DAVINDER SINGH AND ORS.
v.
STATE OF PUNJAB AND ORS.
(Civil Appeal No. 7904 of 2010)

SEPTEMBER 10, 2010

[D.K. JAIN AND H.L. DATTU, JJ.]

Service Law – Termination – For misconduct – Punjab Home Guard Rules, 1963 – Rules 18, 27 – 'Volunteers' of the Punjab Home Guards terminated from service on ground of indiscipline – Termination order challenged – Dispute as regards the governing rules – Held: The 1983 Rules provided for repeal of the 1963 Rules only in the matters relating to 'members of the service', thus, the 1963 Rules were still applicable for the purpose of recruitment, discharge and dismissal of the 'volunteers'– The termination order passed by the Department suffered from legal infirmity inasmuch as the 'volunteers' were not given a reasonable opportunity of showing cause against the action proposed to be taken against them – Action of the Department was contrary to their own statutory rules (the 1963 rules) and in violation of the principles of natural justice – Termination order set aside – On facts and circumstances of the case and in interest of justice, Department directed to reinstate the 'volunteers' as Home Guards without back wages – Punjab Home Guards and Civil Defence (Field) Class III Rules, 1983 – Rule 20.

Plea – New plea of remedy – Plea made by respondents for the first time before Supreme Court that the appellant could not have approached the High Court under Article 226 of the Constitution without exhausting the statutory appeal remedy – Maintainability of – Held: Not maintainable – Remedy.

The appellants, volunteers of the 'Punjab Home Guards', were terminated from service on the allegation

that while boarding a train in connection with election duty, they were involved in an act of indiscipline at the railway station. The appellants challenged the termination order by filing writ petitions. The High Court held that the appellants were `volunteers' engaged in Honorary capacity who had no civil rights and, therefore, the termination of their services on account of the allegation levelled against them could not be considered to be in violation of the law.

In the instant appeal filed by the volunteers, the appellants submitted that they were temporary employees working for 15 to 17 years, and were, therefore, entitled to protection guaranteed under Article 311(2) of the Constitution of India before being terminated; that the appellants were governed by the provisions of the Punjab Home Guards Act, 1947 and Punjab Home Guards and Civil Defence (Field) Class III Rules, 1983, therefore, their services could not have been terminated without issuing show cause notice and without holding departmental enquiry. Alternatively, the appellants contended that the order of termination passed by the respondents was stigmatic and was passed as a consequence of an alleged misconduct and therefore, before any action could have been taken against the appellants, they ought to have been afforded a reasonable opportunity of hearing in consonance with the principles of natural justice.

Per contra, the respondent submitted that the appellants were not temporary employees, but only volunteers in the organization and were still governed by Punjab Homes Guards Rules, 1963.

Allowing the appeals, the Court

HELD: 1.1. There is no provision empowering the State to recruit volunteers from the public under the

scheme of the Punjab Home Guards and Civil Defense (Field) Class III Service Rules, 1983. The 1983 Rules deal with the appointment of individuals to specific posts, when a temporary or permanent vacancy arises. It does not deal with volunteers who are recruited from the general public. The legislative intent for such a distinction with respect to application of the 1983 Rules to 'non-volunteer' members is also discernible from a combined reading of Rule 2(n) and Rule 3. It is apparent from the scheme of the Rules that the appointment of volunteers is not envisaged under the scope of the 1983 Rules. Rule 22 of the Punjab Home Guard Rules, 1963, is the only provision which seems to empower the recruitment of volunteers. Volunteers could be appointed only under Rule 22(2) of the Punjab Home Guard Rules, 1963. [Paras 11, 13, 14 and 17] [618-G-H; 619-F-G; 620-B-C]

1.2. The repeal as envisaged by r.20 of the 1983 Rules applies only to the members of the service mentioned under Annexure 'A' and not to volunteers. The 1983 rules do not confer upon the appointing authority any power to discharge the volunteer when his services are no longer required as provided under Rule 18 of the 1963 Rules. This is because, the 1983 Rules are not meant to apply to volunteers. Under the 1983 Rules, a member of the service can be dismissed only after following the procedure prescribed for that purpose under the Punjab Civil Services (Punishment and Appeal) Rules, 1970. But such a detailed procedure is not envisaged while discharging a volunteer under 1963 rules. It is, therefore, evident that the legislature intended to preserve this distinction between the 'volunteers' and 'members of the service' (non-volunteers members) within the scheme of the 1983 Rules. That being the case, it is neither possible nor desirable to dilute the distinction which the legislature intended to preserve, something which falls squarely in

the realm of policy. Therefore, the 1963 Rules are applicable to the appellants. [Para 19] [620-D-G]

2.1. In the instant case, the order terminating the services of the appellants specifically cited indiscipline at the Amritsar Railway Station as the cause for the termination. Therefore, it is not a case where the appointing authority discharged the services of the appellants on the ground that their services are no longer required but it is a case where their services are sought to be dispensed with, on the ground of indiscipline, which would come within the meaning of the expression 'misconduct'. In such a situation, the respondents cannot terminate the services of the appellants without following the procedure prescribed under Rule 27 of the Rules, the said Rules, specifically deals with Discipline. The language employed in the said Rule is clear and unambiguous. The Rule envisages that any officer may be dismissed from service either for misconduct or for unauthorized absence. The proviso appended to the said Rule speaks of giving an opportunity of hearing to the delinquent officer or the member appointed under the Act and the Rules. In the instant case no such opportunity of hearing or notice was given to the appellants as is required under Rule 27. In this view of the matter, the respondents cannot be permitted to contend that the appellants being `volunteers', their services could be terminated without complying with the procedure prescribed in the statutory Rules, which speaks of providing an opportunity of hearing to the person who would be affected by the proposed action. [Para 28 and 29] [623-F-H; 624-B-D]

2.2. The instant case is not a case of discharge simplicitor. Under Rule 18 of the 1963 Rules, any member appointed under the rules may be discharged at any time by the authority which had appointed him when his

services are no longer required. If it is an instance of discharge simplicitor, it would necessarily relate to instances where the post has been abolished or where there is a surplus of employees or other similar circumstances. The respondents have not raised the existence of any circumstances which required the discharge of any volunteers, neither has it been urged that there exists any condition which would require the appellants specifically to be discharged, apart from the allegation of indiscipline. [Para 30] [624-G-H; 625-A-B]

2.3. Even in matters of discharge, the authority concerned cannot act arbitrarily while discharging an employee. However, in the instant case, the appellants were discharged from service for indiscipline. Therefore, as provided in proviso to Rule 27 of the Rules, the appellants should have been given a reasonable opportunity of showing cause against the action proposed to be taken against them. No such opportunity was given to them. Therefore, the action of the respondents is contrary to their own statutory rules and in violation of principles of natural justice. [Para 31] [625-C-E]

2.4. Even without going into the question whether the appellants are eligible for the protection under Article 311 of the Constitution, the respondents seem to have acted in an arbitrary manner by terminating the services of the appellants, who have been working as Home Guards for the last 15-17 years. They are all over-aged. They may find it difficult to find alternate employment. Therefore, in the facts and circumstances of this case and in the interest of justice, it is deemed proper to set aside the order of termination passed by the respondents and direct the respondents to reinstate the appellants as Home Guards without back wages. [Para 32] [625-E-G]

State of Gujarat v. Akshay Amrutlal Thakkar **(2006) 2 SCC 309 - distinguished.**

Parshotam Lal Dhingra v. Union of India **(1958) SCR 828;** *Divisional Personnel Officer, Southern Railway, Mysore v. S. Raghavendrachar* **(1966) 3 SCR 106;** *Union of India v. Major Bahadur Singh* **(2006) 1 SCC 368;** *State of Kerala v. Mother Anasthasia, Superior General and Others* **(1997) 10 SCC 79 – referred to.**

3. There is no merit in the submission made by the respondents that the appellants without exhausting the appeal remedy provided under Rule 27(3) of 1963 Rules could not have approached the High Court under Article 226 of the Constitution, inter-alia, requesting the High Court to quash the termination order passed by respondents; for the reason that this issue was not raised nor argued before the High Court and, therefore, this issue cannot be permitted to be raised for the first time before the Supreme Court. [Para 33] [625-H; 626-A-C]

Case Law Reference:

(1958) SCR 828	**referred to**	**Para 4**
(1966) 3 SCR 106	**referred to**	**Para 4**
(2006) 2 SCC 309	**distinguished**	**Para 20**
(2006) 1 SCC 368	**referred to**	**Para 21**
(1997) 10 SCC 79	**referred to**	**Para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7904 of 2010.

From the Judgment & Order dated 11.9.2006 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 5142 of 2005.

WITH

C.A. No. 7905 of 2010.

Sanjay Sharawat for the Appellants.

Rajeev Dhawan, Brijender Chahar, Ajay Pal, Prasahant Shukla, Abhinav Ramakrishan for the Respondents.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. Leave granted.

2. The appellants have come before this Court, being aggrieved by the judgment and order passed by the High Court of Punjab and Haryana at Chandigarh dated 11.09.2006 in CWP No. 5142/2005 and CWP No. 5144/2005. Both the appeals involve identical questions of law and facts. Consequently, both of them are clubbed and disposed of by this common Judgment.

3. The appellants in the instant case are 'volunteers' of the Punjab Home Guards. They were recruited and appointed sometime in the year 1989 under the Punjab Home Guards Act, 1947 and the Rules framed thereunder. They were paid consolidated wages of Rs.2700/- per month, from the date of their appointment till their services were dispensed with. In the order of termination, it is alleged that the appellants were involved in an act of indiscipline at the Amritsar railway station on 02.10.2004. The order of termination was challenged before the High Court in the above mentioned civil writ petitions. The view of the High Court is that `volunteers' are persons engaged in Honorary capacity. They have no civil rights and, therefore, the termination of their services on account of the allegations leveled against them cannot be considered to be in violation of law. The High Court has also placed reliance on the observations made by this Court in the case of *State of Gujarat Vs. Akshay Amrutlal Thakkar* (2006) 2 SCC 309.

4. The learned counsel Sri Sanjay Sharawat appearing for the appellants, apart from others, submitted, that, the appellants, being temporary employees working from last 15 to 17 years,

were entitled to Protection Guaranteed under Article 311(2) of the Constitution of India before being terminated. Reference is made to the decision of this Court in the case of *Parshotam Lal Dhingra Vs. Union of India* (1958) SCR 828; and *Divisional Personnel Officer, Southern Railway, Mysore Vs. S. Raghavendrachar* (1966) 3 SCR 106; since the appellants are governed by the provisions of Punjab Home Guards Act, 1947 and Punjab Home Guards and Civil Defence (Field) Class III Rules, 1983, their services could not have been terminated without issuing Show Cause Notice and without holding departmental enquiry. Alternatively, it is contended that the order of termination passed by the respondents is not only stigmatic but the same has been passed as a consequence of an alleged misconduct committed by the appellants at the Railway Station, Amritsar on 02.12.2004. Therefore, it is submitted that before any action could have been taken against the appellants, they ought to have been afforded a reasonable opportunity of hearing in consonance with the principles of natural justice. It is, therefore, contended that the action of the respondents is arbitrary and in violation of Principles of Natural Justice.

5. It is the contention of the learned senior counsel Dr. Rajeev Dhawan that the appellants are 'volunteers', though their appointment is under the Act and the Rules and, therefore, in view of the specific provisions under the Rules, their services could be discharged at any time without issuing a Show Cause Notice and without holding any enquiry, much less a departmental enquiry. Alternatively, it is contended that the appellants have no civil rights as they are engaged only as volunteers. Since, the appellants have no civil rights, their services could be terminated for the reasons stated in the order of termination. The learned senior counsel invites our attention to the extract of Para 14.4 of Compendium of Instructions on Home Guards issued by Ministry of Home Affairs, which authorizes the Commandant General or the Commandant to discharge any Home Guard at any time, if in his opinion, the

services of such Home Guard are no longer required. It is also submitted that the appellants are not temporary employees, but only volunteers in the Organisation and they are governed by Punjab Homes Guards Rules, 1963 and not the Punjab Home Guards and Civil Defence (Field) Class III Rules, 1983.

6. In view of the rival contentions canvassed by the learned counsel, the first issue which requires our consideration is, which is the rule which may be made applicable to the parties to this lis. The appellants contend, that, they are governed by Punjab Home Guards and Civil Defense (Field) Class III Service Rules, 1983, whereas the Respondents contend that the appellants are governed by the Punjab Home Guard Rules, 1963. They also contend that the Punjab Home Guard Rules, 1963 have been repealed by the Punjab Home Guards and Civil Defense (Field) Class III Service Rules, 1983. In support of their submission, they cite Rule 20 of the latter which reads as under:

> "20.Repeal and Saving :- The Punjab Home Guard Rules 1963 as these are the applicable to the members of the service are hereby repealed. Provided that anything done or any action taken under the rules so repealed shall be deemed to have been done or taken under the corresponding provisions of these rules."

7. The respondents submit that there is a distinction between the 'volunteers' and 'members of the service" of the Punjab Home Guards. It was argued before us, that the 1963 Rules were still applicable to the 'volunteer' members of the Punjab Home Guards and that they are not to be considered as 'members of the service' as mentioned under Rule 20 of the 1983 Rules. The question before us is, whether the 1983 Rules provide for the repeal of the 1963 rules only in matters relating to `members of the service' and whether the 1963 rules are still applicable for the purpose of recruitment, discharge and dismissal of `volunteers' of the Punjab Home Guards.

8. The Punjab Home Guard Rules, 1963 were earlier repealed by the Punjab Home Guard Rules, 1960. Rule 31 of the Punjab Home Guard Rules, 1963 reads:

> "Repeal :- The Punjab Home Guard Rules 1960, republished with Punjab Government Home Department Notification No. G.S.R 9P-A-8/47/S.9/6/ dated 19th December 1961 are hereby repealed."

9. If we were to juxtapose the two corresponding provisions relating to repeal, there is a marked difference in the wording of Rule 31 of The Punjab Home Guard Rules,1963 and Rule 20 of Punjab Home Guards and Civil Defense (Field) Class III Service Rules, 1983. It is to be noted that the Rule 31 of the 1963 rules unlike Rule 20 of the 1983 rules are categorical in repealing the 1960 Rules. There is no reference to the `members of the service'.

10. There is further evidence for such a distinction in Rule 22(2) of the Home Guard Act, 1963. Rule 22 is as under:-

> "22 (1) Training: - Every member shall be required to undergo a preliminary course of training in drill, discipline, weapon training and special training of service he belongs to for such period as may be fixed by the Commandant-General in the case of Home Guards Unit I and the Gram Raksha Dal Chief in the case of Home Guard Unit II.
>
> (2) Such members of the public as may offer themselves voluntarily may also be given training in drill, discipline and the use of weapons."

11. It is relevant to note that there is no such provision empowering the state to recruit volunteers from the public under the scheme of the Punjab Home Guards and Civil Defense (Field) Class III Service Rules, 1983. In fact, Rule 22 of the Punjab Home Guard Rules, 1963, is the only Provision which seems to empower the recruitment of volunteers. The 1983 Rules prescribe an elaborate scheme for appointment of

members to specific posts enumerated in Appendix 'A'. This can be seen from Rule 3 of Punjab Home Guards and Civil Defense (Field) Class III Service Rules, 1983 which states :-

> "3. Number and Character of Posts. - The service shall comprise of the posts shown in Appendix 'A' to these rules."

12. The 1983 Rules envisage a scheme where a person who fulfills the requirements under Rule 5 which deals with nationality, domicile and character of candidates; secondly, he must not be specifically disqualified under Rule 6, thirdly, he has to fall under the age group prescribed under Rule 7. On fulfilling these three criteria, he would be eligible for appointment to any of the posts mentioned under Appendix 'A' as long as he has the necessary educational qualification. The educational requirement differs depending on the post to which the person is being appointed. On appointment there is a period of probation as prescribed under Rule 9 during which the work and conduct of the appointee is evaluated. The proviso to Rule 9 states that:-

> "Provided that the total period of probation, including extension, if any, shall not exceed three years."

13. The 1983 Rules deal with the appointment of individuals to specific posts mentioned in Annexure 'A', when a temporary or permanent vacancy arises. It does not deal with volunteers who are recruited from the general public.

14. The legislative intent for such a distinction with respect to application of the 1983 Rules to `non-volunteer' members is also discernible from a combined reading of Rule 2(n) and Rule 3.

15. Rule 2(n) defines 'service' as follows:- 'Service' means the Punjab Home Guards and Civil Defence [Field] Class III Service.

16. If we read the above definition alongwith Rule 3 which states as under :-

> "3. The service shall comprise of the posts shown in Appendix 'A' to these rules."

17. It is, therefore, apparent from the scheme of the Rules that the appointment of volunteers is not envisaged under the scope of the 1983 Rules. Volunteers could be appointed only under Rule 22(2) of the Punjab Home Guard Rules, 1963.

18. Rule 20 is as under:-

> "20. Repeal and Saving :- The Punjab Home Guard Rules 1963 as these are the applicable to the members of the service are hereby repealed."

19. The repeal applies only to the members of the service mentioned under Annexure 'A' and not to volunteers. Furthermore, the 1983 rules do not confer upon the appointing authority any power to discharge the volunteer when his services are no longer required as provided under Rule 18 of the 1963 Rules. This is because, the 1983 Rules are not meant to apply to volunteers. Under the 1983 Rules, a member of the service can be dismissed only after following the procedure prescribed for that purpose under the Punjab Civil Services (Punishment and Appeal) Rules, 1970. But such a detailed procedure is not envisaged while discharging a volunteer under 1963 rules. It is therefore evident that the legislature intended to preserve this distinction between the 'volunteers' and 'members of the service' within the scheme of the 1983 Rules. That being the case, we think that it is neither possible nor desirable to dilute the distinction which the legislature intended to preserve, something which falls squarely in the realm of policy. Therefore, in our opinion, the 1963 Rules are applicable to the appellants in these appeals.

20. Now we take up the second issue. The appellants contend that the High Court erred in dismissing the writ petition

filed by the appellants relying on the decision of this court in *State of Gujarat vs. Akshay Amrutlal Thakkar* (2006) 2 SCC 309. In that case, Akshay Amrutlal Thakkar was appointed to the honorary post of District Commandant in the Home Guard and then subsequently the order of disengagement was passed by the State Govt. vide its order dated 02.12.1995. It is this order which was impugned in the writ petition. This court sustained the order passed by the State Government primarily on the ground, that the persons involved therein did not act in the terms of undertaking given by them. It has also observed, that the services rendered by those persons was honorary, therefore, no civil consequences were involved. In our view, the facts of that case are different from that of the instant case. In that case, Amrutlal Thakkar was being discharged from a honorary post, his employment was not being terminated as is being done in the present case. Therefore, in our opinion, the High Court was not justified in placing reliance on this decision to unsuit the appellants.

21. A judgment, as is well known is the authority for the proposition which it decides and not what can logically be deduced from. This Court in the case of *Union of India v. Major Bahadur Singh* (2006) 1 SCC 368, has observed:

"The courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of the courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of the courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not

interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes."

The court has proceeded to add:

"Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."

22. There is a substantial difference in the circumstances surrounding the lis in Amrutlal's case and the present case. Firstly, as stated earlier, the appellants in that case were not being terminated from service. Secondly, the revocation of appointment was merely with regard to an honorary post.

23. It is, therefore, necessary to consider whether Order No. E//285 dated 02.12.2004 passed by the respondents is one without authority of law and whether the said order suffers from any other legal infirmities.

24. The order of termination served on the appellants reads:

"In response to above said letters, the following guards who had created indiscipline at the Railway station Amritsar while boarding the train for going to Maharashtra in connection with election duty maybe terminated today the 2.12.2004 and they cannot be given any allowance from 3.12.2004. Immediate [action] in this regard should be taken on this letter."

25. It is argued on behalf of the Respondents that the appellants were discharged under Rule 18 of the 1963 rules read with para 14.4 of compendium of instructions on Home Guards. Rule 18 of 1963 reads:

"Discharge of Members :- any member may be discharged

at any time by the authority which had appointed him when his services are no longer required."

26. The expression `Discharge' was interpreted by this Court in the case of State of Kerala vs. Mother Anasthasia, Superior General and Others (1997) 10 SCC 79, wherein, it is stated, "Discharge would connote for any other reason ejusdem generis due to abolition of the post or course of study or such similar circumstances except for discharge due to misconduct.".

27. The abovesaid Rule does not contemplate the requirement of conducting an enquiry or giving notice to the concerned person and, therefore, the respondents maintain that the termination order was therefore within the scope and scheme of the Home Gaurds Act, 1947 and the 1963 Rules made thereunder.

28. The order terminating the services of the appellants specifically cites indiscipline at the Amritsar Railway Station as the cause for the termination. Therefore, it is not a case where the appointing authority is discharging the services of the appellants on the ground that their services are no longer required but it is a case where their services are sought to be dispensed with on the ground of indiscipline, which would come within the meaning of the expression 'Misconduct'. In such a situation, the respondents cannot terminate the services of the appellants without following the procedure prescribed under Rule 27 of the Rules, the said rules, specifically deals with Discipline. It reads as under :-

"Dismissed :- (1) Any officer may for misconduct or for absence without sufficient cause, be dismissed from service.

Provided that an order of dismissal shall not be passed unless reason of dismissal are recorded in writing and the member concerned has been given a reasonable

opportunity of showing cause against the action proposed to be taken against him."

29. The language employed in the Rule is clear and unambiguous. The Rule envisages that any officer may be dismissed from service either for misconduct or for unauthorized absence. Proviso appended to the Rules speaks of giving an opportunity of hearing to the delinquent officer or the member appointed under the Act and the Rules. It is an admitted position that no such opportunity of hearing or notice was given to the appellants in the present case as is required under Rule 27. In this view of the matter, the respondents cannot be permitted to contend that the appellants being `volunteers', their services could be terminated without complying with the procedure prescribed in the Statutory Rules, which speaks of providing an opportunity of hearing to the person who would be affected by the proposed action.

30. To us, it appears, after going through the Act and the Rules framed thereunder, that the expression 'volunteers' appears to be misnomer. We do not intend to dwell on this issue, since we are told that the writ petitions for the regularization of similarly placed persons are pending before the High Court. The facts and circumstances pleaded by the appellants and the number of years they have spent as 'volunteers' and since they have no other avenue for their alternate employment because of their age factor, we are impelled to look into the reason for the termination of the services of the appellants. The letter discharging their services explicitly states that the reason for discharge is the indiscipline at Amritsar railway station before the appellants were to board the train for Maharashtra on election duty. Therefore, in our view, it is not a case of discharge simplicitor. Under Rule 18 of the 1963 Rules, any member appointed under the rules may be discharged at any time by the authority which had appointed him when his services are no longer required. If it is instance of discharge simplicitor, it would necessarily relate to instances

where the post has been abolished or where there is a surplus of employees or other similar circumstances. The respondents have not raised the existence of any circumstances which required the discharge of any volunteers, neither has it been urged that there exists any condition which would require the appellants specifically to be discharged apart from the allegation of indiscipline. Therefore, in our view, services of the appellants are discharged for acts of alleged misconduct. It casts a stigma on their competence and affects their future career.

31. In our considered view, even in matters of discharge, the authority concerned cannot act arbitrarily while discharging an employee. However, in the instant case, the appellants are being discharged from service for indiscipline. Therefore, as provided in proviso to rule 27 of the rules, the appellants should have been given a reasonable opportunity of showing cause against the action proposed to be taken against them. Admittedly, no such opportunity was given to them. Therefore, we are of the view that the action of the respondents is contrary to their own statutory rules and in violation of principles of natural justice.

32. Even without going into the question whether the appellants are eligible for the protection under Article 311 of the Constitution, in our view, the respondents seem to have acted in an arbitrary manner by terminating the services of the appellants, who have been working as Home Guards for the last 15-17 years. They are all over-aged. They may find it difficult to find alternate employment. Therefore, in the facts and circumstances of this case and in the interest of justice, we deem it proper to set aside the order of termination passed by the respondents dated 02.12.2004 and direct the respondents to reinstate the appellants as Home Guards without back wages.

33. Before parting with the case, we should also notice the minor issue raised by learned senior counsel for respondents.

It is submitted that the appellants without exhausting the appeal remedy provided under rule 27(3) of 1963 rules could not have approached the High Court under Article 226 of the Constitution, inter-alia, requesting the High Court to quash the order passed by respondents dated 02.12.2004. We do not find any merit in their submission, for the reason that this issue was not raised nor argued before the High Court and, therefore, we will not permit this issue to be raised for the first time before us. It is also argued that para 14.4 of compendium of instructions on Home Guards authorizes the Commandant General or the Commandant to discharge a Home Guard at any time, if in his opinion, the services of the Home Guard are no longer required. These instructions are reiteration of Rule 18 of the Rules. We have already dealt with these rules. Therefore, repetition of our reasoning once over again may not be necessary.

34. For the reasons stated, we allow these appeals and set aside the impugned judgment. We direct the respondents to reinstate the appellants within four weeks' time from today without back wages. No order as to costs.

B.B.B. Appeals allowed.

COMMISSIONER OF SALES TAX, U.P.
v.
M/S. SANJIV FABRICS
(Civil Appeal Nos.2344-2347 of 2004)

SEPTEMBER 10, 2010

[D.K. JAIN AND H.L. DATTU, JJ.]

Central Sales Tax Act, 1956: s.10(b) r.w. s.10A – Misuse of registration certificate – Using Form 'C' for purchase of commodities not covered by certificates of registration – Levy of penalty – Essential ingredient for – Held: Existence of mens rea is an essential ingredient for the levy of penalty u/s.10(b) r.w. s.10A – The use of the expression "falsely represents" in s.10(b) indicates that the offence thereunder comes into existence only if the dealer acts deliberately in defiance of law or is guilty of contumacious or dishonest conduct – For levy of penalty u/s.10A, burden is on the revenue to prove the existence of circumstances constituting the offence u/s.10(b) – On facts, the explanation by dealers that they were under bonafide belief that the commodities purchased were covered under the registration certificate need consideration afresh – Matter remitted to adjudicating authority – Interpretation of statutes.

Interpretation of statutes: Taxing statute – For determining whether mens rea is an essential element of an offence created under a taxing statute, regard must be had to the object and scheme of the statute, the language of the section and the nature of penalty – Central Sales Tax Act, 1956 – s.10(b) r.w. s.10A.

The questions which have arisen for consideration in the two sets of appeals are whether the requirement of *mens rea* is an essential ingredient for the levy of penalty under Section 10(b) r.w. Section 10A of the

Central Sales Tax Act, 1956 and whether the dealers are guilty of false representation and, therefore, penalty is imposable on them for using Form 'C' for the purchase of the commodities not covered by their certificates of registration. In the first set of appeals, the High Court set aside the levy of penalty on the dealers and in the second set of appeals, the High Court reduced the penalty in respect of earlier assessment years.

