balance of power. **Para 1118**

<u>On Legitimate State Interest:</u>

- The framers of the Constitution believed that the driving force to bring social change rested with the State. It was keeping in mind this purpose that the DPSP were incorporated into Constitution. State therefore has a legitimate aim to ensure that its citizens receive basic human facilities and reaching out to targeted populations is a valid constitutional purpose. **Para 1209-1216**
- When designing a unique measure of identification, State must ensure both financial exclusion and protection against financial exclusion. Aadhaar scheme seeks to bring about financial inclusion by providing a means of identification to every segment of the population including those who may not have been within coverage of traditional markers of identity. Mandate of Sec 7 is founded on Legitimate State Interest. **Para 1259**

<u>On the question of privacy, dignity & violation of fundamental rights:</u>

- Biometric data in unique and distinguishable from other personal information as the former is intimately connected to the individual concerned. This makes concerns about biometric technology particularly significant in the context of privacy and data protection. **Para 1154**
- 9-Judge Bench in *Puttaswamy* held that informational privacy is an essential aspect of the fundamental right to privacy. The ability to control information about oneself is intrinsically linked to the dignity, self-respect and sense of personhood of an individual. Informational privacy is a right protected against excess by both state and non-state actors and access to personal data of an individual must be governed by a legal regime built around the principles of consent, transparency, and individual control. **Para 1155**
- Any restriction on privacy must be subjected to the three-fold test of legality, legitimate state aim, and proportionality, in addition to meeting requirements of constitutionally permissible restrictions under Part 3 of Constitution. Once biometric system is compromised, it is compromised forever. **Para 1532**
- Therefore, it is imperative that concerns about protecting privacy must be addressed while developing a biometric system and individuals must be given the right to access, correct and delete their data at any point in time, a procedure familiar to an opt-out option. **Para 1255**
- Aadhaar Act and regulations framed thereunder are silent on question of informed consent and do not provide for procedure through which individual can access their information. In this regard, the proviso to Section 28(5) which bars the individual from accessing their own data is invalid as it violates the fundamental principle of ownership of personal data. **Para 1465**
- The "Do No Harm" Principle, which requires that Governments or adjacent authorities do not use biometric and digital identity in such a manner that results in causing harm to the individual concerned, requires rigorous evaluation and continuous oversight. **Para 1204**
- Creating a strong legal regime for privacy protection and safeguards akin to those provided for under the EUGDPR may assuage the fears of the public and uphold the long-term legitimacy of the Aadhaar. However, in current form, Aadhaar framework does not address privacy concerns and is violative of informational privacy. **Para 1205**
- The State is under a constitutional obligation to safeguard the dignity of its citizens and the failure of the Aadhaar Act to account for the flaws in the framework and the resultant failures in authentication have led to denial of benefits and exclusion of individuals. **Para 1412 and 1538**
- The dignity of an individual cannot be made dependent on algorithms and technological vulnerabilities. Denial of benefits arising out of any social security scheme which promotes socio-economic rights of the marginalized, would not be legitimate under the Constitution Exclusion based on technological errors, with no fault of the individual, is a violation of dignity. **Para 1412 and 1538**

<u>On Striking/Reading Down Specific Provisions</u>

- Section 29(4) of the Act suffers from over-breadth as it gives wide discretionary power to UIDAI to publish, display or post core biometric information of an individual for purposes specified by the regulations. **Para 1535**

- Similarly, Section 2 (g), (j), (k) and (t) empower the UIDAI to define the scope of biometric data and further expand the nature of information that may be collected, giving the UIDAI disproportionately wide powers. The definitions of these sections provide the government with unbridled powers to add to the list of biometric details that UIDAI can require a citizen to part with during enrollment which might even amount to an invasive collection of biological attributes including blood and urine samples of individuals. **Para 1536**
- The proviso to Section 28(5) of the Aadhaar Act, which disallows an individual access to the biometric information that forms the core of his or her unique ID, is violative of a fundamental principle that ownership of an individual's data must at all times vest with the individual. **Para 1537**
- Section 47 is arbitrary as it fails to provide a mechanism to individuals to seek efficacious remedies for violation of their right to privacy. **Para 1539.6**
- Section 57 is manifestly arbitrary, it suffers from over-breadth and violates Article 14. It cannot be allowed to pass the test of Constitutional muster. **Para 1539.10**
- Section 7 suffers from over-breadth since the broad definitions of the expressions 'services and 'benefits' enable the government to regulate almost every facet of its engagement with citizens under the Aadhaar platform. **Para 1539.11-12**
- Validity of Section 139AA of the IT Act. Since Adhaar Act itself is unconstitutional, seeding of Adhaar to PAN under Art.139-AA does not stand independently. **Para 1542.**
- The 2017 amendments to the PMLA Rules fail to satisfy the test of proportionality. The presumption is that that any person desirous of opening a bank account is a potential money launderer. Moreover, the consequences of the failure to provide Aadhaar details are draconian and the restriction placed excessive and disproportionate. **Para 1543**
- Aadhaar-Bank Linking – Prevention of Money Laundering Rules, 2017:
- Linking SIM Cards with Aadhaar: Mobile phones in the current day and age are storehouses of personal data and the question that arises is whether Aadhaar is the least intrusive way in which in which the problems associated with subscriber verification may be dealt with. **Para 1544.** In absence of adequate safeguards, biometric data of users can be seriously compromised and exploited for commercial gains and the State must not be oblivious to such privacy concerns.The decision to link Aadhaar numbers with mobile SIM cards is not valid or constitutional as it fails the test of proportionality as laid down by the 9-Judge Bench in *Puttaswamy*. It fails the test of constitutional muster on account of enabling a disproportionate intrusion into the realm of individual privacy. **Para 1429**