Allowing the appeals and remitting the matters to the adjudicating authority, the Court

HELD: 1.1. Section 10 of the Central Sales Tax Act, 1956 not only enumerates seven types of violations of the provisions of the Act which constitute an "offence", it also makes them punishable by prosecution and punishment, which ranges from simple imprisonment for a period, which may extend to six months, or fine or both and in a case of continuous offence, the Section provides for a daily fine. Section 10A of the Act provides for the imposition of penalty in lieu of prosecution. It provides that if any person purchasing goods is guilty of an offence under clause (b) or clause (c) or clause (d) of Section 10 of the Act, a penalty of fine may be imposed. Therefore, it is to be seen whether the words "falsely represents" appearing in clause (b) of Section 10 would cover mere incorrect representation or would embraces only such representations which are made knowingly, wilfully and intentionally. [Para 10-11] [640-H; 641-A-D]

1.2. The question whether an offence can be said to have been committed without the necessary *mens rea* is a vexed one. However, the broad principle applied by the courts to answer the said question is that there is a presumption that *mens rea* is an essential ingredient in every offence but the presumption is liable to be displaced either by the words of the statute creating the

offence or by the subject matter with which it deals and both must be considered. While examining whether *mens rea* is an essential element of an offence created under a taxing statute, regard must be had to the following factors: (i) the object and scheme of the statute; (ii) the language of the section and; (iii) the nature of penalty. It is true that the object of Section 10(b) of the Act is to prevent any misuse of the registration certificate but the legislature has, in the said Section, used the expression "falsely represents" in contradistinction to "wrongly represents." The use of the expression "falsely represents" is indicative of the fact that the offence under Section 10(b) of the Act comes into existence only where a dealer acts deliberately in defiance of law or is guilty of contumacious or dishonest conduct. Therefore, in proceedings for levy of penalty under Section 10A of the Act, burden would be on the revenue to prove the existence of circumstances constituting the said offence. Furthermore, it is evident from the heading of Section 10A of the Act that for breach of any provision of the Act, constituting an offence under Section 10 of the Act, the ordinary remedy is prosecution which may entail a sentence of imprisonment and the penalty under Section 10A of the Act is only in lieu of prosecution. In the light of the language employed in the Section and the nature of penalty contemplated therein, it cannot be said that all types of omissions or commissions in the use of Form 'C' will be embraced in the expression "false representation". Therefore, a finding of *mens rea* is a condition precedent for levying penalty under Section 10(b) read with Section 10A of the Act. [Paras 12, 17, 18, 22] [641-E-F; 644-C-E; 646-C-F]

Nathulal v. State of Madhya Pradesh **AIR 1966 SC 43;** *Union of India & Ors.* v. *Dharamendra Textile Processors & Ors.* **(2008) 13 SCC 369;** *Union of India* v. *Rajasthan Spinning & Weaving Mills* (2009) 13 SCC 448; *M/s Gujarat Travancore*

Agency, Cochin v. *Commissioner of Income Tax, Kerala Ernakulam* **(1989) 3 SCC 52;** *State of Maharashtra v. Mayer Hans George* **AIR 1965 SC 722;** *Cement Marketing Co. of India Ltd. v. Assistant Commissioner of Sales Tax, Indore & Ors.* **(1980) 1 SCC 71 – relied on.**

Commissioner of Sales Tax, U.P. v. Kumaon Tractors & Motors **(2002) 9 SCC 379;** *R.S. Joshi, Sales Tax Officer, Gujarat & Ors. v. Ajit Mills Ltd. & Anr.* **(1974) UPTC 566 (All);** *Dyer Meakins Breweries Ltd. v. U.P.* **(1991) 82 STC 268** (Mad.); *CST v. M/S Rama & Sons* **(1999) UPTC 425 (All);** *Vijaya Electricals v. State of Tamil Nadu* **(1991) 82 STC 268 (Mad.)** and *Integrated Enterprises v. State of Kerala* **(1980) 46 STC 03 (Ker.);** *Bharjatiya Steel Industries v. Commissioner Sales Tax, Uttar Pradesh* **(2008) 11 SCC 617;** *Commissioner of Sales Tax v. Govind Ram Bhagat Ram* **(1996) 7 SCC 92 – referred to.**

Sherras v. De Rutzen **(1895) 1 QB 918 – referred to.**

Black's Law Dictionary 6th Edition; *P. Ramanatha Aiyar in Advance Law Lexicon* **3rd Edition, 2005 – referred to.**

2. As regards the first set of appeals, the High Court set aside the levy of penalty on the ground that apart from the fact that on earlier occasions the department had not raised any objection while issuing Form 'C' to the dealer, the dealer filed an application for amendment of the registration certificate as soon as he learnt about his fault. It is evident from the impugned judgment that the High Court had lost sight of the fact that the dealer had used Form 'C' to import items like sutli, tat, etc., in addition to the cotton waste. Assuming that the dealer was of the *bona fide* belief that cotton included the cotton waste, it is hard to believe that there was some confusion in the mind of the dealer in so far as other items were concerned. Similarly, in the second set of appeals, it is

evident from the impugned judgment that the High Court had not examined the explanation furnished by the dealer that they were under a *bona fide* belief that they were authorized to purchase oil seeds against Form 'C' issued to them regularly by the department without any objection. It is manifest that the High Court proceeded to examine the case of the dealer on the premise that offence under Section 10(b) of the Act was an absolute offence. Under the given circumstances, the explanations furnished by the dealers in both the cases require a fresh look by the authority competent to levy penalty under Section 10A of the Act. [Paras 24-25] [646-H; 647-A-E]

Case Law Reference:

(2002) 9 SCC 379	**relied on**	**Para 5**
(1977) 4 SCC 98	**relied on**	**Para 6**
(1974) UPTC 566 (All)	**relied on**	**Para 6**
(1999) UPTC 425 (All)	**relied on**	**Para 6**
(1991) 82 STC 268 (Mad.)	**relied on**	**Para 6**
(1980) 46 STC 103 (Ker.)	**relied on**	**Para 6**
(2008) 11 SCC 617	**relied on**	**Para 7**
(1996) 7 SCC 92	**relied on**	**Para 7**
AIR 1965 SC 722	**relied on**	**Para 12**
(1895) 1 QB 918	**referred to**	**Para 12**
AIR 1966 SC 43	**relied on**	**Para 13**
(2008) 13 SCC 369	**relied on**	**Para 14**
(2009) 13 SCC 448	**relied on**	**Para 15**
(1989) 3 SCC 52	**relied on**	**Para 16**

(1980) 1 SCC 71 relied on Para 21

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2344-2347 of 2004.

From the Judgment & Order dated 21.08.2003 of the High Court of Judicature at Allahabad in STR Nos. 323, 324, 325 & 326 of 1991.

WITH

C.A. No. 6382-6383 of 2004.

Dhruv Agarwal, Aarohi Bhalla, Gunna, Venkateswara Rao, S.K. Dwivedi, Manoj Kumar Dwivedi, Vandana Mishra, Ashutosh, Subodh S. Patil, Praveen Kumar, Punit Dutt Tyagi for the appearing parties.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. These appeals, by special leave, are directed against the judgments and orders delivered by the High Court of Judicature at Allahabad, reversing the orders passed by the Sales Tax Tribunal, Meerut, (for short "the Tribunal"). In the first set of appeals (No. 2344-2347/2004) the Tribunal had affirmed the levy of penalties on the respondent, under Section 10(b) read with Section 10A of the Central Sales Tax Act, 1956 (for short "the Act") whereas in the second set (appeals No. 6382-6383/2004), the Tribunal had set aside the levy of penalties under the said Section on the appellant. Since the appeals raise a common question of law, it would be convenient to dispose them of by this single judgment.

2. Shorn of unnecessary details, the facts essential for the adjudication of these appeals are:

C.A. Nos. 2344-2347 of 2004

The respondent (hereinafter referred to as "the dealer") is

registered under Section 7(2) of the Act and since the year 1977-78 is engaged in the business of manufacture and sale of Handloom fabrics.

The dealer was authorized to issue Form 'C' on the import of cotton and cotton yarn as raw materials. It is not in dispute that the dealer had imported cotton waste, polythene, sutli and tat against Form 'C' in order to avail the benefit of payment of concessional rate of Central Sales Tax.

On 15th October 1985, the revenue issued a notice to the dealer to show cause as to why penalty under Section 10(b) read with Section 10A of the Act should not be imposed on them for using Form 'C' for the purchase of items which were not covered by their certificate of registration. Immediately on the issuance of the said notice, dated 15th October 1985, the dealer applied for amendment of the certificate of registration for inclusion of "cotton waste" in the certificate. The said amendment was granted on the same day.

In reply to the show cause notice, the dealer pleaded that they were under a bona fide *belief that "cotton" included "cotton waste", and thus there was no false representation on their part. However, not being convinced with the reply, sometime in January 1986, the Assessing Authority imposed penalty on the dealer under Section 10(b) read with Section 10A of the Act amounting to Rs.18,840/-; Rs.63,822/-; Rs.55,111/- and Rs.51,141/- for all the four assessment years in question, viz. 1979-80, 1981-82. 1982-83 and 1983-84 respectively, for making false representation in respect of purchase of tat, sutli, polythene, cotton waste, and jute.*

The first appeals preferred by the dealer were dismissed by the Assistant Commissioner (Judicial) by two separate orders. Being aggrieved, the dealer filed four separate second appeals before the Tribunal.

It appears that in the meanwhile, by an order dated 30th April 1987, the Tribunal, in Second Appeal Nos. 243 of 1986

for the assessment year 1977-78; 242 of 1986 for assessment year 1978-79 and 550 of 1986 for assessment year 1980-81, set aside the order of penalty on purchase of cotton waste on the ground that no objection was raised by the revenue for the previous years, and therefore, the issuance of Form 'C' for the purchase of said commodity was a bona fide error on the part of the dealer and it did not involve false representation. In relation to other commodities, the Tribunal remanded the matters for re-fixation of penalty. However, when appeals for the present assessment years were taken up, notwithstanding its earlier orders, the Tribunal vide order dated 22nd January 1991, affirmed the orders levying penalty, *inter-alia* observing that for the purposes of sales tax, cotton and cotton waste are two different commodities and the fact that the dealer had deliberately used Form 'C' to import items like cotton waste, sutli, tat etc., established that the dealer had imported the goods by making a false representation and had taken the benefit of concessional rate of tax unauthorizedly. According to the Tribunal, these circumstances proved the *mala fide* on the part of the dealer. Finally, distinguishing its earlier orders on the ground that in those cases, the matter was remanded and it remained unclear as to how the matter had proceeded further; the Tribunal reduced the amount of penalty imposed.

Being dissatisfied with the order of the Tribunal, dated 22nd January 1991, the dealer filed Sales Tax Revisions before the High Court of Allahabad. The only dispute which was put in issue in these revisions was with regard to the levy of penalty for use of Form 'C' on the purchases of cotton waste.

As stated above, by the impugned judgment the High Court has allowed the revision petitions, *inter alia,* observing:

> "Cotton" and "Cotton Waste" are two different commodities known to Sales Tax Laws. However, there is not much distinction from the point of view of ordinary people. The applicant is a registered dealer since the assessment year 1977-78 and has been making purchases of "Cotton

waste" and issuing Form-C thereof since then. The department earlier than 15th October, 1985 raised no objection. This as was submitted by the learned counsel for the applicant is very relevant circumstance for determination of the question "false representation" occurring in Section 10(b) of the Act.....

.....

When Tax Laws are so complex the administration should proceed specially in the penalty matter from the view of ordinary citizen who is always willing to comply with the conditions of law. The assessee as soon as it came to know about its (sic) fault filed application for amendment of registration certificate. Some fault was on the part of the department also for maintaining silence over the period of about eight years."

C.A.Nos.6382-6383 of 2004

The appellant herein (hereinafter again referred to as "the dealer") was carrying on the business of manufacture and sale of oil and oil cakes and was registered under Section 7 of the Act. It appears that during the assessment proceedings relating to the assessment years 1985-86 and 1986-87, the Assessing Authority found that the dealer had issued Form 'C' for the import of oil seeds from outside the State and had availed of the benefit of concessional rate of tax by issuing Form 'C' in respect of the said item, which was not included in their registration certificate. Accordingly, a notice was issued to the dealer under Section 10(b) read with Section 10A of the Act to show-cause as to why penalty under the said provisions should not be levied on them.

Not being satisfied with the reply furnished by the dealer, the Assessing Authority levied penalty in the sum of Rs.73298.60p. and Rs.2,08,064/- for the assessment years

1985-86 and 1986-87 respectively.

Dealer's first appeal to the Deputy Commissioner (Appeals) pertaining to the assessment years 1985-86 was partly allowed in as much as the quantum of penalty was reduced to Rs.1075/- but on merits, appeals for both the assessment years were rejected. Being aggrieved, the dealer preferred two second appeals before the Tribunal. *Inter alia,* observing that apart from the fact that in the application under Section 7(1) and 7(2) of the Act in Form 'A', the word 'oil seed', mentioned in an inappropriate column-16-GHA was deleted, the dealer was also under a *bona fide* belief that they were authorized to purchase oil seeds against Form 'C' as the department had been regularly issuing Form 'C' to them for the purchase of oil seeds, the Tribunal set aside the penalty levied on the dealer under Section 10(b) of the Act.

Not being satisfied with the order passed by the Tribunal, the revenue took the matter in revision to the High Court. As afore-stated, the High Court came to the conclusion that the order of the Tribunal deleting the penalty was erroneous. However, having regard to the facts and circumstances of the case, the High Court held that since the revenue had been regularly issuing Form 'C' in spite of details being furnished by the dealer, penalty only to the extent of benefit availed by the dealer i.e. @ 4% should be levied. Accordingly, the High Court reduced the penalty to Rs.27,275/- and Rs.66,955/- in respect of assessment years 1985-86 and 1986-87 respectively.

3. Hence both the revenue and the dealer are before us in these appeals.

4. We have heard learned counsel for the parties.

5. Mr. Aarohi Bhalla, learned counsel appearing for the revenue contended that the judgment of the High Court deleting the penalty is erroneous in as much as the revisionary jurisdiction of the High Court under Section 11 of the UP Trade

Tax Act, 1948 is very limited and confined only to an examination of the question of law. Section 11 of the UP Trade Tax Act does not contemplate re-evaluation of the evidence by the High Court and, therefore, the High Court cannot interfere with a finding of fact as has been done in the present case. In support of the contention, learned counsel relied on the decision of this Court in *Commissioner of Sales Tax, U.P. Vs. Kumaon Tractors & Motors*[1].

6. Learned counsel also submitted that *mens rea* is not an essential ingredient of the offence under Section 10(b) of the Act, as penalty under the said provision is in the nature of a civil liability. According to the learned counsel, it is only when the prosecution is launched pursuant to a sanction under Section 11 of the Act, the requirement of *mens rea* assumes importance as the "offence" comes into existence only when a sanction is received. To buttress his argument, learned counsel commended us to the decision of this Court in *R.S. Joshi, Sales Tax Officer, Gujarat & Ors. Vs. Ajit Mills Ltd. & Anr.*[2], in particular to the following observation:

> "The classical view that 'no mens rea, no crime' has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude mens rea."

Reliance was also placed on the decisions of the High Courts in *Dyer Meakins Breweries Ltd. Vs. U.P.*[3]*; CST Vs. M/S Rama & Sons*[4]*; Vijaya Electricals Vs. State of Tamil Nadu*[5] and *Integrated Enterprises Vs. State of Kerala*[6] in support of the

1. (2002) 9 SCC 379.
2. (1977) UPTC 566 (All)]
3. [1974] UPTC 566 (All)]
4. [1999] UPTC425 (All)]
5. [1991] 82 STC 268 (Mad.)
6. [1980] 46 STC 103 (Ker.)]

same proposition. It was asserted that in the present cases the items which were included in the Registration Certificate were clearly different and distinct from the items for which Form 'C' were issued and therefore, the dealers could not claim that it was a bona fide omission on their part.

7. Mr. Dhruv Agarwal, learned senior counsel appearing for the dealers in both the cases, on the other hand, submitted that since under Section 10A of the Act, in case of offence under Section 10(b) of the Act, discretion is conferred on the Assessing Authority to levy penalty in lieu of the prosecution of the dealer, the requirement of mens rea would be sine qua non for attracting the said penal provision. In support, learned counsel relied on the decision of this Court in *Bharjatiya Steel Industries Vs. Commissioner, Sales Tax, Uttar Pradesh*[7]*.* Learned counsel argued that since in both the cases, the dealers had been issued Form 'C' in respect of the same very items in the previous years regularly without any objection by the revenue, the dealers entertained a bona fide belief that these items were covered under the Registration Certificate, penalties under the said provision were not leviable on the dealers. Relying on the decision of this Court in *Commissioner of Sales Tax Vs. Govind Ram Bhagat Ram*[8]*,* learned counsel submitted that in the case of M/s Hari Oil & General Mills (C.A.Nos.6382-6383 of 2004), the High Court should not have interfered with the findings of fact recorded by the Tribunal to the effect that since Form 'C' were being issued regularly by the revenue for the purchase of oil seeds without any objection for the last five years and the accounts rendered in that behalf had been verified and accepted by the Assessing Authority, it could not be held that the dealer had made false representation while making purchases of oil seeds against the said forms.

8. Thus, the first and the foremost issue arising for our consideration is whether the requirement of mens rea is an

7. (2008) 11 SCC 617.
8. (1996) 7 SCC 92.

essential ingredient for the levy of penalty under Section 10(b) read with Section 10A of the Act?

9. In order to answer the point formulated for consideration, it would be necessary to refer to the relevant provisions of the Act. Section 10 of the Act deals with penalties. It reads as under:

"**10. Penalties.**—If any person—

(a) furnishes a declaration under sub-section (2) of section 6 or sub-section (1) of section 6A or sub-section (4) or sub-section (8) of section 8, which he knows, or has reason to believe, to be false; or

(aa) fails to get himself registered as required by section 7 or fails to comply with an order under sub-section (3A) or with he requirements of sub-section 3(C) or sub-section (3E) of that section;

(b) being a registered dealer, falsely represents when purchasing any class of goods that goods of such class are covered by his certificate of registration; or

(c) not being a registered dealer, falsely represents when purchasing goods in the course of inter-State trade or commerce that he is a registered dealer; or

(d) after purchasing any goods for any of the purposes specified in clause (b) or clause (c) or clause (d) of sub-section (3) or sub-section (6) of section 8 fails, without reasonable excuse, to make use of the goods for any such purpose;

(e) has in his possession any form prescribed for the purpose of sub-section (4) or sub-section (8) of section 8 which has not been obtained by him or by his principal or by his agent in accordance with the provisions of this Act or any rules made thereunder;

(f) collects any amount by way of tax in contravention of the provisions contained in section 9A,

he shall be punishable with simple imprisonment which may extend to six months, or with fine or with both; and when the offence is a continuing offence, with a daily fine which may extend to fifty rupees for every day during which the offence continues."

Section 10A of the Act provides for the imposition of penalty in lieu of prosecution. Sub-section (1) of the said Section, relevant for our purpose, reads as follows:

"**10A. Imposition of penalty in lieu of prosecution**—(1) If any person purchasing goods is guilty of an offence under clause (b) or clause (c) or clause (d) of section 10, the authority who granted to him or, as the case may be, is competent to grant to him a certificate of registration under this Act may, after giving him a reasonable opportunity of being heard, by order in writing, impose upon him by way of penalty a sum not exceeding one and a half times the tax which would have been levied under sub-section (2) of section 8 in respect of the sale to him of the goods, if the sale had been a sale falling within that sub-section:

Provided that no prosecution for an offence under section 10 shall be instituted in respect of the same facts on which a penalty has been imposed under this section."

10. Section 10 of the Act not only enumerates seven types

of violations of the provisions of the Act which constitute an "offence", it also makes them punishable by prosecution and punishment, which ranges from simple imprisonment for a period, which may extend to six months, or fine or both and in a case of continuous offence, the Section provides for a daily fine. Section 10A of the Act provides for the imposition of penalty in lieu of prosecution. It provides that if any person purchasing goods is guilty of an offence under clause (b) or clause (c) or clause (d) of Section 10 of the Act, a penalty of fine may be imposed. Thus, the violations enumerated in clause (b), clause (c) and clause (d) of Section 10 may not necessarily result in prosecution with the possible imposition of sentence of imprisonment as an alternative is provided in respect of these violations.

11. Therefore, what we are required to construe is whether the words "falsely represents" would cover a mere incorrect representation or would embrace only such representations which have been made knowingly, wilfully and intentionally.

12. Whether an offence can be said to have been committed without the necessary mens rea is a vexed question. However, the broad principle applied by the courts to answer the said question is that there is a presumption that mens rea is an essential ingredient in every offence but the presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals and both must be considered. (See: *Sherras Vs. De Rutzen*[9] and *State of Maharashtra Vs. Mayer Hans George*[10]).

13. Although in relation to the taxing statutes, this Court has, on various occasions, examined the requirement of mens rea but it has not been possible to evolve an abstract principle of law which could be applied to determine the question. As already stated, answer to the question depends on the object

9. [1895] 1 QB 918.

10. AIR 1965 SC 722.

of the statute and the language employed in the provision of the statute creating the offence. There is no gain saying that a penal provision has to be strictly construed on its own language. In *Nathulal Vs. State of Madhya Pradesh*[11], while dealing with the question whether to constitute an offence under Section 7 of the Essential Commodities Act, 1955 which provides for levy of penalty for contravention of any order made under Section 3 of the State Act mens rea is an essential ingredient, a three-Judge Bench of this Court observed as follows:

> "Mens rea is an essential ingredient of a criminal offence. Doubtless a statute may exclude the element of mens rea, but it is a sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded mens rea. The mere fact that the object of the statute is to promote welfare activities or to eradicate a grave social evil is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredients of an offence. Mens rea by necessary implication may be excluded from a statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated. The nature of the mens rea that would be implied in a statute creating an offence depends on the object of the Act and the provisions thereof."

14. In *Union of India & Ors. Vs. Dharamendra Textile Processors & Ors.*[12], while examining the scope of Section 11-AC of the of the Central Excise Act, 1944, a three judge Bench of this Court, observed that:

> "A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far

11. AIR 1966 SC 43.

12. (2008) 13 SCC 369.

different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."

15. However, in *Union of India Vs. Rajasthan Spinning & Weaving Mills*[13], this Court observed that:

"We fail to see how the decision in *Dharamendra Textile* can be said to hold that Section 11-AC would apply to every case of non-payment or short-payment of duty regardless of the conditions expressly mentioned in the section for its application…The decision in *Dharamendra Textile* must, therefore, be understood to mean that though the application of Section 11-AC would depend upon the *existence or otherwise of the conditions expressly stated in the section."*

(Emphasis supplied by us)

16. In *M/s Gujarat Travancore Agency, Cochin Vs. Commissioner of Income Tax, Kerala, Ernakulam*[14], the question that arose for consideration was whether Section 271(1)(a) of the Income Tax Act, 1961 required the existence of mens rea. While holding that the said Section dealt merely with a failure to file return, and hence no mens rea was required, this Court observed thus:

"It is sufficient for us to refer to Section 271(1)(a), which provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income, and to Section 276-C which provides that if a person wilfully fails to furnish in due time the return of income required under Section 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. It is clear that in the former case what is intended

13. (2009) 13 SCC 448.

14. (1989) 3 SCC 52.

is a civil obligation while in the latter what is imposed is a criminal sentence. *There can be no dispute that having regard to the provisions of Section 276-C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mens rea is established."*

(Emphasis supplied by us)

17. To put it succinctly, in examining whether mens rea is an essential element of an offence created under a taxing statute, regard must be had to the following factors: (i) the object and scheme of the statute; (ii) the language of the section and; (iii) the nature of penalty.

18. It is true that the object of Section 10(b) of the Act is to prevent any misuse of the registration certificate but the legislature has, in the said Section, used the expression "falsely represents" in contradistinction to "wrongly represents." Therefore, what we are required to construe is whether the words "falsely represents" would cover a mere incorrect representation or would embrace only such representations which are knowingly, wilfully and intentionally false.

19. According to the Black's Law Dictionary (6th Edition), the word "false" has two distinct and well-recognized meanings: (1) intentionally or knowingly or negligently untrue; (2) untrue by mistake or accident, or honestly after the exercise of reasonable care. A thing is called "false" when it is done, or made, with knowledge, actual or constructive, that it is untrue or illegal, or is said to be done falsely when the meaning is that the party is in fault for its error.

20. Likewise, P. Ramanatha Aiyar in Advance Law Lexicon (3rd Edition, 2005) explains the word "false" as:

"In the more important uses in jurisprudence the word implies something more than a mere untruth; it is an

> untruth coupled with a lying intent……or an intent to deceive or to perpetrate some treachery or fraud. The true meaning of the term must, as in other instances, often be determined by the context'."

21. In *Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore & Ors.*[15], a similar question fell for consideration of this Court. In that case, a penalty under Section 43 of the Madhya Pradesh General Sales Tax Act, 1958 and Section 9(2) of the Act was imposed on the dealer on the ground that he had furnished false returns by not including the amount of freight in the taxable turnover disclosed in the returns. Allowing the appeal of the dealer, this Court had observed as under:

> "What Section 43 of the Madhya Pradesh General Sales Tax Act, 1958 requires is that the assessee should have filed a 'false' return and a return cannot be said to be 'false' unless there is an element of deliberateness in it. It is possible that even where the incorrectness of the return is claimed to be due to want of care on the part of the assessee and there is no reasonable explanation forthcoming from the assessee for such want of care, the Court may, in a given case, infer deliberations and the return may be liable to be branded as a false return. But where the assessee does not include a particular item in the taxable turnover under a bona fide belief that he is not liable so to include it, it would not be right to condemn the return as a 'false' return inviting imposition of penalty."

The Court finally held that it was elementary that Section 43 of the State Act which provided for imposition of penalty is penal in character and unless the filing of an inaccurate return is accompanied by a guilty mind, the section cannot be invoked for imposing penalty. It was emphasised that if the view canvassed by the Revenue were to be accepted, the result

15. (1980) 1 SCC 71.

would be that even if a dealer raises a bona fide contention that a particular item was not liable to be included in the taxable turnover, he will have to show it as forming part of the taxable turnover in his return and pay taxes upon it on pain of being held liable for penalty in case his contention is ultimately found by the Court to be not acceptable. That surely could never have been the intention of the Legislature.

22. In view of the above, we are of the considered opinion that the use of the expression "falsely represents" is indicative of the fact that the offence under Section 10(b) of the Act comes into existence only where a dealer acts deliberately in defiance of law or is guilty of contumacious or dishonest conduct. Therefore, in proceedings for levy of penalty under Section 10A of the Act, burden would be on the revenue to prove the existence of circumstances constituting the said offence. Furthermore, it is evident from the heading of Section 10A of the Act that for breach of any provision of the Act, constituting an offence under Section 10 of the Act, ordinary remedy is prosecution which may entail a sentence of imprisonment and the penalty under Section 10A of the Act is only in lieu of prosecution. In light of the language employed in the Section and the nature of penalty contemplated therein, we find it difficult to hold that all types of omissions or commissions in the use of Form 'C' will be embraced in the expression "false representation". In our opinion, therefore, a finding of mens rea is a condition precedent for levying penalty under Section 10(b) read with Section 10A of the Act.