  All Telecom Service Providers directed to delete the biometric data and Aadhaar details of all subscribers forthwith **Para 1544**

14. SUSHILA AGGARWAL AND OTHERS V. STATE (NCT OF DELHI) AND ANOTHER REPORTED IN (2020) 5 SCC 1

[Coram: *Arun Mishra, Indira Banerjee, Vineet Saran, M. R. Shah and S. Ravindra Bhat, JJ.]*
Independent concurring Judgments delivered by Justice MR Shah and Justice Ravindra Bhat. The other judges concurred with both.

While referring the matter to a CB, a Bench of 3-judges prima facie noticed that **one line of judgments** (*Salauddin Abdulsamad Shaikh v. State of Maharashtra; K.L. Verma v. State & Anr; Sunita Devi v. State of Bihar & Anr; Adri Dharan Das v. State of West Bengal; Nirmal Jeet Kaur v. State of M.P. & Anr; HDFC Bank Limited v. J.J. Mannan; Satpal Singh v. the State of Punjab and Naresh Kumar Yadav v Ravindra Kumar*) **held that anticipatory bail orders should invariably contain conditions, either with reference to time, or occurrence of an event, such as filing of a charge sheet, in criminal proceedings, that would define its time of operation**, after which the individual concerned would have to secure regular bail, under Section 439 Cr. PC. The court also noticed, that on the other hand, the observations in *Gurbaksh Singh Sibbia v. State of Punjab* (CB Judgment) did not suggest such an inflexible approach. The second line of cases included *Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors* and *Bhadresh Bipinbhai Sheth v. State of Gujarat & Anr* wherein it was held **that no conditions ought to be imposed by the court, whilst granting anticipatory bail, which was to inure and protect the individual indefinitely till the end of the trial. (Para 11)**

Questions: (Para 7)

1. Whether the protection granted under Section 438 CrPC (anticipatory bail) should be limited to a fixed period so as to enable the person to surrender before the trial court and seek regular bail.
2. Whether the life of an anticipatory bail should end at the time and stage when accused is summoned by the Court.

Findings:

A] As per M. R. Shah, J. (Arun Mishra, Indira Banerjee, Vineet Saran, JJ. and Ravindra Bhat, J. concurring):

- **Para 7.1** - A person in whose favour a pre-arrest bail order is made under S. 438 CrPC has to be arrested. However, when such a person is arrested, he has to be released on bail. The only difference between the pre-arrest bail order u/S 438 CrPC and the bail order u/S 437 and 439 CrPC is the stages at which the bail order is passed.
- **Para 7.5** - In ***Gurbaksh Singh Sibbia v. State of Punjab*** reported **(1980) 2 SCC 565**, the **Constitution Bench** specifically observed that the normal rule should be not to limit the operation of the order granting anticipatory bail to a specific period of time (Para 42 and 43). This means that in an appropriate case, the Court concerned can limit the operation of the order.
- Decision in ***Siddharam Satlingappa Mhetre v. State of Maharashtra*** reported in **(2011) 1 SCC 694** to the extent it takes the view that the life of the order under S. 438 CrPC cannot be curtailed is not a correct law and the decision in ***Salauddin Abdulsamad Shaikh v. State of Maharashtra*** reported in **(1996) 1 SCC 667**that order of anticipatory bail has to be necessarily limited in time-frame is also not a good law. Both are contrary to the Constitution Bench judgment in ***Gurbaksh Singh Sibbia.***
- **Para 7.6 – Conclusion:** Considering the decision in ***Gurbaksh Singh Sibbia,*** **the Court may, if there are reasons for doing so, limit the operation of the order to a short period only after filing of an FIR in respect of the matter covered by the order**. The applicant in this case may be directed to obtain regular bail (S. 437 or 439 CrPC) within a reasonable short period after filing of FIR.
  Conditions can be imposed, including limiting the operation of the order in relation to a period of time, if circumstances so warrant, more particularly the stage at which anticipatory bail application is moved – before or after FIR, when investigation is in progress or when investigation is complete and charge sheet is filed. However, **normal rule should be not to limit the order in relation to a period of time.**

B] As per Ravindra Bhat, J. (Arun Mishra, Indira Banerjee, Vineet Saran, JJ. and M. R. Shah, J. concurring):

- **Para 53 –** Predominant thinking in ***Gurbaksh Singh Sibbia*** was that provision for anticipatory bail was made given the premium and value the Constitution and Article 21 placed on liberty. There was no

invariable or inflexible rule that the applicant had to make out a special case, or that the relief was to be of limited duration, in a point of time, or was unavailable for any particular class of offences.

- **Para 56** – S .438 CrPC is a procedural provision concerned with the personal liberty of each individual who is entitled to the benefit of the presumption of innocence. Court should lean against the imposition of unnecessary restrictions on the scope of S. 438 CrPC.
- **Para 63** – Noticing the 2018 Amendment which introduced S. 438(4), the Court viewed that where Parliament wished to exclude or restrict the power of courts under S. 438, it did so in categorical terms. Neither a blanket restriction can be read into by this Court, nor can inflexible guidelines in the exercise of discretion be insisted upon – that would amount to judicial legislation.
- **Para 72 - It is always open to courts to impose the needed restrictions – be that in point of time or at the stage of investigation or enquiry-in the given circumstances of any case. But they should not always be imposed invariably in all cases.** If this Court were to weave conditions to impose and read into Section 438 that are not expressly provided, the danger would be that several applicants who might otherwise be entitled to relief, would be denied it altogether.
- **Para 73** – Noting the decision in ***State of U.P. v. Deoman Upadhayaya*** **[1961 (1) SCR 14]** as discussed in ***Gurbaksh Singh Sibbia***, the Court held that "limited custody" or "deemed custody" to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is relatable to a statement made during such event (i.e deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail.
- **Para 74** - ***Gurbaksh Singh Sibbia*** clearly disapproved the imposition of stringent conditions or ruling out of certain offences or adoption of a cautious or special approach while granting an order of anticipatory bail.

Conclusion regarding 1st question

- **Para 75 - There is no offence, per se, which stands excluded from the purview of Section 438, - except the offences mentioned in Section 438 (4).** if there are indications in any special law or statute, which exclude relief under Section 438 (1) they would have to be duly considered.
- **Para 76 and 84.1** - The view expressed in ***Salauddin Abdulsamad Shaikh, K.L. Verma, Nirmal Jeet Kaur, Satpal Singh, Adri Dharan Das, HDFC Bank, J.J. Manan and Naresh Kumar Yadav*** about the Court of Sessions, or the High Court, being obliged to grant anticipatory bail, for a limited duration, or to await the course of investigation, so as the "normal court" not being "bye passed" or that in certain kinds of serious offences, anticipatory bail should not be granted normally including in economic offences, etc are not good law. The observations – which indicate that such time related or investigative event related conditions, should invariably be imposed at the time of grant of anticipatory bail are therefore, **overruled.** Observations in ***Siddharam Satlingappa Mhetre*** is too wide and **cannot be considered good law.** The judgment in ***Sibbia*** itself is an authority that such conditions can be imposed, but not in a routine or ordinary manner. Therefore, courts can use their discretion, having regard to the offence, the peculiar facts, the role of the offender, circumstances relating to him, his likelihood of subverting justice (or a fair investigation), likelihood of evading or fleeing justice- to impose special conditions on a case-to-case basis.

Regarding 2nd question

- **Para 77** - Question is regarding whether upon filing of charge-sheet, or the summoning of the accused by the Court or even the addition of an offence in the charge-sheet, the applicant should be asked to surrender and apply for regular bail.
- **Para 77.2** – The judgment in ***Aslam Babalal Desai v. State of Maharashtra (1992) 4 SCC 272*** has clarified that when an accused is released by operation of S. 167(2) CrPC (default bail) and subsequently, a charge-sheet is filed, there is no question of cancellation of his bail.
- **Para 77.3** - The analogy with 'deemed bail' under Section 167(2) concludes that the mere subsequent event of the filing of a charge-sheet cannot compel the accused to surrender and seek regular bail.
- **Para 77.4 and Para 78**- At any time during the investigation were any occasion to arise calling for intervention of the court for infraction of any of the conditions imposed under Section 437(3) read with Section 438(2) or the violation of any other condition imposed in the given facts of a case, recourse can always be had under Section 439(2).