23. That takes us to the next question viz. whether on the facts of the two cases before us it could be said that the dealers had purchased the goods in question and furnished Form 'C' in respect of those goods knowing that the said goods were not covered by their certificates of registration and, therefore, the requirement of mens rea was satisfied.

24. As regards, the first set of appeals, as afore-stated, the High Court has deleted the penalty on the ground that apart

from the fact that on earlier occasions the department had not raised any objection while issuing Form 'C' to the dealer, the dealer filed an application for amendment of the registration certificate as soon as he learnt about his fault. It is evident from the impugned judgment that the High Court has lost sight of the fact that the dealer had used Form 'C' to import items like sutli, tat, etc., in addition to the cotton waste. Assuming that the dealer was of the bona fide belief that cotton included the cotton waste, it is hard to believe that there was some confusion in the mind of the dealer in so far as other items were concerned. Similarly, in the second set of appeals, it is evident from the impugned judgment that the High Court has not examined the explanation furnished by the dealer that they were under a bona fide belief that they were authorized to purchase oil seeds against Form 'C' issued to them regularly by the department without any objection. It is manifest that the High Court proceeded to examine the case of the dealer on the premise that offence under Section 10(b) of the Act was an absolute offence.

25. Under the given circumstances, we are of the opinion that the explanations furnished by the dealers in both the cases require a fresh look by the authority competent to levy penalty under Section 10A of the Act, in light of the aforesaid enunciation of law.

26. Resultantly, both the appeals are allowed; the impugned judgments are set aside and all the appeals in both the cases are remitted back to the adjudicating authority for fresh consideration as to whether on the facts and circumstances of both the cases, penalties under Section 10(b) read with Section 10A of the Act are leviable. Needless to add that the said authority shall take fresh decisions on the merits of each case untrammelled by any observation in the impugned orders or by us in this judgment. There shall, however, be no order as to costs.

D.G. Appeals allowed.

SUNITA JHA

v.

STATE OF JHARKHAND

(Criminal Appeal No. 1745 of 2010)

SEPTEMBER 13, 2010

[ALTAMAS KABIR AND A.K. PATNAIK, JJ.]

Penal Code, 1860 – s.498A – Offence of cruelty – 'Relative of the husband' – Complaint case filed by respondent no.2-wife against her husband and appellant, who was living with the accused husband allegedly as his wife – Discharge application filed by appellant dismissed – Order upheld by High Court – On appeal, held: Only the husband or his relative could be proceeded against u/s.498A – S.498A cannot be applied to a person who is not a relation of the husband when the alleged offence is said to have been committed — Merely because appellant was living with the accused husband of respondent no.2, she did not become a family member of respondent no.2's husband – High Court erred in bestowing upon the appellant the status of wife and, therefore, a family member of respondent no.2's husband – Doctrine of acknowledgement would not be available in the facts of the case – Though there is direct allegation against the appellant of cruelty against the respondent no.2, but the same would enable the respondent no.2 to proceed against her husband u/s. 498A and also against the appellant under the different provisions of the Hindu Marriage Act, 1955, but not u/s.498A – Doctrine of acknowledgement.

Words and Phrases:

Expression 'relative of the husband' (as in s.498-A, IPC) – Connection of.

Respondent No.2 filed a complaint case against her

husband, and the appellant under Section 498A IPC. The appellant filed an application for discharge, inter alia, on the ground that respondent no.2 had not been examined as a witness in the case. During the arguments on the said application, the appellant contended that she could not be made an accused under Section 498A IPC since she was not a relative of respondent no.2's husband and the allegations made against her did not make out a case of cruelty under the aforesaid Section. However, the Magistrate rejected the appellant's application for discharge on the ground that there was prima facie evidence for framing of charge against the accused, including the appellant, under Section 498A IPC. Aggrieved, the appellant moved the High Court by way of Criminal Revision. The High Court held that since the appellant was living with the accused husband of the respondent no.2, she must be deemed to have become a family member of respondent no.2's husband for the purpose of Section 498A IPC, and accordingly affirmed the order of the Trial Court.

In the instant appeal the question arising for consideration was: whether the appellant became a member of the family of respondent no.2's husband merely because she was living with him in his house allegedly as his wife.

Allowing the appeal, the Court

HELD: 1.1. From a reading of Section 498A, IPC, it is clear that it is either the husband or the relative of a husband of a woman who subjects her to cruelty, who could be charged under the said Section. Such provision could not apply to a person who was not a relation of the husband when the alleged offence is said to have been committed. Section 498A IPC is clear and unambiguous that only the husband or his relative could be proceeded

against under the said Section for subjecting the wife to "cruelty", which has been specially defined in the said Section in the Explanation thereto. The High Court committed an error in bestowing upon the appellant the status of wife and, therefore, a member of the family of respondent no.2's husband. The doctrine of acknowledgement would not be available in the facts of this case. No doubt, there is direct allegation against the appellant of cruelty against the respondent No.2, but the same would enable the respondent No.2 to proceed against her husband under Section 498A IPC and also against the appellant under the different provisions of the Hindu Marriage Act, 1955, but not under Section 498A IPC. [Para 13] [654-F-G; 655-A-B]

1.2. The judgment of the High Court is set aside and the cognizance taken against the appellant by the Sub-Divisional Judicial Magistrate under Section 498A IPC, is hereby quashed. [Para 14] [655-C]

U. Suvetha v. State **(2009) 6 SCC 757 – referred to.**

Case Law Reference:

(2009) 6 SCC 757	**referred to**	**Para 7**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1745 of 2010.

From the Judgment & Order dated 29.04.2009 of the High Court of Jharkhand at Ranchi in CRR No. 410 of 2007.

Gaurav Agrawal for the Petitioner.

Gopal Prasad, Mohan Pandey for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. This Appeal is directed against the judgment and order dated 29th April, 2009, passed by a learned Single Judge of the Jharkhand High Court in Criminal Revision No.410 of 2007 dismissing the same and affirming the order of the Trial Court rejecting the prayer of the Appellant for being discharged from the case.

3. One Asha Rani Pal, the Respondent No.2 herein, filed a complaint case against her husband, Mukund Chandra Pandit, and the Appellant herein, being Complaint Case No.404 of 2005, before the Sub-Divisional Judicial Magistrate, Dumka, Jharkhand, under Section 498A IPC. The learned Magistrate by his order dated 6th February, 2006, took cognizance against the Appellant and other accused and issued process for the accused to appear before him on 5th April, 2006. Pursuant to the said order, the Appellant appeared before the learned Magistrate on 10th July, 2006, when the prosecution examined two witnesses, namely, PW.1 Kanhai Pal, father of the Respondent No.2 and PW.2 Mukti Pal. No further evidence was led by the complainant/Respondent No.2 and on 13th November, 2006, the learned Magistrate closed the pre-charge evidence and posted the case for arguments on framing of charge.

4. On 9th March, 2007, the Appellant filed an application for discharge, inter alia, on the ground that the complainant had not been examined as a witness in the case. During the arguments on the said application, it was contended that the Appellant could not be made an accused under Section 498A IPC since she was not a relative of Mukund Chandra Pandit and that the allegations made against her did not make out a case of cruelty under the aforesaid Section. However, by his order dated 9th March, 2007, the learned Magistrate rejected the Appellant's application for discharge on the ground that there was prima facie evidence for framing of charge against the accused, including the Appellant, under Section 498A IPC.

5. Aggrieved by the said order, the Appellant moved the

Jharkhand High Court at Ranchi by way of Criminal Revision No.410 of 2007. As indicated hereinabove, a learned Single Judge of the High Court by his order dated 29th April, 2009, dismissed the Revision Application on the ground that since the Appellant was living with the accused husband of the complainant, she must be deemed to have become a family member of Mukund Chandra Pandit for the purpose of Section 498A IPC.

6. The case of the Appellant before us is that the High Court erred in law in holding that the Appellant became a member of the family of Mukund Chandra Pandit merely because she was living with him in his house allegedly as his wife. Mr. Gaurav Agrawal, Advocate, appearing for the Appellant, contended that Section 498A IPC was very clear as to who could be charged under the said Section. For the sake of convenience, the said Section is reproduced hereinbelow :-

> **"498A. Husband or relative of husband of a woman subjecting her to cruelty. -** Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.
>
> Explanation. - For the purpose of this section, "cruelty" means-
>
> (a) Any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
>
> (b) Harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

7. It will be seen from the aforesaid provisions that it is either the husband or the relative of a husband of a woman who subjects her to cruelty, who could be charged under the said Section. Such provision could not apply to a person who was not a relation of the husband when the alleged offence is said to have been committed. It was contended that the Appellant was in no way related to the husband and was not his wife as held by the High Court so as to bring her within the ambit of Section 498A IPC and the charge framed against her was, accordingly, invalid and liable to be quashed. Reliance was placed by Mr. Agrawal on the decision of this Court in *U. Suvetha v. State* [(2009) 6 SCC 757], wherein the aforesaid question was directly in issue. This Court took up for consideration the question as to the persons who could be charged under Section 498A IPC having particular regard to the phrase "relative of the husband" occurring in the said Section. This Court categorically held that neither a girlfriend nor a concubine is a relative of the husband within the meaning of Section 498A IPC, since they were not connected by blood or marriage to the husband.

8. The other question which fell for determination was if a husband was living with another woman besides his wife, whether the same would amount to "cruelty" within the meaning of Section 498A. It was held that if such other woman was not connected to the husband by blood or marriage, the same would not attract the provisions of Section 498A I.P.C., although it could be an act of cruelty for the purpose of judicial separation or dissolution of marriage under the marriage laws, but could not be stretched to amount to "cruelty" under Section 498A IPC.

9. While construing the provisions of Section 498A IPC in the given circumstances, this Court observed that Section 498A being a penal provision deserved strict construction and by no stretch of imagination would a girlfriend or even a concubine be a "relative", which status could be conferred either by blood connection or marriage or adoption. If no marriage has taken

place, the question of one being relative of another would not arise.

10. Mr. Agrawal urged that the High Court had misconstrued the provisions of Section 498A vis-à-vis the Appellant in relation to the said Section and the impugned order of the High Court was, therefore, liable to be set aside along with the order of the learned Sub-Divisional Judicial Magistrate rejecting the Appellant's prayer for discharge from the complaint case filed by Asha Rani Pal.

11. An attempt was made on behalf of the complainant, Asha Rani Pal, to justify the order passed by the learned Magistrate as also the High Court on the ground that the Appellant must be deemed to have acquired the status of wife of Mukund Chandra Pandit by her conduct and the fact that they had been living together as husband and wife.

12. We have considered the submissions made on behalf of the Appellant and the complainant wife. It may be indicated that the husband Mukund Chandra Pandit has not been made a party to these proceedings. However, having regard to the view which we are taking, his presence is not necessary for disposing of the present appeal.

13. Section 498A IPC, as extracted hereinabove, is clear and unambiguous that only the husband or his relative could be proceeded against under the said Section for subjecting the wife to "cruelty", which has been specially defined in the said Section in the explanation thereto. The question as to who would be a relative of the husband for the purpose of Section 498A has been considered in detail in *U. Suvetha's case* (supra). We are entirely in agreement with the views expressed in the said case and we agree with the submissions made on behalf of the Appellant that the learned Judge of the High Court committed an error in bestowing upon the Appellant the status of wife and, therefore, a member of Mukund Chandra Pandit's family. The doctrine of acknowledgement would not be available

in the facts of this case. No doubt, there is direct allegation against the Appellant of cruelty against the Respondent No.2, Asha Rani Pal, but as indicated in *U. Suvetha's* case (supra), the same would enable the Respondent No.2 to proceed against her husband under Section 498A I.P.C. and also against the Appellant under the different provisions of the Hindu Marriage Act, 1955, but not under Section 498A I.P.C.

14. The Appeal, therefore, succeeds and is allowed. The judgment of the learned Single Judge of the Jharkhand High Court impugned in this Appeal is set aside and the cognizance taken against the Appellant on 6th February, 2006, by the learned Sub-Divisional Judicial Magistrate, Dumka, under Section 498A IPC, is hereby quashed.

B.B.B. Appeal allowed.

GADDAM RAMAKRISHNAREDDY & ORS.
v.
GADDAM RAMI REDDY & ANR.
(SLP (C) Nos. 30004-30005 of 2008)

SEPTEMBER 14, 2010

[ALTAMAS KABIR AND A.K. PATNAIK, JJ.]

Hindu Succession Act, 1956 – s. 14(1) – Applicability of – If a right is created in a Hindu female for the first time in respect of any property under any instrument or under a decree/order/award, where a restricted estate in such property is prescribed – Held: Provisions of subsection (1) of s. 14 would not applicable by virtue of sub-section (2) and would not convert such a right into a full-fledged right of ownership of the property – Provisions of s. 14(2) would be attracted – On facts, courts below rightly held that life-estate created in favour of wife by a gift deed executed by husband with the stipulation to the effect that after the death of wife, properties would devolve on his son, did not enlarge into an absolute estate as contemplated under sub-section (1) of s. 14 – Wife's rights in the properties would be governed by sub-section (2) of s. 14 – On her death, properties devolved on the son in terms of gift deed – Life-estate created by husband in favour of wife was not in lieu of her maintenance – Also High Court rightly dismissed the appeals on the ground of res judicata in view of the judgment passed in the earlier suit on the said issue having attained finality – Res judicata.

In the year 1952, the husband-'GP' executed a deed of gift. He created a life-estate in favour of his wife 'S' and stipulated that after her death the said properties would devolve on his son-respondent no. 1, who was then a minor. 'GP' expired in 1957. 'S' executed a deed of relinquishment in respect of her share and executed sale

deeds in favour of 'MC' and 'VR'. 'S' also executed a registered Will in favour of her grandchildren bequeathing the properties which were received by her through gift deed. Respondent no. 1 filed a suit against 'MC' and 'VR' for a declaration that the sale deeds executed by 'S' in favour of 'MC' and 'VR', did not affect his rights in the properties. The trial court decreed the suit and the said order attained finality. Respondent no. 1 then filed a suit for a direction upon the defendants-'MC', 'VR' and others, to put him in the possession of the suit properties and also for payment of mesne profits. The trial court decreed the suit holding that life-estate created by husband in favour of his wife by gift deed could not be said to be an interest in lieu of maintenance, and the holding in the previous suit that life estate did not enlarge into a full-fledged right of ownership u/s. 14(1) had become final and any claim through 'S' was void. The High Court dismissed the appeals on the ground of *res juicata*. Therefore, the petitioners filed the instant Special Leave Petitions.

Dismissing the Special Leave Petitions, the Court

HELD: 1.1 If a Hindu woman had any existing interest in a property, howsoever small, prior to the enactment of the Hindu Succession Act, 1956, the same would blossom into a full-fledged right by virtue of the operation of Section 14(1) thereof. On the other hand, the provisions of Section 14(1) of the Act, would be attracted if any of the conditions contained in the Explanation stood fulfilled. If, however, a right is created in a Hindu female for the first time in respect of any property under any instrument or under a decree or order of a civil court or under an award, where a restricted estate in such property is prescribed, the provisions of sub-section (1) of Section 14 would have no application by virtue of sub-section (2) thereof. The provisions of Section 14(2) of the

Act would be attracted and would not convert such a right into a full-fledged right of ownership of the property. [Paras 16 and 18] [667-A-C; 666-A-D]

1.2 In the instant case, 'GP' created a life interest in favour of his wife-'S' in respect of the plaint schedule property, but also gifted the property in question to respondent no.1, who was then a minor. The principal object of the deed of gift executed by 'GP' was that the property should ultimately go to respondent no.1. [Para 17] [666-F-G]

1.3 The deed of gift was considered by both the courts below which concurrently held that the life-estate created by 'GP' in favour of 'S' was not in lieu of her maintenance as she was already managing the properties in question and in no uncertain terms it was the donee's desire that the said properties should ultimately go to his son-respondent no.1. Once that is established, apart from other surrounding circumstances, the immediate fallout is that rights of 'S' in the properties came to be governed by sub-section (2) of Section 14 of the Act, and her right did not blossom into an absolute estate as contemplated under sub-section (1) of Section 14 of the Act. [Para 19] [667-G-H; 668-A]

1.4 Both the courts below correctly decided that 'S' did not acquire any right beyond a life-estate in the suit properties and on her death, the said properties devolved on respondent no.1 in terms of the deed of gift executed by 'GP' on 21.12.1952. Even on the question of *res judicata*, the views expressed by the High Court were correct. [Paras 20 and 21] [668-B-C]

V. Tulasamma and Ors. vs. V. Shesha Reddy **(1977) 3 SCC 99 – relied on.**

Thota Sesharathamma and Anr. vs. Thota Manikyamma

(Dead) by Lrs. and Ors. **(1991) 4 SCC 312;** *C. Masilamani Mudaliar and Ors. vs. Idol of Sri Swaminathaswami Swaminathaswami Thirukoil and Ors.* **(1996) 8 SCC 525;** *Sadhu Singh vs. Gurdwara Sahib Narike and* Ors. **(2006) 8 SCC 75;** *Shakuntala Devi vs. Kamla and Ors.* **(2005) 5 SCC 390 – referred to.**

Case Law Reference:

(1977) 3 SCC 99	**relied on.**	**Para 10**
(1991) 4 SCC 312	**referred to.**	**Para 10**
(1996) 8 SCC 525	**referred to.**	**Para 11**
(2006) 8 SCC 75	**referred to.**	**Para 14**
(2005) 5 SCC 390	**referred to.**	**Para 15**

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 30004-30005 of 2008.

From the Judgment and order dated 28.04.2008 of the High Court of Andhra Pradesh at Hyderabad in AS No. 1010 of 1997 and AS No. 2869 of 2004.

Jayanth Muth Raj, Madhurika and P.V. Dinesh for the Petitioners.

T. Anamika for the Respondents.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. The suit properties, along with certain other properties, formed the joint family properties of one G. Pullareddy and his two sons, G. Pitchireddy and Gaddam Ramireddy. The said properties were partitioned in 1947 into three equal shares and were separately enjoyed by the three co-sharers thereafter according to such partition.

2. On 21st December, 1952, G. Pullareddy executed and

registered a Deed of Gift giving a limited right in his share of the properties to his wife, Gaddam Sheshamma. In terms of the Gift Deed Sheshamma was given a limited right of enjoyment of the properties during her lifetime, without right of alienation, and the remainder was vested in G. Ramireddy. It was stipulated that after Sheshamma's death, the properties would devolve on G. Ramireddy.

3. G. Pullareddy died in or about 1957. At about the same time, Sheshamma is said to have executed a Deed of Relinquishment in respect of 1.89 acres in R.S. Nos.93/2 and 1/1 and also executed two sale deeds in favour of one Mukkala Chennareddi and Vintha Ramakotireddy in respect of some of the aforesaid properties. On 17th February, 1972, Sheshamma also executed and registered a Will in favour of her grandchildren through G. Pitchireddy, bequeathing the properties which were received by her through the Gift Deed dated 21st December, 1952, to them.

4. Apparently, in view of all the aforesaid alienations by Sheshamma, G. Ramireddy filed O.S. No.17 of 1975 against Sheshamma, Mukkala Chennareddi and Vintha Ramakotireddy before the District Munsif, Tituvur, for a declaration that the sale deeds dated 31st January, 1967 and 16th July, 1974, executed by his mother, Sheshamma, in favour of Mukkala Chennareddi and Vintha Ramakotireddy, who were made Defendant Nos.5 and 6 in the suit, did not affect his rights in the properties. He also prayed for permanent injunction against the said Defendants from interfering with his possession in the said properties. The suit was contested by Sheshamma and Mukkala Chennareddi and was ultimately decreed on 31st January, 1979, in favour of G. Ramireddy, the Respondent No.1 herein, holding that the sale deeds executed by Sheshamma in favour of the Defendant Nos.5 and 6 were invalid, inasmuch as, Sheshamma had no right of alienation as she did not get an absolute right in the properties. No appeal appears to have been preferred against the said judgment.

5. On 15th August, 1991, Sheshamma died and on 9th October, 1991, G. Ramireddy filed O.S. No.111 of 1991, which is the present suit, in the Court of Subordinate Judge, Nuzvid, for a direction upon the Defendants to put him in possession of the suit properties and also for payment of mesne profits. The Defendant No.2 duly filed his Written Statement and the same was adopted by Defendant Nos.1, 3 and 4, denying the claim of the Plaintiffs and asserting their independent right to the properties through their late father, G. Pitchireddy. It was also the case of the Defendant Nos.1 to 4 that they had perfected their rights in respect of Item Nos.4 and 5 of the plaint schedule by way of adverse possession and that Sheshamma had a pre-existing right of maintenance in the properties of G. Pullareddy and the life estate created under the Gift Deed dated 21st December, 1952, blossomed into an absolute estate under Section 14(1) of the Hindu Succession Act, 1956. Although, it was admitted that the rights in respect of the properties covered under Item No.6 of the plaint schedule had become final in O.S. No.17 of 1975, it was at the same time submitted that the same could not operate as res judicata in the present suit. The 5th Defendant contested the suit claiming that he was in possession of 0.07 acres of land forming part of Item No.6 of the plaint schedule properties and that he had purchased the same through sale deed dated 16th July, 1974, executed by Sheshamma for use as a passage to reach his own land and that he had remained in continuous possession even after the judgment in O.S. No.17 of 1975.

6. The Trial Court by its judgment dated 30th July, 1997, decreed the suit and held that the properties were gifted to G. Ramireddy and not to Sheshamma, who had only been given a life estate therein without any link with her maintenance during or after Pullareddy's lifetime. It was also held that the judgment in O.S. No.17 of 1975, in which it was held that the limited estate under the Deed of Gift executed by G. Pitchireddy did not ripe into an absolute estate as far as Sheshamma was

concerned, had become final and any claim through her would be void.

7. Aggrieved by the said judgment, the Defendant Nos.1, 2 and 4 and the heirs of Defendant No.3, Gaddam Madhavareddy, who had died in the meantime, preferred an appeal, being A.S. No.1010 of 1997, before the Andhra Pradesh High Court on the ground that the properties had been given to Sheshamma for life in lieu of her maintenance and that the same ripened into an absolute estate under Section 14(1) of the Hindu Succession Act, 1956. It was also submitted that Section 14(2) of the said Act had no application on account thereof and the Will executed by Sheshamma was legal and valid. It was further contended that the judgment and decree in O.S. No.17 of 1975 did not operate as res judicata since the Defendants had not been made parties to the suit and that only Item No.6 of the plaint schedule properties was covered by the earlier suit.

8. The Appeal against the sixth Defendant, who was made the third respondent in the appeal, was dismissed for default on 18th October, 2001, and on the death of the third Defendant, who was the third Appellant, during the pendency of the appeal, his legal representatives were brought on record.

9. During the pendency of the appeal, the High Court, by its order dated 23rd October, 2003, stayed the execution of the decree and permitted determination of mesne profits from 15.08.1991. Pursuant thereto, on an application filed by the plaintiff/Respondent No.1, G. Ramireddy, the Trial Court appointed an Advocate Commissioner and on the basis of his report, the Trial Court determined the mesne profits, to which the Respondent No.1 was entitled, to be Rs.2,31,052/- for the period from 15.08.1991 to 15.06.1999. Since the matter was pending before the High Court, no interest was granted on the said amount. An appeal, being A.S.No.2869 of 2004, was filed by the Petitioners herein against the aforesaid order dated 23rd October, 2003. Both the appeals, i.e., A.S.No. 1010/97 and

A.S.No.2869/04, were heard together and were disposed of by a common judgment dated 28th April, 2008. The High Court, while dismissing both the appeals on the ground of res judicata in view of the judgment passed earlier in O.S.No.17 of 1975, modified the cultivation expenses for the first 5 years from 1991.

10. The focus of the submissions made on behalf of the Petitioners was on the question whether the limited estate given by G. Pullareddy to Sheshamma by the Deed of Gift dated 21st December, 1952, would be governed by the provisions of Sections 14(1) or 14(2) of the Hindu Succession Act, 1956. It was again sought to be re-emphasized that the life estate created in favour of Sheshamma by the Deed of Gift dated 21st December, 1952 executed by G. Pullareddy was in lieu of her maintenance and, accordingly, having regard to the views expressed by this Court in the case of *V. Tulasamma & Ors. vs. V. Shesha Reddy* [(1977) 3 SCC 99], the life estate given to Sheshamma blossomed into a right of full ownership in respect of the plaint schedule properties. Reference was also made to a subsequent decision of this Court in *Thota Sesharathamma & Anr. vs. Thota Manikyamma (Dead) by Lrs. & Ors.* [(1991) 4 SCC 312], where following the decision in *Tulasamma's* case, it was inter alia held that Sub- Section (2) of Section 14 of the Hindu Succession Act, 1956, would operate where there was no pre-existing right and a restricted estate in the property is conferred for the first time under any instrument.

11. Reference was also made to the decision of a three-Judge Bench of this Court in *C. Masilamani Mudaliar & Ors. vs. Idol of Sri Swaminathaswami Swaminathaswami Thirukoil & Ors.* [(1996) 8 SCC 525], where the earlier views expressed in *Tulasamma's* case (supra) and *Thota Sesharathamma's* (supra) were re-emphasized and it was also added that Section 14 should be construed harmoniously considering the constitutional goal of removing gender-based discrimination

and effectuating economic empowerment of Hindu females vis-'-vis their rights under the Constitution and the protection of human rights as embodied in the Vienna Declaration on the Elimination of all Forms of Discrimination against Women (CEDAW), as ratified by the United Nations on 18.12.1979 and by the Government of India on 19.06.1993. It was urged that all the transactions entered into by Sheshamma, including the registered Will in favour of the Petitioners, were accordingly valid and acted upon.

12. On the question of res judicata, it was urged that having regard to the decision in O.S.No.17 of 1975 and O.S.No. 367 of 1974, which was never challenged and attained finality, the High Court erred in holding that the subsequent suit filed by Respondent No.1, G. Ramireddy, was not barred by the principles of res judicata. It was submitted by Mr. Jayanth Muth Raj, learned Advocate, that the Trial Court, as well as the High Court, had erred in law in decreeing the suit filed by the Respondent No.1 and directing the Petitioners herein to put the said Respondent in possession of the plaint schedule properties.

13. On behalf of the Respondent No.1 it was submitted by Ms. T. Anamika, learned Advocate, that the judgment and order of the High Court affirming the judgment and decree of the Trial Court decreeing the suit in favour of the Respondent No.1/ Plaintiff did not call for any interference on account of the provisions of Section 14(2) of the Hindu Succession Act, 1956, which squarely covered the facts of this case. It was contended that after Pullareddy acquired his 1/3rd share in the joint properties pursuant to the partition effected in 1947, it was his intention that his minor son, Ramireddy, the Respondent No.1 herein, should be the ultimate beneficiary of the Deed of Gift executed by him on 21.12.1952, and that his wife, Sheshamma, should act as caretaker of the property on behalf of the minor son while enjoying a life estate for herself. As would be quite apparent from the Deed of Gift executed by Pullareddy, there

was no intention on his part that the income from the property was to be in lieu of maintenance for Sheshamma. On the other hand, it was crystal clear that Pullareddy intended to create for the first time a right in favour of Sheshamma to enjoy the properties during her life time and to take care of the same for the ultimate beneficiary of the Gift, namely, G. Ramireddy.