- **Para 79** – Decision in ***Pradeep Ram v. State of Jharkhand (2019) 17 SCC 326*** supports the view that prosecution has an option to apply for a direction to arrest the accused.
- **Para 79 to 83 and 84.2** - Decision in ***Bhadresh Bipinbhai Sheth v. State of Gujarat (2016) 1 SCC 152, Arvind Tiwary v. State of Bihar (2018) 8 SCC 475*** and several other judgments have expressed similar views that accused cannot be compelled to surrender before the trial court. Subject to compliance with the conditions imposed, the anticipatory bail given to a person, can continue till end of the trial.

C] FINAL CONCLUSION BY ALL JUDGES

Question 1: Protection granted to a person u/S 438 CrPC should not be limited to a fixed period and should inure in favour of the accused without any restriction on time. Normal conditions u/S 437(3) r/w S. 438(2) should ne imposed. If there are specific facts or features, it is open for the Court to impose any appropriate condition including fixed nature of relief or it being tied to an event etc.

Question 2: Life or duration of an anticipatory bail order does not end normally at the time and stage when the accused is summoned by the Court, or when charges are framed, but can continue till the end of the trial. If there are any special/peculiar features necessitating the limitation of the tenure of the anticipatory bail, it is open for the Court to do so.

Following need to be kept in mind by Courts dealing with applications u/S 438 CrPC:
(*Guiding principles to deal with applications u/S 438 CrPC culled out by Justice Ravindra Bhat in Para 85 adopted by all Judges*)

1. Applications for anticipatory bail should contain clear and essential facts relating to the offence, and why the applicant reasonably apprehends his or her arrest, as well as his version of the facts. It is not a necessary condition that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.
2. The Court may issue notice to the public prosecutor and obtain facts, even while granting limited interim anticipatory bail.
3. While weighing and considering an application the court has to consider the **nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice, etc**. The courts would be justified – and ought to **impose conditions spelt out in Section 437 (3), Cr. PC** [by virtue of Section 438 (2)]. Such **special or other restrictive conditions** may be imposed if the case or cases warrant, but **should not be imposed in a routine manner**, in all cases.
4. Whether to grant anticipatory bail or not and if so what kind of special conditions should or should not be imposed are dependent on facts of the case and are matters of discretion to be exercised by the Court.
5. Anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge sheet till end of trial.
6. Orders of anticipatory bail should not be "blanket" in the sense that it should not enable the accused to commit further offences and claim relief.
7. Orders of anticipatory bail do not in any manner limit or restrict the rights or duties of the police or investigating agency to investigate.
8. The observations in ***Sibbia*** regarding "limited custody" or "deemed custody" to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27.
9. It is open to the police or the investigating agency to move the court concerned, which granted anticipatory bail, in the first instance, for a direction under Section 439 (2) to arrest the accused.
10. The correctness of an order granting bail, can be considered by the appellate or superior court at the behest of the state or investigating agency, and set aside on the ground that the court granting it did not consider material facts or crucial circumstance. This does not amount to "cancellation" in terms of Section 439 (2), Cr. PC.
11. The judgment in ***Mhetre*** (and other similar decisions) restrictive conditions cannot be imposed at all, at the time of granting anticipatory bail are **hereby overruled**. Likewise, the decision in ***Salauddin*** and subsequent decisions (*including K.L. Verma, Sunita Devi, Adri Dharan Das, Nirmal Jeet Kaur, HDFC Bank Limited, Satpal Singh and Naresh Kuamr Yadav*) which lay down such restrictive conditions limiting the grant of anticipatory bail, to a period of time are hereby **overruled**.

15. INDORE DEVELOPMENT AUTHORITY VS. MANOHARLAL AND OTHERS (S).; 2020 8 SCC ONLINE 129

[Coram: Arun Mishra, Indira Banerjee Vineet Saran, M.R. Shah, Ravindra S. Bhatt, JJ.]

Facts: In this case a five judge bench resolved the ambiguities pertaining to land acquisition lapses under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

Issue: 1. Whether the word "or" in sec 24 (2) should be interpreted disjunctively or conjunctively i.e., whether the word "or" should be interpreted as an "and".

Rule: Section 24 of the Act of 2013

Contentions on Behalf of the Petitioners: From Para 1-96

Ld. SG:

1. He Highlighted that Section 24 is a transitional provision and such provision and such a provision should be given an interpretation which accords with legislative intent. Further he urged that there is a presumption in favour of restricted retrospective applicability of any provision in an enactment unless a contrary intention appears so. **@ Para 9**
2. Section 24(1)(a) contemplates a limited applicability of the Act of 2013, and Sec 24 (1)(b) stipulates that where an award under section 11 of the LA Act has been made, the entire proceedings would continue under that law and the provisions of Act of 2013 would be in applicable. Section 24 (1) (b) is the larger umbrella clause under Section 24, which protects the vested rights of the parties under the LA Act if the stage of passing of award has been crossed. It is argued that the umbrella clause Section 24 (1) (b), is followed by Section 24(2) which provides for the exclusionary clause. **@ Para 10**
3. Section 24(2) is the only lapsing clause under the provision which brings in the rigours of the Act of 2013 in totality by mandating the land acquisition to be initiated de novo. **@ Para 10**
4. It was submitted that the contingencies for lapsing in Section 24(2), are subject to an award under Section 11 of the LA Act being made five years prior to the commencement of the Act of 2013 (which is 1.1.2014). If the award is so made, two contingencies result in complete lapse: (a) Physical possession of the land has not been taken; or (b) compensation has not been paid. **@ Para 12**
5. Proviso to Section 24(2) further carves out an exception to Section 24(2) viz, in case the award has been made and compensation in respect of majority of landholdings has not been deposited in the account of the beneficiaries, no lapsing will take place, but all the beneficiaries specified in the notification for acquisition shall be entitled to compensation in accordance with the provisions of the Act of 2013. **@ Para 13**
6. It was submitted that Section 24(1)(a) and Section 24(2) are balancing provisions controlling the extent of retrospectivity and curtailing the effacement of rights. **@ Para 15**
7. If nobody is paid the compensation or compensation is not taken by everyone though tendered and/ or kept ready, the legislature contemplates such a situation to be a reversible one and, therefore, provides for lapsing of all previous stages prior to non-payment. However, if it can be demonstrated that though (1) compensation was tendered to all; (2) some of them [for whatever reason] did not take the compensation; and (3) compensation is deposited in case of majority of the land holdings [viz. setting apart the share of such persons and making it available for them to take it], then, neither proceedings would lapse nor the compensation will be required to be determined under the Act of 2013. **@ Para 16**
8. This was the genesis behind Section 24(1)(a) and proviso to Section 24(2) which protect acquisitions from lapsing whilst providing for higher compensation under the Act of 2013 to the land owners under limited defined circumstances. **@ Para 18**
9. The context of Section 24, learned counsel urged, is to provide for a transitory provision viz. to take care of the pending land acquisition proceedings which are ongoing under the LA Act when the Act of 2013 is brought into force w.e.f. 1.1.2014. The purpose and object of making this provision is to balance the competing rights of public projects vis--vis holders of the land. The object and purpose was to ensure that where acquisition proceedings under LA Act have reached an advanced stage and investment of public money had already been made, firstly, the lapsing of such ongoing projects should be avoided and secondly as far as possible, the land owners also can, without disturbing the process of acquisition, be given the compensation under the Act of 2013. **@ Para 26**

Ld. ASG:

10. It was submitted that this Court, whilst interpreting Section 24 of the Act of 2013, for the first time in Pune Municipal Corporation [supra] and subsequent judgments, presumed that the word paid occurring in Section 24(2) of the Act of 2013 would have to be interpreted as per Section 31 of the LA Act. **@ Para 32**
11. It was urged that if Section 24 of the Act of 2013 intended to attract the rigours and technicalities of Section 31 of the LA Act, it would have used the requisite phrase. It is submitted that the term Section 31 of the LA Act is conspicuous by its absence in Section 24 of the Act of 2013. Parliament intentionally used the phrases paid and deposit not in terms of their meanings under Section 31 so as to avoid the rigours of the said provision and to keep the practical exigencies of land acquisition in mind, more particularly when Section 24 of the Act of 2013 is merely a transitory provision. **@ Para 34**
12. It is submitted that Section 24(1) begins with a non-obstante clause, providing for a limited overriding effect of the LA Act in case of the contingencies mentioned in Section 24 (a) and (b). Section 24 (1) (a) contemplates that where land acquisition proceedings were initiated under the LA Act but no award was passed till the date the new Act came into force viz. 1.1.2014, acquisition proceedings could continue, however compensation will have to be determined under the Act of 2013. Section 24 (1) (b) provides that where an award under Section 11 of the LA Act has been made, the entire proceedings would continue under the Act of 1894, as if it were not repealed. Section 24(2) provides for an exclusionary clause which mandates the land acquisition proceedings to be lapsed and initiated de novo. **@ Para 35**
13. It was submitted that the requirements for lapsing (of acquisition) in Section 24(2), are subject to an award under Section 11 of the LA Act being made five years prior to the commencement of the Act of 2013 viz. 1.1.2014. If the award is made and the following two situations occurred, the proceedings will lapse; one, physical possession has not been taken or (to be read as "and") and two, compensation has not been paid. **@ Para 36**
14. It was submitted that Section 24(2), while providing for lapsing, uses the two phrases concerning possession of the land and the tendering of payment with the disjunctive word “or" thereby making it mandatory for the acquiring authority to satisfy both contingencies in order to avoid lapsing. It is submitted that the same would be against the legislative intention of limited lapsing. it is submitted that the word "or" may be read as "and" so as to limit the lapsing only in cases where both, payment has not been made (subject to proviso) and possession has not been taken.**@ Para 43**
15. It was urged that were the court to accept an interpretation, that either non-payment of compensation, or taking of possession under Section 24 (2), would result in lapsing of acquisition, as held in Pune Municipal Corporation (supra) and other decisions, land vested in the State, and conveyed to third parties (either as allottees of housing schemes or public sector undertakings, for one development project or another, or for public purposes such as construction of roads, bridges and other public works) would be divested. **@ Para 46**
16. Therefore, the word deemed to lapse in Section 24(2) should not be interpreted to mean divesting of land from the Government which is already vested in the Government and moreover in the absence of any provision of divesting in the 1894 Act. **@ Para 47**
17. It was urged, therefore, that absence of provision to return the compensation received to Government convincingly points to Parliamentary intent that "or" should be read as "and": thus, only if neither possession is taken (of acquired lands) nor is compensation paid, (i.e., tendered to the party or parties) would the acquisition under the LA Act lapse. **@ Para 48**
18. It is submitted that when the State acquires land and has drawn memorandum of taking possession that is the way the State takes possession of large tract of land acquired, it ought not necessarily to physically occupy such land after forcefully displacing those physically. **@ Para 51**