14. Referring to the decision of this Court in *Sadhu Singh vs. Gurdwara Sahib Narike & Ors.* [(2006) 8 SCC 75], Ms. Anamika submitted that this Court had held that giving only a life-estate to the wife and stipulating that during her life time she would not be entitled either to testamentarily dispose of the property or to mortgage or sell it to anyone and that after her death the property would devolve on her nephews in equal shares, made it very clear that the testator's widow had no pre-existing right in the self-acquired property of her husband. As a result, the life-estate given to the widow under the Will could not get enlarged into an absolute estate under Section 14(1) of the Hindu Succession Act, 1956. It was also held that the widow was not entitled to gift away the property and even if the gift was treated to be valid, the donee thereunder would be liable to be evicted by the legatees who acquired the title to the property after the cessation of life-estate of the widow on her death. It was categorically held that the title acquired by the legatee on the widow's death would not be affected by mutation made in favour of the widow who died after such mutation. This Court concluded that the essential ingredients for determining whether Section 14(1) of the above Act would be attracted are: the antecedents of the property, the possession of the property as on the date of commencement of the Act and the existence of a right in the female over it, however limited it may be.

15. On the question of res judicata, reliance was placed on the decision of a three-Judge Bench of this Court in *Shakuntala Devi vs. Kamla & Ors.* [(2005) 5 SCC 390], wherein it was held that a declaratory decree would not operate as res judicata, unless it was protected by a special enactment.

16. Despite the elaborate submissions made on behalf of the respective parties, the scope of the Special Leave Petition is confined to the question as to whether the life-estate created by Pullareddy in favour of his wife, Sheshamma, by the Deed of Gift dated 21.12.1952 could be said to be an interest in lieu of maintenance which subsequently became enlarged into a full-fledged right of ownership under Section 14(1) of the Hindu Succession Act, 1956, or whether the same amounted only to a life estate for the purpose of managing the properties and enjoying the fruits thereof till G. Ramireddy, the second son of Pullareddy, who was then a minor, attained majority. The law in this regard has been crystallized in *V. Tulasamma's* case (supra) and the same has been consistently followed over the years. The ratio of the said decision in simple terms is that if a Hindu woman had any existing interest in a property, howsoever small, prior to the enactment of the Hindu Succession Act, 1956, the same would blossom into a full-fledged right by virtue of the operation of Section 14(1) thereof. On the other hand, if such a right was so acquired for the first time under an instrument, after the Act came into force, the provisions of Section 14(2) of the above Act would be attracted and would not convert such a right into a full-fledged right of ownership of the property.

17. In the instant case, Pullareddy created a life interest in favour of his wife, Sheshamma, in respect of the plaint schedule property, but also gifted the property in question to the Respondent No.1 herein, G. Ramireddy, who was then a minor. The principal object of the Deed of Gift executed by Pullareddy was that the property should ultimately go to G. Ramireddy, the Respondent No.1 herein. The question which we have to consider in this case is whether in view of the intervention of the Hindu Succession Act in 1956, after the execution of the Deed of Gift, it can be said that the gift intended in favour of G. Ramireddy stood extinguished by operation of Section 14(1) of the Act.

18. The consistent view which has been taken by this Court since the decision in *V. Tulasamma's* case (supra) is that the provisions of Section 14(1) of the Hindu Succession Act, 1956, would be attracted if any of the conditions contained in the Explanation stood fulfilled. If, however, a right is created in a Hindu female for the first time in respect of any property under any instrument or under a decree or order of a Civil Court or under an award, where a restricted estate in such property is prescribed, the provisions of sub-section (1) of Section 14 would have no application by virtue of sub-section (2) thereof.

19. At this stage it would be worthwhile to set out the relevant portion of the Deed of Gift executed by Pullareddy, marked Exhibit A-11 in the suit and extracted in the judgment of the Trial Court. The same reads as follows:

> "As I have great affection towards my wife and my minor son Rami Reddy and believed that they will look after me with all comforts, I hereby make an arrangement that here after my wife Sheshamma shall enjoy as she likes, the income from the lands which stand in my name, in Patta No.8 situated at Maddula Parva Village and in Patta No.354 situated at Muchanapalli village shown in the Schedule below, without any right to alienate the said land to any one or to give the said land on long lease and after the death of my wife, my minor son Rami Reddy shall get possession of my land along with his share of land and enjoy the same with an absolute right thereon."

The aforesaid provision has been considered by both the Courts below which have concurrently held that the life-estate created by Pullareddy in favour of Sheshamma was not in lieu of her maintenance as she was already managing the properties in question and in no uncertain terms it was the Donee's desire that the said properties should ultimately go to his son Ramireddy, the Respondent No.1 herein. Once that is established, apart from other surrounding circumstances, the immediate fallout is that Sheshamma's rights in the properties

came to be governed by sub-section (2) of Section 14 of the Hindu Succession Act, 1956, and her right does not blossom into an absolute estate as contemplated under sub-section (1).

20. Both the Courts below have correctly decided that Sheshamma did not acquire any right beyond a life-estate in the suit properties and on her death, the said properties devolved on the Respondent No.1 in terms of the Deed of gift executed by Pullareddy on 21.12.1952.

21. Even on the question of res judicata, we are in agreement with the views expressed by the High Court.

22. The Special Leave Petitions, therefore, fail and are dismissed. The parties will bear their own costs of these proceedings.

N.J. SLPs dismissed.

SAJJAN KUMAR
v.
CENTRAL BUREAU OF INVESTIGATION
(Criminal Appeal No. 1803 of 2010)

SEPTEMBER 20, 2010

[P. SATHASIVAM AND ANIL R. DAVE, JJ.]

Code of Criminal Procedure, 1973: ss.227, 228 – Discharge/Framing of charge – Held: While considering the discharge petition filed u/s.227 or at the stage of framing of charge u/s.228, it is not for the judge/magistrate to analyse all the materials including pros and cons, reliability or acceptability – It is at the trial, that the judge has to appreciate their evidentiary value, credibility or otherwise of the statements, veracity of various documents and if there is "not sufficient ground" for proceeding against the accused, he shall discharge the accused by recording reasons – In exercising jurisdiction u/s.227, magistrate should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial – At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible – Principles as regards the scope of ss.227 and 228 – Enumerated – The instant case related to 1984 anti-sikh riots in respect of certain deaths – The framing of charges on the basis of certain statements made after a gap of 23 years was neither bad in law nor abuse of process of law or without any material – High Court rightly affirmed the same – Delay/laches.

Delay/laches: Inordinate delay in framing of charges on the basis of certain statements made after a gap of 23 years – Held: Though delay is a relevant factor and every accused

is entitled to speedy justice in view of Article 21 of the Constitution, ultimately it depends upon various factors/ reasons and materials placed by the prosecution – In the instant case, in the light of the materials which are available before the court through CBI, without testing the same at the trial, the proceedings cannot be quashed merely on the ground of delay – Those materials have to be tested in the context of prejudice to the accused only at the trial – Constitution of India, 1950 – Article 21.

In the 1984 anti-Sikh riots, FIRs were lodged in respect of certain deaths, which ended in acquittals. The investigation pertaining to the death of family members of PW-1 was re-opened by the anti-riot Cell of Delhi Police in the year 2002 and after investigation, a closure report was filed in the court on 15/22.12.2005. After filing of the closure report, on 31.07.2008, a Status Report was filed by the Delhi Police. Meanwhile, pursuant to the recommendation of Justice Nanavati Commission, the Government of India had entrusted the investigation to the CBI on 24.10.2005. On receipt of the said communication, the respondent-CBI had registered a formal FIR on 22.11.2005. The closure report was filed by Delhi Police on 15.12.2005/22.12.2005, when a case had already been registered by the CBI on 22.11.2005 and the documents had already transferred to the respondent-CBI.

After fresh investigation, CBI filed charge-sheet on 13.01.2010. After committal, charges were framed on 15.05.2010. The appellant filed a petition for discharge before the Special Court, which was dismissed. He filed a revision before the High Court which was also dismissed.

In the instant appeal, it was contended for the appellant that the statement of PW-1 was highly doubtful

and, therefore, could not be relied upon to frame the charges against the appellant; that because of long delay, the continuation of the prosecution and framing of charges on the basis of certain statements made after a gap of 23 years could not be accepted and it would go against the protection provided under Article 21 of the Constitution; and that certain observations were made in the order of the High Court which would affect the mind of the trial judge to take independent conclusion and, therefore, were unwarranted.

Disposing of the appeal, the Court

HELD: 1.1. A perusal of Sections 227 and 228 Cr.P.C. makes it clear that the judge concerned has to consider all the records of the case, the documents placed before him, hear the submission of the accused and the prosecution and if there is "not sufficient ground" for proceeding against the accused, he shall discharge the accused by recording reasons. If after such consideration and hearing, as mentioned in Section 227, the Judge is of the opinion that "there is ground for presuming" that the accused has committed an offence, he is free to direct the accused to appear and then try the offence in accordance with the procedure after framing charge in writing against the accused. [Para 7] [680-B-C]

Union of India v. Prafulla Kumar Samal and Another **(1979) 3 SCC 4;** *Dilawar Balu Kurane v. State of Maharashtra* **(2002) 2 SCC 135 – relied on.**

1.2. The principles as regards the scope of Section 227 and 228, Cr.P.C. are:

(i) The Judge while considering the question of framing the charges under Section 227, Cr.P.C. has the undoubted power to sift and weigh the evidence

for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

(iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging

therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal. [Para 17] [685-D-H; 686-A-F]

1.3. Keeping in view the principles regarding the scope of exercising jurisdiction under Sections 227 and 228, Cr.P.C., from the statements of PW-1, PW-2, PW-10 as well as of PW-8, it cannot be presumed that there was no case at all to proceed. The closure report was prepared and filed before the magistrate on 31.07.2008. The magistrate, on going through the report and after hearing the submissions and after noting that the matter under consideration was being further investigated by the CBI and the investigation was pending and after finding that no definite opinion could be given in respect of the closure report, without passing any order closed the matter, giving liberty to the prosecution to move appropriate motion as and when required. In view of the order dated 31.7.2008 of the magistrate, declining to give definite opinion on the closure report since the same was under further investigation by CBI, no further probe/ enquiry on that aspect is required. [Paras 18, 20, 21] [686-G-H; 680-A-F]

Vakil Prasad Singh v. State of Bihar **(2009) 3 SCC 355;** *Abdul Rehman Antulay and Ors. v. R.S. Nayak & Anr.; P. Vijayan v. State of Kerala and Another* **(2010) 2 SCC 398;**

Japani Sahoo v. Chandra Sekhar Mohanty **(2007) 7 SCC 394 – referred to.**

2. Though delay is a relevant factor and every accused is entitled to speedy justice in view of Article 21 of the Constitution, ultimately, it depends upon various factors/reasons and materials placed by the prosecution. In the instant case, in the light of the materials which are available before the court through CBI, without testing the same at the trial, the proceedings cannot be quashed merely on the ground of delay. Those materials have to be tested in the context of prejudice to the accused only at the trial. [Paras 24, 25] [695-C-D; G-H; 696-A]

Common Cause, A Registered Society v. Union of India & Ors. **(1999) 6 SCC 667 – referred to.**

3. In the light of the fact that it is for the trial court to evaluate all the materials including the evidentiary value of the witnesses of the prosecution such as PW-1, PW-2, PW-10 and PW-8, alleged contradictory statements, delay and the conduct of the Delhi Police in filing Status Report and on the basis of further investigation by the CBI, observations of the High Court would not affect the ultimate analysis and final verdict of the trial Judge. It cannot be concluded that framing of charges against the appellant by the trial court was either bad in law or abuse of process of law or without any material. However, de hors the comments, observations and explanations in the judgment of the single Judge, the trial court is free to analyse, appreciate, evaluate and arrive at a proper conclusion based on the materials placed before it by prosecution as well as the defence. Inasmuch as the trial relates to the incident of the year 1984, the trial court is directed to take sincere efforts for completion of the case as early as possible for which the prosecution and accused must render all assistance. [Paras 26, 27] [697-C-E; 697-G-H; 698-A-B]

Case Law Reference:

(1979) 3 SCC 4	**relied on**	**Para 13, 14,15**
(2002) 2 SCC 135	**relied on**	**Para 13, 15**
(2009) 3 SCC 355	**relied on**	**Para 22, 24**
(2010) 2 SCC 398	**referred to**	**Para 23**
(2007) 7 SCC 394	**referred to**	**Para 25**
(1999) 6 SCC 667	**referred to**	**Para 28**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1803 of 2010.

From the Judgment & Order dated 19.07.2010 of the High Court of Delhi at New Delhi in Criminal Revision Petition No. 261 of 2010.

H.P. Rawal. ASG, U.U. Lalit, Dushyant Dave, H.S. Phoolka, S.A. Hashmi, A.K. Sharma, Anil Kumar Sharma, Parerna Kumari, Sangram Saron, Amit Anand Tiwari, Yashvardhan, Kamma Vohra, Jagjit Singh Chhabra, Shweta Verma, D.P. Singh, Avneet Toor, Tarannum Cheema, A.K. Sharma, T.A. Khan for the appearing parties.

The Judgment of the Court was delivered by

P. Sathasivam, J. 1. Application for intervention is allowed.

2. Leave granted.

3. This appeal is directed against the order of the High Court of Delhi at New Delhi dated 19.07.2010 whereby the learned single Judge confirmed the order dated 15.05.2010 passed by the District Judge-VII/NE-cum-Additional Sessions Judge, Karkardooma Courts, Delhi in S.C. No. 26/10, RC SII 2005 S0024. By the said order, the Additional Sessions Judge

has ordered the framing of charges against the appellant for offences punishable under Section 120B read with Sections 153A, 295, 302, 395, 427, 436, 339 and 505 of the Indian Penal Code (hereinafter referred to as "IPC") and for the offence under Section 109 read with Sections 147, 148, 149, 153A, 295, 302, 395, 427, 435, 339 and 505 IPC, besides framing of a separate charge for offence punishable under Section 153A IPC and rejected the application for discharge filed by the appellant.

4. Brief Facts:-

(a) The present case arises out of 1984 anti-Sikh Riot cases in which thousands of Sikhs were killed. Delhi Police has made this case a part of FIR No. 416 of 1984 registered at Police Station Delhi Cantt. In this FIR, 24 complaints were investigated pertaining to more than 60 deaths in the area. As many as 5 charge-sheets were filed by Delhi Police relating to 5 deaths which resulted in acquittals. One supplementary charge-sheet about robbery, rioting etc. was also filed which also ended in acquittal. The investigation pertaining to the death of family members of Smt. Jagdish Kaur PW-1, was reopened by the anti-Riot Cell of Delhi Police in the year 2002 and after investigation, a Closure Report was filed in the Court on 15/22.12.2005.

(b) After filing of the Closure Report in the present case, on 31.07.2008, a Status Report was filed by the Delhi Police before the Metropolitan Magistrate, Patiala House Court, New Delhi. Pursuant to the recommendation of Justice Nanavati Commission, the Government of India entrusted the investigation to the Central Bureau of Investigation (hereinafter referred to as "CBI") on 24.10.2005. On receipt of the said communication, the respondent-CBI registered a formal FIR on 22.11.2005. The Closure Report was filed by Delhi Police on 15.12.2005/22.12.2005, when a case had already been registered by the CBI on 22.11.2005 and the documents had already been transferred to the respondent-CBI.

(c) After fresh investigation, CBI filed charge-sheet bearing No. 1/2010 in the present case on 13.01.2010. After committal, charges were framed on 15.05.2010. At the same time, the appellant has also filed a petition for discharge raising various grounds in support of his claim. Since he was not successful before the Special Court, he filed a revision before the High Court and by the impugned order dated 19.07.2010, after finding no merit in the case of the appellant, the High Court dismissed his criminal revision and directed the Trial Court for early completion of the trial since the same is pending from 1984.

5. Heard Mr. U.U. Lalit, learned senior counsel for the appellant, Mr. H.P. Rawal, learned Additional Solicitor General for the respondent-CBI and Mr. Dushyant Dave, learned senior counsel for the intervenor.

6. **Submissions:**

(a) After taking us through the charge-sheet dated 13.01.2010, statements of PW-1, PW-2 and PW-10, order dated 15.05.2010 framing charges by the District Judge, Karkardooma Courts, Delhi and the impugned order of the High Court dated 19.07.2010, Mr. Lalit, learned senior counsel for the appellant submitted that i) the statement of Jagdish Kaur is highly doubtful and later she made an improvement, hence the same cannot be relied upon to frame charge against the appellant; ii) reliance on the evidence of Jagsher Singh PW-2, who gave a statement after a gap of 25 years cannot be accepted; iii) the statement of Nirprit Kaur PW-10 is also not acceptable since the same was also made after a gap of 25 years of the occurrence; iv) other witnesses who were examined in support of the prosecution specifically admitted that they did not see the appellant at the time of alleged commission of offence; v) inasmuch as the charge has been framed after 25 years of occurrence, proceeding against the appellant, at this juncture, is violative of his constitutional right under Article 21; vi) after filing of the closure report by the Delhi Police, by

following the procedure, the present action of the CBI conducting further re-investigation and filing charge-sheet based on fresh and improved materials is impermissible in law; vii) follow-up action based on the recommendation of Justice Nanavati Commission is also impermissible at this juncture; viii) many remarks/observations made by the High Court are uncalled for and based on conjectures and surmises and also without there being any material on record. If those observations are not deleted from the order of the High Court, it would amount to directing the trial Judge to convict the appellant without proper proof and evidence.

(b) On the other hand, Mr. H.P. Rawal, learned Additional Solicitor General appearing for the CBI submitted that in view of categorical statement by the victims before Justice Nanavati Commission and its recommendation which was deliberated in the Parliament, the Government of India took a decision to entrust further/re-investigation in respect of 1984 anti-Sikh riots through CBI. According to him, the present action by the CBI and framing of charges against the appellant and others is in consonance with Sections 227 and 228 of the Code of Criminal Procedure (hereinafter referred to as "Cr.P.C."). He also submitted that at the stage of framing of the charges, the material on record has not to be examined meticulously; a prima facie finding of sufficient material showing grave suspicion is enough to frame a charge. He pointed out that there is nothing illegal with the order framing charge which was rightly affirmed by the High Court. He further submitted that the High Court has not exceeded in making observations and, in any event, it would not affect the merits of the case.

(c) Mr. Dushyant Dave, learned senior counsel for the intervenor, while reiterating the stand taken by the learned Additional Solicitor General supported the order of the District Judge framing charges as well as the order of the High Court dismissing the criminal revision filed by the appellant. He pointed out that it is not a case for interference under Article

136 of the Constitution of India. No prejudice would be caused to the appellant and he has to face the trial. He further contended that the delay cannot be a ground for interference.

Relevant Provisions:

7. Before considering the claim of the parties, it is useful to refer Sections 227 and 228 of the Cr.P.C. which are reproduced below:

> **"227. Discharge.-** If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.
>
> **228. Framing of charge-** (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-
>
> (a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;
>
> (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.
>
> (2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

It is clear that the Judge concerned has to consider all the records of the case, the documents placed, hear the submission of the accused and the prosecution and if there is "*not sufficient ground*" (Emphasis supplied) for proceeding against the accused, he shall discharge the accused by recording reasons. If after such consideration and hearing, as mentioned in Section 227, if the Judge is of the opinion that "*there is ground for presuming*" (Emphasis supplied) that the accused has committed an offence, he is free to direct the accused to appear and try the offence in accordance with the procedure after framing charge in writing against the accused.

Statements of PW-1, PW-2, PW-8 and PW-10

8. Mr. Lalit, learned senior counsel for the appellant pointed out that the prosecution, for framing the impugned charges, heavily relied on the statements of Jagdish Kaur, Jagsher Singh and Nirprit Kaur. He also took us through their statements made at various stages which are available in the paper-book. It is true that Jagdish Kaur PW-1, in her statement under Section 161 Cr.P.C. dated 20.01.1985, did not mention the name of the appellant. Even in the affidavit dated 07.09.1985, filed before Justice Ranganath Misra Commission she has not whispered a word about the role of the appellant. According to him, for the first time i.e. in the year 2000, after a gap of 15 years an affidavit was filed before Justice Nanavati Commission, wherein she referred the name of the appellant and his role along with certain local Congress workers. According to Mr. Lalit, except the above statement in the form of an affidavit before Justice Nanavati Commission, she had not attributed anything against the appellant in the categorical statements made on 20.01.1985 as well as on 07.09.1985 before Justice Ranganath Misra Commission.

9. He also pointed out that even after submission of

Justice Nanavati Commission's report and entrusting the investigation to CBI, she made a statement before the CBI officers at the initial stage by mentioning "that the mob was being led by Congress leaders". Only in later part of her statement, she mentioned that "she learnt that Sajjan Kumar, the Member of Parliament was conducting meeting in the area". She confirmed the statement in the form of an affidavit dated 07.09.1985 filed before Justice Ranganath Misra Commission as well as her deposition with regard to the appellant before Justice Nanavati Commission on 08.01.2002. No doubt, in the last part of her statement, it was stated that in the year 1984-85, the atmosphere was totally against the Sikh community and under pressure she did not mention the name of Sajjan Kumar. She also informed that she could not mention his name for the safety of her children.

10. The other witness Jagsher Singh, first cousin of Jagdish Kaur, in his statement recorded by the CBI on 07.11.2007 i.e. after a gap of 23 years, mentioned the name of the appellant and his threat to Sikhs as well as to Hindus who had given shelter to Sikhs. According to Mr. Lalit, this witness mentioned the name of the appellant for the first time before the CBI nearly after 23 years of the incident which, according to him, cannot be relied upon.

11. The other witness relied on by the prosecution in support of framing of charges is Nirprit Kaur PW-10. It is pointed out that she also made certain statements to the CBI after a gap of 23 years and she did not mention the name of the appellant except stating that one Balwan Khokhar who is alleged to be a nephew of Sajjan Kumar, came to her house for discussing employment for her nephew as driver.

12. The other statement relied on by the prosecution in support of framing of charges against the appellant is that of Om Prakash PW-8. He narrated that during the relevant time he had given shelter to a number of women and children of Sikh community including Jagdish Kaur PW-1. Mr. Lalit pointed out

that in his statement, he did not even utter a word about the appellant but at the end of his statement on being asked, stated that he knew Shri Sajjan Kumar, Member of Parliament. However, he further stated that he did not see him in that mob or even in their area during the said period. In the last sentence, he expressed that he had heard from the people in general that Sajjan Kumar was also involved in the 1984 riots.

13. By pointing out the earlier statement of Jagdish Kaur PW-1, recorded by the CBI, her affidavit before Justice Nanavati Commission and the statement of Jagsher Singh PW-2, Nirpreet Kaur PW-10 and Om Prakash PW-8 before the CBI, Mr. Lalit submitted that there was no assertion by anyone about the specific role of the appellant except the bald statement and that too after 23 years. In such circumstances, according to him, the materials relied on by the prosecution are not sufficient to frame charges. According to him, mere suspicion is not sufficient for which he relied on the judgments of this Court in *Union of India vs. Prafulla Kumar Samal and Another,* (1979) 3 SCC 4 and *Dilawar Balu Kurane vs. State of Maharashtra,* (2002) 2 SCC 135.

14. In *Prafulla Kumar Samal* (supra), the scope of Section 227 of the Cr.P.C. was considered. After adverting to various decisions, this Court has enumerated the following principles:

> "(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.
>
> (2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.
>
> (3) The test to determine a prima facie case would

naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

15. In *Dilawar Balu Kurane* (supra), the principles enunciated in *Prafulla Kumar Samal* (supra) have been reiterated and it was held:

"12. Now the next question is whether a prima facie case has been made out against the appellant. In exercising powers under Section 227 of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the said section has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion

against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under Section 227 of the Code of Criminal Procedure, the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial (see *Union of India v. Prafulla Kumar Samal*).

14. We have perused the records and we agree with the above views expressed by the High Court. We find that in the alleged trap no police agency was involved; the FIR was lodged after seven days; no incriminating articles were found in the possession of the accused and statements of witnesses were recorded by the police after ten months of the occurrence. We are, therefore, of the opinion that not to speak of grave suspicion against the accused, in fact the prosecution has not been able to throw any suspicion. We, therefore, hold that no prima facie case was made against the appellant."

16. It is clear that at the initial stage, if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence, then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the prosecution proposes to adduce prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. A Magistrate enquiring into a case under Section 209 of the

Cr.P.C. is not to act as a mere Post Office and has to come to a conclusion whether the case before him is fit for commitment of the accused to the Court of Session. He is entitled to sift and weigh the materials on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction. If there is no prima facie evidence or the evidence is totally unworthy of credit, it is the duty of the Magistrate to discharge the accused, on the other hand, if there is some evidence on which the conviction may reasonably be based, he must commit the case. It is also clear that in exercising jurisdiction under Section 227 of Cr.P.C., the Magistrate should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

17. *Exercise of jurisdiction under Sections 227 & 228 of Cr.P.C.*

On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge:-

(i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities

etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.

18. With the above principles, if we discuss the statements of PW-1, PW-2, PW-10 as well as of PW-8, it cannot be presumed that there is no case at all to proceed. However, we are conscious of the fact that the very same witnesses did not whisper a word about the involvement of the appellant at the earliest point of time. It is the grievance of the appellant that

the High Court did not take into account that the complainant Jagdish Kaur PW-1 had not named him in her first statement filed by way of an affidavit dated 07.09.1985 before Justice Ranganath Misra Commission nor did she named him in her subsequent statements made before the Delhi Police (Riots Cell) and in her deposition dated 08.01.2002 before Justice Nanavati Commission except certain hearsay statement. It is the stand of Jagdish Kaur PW-1, the prime prosecution witness, that apart from her statement dated 03.11.1984, she has not made any statement to Delhi Police at any stage. However, it is also the claim of the C.B.I. that the alleged statements of Jagdish Kaur PW-1, dated 20.01.1985 and 31.12.1992 are doubtful. Likewise, Nirprit Kaur PW-10, in her statement under Section 161 Cr.P.C., has denied having made any statement before the Delhi Police. At the stage of framing of charge under Section 228 of the Cr.P.C. or while considering the discharge petition filed under Section 227, it is not for the Magistrate or a Judge concerned to analyse all the materials including pros and cons, reliability or acceptability etc. It is at the trial, the Judge concerned has to appreciate their evidentiary value, credibility or otherwise of the statement, veracity of various documents and free to take a decision one way or the other.

Investigation by the C.B.I.