Arguments on Behalf of the Landowners:

Ld. Senior Counsel Mr. Shyam Divan:

1. It was argued that the Parliamentary intention was firstly to repeal the previous law to a limited extent and save ongoing acquisition proceedings in terms of Section 24(1) and usher a new regime, i.e. Section 24(2) whereby indolence on the part of the State agencies either with respect to payment of compensation or with respect to taking over of possession, resulting in the lapse of acquisition proceedings itself. **@ Para 57**

2. To address the problem of delays, the Parliament wished to enact a bright line approach whereby all acquisitions which did not culminate either in payment of compensation or taking over of possession in respect of awards made five or more years prior to 1.1.2014 had to lapse. **@ Para 58**
3. The two conditions to be fulfilled as on 01.01.2014 to trigger the deeming provision into operation, according to Mr. Divan are firstly, there must be award under section 11 of the 1894 Act which has been made five years or more prior to the commencement of the Act of 2013 (i.e., an award made on or before 1.1.2009); and secondly either physical possession of the land has not been taken from the landowner or compensation had not been paid as required under the Act of 1894. **@ Para 61**
4. Paid, it was urged, means paid. It does not mean a deposit in treasury. He further submitted that deposit in the account of the beneficiaries does not mean a deposit in the treasury. He argued that there was no reason to depart from the rule of literal interpretation, and the manner of payment, as held in Pune Municipal Corporation (supra), is to be strictly in terms of Section 31 of the Act of 1894 as it is an expropriatory legislation. **@ Para 65**
5. An important distinction is required to be drawn in respect of de jure / constructive / deemed possession and physical possession. Even if it is conceded that drawing of a Panchnama is a valid mode of initially taking possession of vast tracts of vacant land. the intention of the legislature is that over a period of five years, such possession must transform to evident and demonstrable physical possession i.e., the manifestation of actual control and dominion over the subject land(s). Learned counsel relied on several decisions in support of their argument that physical possession should be construed as actual physical possession, and not constructive, or de jure possession. which in most cases is possession on paper. **@ Para 67**
6. All counsel for landowners submitted that there is no valid reason to exclude from the period of 5 years under section 24(2), the time during which a landowner had the benefit of an interim order of a court. In support of this argument, it was argued firstly, that Parliament did not expressly exclude such a period in Section 24. Second, where in the Act of 2013, the legislature did want to exclude the period of a stay or injunction, it has done so by using express words such as in the proviso to Section 19 and the explanation to Section 69 of the Act of 2013. **@ Para 69**
7. The Legislature intended the two conditions separated by the word or to be alternative conditions. Four situations arise where the conditions are disjunctive: firstly, when physical possession is with the State and compensation is with the citizen, there is no deemed lapse; secondly, when physical possession is with the citizen and compensation is with the State, there is no need for restitution as the State has retained the compensation amount; thirdly, when physical possession is with the citizen, and the compensation is also with the citizen, in such scenarios, the citizen must return the compensation. **@ Para 70**
8. It was urged that where the State has paid the money by deposit in the Reference Court and the money was lying with the Court, the State may withdraw the money on deemed lapsing. However, if the State were to decide to acquire the land afresh, the compensation already paid may be adjusted; and further since inherent in the notion of lapsing is the requirement for restitution, the State can recover the compensation, inter alia by framing suitable rules. **@ Para 70**