19. Learned Additional Solicitor General has brought to our notice the letter dated 24.10.2005 from Mr. K.P. Singh, Special Secretary (H) to Mr. U.S. Mishra, Director, Central Bureau of Investigation, North Block, New Delhi. A perusal of the said letter shows that in reply to the discussion held in the Lok Sabha on 10.08.2005 and the Rajya Sabha on 11.08.2005 on the report of Justice Nanavati Commission of Inquiry into 1984 anti-Sikh riots, the Prime Minister and the Home Minister had given an assurance that wherever the Commission has named any specific individuals as needing further examination or re-opening of case the Government will take all possible steps to do so within the ambit of law. The letter further shows

that based on the assurance on the floor of the Parliament, the Government examined the report of Justice Nanavati Commission, its recommendations regarding investigation/re-investigation of the cases against (a) Shri Dharam Das Shastri, (b) Shri Jagdish Tytler, and (c) Shri Sajjan Kumar. The letter further shows that the Government had decided that the work of conducting further investigation/re-investigation against the abovementioned persons as per the recommendations of Justice Nanavati Commission should be entrusted to the CBI. Pursuant to the said decision, Home Department forwarded the relevant records connected with the cases against the abovementioned persons. It also shows those additional records/information required in connection with investigation are to be obtained from the Delhi Police. The materials placed by the CBI show that Justice Nanavati Commission submitted its report on 09.02.2005, its recommendations were discussed by the Lok Sabha on 10.08.2005 and the Rajya Sabha on 11.08.2005, Government of India asked CBI to inquire those recommendations on 24.10.2005 and the F.I.R. No. 416 of 1984 dated 04.11.1984 of Police Station, Delhi Cantt was re-registered by the CBI as case RC-24(S)/2005-SCU.I/CBI/SCR.I/New Delhi. Pursuant to the same, on 22.11.2005, investigation was taken up and it revealed that the accused persons committed offences punishable under Section 109 read with Sections 147, 148, 149, 153A, 295, 302, 396, 427, 436, 449, 505 and 201 IPC and accordingly filed the charge-sheet. It is relevant to note that no one including the appellant has not challenged appointment of CBI to inquire into the recommendations made by Justice Nanavati Commission.

Status Report by Delhi Police

20. Mr. Lalit heavily relied on the status report of the Delhi Police and consequential order of the Magistrate. By pointing out the same, he contended that the CBI is not justified in re-opening the case merely on the basis of observations made by Justice Nanavati Commission. The following conclusion in

the status report dated 31.07.2008 filed by the Delhi Police was pressed into service.

> "From the investigation and verification made so far it was revealed that:-
>
> (a) There is no eye-witness to support the version of the complaint of Smt. Jagdish Kaur.
>
> (b) The complaints and affidavits made by Smt. Jagdish Kaur are having huge contradictions.
>
> (i) In her first statement recorded by local police during the investigation, she did not name any person specifically and also stated that she could not identify any one among the mob.
>
> (ii) She even did not name Shri Sajjan Kumar in her statement recorded by the I.O. of the Spl. Riot Cell after a gap of seven years.
>
> (iii) She suspected the involvement of one Congress Leader Balwan Khokhar in these riots but she had not seen him personally. She was told by one Om Prakash who was colleague of her husband, about the killing of her husband and son.
>
> (iv) In the statement recorded on 22.01.1993 under Section 161 Cr.P.C. during the course of further investigation, the witness Om Prakash stated that he had seen nothing about the riots. Jagdish Kaur stayed at his house from 01.11.1984 to 03.11.1984 but she did not mention the name of any person who was indulged in the killing of her husband and son."

It is seen from the report that taking note of lot of contradictions in the statement of Jagdish Kaur PW-1 before the Commissions and before different investigating officers and

after getting legal opinion from the Public Prosecutor, closure report was prepared and filed before the Metropolitan Magistrate, Patiala House Courts, New Delhi on 31.07.2008. It is further seen that before accepting the closure report, the Magistrate issued summons to the complainant i.e, Smt. Jagdish Kaur number of times and the same were duly served upon her by the officers of the Special Riot Cell but she did not appear before the Court. In view of the same, the Magistrate, on going through the report and after hearing the submissions and after noting that the matter under consideration is being further investigated by the CBI and the investigation is still pending and after finding that no definite opinion can be given in respect of the closure report, without passing any order closed the matter giving liberty to the prosecution to move appropriate motion as and when required.

21. Mr. Lalit, learned senior counsel, by placing copy of the final report under Section 173 Cr.P.C. by Delhi Police as well as endorsement therein including the date on which the said report was filed before the Court, submitted that the action taken by Delhi Police cannot be faulted with. In other words, according to him, till the entrustment of further investigation by the CBI, Delhi Police was free to proceed further and there is no error in the action taken by the Delhi Police. In view of the order dated 31.07.2008 of the Magistrate, declining to give definite opinion on the closure report since the same was under further investigation by CBI, we are of the view that no further probe/enquiry on this aspect is required.

Delay

22. Learned senior counsel appearing for the appellant further submitted that because of the long delay, the continuation of the prosecution and framing of charges merely on the basis of certain statements made after a gap of 23 years cannot be accepted and according to him, it would go against the protection provided under Article 21 of the Constitution. Mr. Lalit heavily relied on para 20 of the decision of this Court in

Vakil Prasad Singh vs. State of Bihar, (2009) 3 SCC 355 which reads as under:

> **"20.** For the sake of brevity, we do not propose to reproduce all the said propositions and it would suffice to note the gist thereof. These are: (*A.R. Antulay case,* SCC pp. 270-73, para 86)
>
> (i) fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily;
>
> (ii) right to speedy trial flowing from Article 21 encompasses all the stages, namely, the stage of investigation, inquiry, trial, appeal, revision and retrial;
>
> (iii) in every case, where the speedy trial is alleged to have been infringed, the first question to be put and answered is — who is responsible for the delay?;
>
> (iv) while determining whether undue delay has occurred (resulting in violation of right to speedy trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on—what is called, the systemic delays;
>
> (v) each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of the accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case;
>
> (vi) ultimately, the court has to balance and weigh several relevant factors—'balancing test' or 'balancing process'—

> and determine in each case whether the right to speedy trial has been denied;
>
> (vii) ordinarily speaking, where the court comes to a conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open and having regard to the nature of offence and other circumstances when the court feels that quashing of proceedings cannot be in the interest of justice, it is open to the court to make appropriate orders, including fixing the period for completion of trial;
>
> (viii) it is neither advisable nor feasible to prescribe any outer time-limit for conclusion of all criminal proceedings. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint;
>
> (ix) an objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in the High Court must, however, be disposed of on a priority basis."

After adverting to various decisions including *Abdul Rehman Antulay and Ors. vs. R.S. Nayak & Anr.,* this Court further held:

> **"24.** It is, therefore, well settled that the right to speedy trial in all criminal persecutions (sic prosecutions) is an inalienable right under Article 21 of the Constitution. This right is applicable not only to the actual proceedings in court but also includes within its sweep the preceding police investigations as well. The right to speedy trial

extends equally to all criminal prosecutions and is not confined to any particular category of cases. In every case, where the right to speedy trial is alleged to have been infringed, the court has to perform the balancing act upon taking into consideration all the attendant circumstances, enumerated above, and determine in each case whether the right to speedy trial has been denied in a given case.

25. Where the court comes to the conclusion that the right to speedy trial of an accused has been infringed, the charges or the conviction, as the case may be, may be quashed unless the court feels that having regard to the nature of offence and other relevant circumstances, quashing of proceedings may not be in the interest of justice. In such a situation, it is open to the court to make an appropriate order as it may deem just and equitable including fixation of time-frame for conclusion of trial."

Considering the factual position therein, namely, alleged demand of a sum of Rs.1,000/- as illegal gratification for release of payment for the civil work executed by a contractor, a charge was laid against Assistant Engineer in the Bihar State Electricity Board and taking note of considerable length of delay and insufficient materials, based on the above principles, ultimately the Court after finding that further continuance of criminal proceedings pending against the appellant therein is unwarranted and quashed the same. Though the principles enunciated in the said decision have to be adhered to, considering the factual position being an extraordinary one, the ultimate decision quashing the criminal proceedings cannot be applied straightaway.

23. In *P. Vijayan vs. State of Kerala and Another,* (2010) 2 SCC 398, this Court while considering scope of Section 227 of Crl.P.C. upheld the order dismissing the petition filed for discharge and permitted the prosecution to proceed further even after 28 years. In that case, from 1970 till 1998, there was no allegation that the encounter was a fake and only in the year

1998 reports appeared in various newspapers in Kerala that the killing of Varghese in the year 1970 was in a fake encounter and that senior police officers were involved in the said fake encounter. Pursuant to the said news reports, several writ petitions were filed by various individuals and organisations before the High Court of Kerala with a prayer that the investigation may be transferred to the Central Bureau of Investigation (CBI). In the said writ petition, Constable Ramachandran Nair filed a counter affidavit dated 11.01.1999 in which he made a confession that he had shot Naxalite Varghese on the instruction of the then Deputy Superintendent of Police (DSP), Lakshmana. He also stated that the appellant was present when the incident occurred. By order dated 27.01.1999, learned Single Judge of the High Court of Kerala passed an order directing CBI to register an FIR on the facts disclosed in the counter affidavit filed by Constable Ramachandran Nair. Accordingly, CBI registered an FIR on 3-3-1999 in which Constable Ramachandran Nair was named as Accused 1, Mr Lakshmana was named as Accused 2 and Mr. P. Vijayan, the appellant, was named as Accused 3 for an offence under Section 302 IPC read with Section 34 IPC. After investigation, CBI filed a charge-sheet before the Special Judge (CBI), Ernakulam on 11.12.2002 wherein all the abovementioned persons were named as A-1 to A-3 respectively for an offence under Sections 302 and 34 IPC. The appellant - P. Vijayan filed a petition under Section 227 of the Code on 17.05.2007 for discharge on various grounds including on the ground of delay. The trial Judge, by order dated 08.06.2007, dismissed the said petition and passed an order for framing charge for offences under Sections 302 and 34 IPC. Aggrieved by the aforesaid order, the appellant – Vijayan filed Criminal Revision Petition No. 2455 of 2007 before the High Court of Kerala. By an order dated 04.07.2007, learned Single Judge of the High Court dismissed his criminal revision petition. The said order was challenged by Mr. P. Vijayan before this Court. Taking note of all the ingredients in Section 227 of the Criminal Procedure Code and the materials placed by the

prosecution and the reasons assigned by the trial Judge for dismissing the discharge petition filed under Section 227, this Court confirmed the order of the trial Judge as well as the order of the High Court. Though, there was a considerable lapse of time from the alleged occurrence and the further investigation by CBI inasmuch as adequate material was shown, the Court permitted the prosecution to proceed further.

24. Though delay is also a relevant factor and every accused is entitled to speedy justice in view of Article 21 of the Constitution, ultimately it depends upon various factors/reasons and materials placed by the prosecution. Though Mr. Lalit heavily relied on paragraph 20 of the decision of this Court in *Vakil Prasad Singh's* case (supra), the learned Additional Solicitor General, by drawing our attention to the subsequent paragraphs i.e., 21, 23, 24, 27 and 29 pointed out that the principles enunciated in *A.R.Antulay's* case (supra) are only illustrative and merely because of long delay the case of the prosecution cannot be closed.

25. Mr. Dave, learned senior counsel appearing for the intervenor has pointed out that in criminal justice "a crime never dies" for which he relied on the decision of this Court in *Japani Sahoo vs. Chandra Sekhar Mohanty,* (2007) 7 SCC 394. In para-14, C.K. Thakker, J. speaking for the Bench has observed:

> "It is settled law that a criminal offence is considered as a wrong against the State and the society even though it has been committed against an individual. Normally, in serious offences, prosecution is launched by the State and a court of law has no power to throw away prosecution solely on the ground of delay."

In the case on hand, though delay may be a relevant ground, in the light of the materials which are available before the Court through CBI, without testing the same at the trial, the proceedings cannot be quashed merely on the ground of delay.

As stated earlier, those materials have to be tested in the context of prejudice to the accused only at the trial.

Observations by the High Court

26. Coming to the last submission about the various observations made by the High Court, Mr. Lalit pointed out that the observations/reference/conclusion in paragraphs 64, 65, 69, 70, 72, 73 and 50 are not warranted. According to him, to arrive such conclusion the prosecution has not placed relevant material. Even otherwise, according to him, if the same are allowed to stand, the trial Judge has no other option but to convict the appellant which would be against all canons of justice. He further submitted that even if it is clarified that those observations are to be confined for the disposal of the appeal filed against framing of charges and dismissal of discharge petition and need not be relied on at the time of the trial, undoubtedly, it would affect the mind of the trial Judge to take independent conclusion for which he relied on a judgment of this Court in *Common Cause, A Registered Society vs. Union of India & Ors.* (1999) 6 SCC 667. He pressed into service paragraph 177 which reads as under:

> "177. Mr Gopal Subramaniam contended that the Court has itself taken care to say that CBI in the matter of investigation, would not be influenced by any observation made in the judgment and that it would independently hold the investigation into the offence of criminal breach of trust or any other offence. To this, there is a vehement reply from Mr Parasaran and we think he is right. It is contended by him that this Court having recorded a finding that the petitioner on being appointed as a Minister in the Central Cabinet, held a trust on behalf of the people and further that he cannot be permitted to commit breach of the trust reposed in him by the people and still further that the petitioner had deliberately acted in a wholly arbitrary and unjust manner and that the allotments made by him were wholly mala fide and for extraneous consideration, the

direction to CBI not to be influenced by any observations made by this Court in the judgment, is in the nature of palliative. CBI has been directed to register a case against the petitioner in respect of the allegations dealt with and findings reached by this Court in the judgment under review. Once the findings are directed to be treated as part of the first information report, the further direction that CBI shall not be influenced by any observations made by this Court or the findings recorded by it, is a mere lullaby."

On the other hand, learned Additional Solicitor General highlighted that these observations by the High Court are based on the materials placed and, in any event, it would not affect the interest of the appellant in the ultimate trial. In view of the apprehension raised by the learned senior counsel for the appellant, we also verified the relevant paragraphs. In the light of the fact that it is for the trial Judge to evaluate all the materials including the evidentiary value of the witnesses of the prosecution such as Jagdish Kaur PW-1, Jagsher Singh PW-2, Nirpit Kaur PW-10 and Om Prakash PW-8, alleged contradictory statements, delay and the conduct of the Delhi Police in filing Status Report and on the basis of further investigation by the CBI, we clarify that all those observations of the High Court would not affect the ultimate analysis and final verdict of the trial Judge.

Conclusion:

27. In the light of the above discussion, we are of the view that it cannot be concluded that framing of charges against the appellant by the trial Judge is either bad in law or abuse of process of law or without any material. However, we clarify that de hors to those comments, observations and explanations emanating from the judgment of the learned single Judge, which we referred in para 26, the trial Judge is free to analyse, appreciate, evaluate and arrive at a proper conclusion based on the materials being placed by prosecution as well as the defence. Inasmuch as the trial relates to the incident of the year

1984, we direct the trial Judge to take sincere efforts for completion of the case as early as possible for which the prosecution and accused must render all assistance. Interim order granted on 13.08.2010 is vacated. With the above observation and direction, the appeal is disposed of.

D.G. Appeal disposed of.

RAJESH KOHLI

v.

HIGH COURT OF J & K AND ANR.

(Writ Petition (Civil) No. 95 of 2004)

SEPTEMBER 21, 2010

[DR. MUKUNDAKAM SHARMA AND ANIL R. DAVE, JJ.]

Service law: Judicial service – Higher Judicial service – Termination of service of probationary judicial officer – Challenged on the ground that the order of termination was stigmatic – Held: Reference in the order that service of the judicial officer was unsatisfactory do not amount to stigma nor does it amount to casting any aspersion on him – The order of termination was a fall out of his unsatisfactory service adjudged on the basis of his overall performance and the manner in which he conducted himself – Mere grant of yearly increments would not in any manner indicate that after completion of the probation period, the High Court (administrative side) was not competent to scrutinize his records and on the basis thereof take a decision as to whether or not his service should be confirmed or dispensed with or whether his probation period should be extended – The High Court has a solemn duty to consider and appreciate the service of a judicial officer before confirming him in service – The District Judiciary is the bedrock of Indian judicial system and is positioned at the primary level of entry to the doors of justice – Upright and honest judicial officers are needed not only to bolster the image of the judiciary in the eyes of litigants, but also to sustain the culture of integrity, virtue and ethics among judges – Jammu & Kashmir Higher Judicial Service Rules – Rule 15 – Administrative law – Administrative authority – Judiciary.

The writ petitioner was appointed as a judicial officer

on temporary basis. During probation period of two years, certain criminal complaints were made against him and the matters were recorded in his personal records. After completion of the initial two years of his probationary period, his records and his case were placed before the Full Court of the High Court for consideration of his case for confirmation or extension of period of probation or otherwise. The Full Court resolved that the service of the petitioner was not satisfactory and thus the probation was not extended. The resolution of the Full Court meeting and the recommendation were forwarded to the State Government and the State Government passed an order dispensing with the service of the petitioner.

In the instant writ petition, the petitioner challenged the order of the High Court recommending the termination of the service of the petitioner and also against the order of the State government dispensing with the service of the petitioner.

Dismissing the writ petition, the Court

HELD: 1. Rule 15 of the Jammu & Kashmir Higher Judicial Service Rules permitted an officer to be kept on probation ordinarily for a period of at least three years. The petitioner was temporarily appointed as District & Sessions Judge on 24.08.2000 and therefore completed his initial period of probation of two years on 23.08.2002. Thereafter his matter was placed on the administrative side before the Full Court of the High Court in its meeting held on 26.04.2003 for the purpose of confirmation of his service or otherwise or for extension of probationary period. The Full Court on consideration of the records of the petitioner held that his service was not found to be satisfactory and therefore, his probation period would not be extended and accordingly the Full Court

recommended that the services of the petitioner be dispensed with. [Paras 11, 12, 14] [708-C-F]

Satya Narayan Athya v. High Court of M.P. **(1996) 1 SCC 560 – referred to.**

2. The order of termination of service of the petitioner was not issued by the High Court but it only recommended his termination as his service was not found to be satisfactory. The said recommendation was accepted by the Government which finally ordered the termination of his service. The said order was an order of the competent authority and issued by the State Government and, therefore, it was a valid order and should be treated as such, although it was specifically not issued in the name of the Governor. [Para 16] [710-F-G]

3. The services rendered by a judicial officer during probation are assessed on the basis of judicial performance, and also on the probity as to how he had conducted himself. If an order of termination refers to unsatisfactory service of the person concerned, the same cannot be said to be stigmatic. None of the said two orders could be said to be a stigmatic order as no stigma was attached. The order of termination was a fall out of petitioner's unsatisfactory service adjudged on the basis of his overall performance and the manner in which he conducted himself. Such satisfaction, even if recorded that his service is unsatisfactory would not make the order stigmatic or punitive. [Paras 14, 19, 23] [710-B-C; 711-E-F; 714-E-F]

Pavanendra Narayan Verma v. Sanjay Gandhi PGI Of Medical Sciences **(2002) 1 SCC 520 – relied on.**

Satya Narayan Athya v. High Court of M.P. **(1996) 1 SCC 560 – referred to.**

4. The mere grant of yearly increments would not in any manner indicate that after completion of the probation period the Full Court of the High Court was not competent to scrutinize his records and on the basis thereof take a decision as to whether or not his service should be confirmed or dispensed with or whether his probation period should be extended. The High Court has a solemn duty to consider and appreciate the service of a judicial officer before confirming him in service. The District Judiciary is the bedrock of Indian judicial system and is positioned at the primary level of entry to the doors of justice. In providing the opportunity of access to justice to the people of the country, the judicial officers who are entrusted with the task of adjudication must officiate in a manner that is becoming of their position and responsibility towards society. Upright and honest judicial officers are needed not only to bolster the image of the judiciary in the eyes of litigants, but also to sustain the culture of integrity, virtue and ethics among judges. The public's perception of the judiciary matters just as much as its role in dispute resolution. The credibility of the entire judiciary is often undermined by isolated acts of transgression by a few members of the Bench, and therefore it is imperative to maintain a high benchmark of honesty, accountability and good conduct. [Paras 25, 26] [715-A-F]

Krishnadevaraya Education Trust v. L.A. Balakrishna **(2001) 9 SCC 319;** *Chaitanya Prakash* v. *H. Omkarappa* **(2010) 2 SCC 623;** *State of Punjab v. Bhagwan Singh* **(2002) 9 SCC 636 – relied on.**

Case Law Reference:

(1996) 1 SCC 560	**referred to**	**Para 13**
(2002) 1 SCC 520	**relied on**	**Para 19**

(2001) 9 SCC 319	**relied on**	**Para 20**
(2010) 2 SCC 623	**relied on**	**Para 21**
(2002) 9 SCC 636	**relied on**	**Para 22**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 95 of 2004.

Rajesh Kohli, Petitioner-in-Person.

Anis Suhrawardy, S.M. Imam, Tabrez Ahmad, Parnez Dabas, Sunil Fernandes, Renu Gupta, Sidhan Goel, Vikrant Nagpal for the Respondents.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. The present Writ Petition has been filed by the petitioner under Article 32 of the Constitution of India against the impugned administrative order of the High Court of Jammu & Kashmir [Respondent No. 1] recommending the termination of service of the petitioner who was working as a probationary Judicial Officer, and also against the order issued by the State of Jammu & Kashmir [Respondent No. 2] on the basis of such recommendation, on 03.07.2003, dispensing with the services of the petitioner as a District & Sessions Judge.

2. The petitioner herein was recommended by the High Court of Jammu & Kashmir for appointment as the District and Sessions Judge on a temporary basis. This aforesaid recommendation of the High Court was accepted by the Government of Jammu & Kashmir and an order of appointment was issued to him appointing him as the District and Sessions Judge on a temporary basis. It was clearly mentioned in the said order of appointment issued by the State Government that the petitioner would remain on probation for a period of two years as provided under the Jammu & Kashmir Higher Judicial Service Rules. Consequent upon the aforesaid temporary

appointment, the petitioner was appointed as 3rd Additional District Sessions Judge, Srinagar by order dated 28.08.2000. Thereafter he was transferred and posted as Additional District and Sessions Judge, Jammu by issuing an order dated 05.06.2001.

3. At this stage, it is required to be mentioned that in terms of the Jammu & Kashmir Higher Judicial Service Rules, the total period of probation for a Judicial Officer after his initial appointment could be for three years for when he is initially appointed, at the first instance his probation period is given as two years and thereafter the same could be extended by another one year. In this connection, reference could be made to Rule 15 of the Jammu & Kashmir Higher Judicial Service Rules which provides as follows: -

> "15. Probation – (1) All persons shall on appointment to the service in the substantive vacancies be placed on probation. The period of probation shall, in each case, be two years; provided that the period for which an officer has been continuously officiating immediately prior to his appointment may be taken into account, for the purpose of computing the period of probation.
>
> (2) The Governor may in consultation with the Court, at any time extend the period of probation; provided that the total period of probation shall not ordinarily exceed three years. An order sanctioning such extension of probation shall specify whether or not such extension shall count for increment in the time-scale.
>
> (3) If it appears to the appointing authority at any time during or at the end of the period of probation or extended period of probation, as the case may be, that a probationer has not made sufficient use of his opportunities or has otherwise failed to give satisfaction, his service may be dispensed with immediately.

(4) A person whose services are dispensed with shall not be entitled to any compensation."

4. The petitioner was also given his increments in terms of the rules. However, while the petitioner was so serving as an Additional District and Sessions Judge, a complaint was received against him, filed by one Mr. Babu Ram, which was duly supported by an affidavit dated 06.08.2001, contending *inter alia* that the petitioner while acting as a counsel for him fraudulently withdrew an amount of Rs. 2.6 lacs deposited with the Registrar [Judicial], High Court of Jammu & Kashmir which was payable to the complainant – Babu Ram.

5. The aforesaid complaint was enquired into by the Chief Justice of the High Court through the Registrar [Vigilance] of the High Court. On conclusion of the enquiry, a report was submitted stating *inter alia* that Mr. Rajesh Kohli, the petitioner herein, who was engaged by Mr. Narain Dutt – the attorney holder of Babu Ram, identified someone else as Babu Ram before Registrar [Judicial], Jammu & Kashmir High Court and received an account payee cheque in the name of Babu Ram. In the said report, it was also alleged that the petitioner besides identifying the impersonator as Babu Ram, also introduced him to Vijay Bank at the time of opening of the Bank account and thereby managed to unlawfully receive an amount of Rs. 2.6 lacs, while the real beneficiary - Babu Ram neither appeared before the Registrar [Judicial] or before Vijaya bank nor did he receive the said amount. The aforesaid report of the Registrar [Vigilance] dated 24.12.2001 was placed before the Chief Justice of the Jammu & Kashmir High Court who directed that the matter be referred to the Chairman, Disciplinary Committee for necessary action. The Registrar [Judicial] of the High Court was asked to file a criminal complaint against the petitioner before the SHO of the concerned police station.

6. Further, during the period when the petitioner was posted to District – Kargil as Principal District & Sessions Judge, he did not join there, w.e.f., 24.12.2001 to 18.01.2002

and an explanation was sought from him in that regard. Even thereafter, a complaint from a judicial employee of District Kargil was received wherein it was alleged that the petitioner had been abusing the employees and had created lot of problems at the District Kargil. These matters are recorded in the personal records of the petitioner. After completion of the initial two years of his probationary period, his records and his case were required to be placed before Full Court for consideration of his case for confirmation or extension of period of probation or otherwise. Consequently his records were considered by the High Court in its full court meeting held on 26.04.2003 at Jammu, wherein it was resolved as under: -

"……..

resolved that services of Shri Rajesh Kohli, District and Sessions Judge are not found satisfactory and thus the probation of the officer is not extended……. His services are dispensed with……."

The aforesaid resolution of the full court meeting with the recommendation was forwarded to the State Government and the State Government passed an order on 03.07.2003, whereby the services of the petitioner was dispensed with as recommended by the Hon'ble High Court. This action was taken in exercise of the powers vested on the competent authority under sub Rules 3 and 4 of Rule 15 of the Judicial Service Rules.

7. Being aggrieved by the issuance of the aforesaid order dated 03.07.2003 dispensing with his service, the petitioner filed the present Writ Petition on which notice was issued. On service of notice, the High Court has entered appearance and also filed the counter affidavit explaining the circumstances under which the service of the petitioner came to be terminated.

8. The petitioner appeared in person before us and submitted that the aforesaid order issued by the Government of Jammu & Kashmir of 03.07.2003 is illegal and without

jurisdiction as the said order was not issued by the Governor but was issued by the Government of Jammu & Kashmir. He also submitted that the recommendation of the High Court as communicated under letter dated 05.05.2003 is also illegal and liable to be set aside as the High Court terminated the service of the petitioner under the aforesaid order for which no power is vested on the High Court to dispense with the service under its own order. It was also submitted by him that he had completed his two years' probation period on 23.08.2002 and since there was no order of extension of his probation period prior to and immediately after 23.08.2002, he should be deemed to have been confirmed in the judicial service and therefore his service could not have been terminated on the ground that he was on probation.

9. The petitioner also submitted that his service was terminated on the ground of an alleged misconduct, namely, pendency of a criminal complaint and his alleged behaviour with subordinate staff and, therefore, the said order of termination of service was in the nature of a punishment by casting a stigma on the petitioner and therefore illegal and without jurisdiction as no opportunity of hearing was given to the petitioner prior to passing of the order of his termination. He also submitted that since he was granted increments by the respondent, it is proved that the Respondents were satisfied with his se rvice and, therefore, the order terminating his service is without jurisdiction.

10. Counsel appearing for the respondent, the High Court of Jammu & Kashmir, however, refuted the aforesaid submissions and placed before us the records of High Court connected with the service of petitioner and also the records leading to his termination from service. He submitted that the petitioner continued to be on probation even after two years as no order of his confirmation was issued or passed by the respondent and that his service was terminated within the three years period of his probation on the ground of unsatisfactory service. He denied that the impugned order is stigmatic or in

any way punitive or that there was any violation of the principles of natural justice. He submitted that since the service of the petitioner was terminated on the ground of unsatisfactory service, there was no question of drawing up of any departmental proceedings against him.

11. In the light of the aforesaid submissions of the counsel appearing for the parties we have perused the records. The petitioner was recommended by the High Court of Jammu & Kashmir for appointment as a District and Sessions Judge on temporary basis. The appointment letter placed on record clearly indicates that his initial appointment was not only on temporary basis but he was also kept on probation for a period of two years. Rule 15 of the Jammu & Kashmir Higher Judicial Service Rules permits an officer to be kept on probation ordinarily for a period of at least three years.

12. The petitioner was temporarily appointed as District & Sessions Judge on 24.08.2000 and therefore completed his initial period of probation of two years on 23.08.2002. Thereafter his matter was placed on the administrative side before the full court of the High Court in its meeting held on 26.04.2003 for the purpose of confirmation of his service or otherwise or for extension of probationary period. The full court on consideration of the records of the petitioner held that his service was not found to be satisfactory and therefore, his probation period would not be extended and accordingly the full court recommended that the services of the petitioner be dispensed with. At this stage, it may also be noted that when by the order dated 03.07.2003 the service of the petitioner was terminated, the period of probation of the petitioner was extended for the period from 24.08.2000 to 05.05.2003, the date on which a follow-up order was issued by the High Court to the State Government recommending his case for termination. Finally by the order dated 03.07.2003, the service of the petitioner was terminated.

13. Since the rule permits probation to be extended for

another one year and since there was no order of confirmation passed by the respondents confirming his service, the petitioner would be deemed to be continuing on probation immediately after his expiry of the initial two years of probation. In this regard, we may refer to the case of *Satya Narayan Athya v. High Court of M.P.* reported in (1996) 1 SCC 560 in which a judicial officer was not given any confirmation letter even after the completion of his two years' of probation period. The rules in the said case provided for the extension of initial two years of probation period for a further period of two years. This Court in that case held at Paragraphs 3 & 5 that : -

> "3. ……A reading thereof would clearly indicate that every candidate appointed to the cadre shall undergo training initially for a period of six months before he is appointed on probation for a period of two years. On his completion of two years of probation, it may be open to the High Court either to confirm or extend the probation. At the end of the probation period, if he is not confirmed on being found unfit, it may be extended for a further period not exceeding two years. *It is seen that though there is no order of extension, it must be deemed that he was continued on probation for an extended period of two years. On completion of two years, he must not be deemed to be confirmed automatically. There is no order of confirmation. Until the order is passed, he must be deemed to continue on probation.*
>
> 5. Under these circumstances, the High Court was justified in discharging the petitioner from service during the period of his probation. It is not necessary that there should be a charge and an enquiry on his conduct since the petitioner is only on probation and during the period of probation, it would be open to the High Court to consider whether he is suitable for confirmation or should be discharged from service."

14. During the period of probation an employee remains

under watch and his service and his conduct is under scrutiny. Around the time of completion of the probationary period, an assessment is made of his work and conduct during the period of probation and on such assessment a decision is taken as to whether or not his service is satisfactory and also whether or not on the basis of his service and track record his service should be confirmed or extended for further scrutiny of his service if such extension is permissible or whether his service should be dispensed with and terminated. The services rendered by a judicial officer during probation are assessed not solely on the basis of judicial performance, but also on the probity as to how one has conducted himself.

15. The aforesaid resolution taken by the full court on its administrative side clearly indicates that the matter regarding his confirmation or otherwise or extension of his probation period for another one year was considered by the full court but since his service was not found to be satisfactory on consideration of the records, therefore, the full court decided not to confirm him in service and to dispense with his service and accordingly recommended for dispensation of his service. On the basis of the aforesaid recommendation of the High Court, an order was passed by the Government of Jammu & Kashmir dispensing with the service of the petitioner.

16. These facts clearly prove and establish that the order of termination of service of the petitioner was not issued by the Jammu & Kashmir High Court but it only recommended his termination as his service was not found to be satisfactory. The aforesaid recommendation was accepted by the Government which finally ordered the termination of his service. The aforesaid order was an order of the competent authority and issued by the Government of Jammu & Kashmir. Since the said order was issued by the competent authority, it was a valid order and should be treated as such, although it was specifically not issued in the name of the Governor.

17. In the present case, two orders are challenged, one,

which was the order of the High Court based on the basis of the resolution of the full court and the other one issued by the Government of Jammu & Kashmir on the ground that they were stigmatic orders.

18. In our considered opinion, none of the aforesaid two orders could be said to be a stigmatic order as no stigma is attached. Of course, aforesaid letters were issued in view of the resolution of the full court meeting where the full court of the High Court held that the service of the petitioner is unsatisfactory. Whether or not the probation period could be or should be extended or his service should be confirmed is required to be considered by the full court of the High Court and while doing so necessarily the service records of the petitioner are required to be considered and if from the service records it is disclosed that the service of the petitioner is not satisfactory it is open for the respondents to record such satisfaction regarding his unsatisfactory service and even mentioning the same in the order would not amount to casting any aspersion on the petitioner nor it could be said that stating in the order that his service is unsatisfactory amounts to a stigmatic order.

19. This position is no longer *res integra* and it is well-settled that even if an order of termination refers to unsatisfactory service of the person concerned, the same cannot be said to be stigmatic. In *Pavanendra Narayan Verma v. Sanjay Gandhi PGI Of Medical Sciences* reported in (2002) 1 SCC 520, this Court has explained at length the tests that would apply to determine if an order terminating the services of a probationer is stigmatic. On the facts of that case it was held that the opinion expressed in the termination order that the probationer's "work and conduct has not been found satisfactory" was not *ex facie* stigmatic and in such circumstances the question of having to comply with the principles of natural justice do not arise. In this case court had the occasion to determine as to whether the impugned order therein was a letter of termination of services *simpliciter* or stigmatic termination. After considering various earlier

decisions of this Court in para 21 of the aforesaid decision it was stated by this Court thus: (SCC p. 528)

> "21. One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if anyone of the three factors is missing, the termination has been upheld."

In para 29 of the judgment, it further held thus: (SCC, p.529)

> "29. Before considering the facts of the case before us one further, seemingly intractable, area relating to the first test needs to be cleared viz. what language in a termination order would amount to a stigma? Generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic. *A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic.* The decisions cited by the parties and noted by us earlier, also do not hold so. *In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job.*"

20. In the case of *Krishnadevaraya Education Trust v. L.A. Balakrishna* reported in (2001) 9 SCC 319, the services of respondent-Assistant Professor were terminated on the ground that his on the job proficiency was not upto the mark. This Court held that merely a mention in the order by the employer that the services of the employee are not found to be satisfactory would

not tantamount to the order being a stigmatic one. This Court held in para 5 thus:-

> "5. There can be no manner of doubt that the employer is entitled to engage the services of a person on probation. During the period of probation, the suitability of the recruit/ appointee has to be seen. If his services are not satisfactory which means that he is not suitable for the job, then the employer has a right to terminate the services as a reason thereof. If the termination during probationary period is without any reason, perhaps such an order would be sought to be challenged on the ground of being arbitrary. Therefore, normally services of an employee on probation would be terminated, when he is found not to be suitable for the job for which he was engaged, without assigning any reason. If the order on the face of it states that his services are being terminated because his performance is not satisfactory, the employer runs the risk of the allegation being made that the order itself casts a stigma. We do not say that such a contention will succeed. Normally, therefore, it is preferred that the order itself does not mention the reason why the services are being terminated."
>
> 6. If such an order is challenged, the employer will have to indicate the grounds on which the services of a probationer were terminated. *Mere fact that in response to the challenge the employer states that the services were not satisfactory would not ipso facto mean that the services of the probationer were being terminated by way of punishment. The probationer is on test and if the services are found not to be satisfactory, the employer has, in terms of the letter of appointment, the right to terminate the services."*

21. In the case of *Chaitanya Prakash v. H. Omkarappa* reported in (2010) 2 SCC 623, the services of respondent were terminated by the appellant company. During the period of

probation, his services were not found to be satisfactory and he was also given letters for improvement of his services and his period of service was also extended and ultimately company terminated him. Court after referring to a series of cases held that the impugned order of termination of respondent is not stigmatic.

22. In the case of *State of Punjab v. Bhagwan Singh* reported in (2002) 9 SCC 636 this Court at paragraphs 4 & 5 held as follows: -

> "4. …….. In our view, when a probationer is discharged during the period of probation and if for the purpose of discharge, a particular assessment of his work is to be made, and the authorities referred to such an assessment of his work, while passing the order of discharge, that cannot be held to amount to stigma.
>
> 5. The other sentence in the impugned order is, that the performance of the officer on the whole was "not satisfactory". Even that does not amount to any stigma."

23. In the present case, the order of termination is a fall out of his unsatisfactory service adjudged on the basis of his overall performance and the manner in which he conducted himself. Such satisfaction even if recorded that his service is unsatisfactory would not make the order stigmatic or punitive as sought to be submitted by the petitioner. On the basis of the aforesaid resolution, the matter was referred to the State Government for issuing necessary orders.

24. One of the issues that were raised by the petitioner was that he was granted two increments during the period of two and a half years of his service. Therefore the stand taken by the respondents that his service was unsatisfactory is belied according to the petitioner because of the aforesaid action even on the part of the respondents impliedly accepting the position that his service was satisfactory.

25. The aforesaid submission of the petitioner is devoid of any merit in view of the fact that since the petitioner was continuing in service, therefore, the case for granting increment was required to be considered which was so granted. The mere granting of yearly increments would not in any manner indicate that after completion of the probation period the full court of the High Court was not competent to scrutinize his records and on the basis thereof take a decision as to whether or not his service should be confirmed or dispensed with or whether his probation period should be extended. The High Court has a solemn duty to consider and appreciate the service of a judicial officer before confirming him in service. The district judiciary is the bedrock of our judicial system and is positioned at the primary level of entry to the doors of justice. In providing the opportunity of access to justice to the people of the country, the judicial officers who are entrusted with the task of adjudication must officiate in a manner that is becoming of their position and responsibility towards society.

26. Upright and honest judicial officers are needed not only to bolster the image of the judiciary in the eyes of litigants, but also to sustain the culture of integrity, virtue and ethics among judges. The public's perception of the judiciary matters just as much as its role in dispute resolution. The credibility of the entire judiciary is often undermined by isolated acts of transgression by a few members of the Bench, and therefore it is imperative to maintain a high benchmark of honesty, accountability and good conduct.

27. In the light of the aforesaid discussion, the contentions raised by the petitioner are found to be without any merit and consequently they are rejected.

28. As a result, there is no merit in this Writ Petition, which is hereby dismissed, leaving parties to bear their own costs.

D.G. Writ Petition dismissed.

PAL @ PALLA
v.
STATE OF UTTAR PRADESH
(Criminal Appeal No. 1830 of 2010)

SEPTEMBER 22, 2010

[ALTAMAS KABIR AND A.K. PATNAIK, JJ.]

Code of Criminal Procedure, 1973 – ss. 210, 200, 202 and 482 – Clubbing of cases u/s. 210 – Two cases arising out of the same incident – One on basis of charge-sheet filed by police – Other on basis of complaint – Accused in two cases not common – Accused in one case witnesses in the other and vice versa – Holding of common trial – Held: Provision contemplated in Section 210 not attracted – Version in the complaint case and police report totally different, though, the incident was same – Accused also different in two separate proceedings – Prejudice is likely to be caused in a single trial where person was both accused and witness in view of two separate proceedings out of which trial arose – Thus, two trials should be held simultaneously but not as a single trial – Penal Code, 1860 – ss. 147, 323, 302.

The appellant lodged a First Information Report against 'Y', 'P', 'O', 'K' and 'KN' for committing murder of his father. The appellant and 'GS' filed a writ petition praying for the investigation to be entrusted to an independent agency. During pendency, the Investigating Officer submitted a charge-sheet against two persons not named by the appellant in the FIR. Thereafter, the Investigating Officer filed another charge-sheet naming 'GS' as an accused. The High Court held that the investigation was not proper, but the relief sought for by the appellant had become infructuous. Thereafter, the appellant filed a protest petition which was treated as a

complaint and statements were recorded by the magistrate u/ss. 200 and 202 of the Code of Criminal Procedure, 1973. The magistrate issued summons to all the accused named in the complaint and in the FIR lodged by the appellant. The High Court upheld the order but directed that both the cases, one on the basis of the charge-sheet filed by the police and the other on the basis of the complaint filed by the appellant, would run simultaneously. Meanwhile, both the cases were committed to the Court of Session for trial. The accused persons filed an application before the Sessions Judge praying that the two cases be tried separately. The Sessions Judge framed charges against the accused named in both the cases and the proceedings were conducted. The persons against whom the police submitted a charge-sheet were the witnesses named by the appellant in FIR. The prosecution examined the winesses. The appellant filed an application for closing the evidence of the prosecution but the same was rejected. The appellant then filed an application under Section 482 Cr.P.C. praying for a direction that the trial of the two cases be held separately. The Single Judge of the High Court disposed of the application. Therefore, the appellant filed the instant appeal.

Disposing of the appeal, the Court

HELD: 1.1 Section 210 of the Code of Criminal Procedure, 1973 provides the procedure to be followed when there is a complaint case and police investigation in respect of the same offence. Although, under Section 210 Cr.P.C. the magistrate may try the two cases arising out of a police report and a private complaint together, the same, contemplates a situation where having taken cognizance of an offence in respect of an accused in a complaint case, in a separate police investigation such

a person is again made an accused, then the magistrate may inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report. [Paras 22 and 23] [726-G-H; 727-D-F]

2.1 In the instant case, the accused are different in the two separate proceedings and the situation has, in fact, arisen where prejudice in all possibility is likely to be caused in a single trial where a person is both an accused and a witness in view of the two separate proceedings out of which the trial arises. The version in the complaint case and the police report are totally different, though, arising out of the same incident. Thus, the two trials should be held simultaneously but not as a single trial. [Para 23] [727-F-H; 728-A]

2.2 The facts of the case also warrant that the two trials should be conducted by the same Presiding Officer in order to avoid conflict of decisions. Clubbing and consolidating the two cases, one on a police challan and the other on a complaint, if the prosecution versions in the two cases are materially different, contradictory and mutually exclusive, should not be consolidated but should be tried together with the evidence in the two cases being recorded separately, so that both the cases could be disposed of simultaneously. [Para 24] [728-B-C]

2.3 Although, the High Court relied on the provisions of Section 210 of the Code in directing that the two cases be clubbed together, the fact situation do not really attract the provisions contemplated in the Section 210. On the other hand, the trial court, in the unusual facts of the case, is required to hear the two cases together, though separately, and take evidence separately, except in respect of all witnesses who would not be affected either by the provisions of Article 20(2) of the Constitution or

Section 300 Cr.P.C. [Para 25] [728-D-F]

2.4 The order of the High Court impugned in the appeal cannot be sustained and is set aside. The trial court should proceed to hear the two cases simultaneously, but separately, and dispose of the same simultaneously as well, as expeditiously as possible. [Paras 26 and 27] [728-F-G]

Harjinder Singh vs. State of Punjab and Ors. **(1985) 1 SCC 422;** *Kewal Krishan s/o Lachman Das vs. Suraj Bhan and Anr.* **(1980) (Supp.) SCC 499;** *Khetrabasi Samual Etc. vs. State of Orissa* **(1969) 2 SCC 571;** *Dilawar Singh vs. State of Delhi* **(2007) 12 SCC 641 – referred to.**

Case Law Reference:

(1985) 1 SCC 422	**Referred to.**	**Para 16**
(1980) (Supp.) SCC 499	**Referred to.**	**Para 17**
(1969) 2 SCC 571	**Referred to.**	**Para 19**
(2007) 12 SCC 641	**Referred to.**	**Para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1830 of 2010.

From the Judgment & Order dated 14.12.2007 of the High Court of Judicature at Allahabad in Criminal Misc. Application No. 29076 of 2007.

Dr. Madan Sharma, J.P. Tripathi, Asha Upadhyay, R.D. Upadhyay for the Appellant.

Shail Kr. Dwivedi, AAG, Sanjay Visen, Vandana Mishra, Kamlendra Mishra for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. This appeal is directed against the judgment and order passed by the Allahabad High Court on 14th December, 2007, disposing of the Appellant's application under Section 482 Cr.P.C. (Crl.M.A.No.29076 of 2007) with certain directions which were in keeping with the orders of the learned Magistrate impugned in the said petition.

3. On 1st July, 1996, the Appellant herein lodged a First Information Report at Nanauta Police Station in the District of Saharanpur, U.P., in regard to offences alleged to have been committed by Yashpal, Pramod, Dharma, Kalu and Kanwar, all residents of Village Bhojpur under Nanauta Police Station, under Sections 147, 323 and 302 I.P.C. The said five accused were alleged to have committed the murder of Bhartu, the father of the Appellant. According to the Appellant, the Investigating Officer began to conduct the investigation in a manner which was geared to favouring the accused. The Appellant, accordingly, filed a Writ Petition (Crl.) No.1166 of 1997, together with Gyan Singh, before the Allahabad High Court and prayed for the investigation to be entrusted to an independent agency.

4. While the aforesaid writ petition was pending before the High Court, the Investigating Officer submitted a charge-sheet against one Phool Singh and Vishwas on 23rd April, 1997, despite the fact that they had not been named by the Appellant in the First Information Report lodged by him. Subsequently, another charge-sheet was filed by the Investigating Officer on 1st August, 1997, in which Gyan Singh, who was one of the petitioners in Writ Petition (Criminal) No.1166 of 1997, was named as an accused.

5. The writ petition came up for hearing before the High Court on 8th September, 1997, and was disposed of by the High Court which came to the conclusion that the investigation was improper, but, since charge-sheet had already been filed, the relief sought for by the Appellant for investigation by a different agency had become infructuous. The writ petition was,

accordingly, disposed of by observing that the Appellant could seek other remedial measures available to him, including filing of a protest petition. Thereafter, on 3rd February, 1998, the Appellant filed a protest petition before the Judicial Magistrate, Deoband, District Saharanpur, and the same was treated as a complaint and statements were recorded by the learned Magistrate under Sections 200 and 202 Cr.P.C. On 5th September, 1998, the learned Magistrate issued summons to all the five accused who were named in the complaint and whose names also appeared in the First Information Report lodged by the Appellant.

6. It is against the said order of the learned Magistrate issuing summons that an application was filed by the five accused under Section 482 Cr.P.C. in Criminal Misc. Application No.857 of 1999, challenging the said order which was, however, dismissed by the High Court on 15th May, 2002. The High Court upheld the order passed by the learned Magistrate on 5th September, 1998, but directed that both the cases, one on the basis of the charge-sheet filed by the police and the other on the basis of the complaint filed by the Appellant, would run simultaneously.

7. After their application had been disposed of by the High Court on 16th May, 2002, the accused persons made an application before the learned Sessions Judge on 11th April, 2004, praying that the two cases be tried separately, since, in the meantime, both the cases had been committed to the Court of Sessions for trial. After their cases were committed to the Court of Sessions, only one sessions trial, being S.T.No.772 of 2003, was commenced. The learned Sessions Judge framed charges against the accused named in both the cases, i.e., the charge-sheet submitted by the police and the complaint filed by the Appellant. As a result, all those persons, against whom the police had submitted a charge-sheet, were the witnesses named by the Appellant in his First Information Report. The accused in both the cases denied the charges and claimed to be tried. The charges against both sets of accused

were framed in the same Sessions Trial No.772 of 2003 and the entire proceeding was being conducted both in respect of the complaint filed by the Appellant and that filed by the investigating authorities.

8. Difficulties arose when the prosecution started examining its witnesses according to the charge-sheet filed by the police and the Sessions Judge proceeded in the trial of cases adopting the procedure provided under Section 210(2) Cr.P.C., although, it was pointed out to the learned Sessions Judge that since none of the accused in both the cases was common, the procedure prescribed under Section 210(2) Cr.P.C. could not be legally adopted and the procedure prescribed under Section 210(3) would be applicable to the facts of the case. It was also pointed out that earlier also the High Court had directed the cases to be tried simultaneously and the accused in the complaint case had themselves made an application on 11th April, 2004, for separate trials of the two cases.

9. On 31st October, 2007, the prosecution examined its witnesses mentioned in the charge-sheet and an application was made by the Appellant for closing the evidence of the prosecution, which was rejected by the learned Sessions Judge upon observing that it was the prerogative of the prosecution to examine or not to examine any witness and the complainant had no say in the said matter. It is at this stage on 12th December, 2007, that the Appellant moved the Allahabad High Court under Section 482 Cr.P.C. praying for a direction that the trial of the two cases be held separately. The said application came up for hearing before the learned Single Judge of the High Court on 14th December, 2007, and was disposed of by the learned Judge upon holding that the procedure adopted by the Magistrate did not suffer from any infirmity or error in clubbing both the cases in which witnesses have been mentioned.

10. Being aggrieved by the order of the High Court in

upholding the order of the Magistrate clubbing the two cases together, the Appellant filed the special leave petition, out of which the present appeal arises.

11. The question, therefore, which arises for consideration in this appeal is whether a common trial can be held in respect of two cases, one on the basis of the charge-sheet filed by the police and the other on the basis of a protest petition which has been treated as a complaint having been committed to the Court of Sessions, although, none of the accused in the said two cases are common. In fact, as indicated hereinabove, the accused in one of the cases are the witnesses in the other and vice versa.

12. At this stage, it may be indicated that at an earlier point of time, the learned Magistrate had taken cognizance on the protest petition filed by the Appellant, treating the same to be a complaint, and summons were issued against the persons arraigned as accused therein. The accused persons challenged the order of the learned Magistrate before the High Court in Criminal Misc. Application No.857 of 1999, which was dismissed on 16th May, 2002, but with the direction that the case arising out of the police report and the other case arising out of the complaint should be tried simultaneously by the Court of Sessions in order to find out as to whose version was true and who were the real culprits.

13. On the basis of the said directions, the learned Magistrate clubbed the two proceedings together, in keeping with the provisions of Section 210 of the Code, as there could be possibility of inconsistent findings. When the same was questioned before the High Court, it held that the Magistrate appeared to have adopted the correct procedure for clubbing both the cases and that the complainant would be at liberty to examine the witnesses shown in the complaint case in order to serve the cause of justice. The trial court was also directed to give permission to the complainant to examine the witnesses cited by him.

14. Mr. R.D. Upadhyay, learned counsel, who appeared for the appellant, urged that Section 210 Cr.P.C. provides for the procedure to be followed when there is a complaint case and a police investigation in respect of the same offence. He submitted that Sub-Section (2) of Section 210 makes it clear that if the Magistrate takes cognizance of an offence on a report filed by the Investigating Officer under Section 173 Cr.P.C. against any person, who is also an accused in a complaint case, the Magistrate shall inquire into or try the two cases together, as if both the cases have been instituted on a police report. Mr. Upadhyay submitted that Sub-Section (3) of Section 210 was not attracted to the facts of this case since it deals with a procedure where, if the police report did not relate to any accused in the complaint case or the Magistrate did not take cognizance of any offence on the police report, he would proceed with the inquiry or trial, which might have been stayed by him under Sub-Section (1) in accordance with the provisions of the Code.

15. According to Mr. Upadhyay, the clubbing of the two cases together was not in accordance either with the provisions of Sub-Section (2) of Section 210 Cr.P.C. or the directions given by the High Court in the earlier proceedings between the parties. Mr. Upadhyay urged that having regard to the peculiar facts of the case, where the accused in one case is the witness in the other, difficulties were bound to arise at the time of examination of witnesses in a common trial. On the other hand, if the two cases were tried separately, as directed by the High Court and the witnesses were examined separately, it would be possible to arrive at the truth after comparing the two sets of evidences that would be led in the two separate cases. Learned counsel submitted that the order passed by the High Court was contrary to the provisions of Section 210(2) Cr.P.C. and was liable to be set aside.

16. In support of his submissions, Mr. Upadhyay firstly referred to the decision of this Court in *Harjinder Singh vs. State of Punjab & Ors.* [(1985) 1 SCC 422], where in an almost

identical situation, this Court, while interpreting Section 223 Cr.P.C., held that clubbing of the two cases, one on a police challan and the other on a complaint, was not permissible and if the prosecution versions in the two cases were materially different, contradictory and mutually exclusive, as in the instant case, such cases may be ordered to be tried together, but not consolidated. In other words, the evidence is to be recorded separately in both the cases and they should be disposed of simultaneously so that the procedure does not infringe the provisions of Article 20(2) of the Constitution read with Section 300 Cr.P.C.

17. In this regard reference was also made to an earlier decision of this Court in *Kewal Krishan s/o Lachman Das vs. Suraj Bhan & Anr.* [(1980 (Supp.) SCC 499], on which reliance had been placed in *Harjinder Singh's* case (supra), where the same views had been expressed and it had been observed that the two cases should be tried separately but by the same court to avoid risk of two courts coming to conflicting findings. Mr. Upadhyay submitted that Section 223 Cr.P.C. did not contemplate clubbing of cases, though, it provides for trial of two cases arising out the same transaction, on a police report and on a complaint, separately, but by the same court. Learned counsel submitted that the High Court was, therefore, wrong in clubbing the two cases together in a single trial and the impugned order was, therefore, liable to be set aside.

18. On behalf of the State of Uttar Pradesh, Mr. Shail Kumar Dwivedi, learned Additional Advocate General, tried to persuade us to take the view which has been taken by the High Court in clubbing the two cases together. He reiterated the reasoning of the High Court that in view of the fact that the High Court had earlier chosen not to quash the order dated 5th September, 1998, taking cognizance of the offence on the protest petition filed on behalf of the Appellant herein, the case arising out of the cognizance taken on the police report was required to be tried simultaneously with the other case by the Court of Sessions in order to find out as to whose version was

true and who were the real culprits. Mr. Dwivedi submitted that by clubbing the two cases together, the Sessions Court had substantially complied with the directions of the High Court by trying the two cases together and that having regard to the fact situation, the Sessions Judge had no option but to club the two cases together for trial. In fact, Mr. Dwivedi contended that unless the two cases were clubbed together, there could be a possibility of inconsistent findings and that the High Court had rightly held that the expression "simultaneously" would mean that both the cases should be taken together.