Held: From Para 96:

1. Section 24(2) of the Act of 2013 is, in our opinion, a penal provision - to punish the acquiring authority for its lethargy in not taking physical possession nor paying the compensation after making the award five years or more before the commencement of the Act of 2013 in pending proceedings, providing that they would lapse. The expression where an award has been made, then the proceedings shall continue used in Section 24(1)(b) under the provisions of the Act of 1894 means that proceedings were pending in praesenti as on the date of enforcement of the Act of 2013 are not concluded proceedings, and in that context, an exception has been carved out in section 24(2). **@ Para 112**
2. Even if possession has been taken, despite which payment has not been made nor deposited, (for the majority of the land-holdings), then all beneficiaries holding land on the date of notification under Section 4 of the Act of 1894, are to be paid compensation under the provisions of the Act of 2013. Section 24 of the Act of 2013 frowns upon indolence and stupor of the authorities. **@ Para 113**
3. There are other reasons to read the word 'or' in Section 24 as 'and.' When we consider the scheme of the Act of 1894, once the award was made under Section 11, the Collector may, undertake possession of the land which shall thereupon vest absolutely in the Government free from all encumbrances. Section 16 of

the Act of 1894 enables the Collector to take possession of acquired land, when an award is made under Section 11. Section 17(1) of the Act of 1894 confers special powers in cases of urgency. **@ Para 114**

4. The provision for lapsing under Section 24 is available only when the award has been made, but possession has not been taken within five years, nor compensation has been paid. In case word 'or' is read disjunctively, proceedings shall lapse even after possession has been taken in order to prevent lapse of land acquisition proceedings, once the land has vested in the govt. and in most cases, development has already been made. @ Para 123
5. Interpreting "or" under Section 24(2) of the Act of 2013 disjunctively, would result in an anomalous situation because, once compensation has been paid to the landowner, there is no provision for its refund. It was fairly conceded on behalf of the landowners that they must return the compensation in the case of lapse if possession has not been taken. In case possession is with the landowner and compensation has been paid, according to landowners submission, there is deemed lapse under Section 24(2) by reading the word or disjunctively. **@ Para 132**
6. In our opinion, the submissions cannot be accepted as an anomalous result would occur. In case physical possession is with the landowner, and compensation has been paid, there is no provision in the Act for disgorging out the benefit of compensation. In the absence of any provision for refund in the Act of 2013, the State cannot recover compensation paid. The landowner would be unjustly enriched. This could never have been the legislative intent of enacting Section 24(2) of the Act of 2013. **@ Para 133**

Conclusion: @ Para 363

1. Under the provisions of Section 24(1) (a) in case the award is not made as on 1.1.2014 the date of commencement of Act of 2013, there is no lapse of proceedings. Compensation has to be determined under the provisions of Act of 2013.
2. In case the award has been passed within the window period of five years excluding the period covered by an interim order of the court, then proceedings shall continue as provided under Section 24(1)(b) of the Act of 2013 under the Act of 1894 as if it has not been repealed.
3. The word or used in Section 24(2) between possession and compensation has to be read as nor or as and. The deemed lapse of land acquisition proceedings under Section 24(2) of the Act of 2013 takes place where due to inaction of authorities for five years or more prior to commencement of the said Act, the possession of land has not been taken nor compensation has been paid. In other words, in case possession has been taken, compensation has not been paid then there is no lapse. Similarly, if compensation has been paid, possession has not been taken then there is no lapse.
4. The expression 'paid' in the main part of Section 24(2) of the Act of 2013 does not include a deposit of compensation in court. The consequence of non- deposit is provided in proviso to Section 24(2) in case it has not been deposited with respect to majority of land holdings then all beneficiaries (landowners) as on the date of notification for land acquisition under Section 4 of the Act of 1894 shall be entitled to compensation in accordance with the provisions of the Act of 2013.

16. <u>M/S SHANTI CONDUCTORS PVT LTD V. ASSAM STATE ELECTRICITY BOARD AND ORS. REPORTED IN (2020) 2 SCC 677</u>

[Coram: Ashok Bhushan, S.Abdul Nazeer and Navin Sinha]

<u>Facts:</u> Three review petitions namely Review Petition (C) Nos. 786-787 of 2019, Review Petition (C) No. 789 of 2019 and Review Petition (C) No. 788 of 2019 are considered separately and are filed against a common judgement dated 23.01.2019 reported in **(2019) 19 SCC 529**.