19. In support of his submissions, Mr. Dwivedi firstly referred to the decision of this Court in *Khetrabasi Samual Etc. vs. State of Orissa* [(1969) 2 SCC 571], wherein, on the basis of Section 252 of the Code of Criminal Procedure, 1898, this Court upheld the direction given by the Magistrate to club the two cases together on the ground that Section 239 of the Code allowed the trial of a number of persons whether accused of the same offence or of different offences, if these were committed in the course of the same transaction.

20. Reliance was also placed on another decision of this Court in *Dilawar Singh vs. State of Delhi* [(2007) 12 SCC 641], which, however, dealt with the procedure to be adopted under Section 210 Cr.P.C., 1973, as a whole. Mr. Dwivedi urged that the order passed by the High Court upholding the order of the learned Magistrate, did not call for any interference in the facts of this case.

21. Having heard learned counsel for the respective parties, we are unable to accept the submissions advanced by Mr. Dwivedi on behalf of the State of Uttar Pradesh.

22. Section 210 Cr.P.C. provides the procedure to be followed when there is a complaint case and police investigation in respect of the same offence. Sub-Section (1) of Section 210 provides that when in a case instituted otherwise than on a police report, namely, a complaint case, the Magistrate is

informed during the course of inquiry or trial that an investigation by the police is in progress in relation to the offence which is the subject matter of inquiry or trial held by him, the Magistrate is required to stay the proceedings of such inquiry or trial and to call for a report on the matter from the Police Officer conducting the investigation. Sub-Section (2) provides that if a report is made by the Investigating Officer under Section 173 and on such report cognizance of any offence is taken by the Magistrate against any person, who is an accused in a complaint case, the Magistrate shall inquire into or try the two cases together, as if both the cases had been instituted on a police report. Sub-Section (3) provides that if the police report does not relate to any accused in the complaint case, or if the Magistrate does not take cognizance of any offence on a police report, he shall proceed with the inquiry or trial which was stayed by him, in accordance with the provisions of the Code.

23. Although, it will appear from the above that under Section 210 Cr.P.C. the Magistrate may try the two cases arising out of a police report and a private complaint together, the same, in our view, contemplates a situation where having taken cognizance of an offence in respect of an accused in a complaint case, in a separate police investigation such a person is again made an accused, then the Magistrate may inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report. That, however, is not the fact situation in the instant case, since the accused are different in the two separate proceedings and the situation has, in fact, arisen where prejudice in all possibility is likely to be caused in a single trial where a person is both an accused and a witness in view of the two separate proceedings out of which the trial arises. In our view, this is a case where the decision in *Harjinder Singh's* case (supra) would be more apposite. In the said case, the question of Article 20(2) of the Constitution, as well as Section 300 Cr.P.C., relating to double jeopardy was considered. A similar situation has arisen in this case where

the version in the complaint case and the police report are totally different, though, arising out of the same incident. In our view, this is a case where the two trials should be held simultaneously but not as a single trial.

24. The facts of the case also warrant that the two trials should be conducted by the same Presiding Officer in order to avoid conflict of decisions. As was observed in *Harjinder Singh's* case (supra) clubbing and consolidating the two cases, one on a police challan and the other on a complaint, if the prosecution versions in the two cases are materially different, contradictory and mutually exclusive, should not be consolidated but should be tried together with the evidence in the two cases being recorded separately, so that both the cases could be disposed of simultaneously.

25. Although, the High Court has relied on the provisions of Section 210 of the Code in directing that the two cases be clubbed together, in our view, the fact situation does not really attract the provisions contemplated in the said section. On the other hand, as indicated hereinabove, the trial court, in the unusual facts of the case, is required to hear the two cases together, though separately, and take evidence separately, except in respect of all witnesses who would not be affected either by the provisions of Article 20(2) of the Constitution or Section 300 Cr.P.C.

26. The order of the High Court impugned in the appeal cannot, therefore, be sustained and is, accordingly, set aside.

27. The trial court shall proceed to hear the two cases simultaneously, but separately, in the light of the observations made hereinbefore and dispose of the same simultaneously as well, as expeditiously as possible.

28. The Appeal is disposed of accordingly.

N.J. Appeal disposed of.

MD. NOOMAN & ORS.
v.
MD. JABED ALAM & ORS.
(Civil Appeal No. 2579 of 2004)

SEPTEMBER 22, 2010

[AFTAB ALAM AND R.M. LODHA, JJ.]

Suit – Eviction suit – Issue regarding title between parties – Recording of finding in favour of plaintiff – Subsequent suit for declaration of title and recovery of possession between the same parties – Effect of earlier suit on the subsequent suit – Held: Finding recorded in favour of the plaintiff in the earlier suit for eviction would operate as res judicata in the subsequent suit for declaration of title and recovery of possession between the parties – Question of title was directly and substantially in issue between the parties in the earlier suit – Res judicata.

The plaintiff, mother of the respondents, filed a suit for eviction against the defendant, father of the appellants. The issues were framed regarding the plaintiff's claim to the title over the suit property and the relationship of landlord and tenant between the parties. The trial court upheld the plaintiff's claim to the title but did not grant decree of eviction since the relationship of landlord and tenant was not established between the parties. The appellate court affirmed the order of the trial court. Thereafter, the plaintiff filed another suit against the defendant seeking declaration of title over the property and recovery of its possession from the defendant. The trial court decreed the suit. The defendant filed an appeal and the same was allowed. Thereafter, the plaintiff died and her legal representatives-respondent filed the second appeal. The High Court set aside the judgment and the

decree passed by the first appellate court and restored the judgment and the decree of the trial court. Therefore, the appellants filed the instant appeal.

Dismissing the appeal, the Court

HELD: The issue of title was expressly raised by the parties in the earlier eviction suit and it was expressly decided by the eviction court. The question of title was directly and substantially in issue between the parties in the earlier suit for eviction. Hence, the High Court was right in holding that the finding recorded in favour of the plaintiff in the earlier suit for eviction would operate as *res judicata* in the subsequent suit for declaration of title and recovery of possession between the parties. [Para 17] [740-D-F]

Pardip Singh vs. Ram Sundar Singh **AIR (36) 1949 Patna 510 – approved.**

Shamim Akhtar v. Iqbal Ahmad and Anr. **(2000) 8 SCC 123;***Sajjadanashin Sayed Md.B.E.Edr.by L.Rs.(D) vs, Musa DadabhaiUmmer and Ors.* **(2000) 3 SCC 350 – referred to.**

Case Law Reference:

(2000) 8 SCC 123	**Referred to.**	**Para 14**
(2000)3 SCC 350	**Referred to.**	**Para 15**
AIR (36) 1949 Patna 510	**approved.**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2579 of 2004.

From the Judgment & Order dated 24.05.2002 of the High Court of Judicature at Patna in Appeal from appellate decree No. 236 of 1987.

H.L. Agarwal, Gaurav Agrawal, Dr. Kailash Chand for the Appellates.

Seema Kashyap, S.K. Sinha for the Respondents.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. A finding on the question of title recorded in a suit for eviction would how far be binding in a subsequent suit for declaration of title and recovery of possession between the same parties? This is the question that arises for consideration in this appeal. The answer to the question would depend on, in what manner the question of title was raised by the parties and how it was dealt with by the court in the eviction proceedings. Ordinarily, it is true, in a suit for eviction even if the court goes into the question of title, it examines the issue in an ancillary manner and in such cases (which constitute a very large majority) any observation or finding on the question of title would certainly not be binding in any subsequent suit on the dispute of title. But there may be exceptions to the general rule and as we shall find presently, the case in hand seems to fall in that exceptional category of very limited number of cases.

2. Amina Khatoon, the mother of respondent nos.1-4, (who were substituted in her place and brought on record after her death) instituted a suit for eviction (Title Suit No.36 of 1973) in the Court of Second Munsif, Arrah, against Md. Lukman, the father of appellant nos.1-6 (who were similarly substituted in his place and brought on record after his death). According to the plaintiff Amina Khatoon, the suit property originally belonged to her mother-in-law, Sulakshana. Sulakshana had two other sons, Md. Lukman (the original defendant) and Md. Jan, apart from Amina's husband, Mahmood Hassan. Amina further claimed that Sulakshana sold the suit house to her through a registered sale deed dated August 13, 1957. Following the purchase of the suit house, she moved the Block Development Officer (BDO) and the municipality for mutation of her name in

respect of the suit house in the revenue and municipal records. The defendant Md. Lukman, filed an objection before the BDO, but his objection was disallowed and her name was entered in the revenue and municipal records. Later on, the municipality filed a suit against her for arrears of tax whereupon all the outstanding dues of tax were paid by her. It was further the case of Amina, that she had let out the suit house to the defendant about 4 or 5 years prior to the filing of the suit on a monthly rent of Rs.10.00 (rupees ten only). The defendant did not pay the rent from September, 1971 to February 13, 1973. She then sent a registered notice to him under section 106 of the Transfer of Property Act, 1882 through her lawyer determining the defendant's tenancy and asking him to vacate the house by March 31, 1973. The defendant did not vacate the house forcing her to go to the court.

3. The defendant in his written statement, apart from the formal objections to the maintainability of the suit, denied that Sulakshana executed any sale deed with respect to the suit house in favour of the plaintiff. He described the sale deed, relied upon by the plaintiff as the basis of her title, as a forged and fabricated document. In this connection, the defendant stated that Sulakshana had an attack of paralysis before August 13, 1957 when the sale was said to have been executed by her. She had lost her senses and she was not in a position to execute any sale deed. No consideration was paid by the plaintiff to Sulakshana and the title to the house never passed to her. The defendant set up a rival claim of title over the suit house. He stated that Sulakshana had transferred the suit house in his favour in 1950, by Hiba (oral gift) and since then he was coming in possession of the suit property. Originally, it was parti (vacant) land. He submitted a plan in the municipality for construction of the house on it and constructed the house after the plan was sanctioned. He was living in the house constructed by him over the land which was given to him by his mother by Hiba. He denied any relationship of landlord and tenant with the plaintiff and also denied to have taken the suit

house from the plaintiff on a monthly rent of Rs.10.00 (rupees ten only). He never paid any rent to the plaintiff, nor was any rent due against him.

4. On the basis of the pleadings of the parties, the trial court framed seven issues, of which issue nos.3 & 4 relating to the plaintiff's claim of title over the suit property and issue no.5 about the relationship of landlord and tenant between the parties are relevant for this appeal. Those three issues are as under:

"3. Has the plaintiff got title to the suit land?

4. Is the sale deed genuine, valid and for consideration?

5. Is there any relationship of landlord and tenant between the Parties?"

5. In support of the rival claims of title over the suit property, both the plaintiff and the defendant led their respective evidences, both oral and documentary. The defendant also examined the third brother, Md. Jan from his side as DW11. On a consideration of the evidences adduced before it, the trial court upheld the plaintiff's claim of title to the property arriving at the following finding:

"In view of the discussion made above I hold that the sale deed (Ext.4) is genuine and that story set up by the defendant that an oral hiba was made by Sulachna to him has not been proved. The plaintiff has got Title to the suit land and the sale deed is genuine valid and for consideration."

6. It then took up issue nos.5 and 6 (about the plaintiff's entitlement to a decree of eviction) together and came to hold and find that the relationship of landlord and tenant between the parties had not been proved. In light of its finding on issue no.5, the court further observed that in case the question of title is raised by the defendant and if it is found that there is no contract

of tenancy, the proper course would be to dismiss the suit and not to convert it into a declaratory or possessory suit which is of altogether a different nature. The court further pointed out that the suit before it was neither for declaration of title nor the plaintiff had paid *ad valorem* court fee. The plaintiff was, therefore, not entitled to a decree of eviction since the relationship of landlord and tenant was not established between the parties. It, accordingly, dismissed the suit by judgment and order dated December 23, 1974.

7. The plaintiff took the matter in appeal, (Title Appeal No.12 of 1975) which too was dismissed by the Second Additional District Judge, Arrah, by judgment and order dated February 19, 1975. From the judgment of the first appellate court, it appears that before it the main focus was on the issue of relationship of landlord and tenant between the parties. The trial court found that the suit property was vacant land and not a house (the case of the plaintiff was that the suit property was a piece of land 3 kathas and 5 dhurs in area with a fallen down house). It also noted that on behalf of the respondent no argument was advanced on the invalidity of the sale deed and the controversy was mainly about the relationship of landlord and tenant between the parties. On this issue, the appellate court came to the same finding as the trial court and dismissed the plaintiff's appeal observing as follows:

"10. It is quite clear from the above enunciated principle that in order to get a decree in such a suit the plaintiff must not come to the Court with a false story. In the present case, it is quite obvious the plaintiff has come with a false case that she let out a house on the suit land to the deft (*sic* defendant) on a rent of Rs.10/- per month. If there is no relationship of landlord and tenant between the parties the plaintiff should have prayed for declaration her title and recovery of possession after paying advalorem Court fee on the current market value of the suit property. By filing a suit for eviction of the defendant and paying small Court

fee on twelve month alleged rent of the house, the plaintiff has adopted a tricky way of getting her title declared and possession of the suit house recovered after paying very low amount of the court fee."

8. The plaintiff did not take the matter any further but filed another suit (Title Suit No.16/82 of 1978-79) against Md. Lukman seeking declaration of title over the property and recovery of its possession from the defendant. In this suit, her claim of title over the suit property was exactly the same as in the previous suit. The defendant too, apart from raising the objections based on limitation and *res judicata* and similar other formal pleas mainly stuck to the same story as in the previous case. According to the defendant, the sale deed relied upon by the plaintiff was not a genuine document for consideration and it was not executed by Sulakshana, who was the mother of the defendant. It was stated on behalf of the defendant that Sulakshana died in 1957. In the beginning of that year she suffered from fever for about a month and remained confined to bed and thereafter she suffered an attack of paralysis. She lost all power of understanding and continued in that state till her death in August 1957. The defendant specifically pleaded that on August 13, 1957 when the disputed sale deed was shown to have been executed, she had no power of understanding. It was further stated on his behalf that the plaintiff's husband was a clever litigant and he manoeuvred to fabricate the sale deed by setting up some other woman as Sulakshana. It was also stated that if there was in existence any sale deed purportedly executed by Sulakshana, it must have been manufactured in collusion with the scribe, the attesting witnesses and the registrar and it would not confer any right, title or interest in the suit property on the plaintiff. It was further the case of the defendant that the disputed sale deed was never acted upon and the plaintiff never came in actual possession of the suit property on this basis. The defendant also denied the case of the plaintiff that she had inducted him as a tenant in the suit premises on a monthly rental of Rs.10.00 (rupees

ten only) or as a licensee, as totally false and concocted. The defendant claimed that his mother Sulakshana had given him the suit property in the year 1950 by Hiba (oral gift) and put him in actual physical possession of the suit premises and since then he was coming in its possession. He constructed a boundary wall around the land and a house consisting of five rooms, etc. It was lastly claimed that the defendant was coming and continuing in possession to the knowledge of everyone, including the plaintiff and, thus, the defendant had, in any event, acquired title by adverse possession.

9. It is, thus, to be seen that in the second suit too both parties went to the court with the same stories as in the previous suit, though, it is true that this time each side led some additional evidence in support of its case, for example, the plaintiff relied upon and produced a copy of the judgment in the earlier suit in which her claim of title over the suit property was upheld.

10. The trial court framed a number of issues, of which issue nos. III, IV, V & VI are relevant for this appeal and are as follows:

"(III) Has the plaintiff got title over the suit property?

(IV) Is there any relationship of landlord and tenant between the plaintiff and the defendant?

(V) Has the plaintiff acquired title by adverse possession?

(VI) Is the plaintiff entitled to recovery of possession? "

The trial court considered issue nos. III, IV & V together and came to find and hold that the plaintiff had succeeded in proving her title whereas the defendant had failed to prove his adverse possession. Issue nos. III & V were therefore decided in the plaintiff's favour while issue no. IV was decided against her. On the basis of its findings, the trial court held that the

plaintiff had valid cause of action and it, accordingly, decreed the suit by judgment and order dated February 28, 1981.

11. Against the judgment and order passed by the trial court the defendant preferred an appeal (Title Appeal No.33 of 1981). The first appellate court (the eighth Additional District Judge, Arrah), on a reappraisal of the evidence produced by the parties, came to find and hold that the plaintiff had failed to prove that Sulakshana had put her left thumb impression on the sale deed (Ext.3) after understanding its contents and she had, thus, failed to prove her title to the suit premises on the basis of the sale deed. The appellate court, accordingly, allowed the appeal and by judgment and order dated May 21, 1987 set aside the judgment and decree passed by the trial court and dismissed the plaintiff's suit.

12. The original plaintiff was dead by this time and her heirs and legal representatives, the present respondents, took the matter in second appeal (Appeal from Appellate Decree No.236 of 1987) to the High Court. In the High Court, the second appeal was heard on the substantial question of law framed as under:

> "…whether the judgment and decree regarding title passed in Title Suit No.36 of 1973 (Ext.15) shall operate as *res judicata* between the parties on the question of title."

13. The High Court by judgment and order dated May 24, 2002 answered the question in the affirmative, in favour of the appellants (respondents herein), allowed the appeal, set aside the judgment and order passed by the appeal court below and restored the judgment and decree of the trial court. The High Court noted that the earlier suit (for eviction) and the later suit for declaration of title and recovery of possession were between the same parties and were contested on exactly the same claims raised by the two sides. The plaintiff on each occasion was claiming title to the suit premises on the basis of a sale deed executed by Sulakshana in her favour in the year 1950.

The defendant on each occasion alleged that the sale deed was sham, fake and fabricated and set up a rival claim of title on the plea that his mother Sulakshana had made an oral gift of the suit premises in his favour in the year 1950 and since then he was coming in possession over it. The premises, when it was given to him in gift, was a vacant land over which he had constructed a house after obtaining sanction from the municipality. The High Court, therefore, observed as under:

> "9… The facts of the earlier Title Suit No.36 of 1973, which was between the same parties and present Title Suit No.16 of 1978 also between the same parties, show that the plea taken by both the parties regarding title in both the Title Suits are same.
>
> 10. In the facts and circumstances of the case, the judgment and decree regarding title passed in Title Suit No.36 of 1973 (Ext.15) shall operate as *res judicata* between the parties on the question of title."

14. Mr. H.L. Agrawal, learned senior advocate, appearing for the appellant contended that the High Court had seriously erred in holding that the finding in the earlier suit of eviction would operate as *res judicata* in the subsequent suit for declaration of title and recovery of possession. Mr. Agrawal contended that a court dealing with an eviction suit was a creature of the Rent Act and was a court of limited jurisdiction. It had no authority or jurisdiction to decide disputes of title and hence, any finding recorded by it on the larger issue of title could not be binding on a court under the Code of Civil Procedure adjudicating upon a dispute of title between the two sides. He further submitted that there may be instances where in a suit for eviction the tenant might deny the title of the person seeking his ejectment and in those cases the rent court may incidentally go into the question of title in order to decide on the primary issue of eviction. But its findings on the issue of title would only be incidental and never binding in a proper suit for declaration of title and recovery of possession. In support of the submission

he relied upon a decision of this Court in *Shamim Akhtar* v. *Iqbal Ahmad & Anr.*, (2000) 8 SCC 123, in which it is said that in an eviction suit under the Rent Act, the question of title can be considered by the court as an incidental question and the final determination of title must be left to the decision of the competent court. The decision in *Shamim Akhtar* arose from U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 and the Provincial Small Cause Courts Act, 1887 and it was on a totally different set of facts. The observation of the court relied upon by Mr. Agrawal was of course stating the general rule and no more than that. The decision in *Shamim Akhtar* in no way helps the case of the appellants in the present appeal.

15. The counsel for the respondents on the other hand relied upon a decision of this court in *Sajjadanashin Sayed Md. B.E.Edr.by LRs. (D) vs. Musa Dadabhai Ummer and Ors.,* (2000) 3 SCC 350. The decision in this case dealt with the question when a matter can be said to be directly and substantially in issue and when it is only collaterally and incidentally in issue. The decision in *Sajjadanashin* does seem to help the case of the respondents. But we may state here that Mr. Agrawal with great fairness brought to our notice a decision of the Patna High Court[1] in *Pardip Singh vs. Ram Sundar Singh*, AIR (36) 1949 Patna 510, though it is clearly against him. It is an old decision in which the division bench of the High Court placed reliance on two earlier decisions of the Privy Council. In *Pardip Singh* Meredith J., speaking for the division bench of the court observed as follows:

> "The decision in a rent suit is not *res judicata* on the question of title unless the question of title had to be decided, was expressly raised, and was expressly decided between the parties and in each case it is necessary to examine carefully the decision in the rent suit before any

1. To which both, Mr. Agrawal and the two of us have been very closely associated at some time.

> opinion can be formed as to whether it operates as *res judicata* on the question of title or not. Ordinarily the decision would be *res judicata* only with regard to the existence of the relationship of landlord and tenant. The difference in the two classes of cases is very well illustrated in two Privy Council decisions, namely, *Run Bahadoor Singh* v. *Mt. Lucho Koer*, 12 I.A. 23: (11 Cal. 301 P.C.), where it was held that the decision was not *res judicata* as the question of title had been gone into only incidentally and collaterally, and *Radhamadhub Holdar* v. *Manohar Mookerji,* 15 I.A. 97: (15 Cal. 756 P.C.), where the question of title was directly decided in a rent suit, and the decision was held to be *res judicata*."

16. We respectfully concur with the view expressed in the decision in *Pardip Singh*.

17. We have carefully examined the pleadings of the parties in the two suits and the evidences led by them in support of their respective claims regarding title in the two suits. And, we are satisfied that the issue of title was expressly raised by the parties in the earlier eviction suit and it was expressly decided by the eviction court. The question of title was directly and substantially in issue between the parties in the earlier suit for eviction. Hence, the High Court was right in holding that the finding recorded in favour of the plaintiff in the earlier suit for eviction would operate as *res judicata* in the subsequent suit for declaration of title and recovery of possession between the parties.

18. We, thus, find no merit in the appeal. It is dismissed, but in the facts and circumstances of the case there will be no order as to costs.

N.J Appeal dismissed.

COMMISSIONER OF CENTRAL EXCISE,
VISAKHAPATNAM-II
v.
M/S. NCC BLUE WATER PRODUCTS LTD.
(Civil Appeal Nos.4608-4609 of 2005)

SEPTEMBER 24, 2010

[D.K. JAIN AND H.L. DATTU, JJ.]

Central Excise Act, 1944 – s.3(1) or its proviso – Sale of shrimps and shrimp seeds in Domestic Tariff Area by an EOU without approval of the Development Commissioner – Exigibility to excise duty – Held: Excise duty to be assessed under s.3(1) and not under proviso to the said section – Circular No. 618/9/2002-CX dated 13th February, 2002 issued by CBEC – Exim Policy 1992-1997 – Handbook of Procedures – Appendix XXXIII.

The question which arose for consideration in the instant appeals was whether the sales of shrimps and shrimp seeds by the assessee-respondent, a 100% export oriented undertaking (EOU), in the Domestic Tariff Area (DTA) without the approval of the Development Commissioner were liable to excise duty under Section 3(1) of the Central Excise Act, 1944 and not under the proviso appended thereto.

Dismissing the appeals, the Court

HELD: 1. All excisable goods produced or manufactured in India are exigible to duty of excise under Section 3 of the Central Excise Act, 1944, the charging Section, at the rates set forth in the Schedule to the Central Excise Tariff Act. However, proviso to the said Section provides that the duties of excise on any excisable goods, which are produced or manufactured

by a 100% EOU and allowed to be sold in India shall be an amount equal to the aggregate of the duties of customs which would be leviable under Section 12 of the Customs Act, 1962. [Para 15] [751-C-D]

2. It was held in *SIV Industries that if the goods were sold without the permission of the Central Government to debond the unit, the duty on the goods sold by the assessee was leviable under main Section 3(1) of the Act. After the decision in *SIV Industries' case, a Circular was issued on 13th February, 2002 by the Central Board of Excise & Customs, New Delhi clarifying that prior to 11th May, 2001, the clearances from EOUs, if not allowed to be sold in India, shall continue to be chargeable to duty under main Section 3(1) of the Act. [Paras 16, 17] [751-F-G; 752-E]

SIV Industries Ltd. v. Commissioner of Central Excise & Customs* **2000 (117) ELT 281 (SC), relied on.

Circular No. 618/9/2002-CX dated 13th February, 2002 issued by CBEC **– referred to.**

3. According to the Exim Policy 1992-1997 read with Appendix XXXIII of the Handbook of Procedures, an EOU may sell 50% of its production in value terms into a Domestic Tariff Area only on issuance of a removal authorization by the Development Commissioner. In the instant case, admittedly at the time of sales of shrimps and shrimp seeds by the assessee in DTA, the Development Commissioner had not issued the requisite removal authorization. Therefore, in view of the dictum of this Court in *SIV Industries, and the Circular dated 13th February, 2002, excise duty on such sales is chargeable under main Section 3(1) of the Act. [Paras 18, 19] [754-A-D]

4. The controversy with regard to the classification of the shrimp seeds is academic in nature as even if the

finding of the Commissioner on classification of shrimp seeds under sub-heading 0301.00 of the Central Excise Tariff Act is affirmed, still the duty payable on these goods would be nil. Similarly, if the excise duty payable is nil, the other question regarding the extended period of limitation on the alleged ground of suppression of sales also pales into insignificance. [Para 20, 21] [754-D-E-H; 755-A-B]

Sam Spintex Ltd. v. Commissioner of C. Ex., **Indore 2004 (163) E.L.T. 212 (Tri.-Del.);** *Commissioner of Central Excise, Jaipur-II v. Pratap Singh* **2003 (153) E.L.T. 711 (Tri.-Del.);** *Modern Denim Ltd. v. Commissioner of Central Excise, Ahmedabad* **2005 (191) E.L.T. 1174 (Tri.-Mumbai);** *M/s Padmini Products v. Collector of Central Excise, Bangalore* **(1989) 4 SCC 275;** *Collector of Central Excise, Hyderabad v. M/s Chemphar Drugs & Liniments, Hyderabad* **(1989) 2 SCC 127;** *Gopal Zarda Udyog & Ors. v. Commissioner of Central Excise, New Delhi* **(2005) 8 SCC 157, referred to.**

Case Law Reference:

2000 (117) ELT 281 (SC)	**relied on**	**Para 11**
2004 (163) ELT 212 (Tri.-Del.)	**referred to**	**Para 9**
2003 (153) ELT 711 (Tri.-Del	**referred to**	**Para 12**
2005 (191) ELT 1174 (Tri.-Mum)	**referred to**	**Para 12**
(1989) 4 SCC 275	**referred to**	**Para 12**
(1989) 2 SCC 127	**referred to**	**Para 12**
(2005) 8 SCC 157	**referred to**	**Para 12**

CIVIL APPPELLATE JURISDICTION : Civil Appeal No. 4608-4609 of 2005.

From the Judgment and order dated 27.12.2004 of the Customs, Excise and Service Tax Appellate Tribunal, South Zone, Bench at Bangalore in Appeal Nos. E/1138/1999 and E/714/2000.