The Assam State Electricity Board, the respondent herein, has issued two supply orders to the petitioner dated 31.03.1992 and 13.05.1992 for supply of aluminium electrical conductors. Petitioner completed supply in pursuance of the above supply orders beginning from June, 1992 till 04.10.1993. The Act namely "The interest on Delayed Payments to Small Scale and Ancillary Industrial Undertaking Act, 1993 (hereinafter referred to as "Act, 1993")" w.e.f. 23.09.1992 was promulgated. A Writ Petition No. 1351 of 1993 was filed by Assam Conductors Manufacturers Association on behalf of its five members, which included M/s. Shanti Conductors Private Limited also for realisation of its dues and for seeking payment. An interim order was passed by the Guwahati High Court on 21.07.1993, in which the High Court observed that respondents may settle with the outstanding bills of the petitioners. A money suit was filed by the Petitioner on 10.01.1997 for a decree towards the interest only on the payment of the principal amount, which had already been received by the petitioner. The last supply was completed on 04.10.1993, since the last payment by the Respondent was made on 05.03.1994, it was contended by the Petitioner that a fresh period of limitation is applicable under Sec 19 of the Limitation Act.

<u>Issues:</u>

- Whether money suit filed by M/s. Shanti Conductors was barred by limitation?
- Whether Order 7 Rule 6 are applicable to the present case?
- Whether there is an error apparent on face of record?

<u>Findings:</u>

- In the judgment dated 23.01.2019, it has been held that the limitation of the suit filed by the petitioner shall be governed by Article 113 of the Limitation Act, 1963, which is three years from the date when the right to sue accrues. In paragraph 71 of the judgment, it has been held that last supply was completed on 04.10.1993, thus, amount became due on 04.11.1993 and the period of three years shall start running from 04.11.1993 and suit filed was beyond three years. The petitioners on the strength of Section 19 contends that since the last payment was made on 05.03.1994, a fresh period of limitation shall begin from the fresh date, i.e., 05.03.1994 and the suit filed on 10.01.1997 was well within time. **(Para 13)**
- The Court by mandate of law, is obliged to dismiss the suit, which is filed beyond limitation even though no pleading or arguments are raised to that effect. Reference to Order VII Rule 6 was made which states the ground for exemption from limitation law. Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed. **(Para 14)**
- The Court also observed that Section 19, provide for a fresh period of limitation, which is founded on certain facts, i.e., (i) whether payment on account of debt or of interest on legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy, (ii) an acknowledgement of the payment appears in the handwriting of, or in a writing signed by, the person making the payment. **(Para 15)**
- On the perusal of the Plaint indicates that there is no pleading as to exception of limitation by running any fresh period of limitation as per Section 19. Hence, there was no occasion for defendants to raise any reply in reference to Section 19. **(Para 17&18)**
- The proviso of Order VII Rule 6 cannot come to the rescue of the plaintiff since the plaintiffs have specifically pleaded that the provisions of the Limitation Act are not applicable since Act, 1993 has overriding effect. **(Para 22)**
- Furthermore, even in the Paragraph of the plaint, that refers to cause of action for the suit, but cause of action is not claimed from the date 05.03.1994, which was the date when the last payment was received by the petitioner. The petitioner in the plaint has clearly not pleaded for benefit of Section 19 nor has

brought necessary facts to enable the Court to consider the claim under Section 19. Thus Court held that that petitioner is not entitled for benefit of Section 19 of the Limitation Act **(Para 23)**

- The scope of review is limited and under the guise of review, petitioner cannot be permitted to reagitate and reargue the questions, which have already been addressed and decided. The scope of review has been reiterated by this Court from time to time. The court reiterated the judgement in *Parsion Devi and Ors v. Sumitri Devi and Ors (1997) 8 SCC 715* wherein in paragraph 9 it is laid down:- Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. Hence, Review Petition (C) Nos. 786-787 of 2019, is dismissed **(Para 25 &26)**
- In the judgment dated 23.01.2019, the Court has observed that "there being nothing on record to come to the conclusion that any supply was made after the enforcement of the Act so as to enable the appellant to claim interest under Section 3 r/w Section 4 of the Act, 1993, we are of the view that judgment of the High Court does not need any interference in this appeal". Thus the Court held that there is error apparent on the face of record in observation of the Court, hence the Review Petition (C) No. 789 of 2019 is dismissed. **(Para 28 &29)**
- Petitioner contended that this Court in the judgment dated 23.01.2019 has dismissed the appeal of the petitioner as not maintainable, which is an error apparent on record. In the present case on considering the facts and issue of maintainability of the appeal having been considered and found against Petitioner in judgment, hence Review Petition (C) No. 788 of 2019 dismissed. **(Para 31&32)**