WITH

Civil Appeal No. 903 of 2006.

Civil Appeal No. 7590 of 2005.

Civil Appeal No. 2986 of 2008.

R.P. Bhatt, Naresh Kaushik, Ajay Sharma, B.V. Balram Das, B.K. Prasad and Anil Katiyar for the Appellant.

Joseph Vellapally, G. Ramakrishna Prasad, B. Syoudhan, Amarpal, Bharat J. Joshi, Md. Wasay Khan and Ragvesh Singh for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. Challenge in this batch of appeals filed by the revenue under Section 35(L)(b) of the Central Excise Act, 1944 (for short "the Act") is to the orders passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zone (for short "the Tribunal"), inter alia, holding that the duty of Central Excise on shrimps and shrimp seeds produced and removed by the respondent (hereinafter referred to as "the assessee"), a 100% Export Oriented Unit (for short "EOU"), in the Domestic Tariff Area (for short "DTA") without the approval of the Development Commissioner, would be payable under Section 3(1) of the Act and not under the proviso appended thereto.

2. Since the question of law arising for our consideration in all the appeals is the same, they are disposed of by this common judgment. In order to comprehend the controversy in these appeals, a brief reference to the facts in Civil Appeal Nos.4608-4609 of 2005, which was treated as the lead case, would suffice:

The assessee company is engaged in the production of shrimps and tiger prawns, falling under Chapter Sub Heading No.0301.00 of the Schedule to the Central Excise Tariff Act, 1985 (for short "the Tariff Act"). They imported some capital goods, viz. sand blowers and air filters, duty free under Customs Notification Nos. 188/93 dated 27th December 1993 and 196/94 dated 8th December 1994 for use in their integrated Aquaculture project. The imports were subject to the condition that the said goods would be used in the production of aquaculture products and 100% or such other percentage of the said products, as may be fixed by the Board of Approvals for 100% EOU, shall be exported out of India for a period of ten years or such extended period as may be specified by the said Board.

3. As per the Exim Policy (1st April 1992 to 31st March 1997), an EOU Aqua culture unit was permitted to sell upto 50% of its production in value terms in DTA, in accordance with the DTA sales guidelines notified in that behalf and subject to minimum value addition.

4. The guidelines for sale of goods in the DTA by an EOU were prescribed under Appendix XXXIII of the Hand Book of procedures for the aforementioned period. As per the said guidelines, sale of goods in the DTA was subject to payment of applicable duties as notified from time to time by the department of revenue; the units could opt for DTA sales on a quarterly, half yearly or annual basis with an intimation to the Development Commissioner of the EPZ concerned; application for DTA sales was to be accompanied by a statement disclosing information regarding ex-factory value of goods produced and of goods actually exported, and the Development Commissioner was to determine the extent of DTA sales admissible and issue goods removal authorisation in terms of value and quantity for sale in DTA.

5. It appears that during the period 1994-95 to 1997-98, the assessee produced and sold 11,15,29,540 number of

shrimp seeds and 48,365 Kgs. of shrimps in DTA without obtaining the permission of the Development Commissioner; without issuing proper invoices as mandated under Rule 100E of Central Excise Rules, 1944 (for short "the Rules") and without payment of Excise Duty. Besides, the assessee also undertook certain job work whereby it processed 864.238 MT of shrimps and 905.580 MT of fish and cleared the said goods in DTA. According to the assessee, these goods were ultimately exported by the DTA units.

6. On 2nd September 1998, a notice was issued to the assessee to show cause as to why duty of excise equal to aggregate of the duties of customs, amounting to Rs. 7,80,58,074/-, should not be levied in terms of Section 3 of the Act read with Rule 9(2) read with proviso to sub-section (1) of Section 11A of the Act, and interest at 20% from first day of the month till the date of payment of duty should not be imposed under Section 11AB of the Act. An additional penalty of Rs. 7,80,58,074/- for non-payment of duty for the reason of wilful suppression of facts and contraventions of the provisions of the Act, together with additional penalty under Rule 173Q(1) for contravention of Rule 9(1), 100D, 100E and 100F of the Rules for clearing goods without issuance of a proper invoice was also proposed to be imposed on the noticee.

7. The assessee contested the notice on diverse grounds. On adjudication, the Commissioner of Central Excise & Customs, Visakhapatnam, vide Order-in-Original No. 9/99 dated 15th April 1999, demanded a duty of Rs.1,83,46,493/- on the shrimp seeds, shrimps and fish, cleared by the assessee, under proviso to Section 11A of the Act. Interest at 20% was demanded on Rs.1,13,05,410/- as being the duty evaded on shrimp seeds, shrimps and fish cleared after 28th September 1996 under Section 11AB of the Act. Penalty of Rs. 1,13,05,410/- was imposed under Section 11AC of the Act with respect to duty evaded since 25th September 1996, and of Rs. 8,00,000/- under Rule 173Q(1) of the Rules.

8. The revenue as well as the assessee questioned the correctness of the adjudication order by preferring appeals before the Tribunal.

9. The Tribunal, vide order dated 27th December 2004, allowed the assessee's appeal and dismissed the appeal filed by the revenue. Reversing the order of the Commissioner, the Tribunal observed thus:

> "The commissioner, after classifying the shrimp seeds under chapter 3, has worked out the amount equal to the aggregate of the Customs duty leviable as per proviso to section 3(1) of the CE Act, 1944 and demanded the same. It is on record that for clearing the shrimp seeds, no permission was taken from the Development Commissioner. When the goods are cleared with the permission of the Development Commissioner, then only proviso to section 3(1) of the CE Act, would be applicable. In *Sam Spintex Ltd. Vs. CCE, Indore* 2004 (163) ELT 212 (Tri.-Del.), it has been held that when there is a removal to DTA without permission of the competent authority, duty is leviable under main section 3 of the CE Act, 1944 and not its proviso. While arriving at the above decision, the Hon'ble Tribunal relied on the decision in the case of *CCE Vs. Pratap Singh* 2003 (153) ELT 711 (Tribunal) which has been affirmed by the Apex Court vide its order reported in 2003 (156) ELT A382. In view of the above decision, even if the Commissioner's finding on the classification of Shrimp seeds is upheld, the duty would be Nil. In that case, the classification issue becomes academic. However, after going through the HSN Explanatory notes, we are convinced that Chapter 3 would not cover items unfit for human consumption. In the present case, the Shrimp seeds are undoubtedly not fit for human consumption in that stage. Therefore, it would not be excisable at all. In view of this finding, the demand of duty on the Shrimp seeds cleared would be not sustainable."

In relation to the goods cleared on job work basis, the Tribunal held that since goods were cleared to other exporters, there was no duty liability and even otherwise, since the permission of the Development Commissioner was not obtained, its decision in the case of *Sam Spintex Ltd. Vs. Commissioner of C. Ex., Indore*[1] would be applicable. It also held that there being no convincing evidence showing suppression of facts, the demand itself was time barred.

10. Being dissatisfied with the order of the Tribunal, the revenue is before us in these appeals.

11. Mr. R.P. Bhatt, learned senior counsel appearing for the Revenue contended that since as per Note 1 of Section 1 of the Customs Tariff Act, 1975, any reference in that Section to a particular genus or species of an animal, except where the context otherwise requires, includes a reference to the young of that genus or species and, therefore, both live shrimps and shrimp seeds are classifiable under heading 0306.23 of Chapter 3 of the Customs Tariff Act, 1975. Learned counsel also submitted that the Tribunal committed an error in relying on the decision of this Court in *SIV Industries Ltd. Vs. Commissioner of Central Excise & Customs*[2], because unlike in that case, in the present case, the assessee had sought permission of the Development Commissioner, who in turn had advised them to approach the SIA for permission to clear shrimps and shrimp seeds which, in fact, was granted and, therefore, they were required to pay duty under proviso to Section 3(1) of the Act. It was argued that under the Exim Policy, an EOU is obliged to make exports of the entire production itself and not through any other entity.

12. Per contra, Mr. Joseph Vellapally, learned senior counsel appearing for the assessee, contended that the DTA sales made by an EOU without approval of the Development

1. 2004 (163) E.L.T. 212 (Tri.-Del.).
2. 2000 (117) ELT 281 (SC).

Commissioner are to be assessed to Excise Duty under Section 3(1) of the Act and not under proviso to the said Section. In support of the submission, learned counsel placed reliance on the decision of this Court in *SIV Industries* (supra) and orders of the Tribunal in *Commissioner of Central Excise, Jaipur-II Vs. Pratap Singh*[3], *Sam Spintex Ltd.* (supra) and *Modern Denim Ltd. Vs. Commissioner of Central Excise, Ahmedabad* [4]. Learned counsel also submitted that since shrimp seeds are microscopic post larva of 20 days, which do not contain meat and as such are not fit for human consumption, on a plain reading of Chapter Note 1(b) of Chapter 3 of the Tariff Act, these cannot fall within tariff entry 0301.00. It was argued that for the purpose of the Exim Policy sale of shrimps by supporting manufacturers carrying out job work and clearance of the same directly for exports on behalf of other exporters is to be treated as export sale and therefore, clearance of shrimps by the assessee on job work basis could not be treated as DTA sales for the purpose of the Act. It was asserted that since there was regular correspondence between the department and the assessee in relation to these sales and invoices and other documents were also submitted, there was no suppression of DTA sales by the assessee with the intent to evade payment of duty, particularly when the entire industry as also the jurisdictional excise authority were under the impression that no duty was payable on sale of shrimps and shrimp seeds. In support of the proposition that a mere violation of rule is not sufficient to invoke extended period of limitation, learned counsel commended us to the decisions of this Court in *M/s Padmini Products Vs. Collector of Central Excise, Bangalore*[5]; *Collector of Central Excise, Hyderabad Vs. M/s Chemphar Drugs & Liniments, Hyderabad*[6] and *Gopal Zarda*

3. 2003 (153) E.L.T. 711 (Tri.-Del.).

4. 2005 (191) E.L.T. 1174 (Tri.-Mumbai).

5. (1989) 4 SCC 275.

6. (1989) 2 SCC 127.

Udyog & Ors. Vs. Commissioner of Central Excise, New Delhi[7].

13. The core question for our consideration, therefore, is whether the sales of shrimps and shrimp seeds by the assessee in DTA, without requisite permission from the Development Commissioner, are to be assessed to Excise Duty under Section 3(1) of the Act or under proviso to the said Section?

14. Before evaluating the rival contentions on the point, we may refer to the relevant part of Section 3 of the Act, which reads as follows :

"3. Duties specified in the Schedule to the Central Excise Tariff Act, 1985 to be levied.—(1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the Schedule to the Central Excise Tariff Act, 1985 :

Provided that the duties of excise which shall be levied and collected on any excisable goods which are produced or manufactured,--

(i) in a free trade zone and brought to any other place in India; or

(ii) by a hundred per cent export-oriented undertaking and allowed to be sold in India,

shall be an amount equal to the aggregate of the duties of customs which would be leviable under Section 12 of the Customs Act, 1962 (52 of 1962) on like goods produced or manufactured outside India if imported into India, and

7. (2005) 8 SCC 157.

where the said duties of customs are chargeable by reference to their value, the value of such excisable goods shall, notwithstanding anything contained in any other provision of this Act, be determined in accordance with the provisions of Customs Act, 1962 (52 of 1962) and the Customs Tariff Act, 1975 (51 of 1975)".

15. It is manifest that all excisable goods produced or manufactured in India are exigible to duty of Excise under Section 3 of the Act, the charging Section, at the rates set forth in the Schedule to the Tariff Act. However, proviso to the said Section provides that the duties of Excise on any excisable goods, which are produced or manufactured by a 100% EOU and allowed to be sold in India shall be an amount equal to the aggregate of the duties of customs which would be leviable under Section 12 of the Customs Act, 1962. As aforestated, the controversy at hand is whether in the absence of an order by the competent authority, allowing the assessee to sell the shrimp seeds and shrimps in India, Excise Duty on such sales could be levied and collected in terms of the proviso. To put it differently, the issue relates to the significance of the expression "allowed to be sold in India" as appearing in clause (ii) to the proviso to sub-section (1) of Section 3 of the Act.

16. A similar issue fell for consideration of this Court in *SIV Industries* (supra). In that case, the assessee was a 100% EOU. Later on they sought permission to withdraw from 100% EOU Scheme, for which the Ministry accorded the necessary permission. However, some of the goods lying in the unit were removed prior to the debonding. A dispute arose regarding the rate of duty payable on such sales. The plea taken by the assessee was that they were liable to pay duty under Section 3(1) of the Act together with customs duty on the imported raw material used in the manufacture of said finished goods, lying in the stock whereas the stand of the revenue was that Excise Duty under the proviso to Section 3(1) of the Act was payable

on the finished goods with no customs duty being leviable on the raw materials used in the manufacture of finished goods. Thus, the bone of contention in that case was also with regard to the interpretation of the expression "allowed to be sold in India" appearing in the said proviso. Interpreting the said expression, this Court held that the expression "allowed to be sold in India" used in the proviso to Section 3(1) of the Act is applicable only to sales made in DTA up to 25% of the production by 100% EOU, which are allowed to be sold into India as per the provisions of the Exim Policy. No permission was required to sell the goods manufactured by 100% EOU lying with it at the time the approval is accorded to debond. The Court opined that the goods having been sold without permission of the Central Government to debond the unit, the duty on the goods sold by the assessee was leviable under main Section 3(1) of the Act.

17. It is pertinent to note that after the decision in *SIV Industries'* case (supra), a Circular was issued by the Central Board of Excise & Customs, New Delhi clarifying that prior to 11th May, 2001, the clearances from EOUs, if not allowed to be sold in India, shall continue to be chargeable to duty under main Section 3(1) of the Act. For the sake of ready reference Circular No. 618/9/2002-CX dated 13th February, 2002 is extracted below:

"Circular :618/9/2002-CX dated 13-Feb-2002

EOU- Removal of goods by 100% EOU to DTA – Non-levy of duty under Section 3(1) of Central Excise Act, 1944 –Clarifications

Circular No. 618/9/2002-CX., dated 13-2-2002

F. No. 268/69/2001-CX.8

Government of India
Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject : Removal of goods by 100% EOUs to DTA – Non-levy of duty under Section 3(1) of Central Excise Act, 1944.

I am directed to invite reference to Supreme Court's judgment in case of *SIV Industries v. CCE* [2000 (117) E.L.T. 281 (S.C.) vide which the Apex Court had held that "proviso to Section 3(1) regarding the duty chargeable on goods cleared by EOUs shall be applicable only to sales made in DTA upto 25% of production which are allowed to be sold into India as per provisions of EXIM Policy". In other words, Hon'ble Court decided that if the goods are "not allowed" to be sold in India, the proviso to Section 3(1) of Central Excise Act, 1944 shall not be applicable. The expression 'allowed to be sold' has since been replaced with 'brought to any other place' w.e.f. 11-5-2001 vide Section 120 of Finance Act, 2001 [14 of 2001].

2. It has come to the notice of the Board that field formations are interpreting the judgment of Apex Court to the effect that if the goods cleared by EOUs are not allowed to be sold into India, the Section 3(1) of Central Excise Act, 1944 is not applicable and duty can be demanded under the provisions of Customs Act, 1962 only. Board has taken a serious view of this mis-interpretation. The provisions of Central Excise Act, 1944 shall apply to all goods manufactured or produced in India for which Section 3 is the charging section. EOUs are also situated in India and the chargeability under Central Excise Act is never in doubt. Therefore, it is clarified that prior to 11-5-2001, the clearances from EOUs if not allowed to be sold in India, shall continue to be chargeable to duty under main Section 3(1) of Central Excise Act, 1944. Appropriate action may be taken immediately to safeguard revenue and all pending decisions may be settled accordingly."

(Emphasis added by us)

18. As aforesaid, according to the Exim Policy 1992-1997 read with Appendix XXXIII of the Handbook of Procedures, an EOU may sell 50% of its production in value terms into a DTA only on issuance of a removal authorization by the Development Commissioner.

19. In the instant case, admittedly at the time of sales of shrimps and shrimp seeds by the assessee in DTA, the Development Commissioner had not issued the requisite removal authorization. Therefore, in view of the dictum of this Court in *SIV Industries* (supra), with which we are in respectful agreement, and the afore-extracted Circular issued by the Board following the said decision, Excise Duty on such sales is chargeable under main Section 3(1) of the Act.

20. Having come to the aforenoted conclusion, the controversy with regard to classification of the shrimp seeds is more in the nature of an academic exercise in as much as even if the finding of the Commissioner on classification of shrimp seeds is affirmed, still the duty payable on these goods would be nil. For the sake of ready reference, the relevant entry in Chapter 3 of the Tariff Act is extracted below:

"Heading No.	Sub-heading No.	Description of goods	Rate of duty
(1)	(2)	(3)	(4)
03.01	0301.00	Fish and crustaceans, molluscs and other aquatic invertebrates	Nil"

21. Thus, it is evident that even if the stand of the revenue is accepted and shrimp seeds are classified under sub-

heading 0301.00 of the Tariff Act, the rate of Excise Duty chargeable would be nil. Similarly, if the Excise Duty payable is nil, the other question regarding the extended period of limitation on the alleged ground of suppression of sales also pales into insignificance.

22. For the foregoing reasons, the impugned orders passed by the Tribunal cannot be flawed and deserve to be affirmed. Resultantly, these appeals, being bereft of any merit, are dismissed accordingly. No order as to costs.

D.G. Appeals dismissed.

ALKA GUPTA

v.

NARENDER KUMAR GUPTA

(Civil Appeal No. 8321 of 2010)

SEPTEMBER 27, 2010

[R.V. RAVEENDRAN AND H.L. GOKHALE, JJ.]

CODE OF CIVIL PROCEDURE, 1908:

O.2, r.2 – HELD: A suit cannot be dismissed as barred by O. 2 r.2 in the absence of plea by defendant to that effect and in the absence of an issue thereon – Besides, in the instant case, cause of action for the second suit being completely different from the cause of action for the first suit, the bar under O.2, r.2 was not attracted.

s.11, Explanations III and IV – Res-judicata – Principles explained – Constructive res judicata – HELD: Plea of res judicata must be clearly established, more particularly, where the bar is sought on the basis of constructive res-judicata – In the instant case, High Court has not stated as to what was the ground of attack that the plaintiff ought to have raised but failed to raise in the first suit – The second suit is not barred by constructive res judicata.

s.11 and O.2, r.2 – Concepts of and difference between – Explained.

O. 15, r.3 – Suit – Dismissal of – HELD: A suit cannot be dismissed without trial merely because the court feels dissatisfied with the conduct of the plaintiff – In the instant case, High Court recorded factual findings on inference from plaintiff's conduct and branded her as an unscrupulous person who abused process of court, without there being a trial and without affording an opportunity to her to explain her conduct

– Such a procedure is opposed to all principles of natural justice embodied in CPC – At all events, alleged weakness of plaintiff's case or her unscrupulousness are not grounds for dismissal of suit without trial – There is also no basis for levying costs of Rs.50,000/- It has been repeatedly stated that in dealing with civil suits, courts will have to follow the provisions of CPC – Principles of natural justice – Costs – Practice and Procedure.

The plaintiff-appellant and the defendant-respondent, as per the deed dated 5.4.2000, were the only partners of a coaching institute under the name and style of "Takshila Institute" in premises at Paschim Vihar. On 29.6.2004, the appellant executed an agreement to sell her undivided half share in a premises at Rohini - Sector 8 and 50% share of M/s Takshila Institute which was run in the premises at Rohini - Sector 8, with all rights, titles, interest, goodwill etc. to the respondent, for a total consideration of Rs.21,50,000/- and received Rs.7,50,000/- as advance. The appellant filed a suit (Suit No. 16/2006) against the respondent in the District Court, Delhi for recovery of Rs.12 lakhs, alleging that in pursuance of the agreement dated 29.6.2004 she had executed a sale deed in regard to the immovable property for Rs. 2 lakhs and the respondent promised to pay the balance of Rs. 12 lakhs in regard to other rights and interest agreed to be sold under the agreement. That suit was decreed.

Thereafter, the appellant filed another suit (O.S. No. 302/2007) against the respondent, in the Delhi High Court, for rendition of accounts for the period 5.4.2000 to 31.7.2000 in regard to the partnership firm of "Takshila Institute" at Paschim Vihar, and her share of profit in that business, pleading that the said partnership was at will and it was dissolved on 31.7.2004 when the respondent had filed a suit for injunction against the appellant and others.

The respondent resisted the suit on the grounds, inter alia, that the suit was barred by res judicate, and was liable to be dismissed for material suppression of facts. It was contended that by virtue of agreement of sale dated 29.6.2004, the partnership under the deed dated 5.4.2000 was dissolved and the claims of the appellant were settled. Issues were framed treating the first issue of res judicata as the preliminary issue. The trial bench (single Judge of the High Court) held that the suit was liable to be dismissed summarily and accordingly dismissed the suit with cost of Rs.50,000/-, inter alia, holding that (i) the suit was barred by O.2, r.2 CPC, (ii) the suit was barred by constructive res judicata and (iii) the appellant was an unscrupulous person, she had abused the process of court by filing the suit based on falsehoods. The appellate bench of the High Court affirmed the decision of the single Judge to the effect that the suit was barred by O.2, r.2 CPC holding that appellant had settled her claims under the agreement of sale dated 29.6.2004. Aggrieved, the plaintiff filed the appeal.

Allowing the appeal, the Court

HELD: 1.1 *A suit cannot be dismissed as barred by O.2, r.2 of the Code of Civil Procedure, 1908 in the absence of a plea by the defendant to that effect and in the absence of an issue thereon.* **The object of O.2, r.2 of the Code is two-fold. The first is to ensure that no defendant is sued and vexed twice in regard to the same cause of action. The second is to prevent a plaintiff from splitting of claims and remedies based on the same cause of action. The effect of O.2, r.2 is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action. It does not, however, bar a second suit**

based on a different and distinct cause of action. Further, unless the defendant pleads the bar under O.2, r.2 and an issue is framed thereon, and the plaintiff is afforded an opportunity, the court can not examine or reject a suit on that ground. In the instant case, the respondent did not contend that the suit was barred by O.2, r.2, nor was an issue on that question framed. But the High Court (both the trial bench and the appellate bench) have erroneously assumed that a plea of res judicata would include a plea of bar under O.2, r. 2 CPC. Res judicata relates to the plaintiff's duty to put forth all the grounds of attack in support of his claim, whereas O.2, r.2 requires the plaintiff to claim all reliefs flowing from the same cause of action in a single suit. The two pleas are different and one will not include the other. The dismissal of the suit by the High Court under Or.2, r.2, in the absence of any plea by the defendant and in the absence of an issue in that behalf, is unsustainable. [para 7-9] [767-F; 768-E-F; 769-D-G]

Gurbux Singh v. Bhoora Lal **1964 SCR 831 = AIR 1964 SC 1810 – relied on.**

1.2. The cause of action for the second suit being completely different from the cause of action for the first suit, the bar under O.2, r.2 of the Code was not attracted. The cause of action for the first suit was non-payment of price under the agreement of sale dated 29.6.2004, whereas the cause of action for the second suit was non-settling of accounts of a dissolved partnership constituted under deed dated 5.4.2000. The two causes of action are distinct and different. The agreement dated 29.6.2004 was not an agreement relating to dissolution of the firm constituted under the deed of partnership dated 5.4.2000, or settlement of the accounts of the said partnership. The agreement of sale made it clear that it

related to sale of the undivided 50% share in the property of Rohiin - sector 8 in which the business was being run and 50% share of the business that was being run in that premises. The second suit was for rendition of accounts in pursuance of the dissolution of the firm of "Takshila Institute" constituted under the deed of partnership dated 5.4.2000, carrying on business at Paschim Vihar and for payment of the amounts due on dissolution of the said firm. The pleadings in the two suits make it clear that both parties proceeded on the basis that the partnership between the appellant and the respondent under the deed dated 5.4.2000 was only in regard to the business run under the name and style of "Takshila Insittue" at Paschim Vihar and that the property at Rohini - Sector 8 with the business carried therein under the name of "M/S Takshila Institute", was not a part of the partnership business under deed dated 5.4.2000. Order 2, r. 2 of the Code would come into play only when both suits are based on the same cause of action and the plaintiff fails to seek all the reliefs based on or arising from the cause of action in the first suit without leave of the court. Merely because the agreement of sale related to an immovable property at Rohini - Sector 8 and the business run therein under the name of "M/s Takshila Institute" and the second suit referred to a partnership in regard to the business run at Paschim Vihar New Delhi, also under the similar name of "Takshila Institute", it cannot be assumed that the two suits relate to the same cause of action. Further, while considering whether a second suit by a party is barred by O.2, r.2, all that is required to be seen is whether the reliefs claimed in both suits arose from the same cause of action. The court is not expected to go into the merits of the claim and decide the validity of the second claim. The strength of the second case and the conduct of plaintiff are not relevant for deciding

whether the second suit is barred by O.2, r.2. [para 10-12] [771-B; 769-G-F; 770-A-F; 771-B-E]

2.1. The second suit was not barred by constructive res judicata. Plea of res judicata is a restraint on the right of a plaintiff to have an adjudication of his claim. The plea must be clearly established, more particularly, where the bar sought is on the basis of constructive res judicata. The plaintiff who is sought to be prevented by the bar of constructive res judicata should have notice about the plea and have an opportunity to put forth his contentions against the same. In this case, there was no plea of constructive res judicata, nor had the plaintiff an opportunity to meet the case based on such plea. But, both the trial bench as also the appellate bench without assigning any reasons, proceeded on the basis that the suit was barred by principle of constructive res judicata. [para 13] [771-F-H; 772-A-C]

2.2 The Code deals with res judicata in section 11, with eight Explanations. The principle of constructive res judicata emerges from Explanation IV when read with Explanation III, both of which explain the concept of "matter directly and substantially in issue". Constructive res judicata deals with grounds of attack and defence which ought to have been raised; but not raised, whereas O.2, r.2 relates to reliefs which ought to have been claimed on the same cause of action but not claimed. In the instant case, the High Court has not stated what was the ground of attack that the plaintiff ought to have raised in the first suit but had failed to raise, which she raised in the second suit, to attract the principle of constructive res judicata. The second suit is not barred by constructive res judicata. [para14-15] [772-C-D; 773-E-F; 774-A-B; G-H]

Direct Recruit Class II Engineering Officers' Association

v. State of Maharashtra **1990 (2) SCR 900 =1990(2) SCC 715;** *Forward Construction Co. v. Prabhat Mandal* **1985 (3) Suppl. SCR 766 = 1986 (1) SCC 100 - relied on.**

Greenhalgh v. Mallard **1947 (2) All ER 257 – referred to.**

3.1. A suit cannot be dismissed without trial merely because the court feels dissatisfied with the conduct of the plaintiff. A civil proceeding governed by the Code will have to be proceeded with and decided in accordance with law and the provisions of the Code, and not on the whims of the court. There are no short-cuts in the trial of suits, unless they are provided by law. The Code enumerates the circumstances in which a civil suit can be dismissed without trial. It also provides for expeditious disposal in a summary manner. But where the summons have been issued for settlement of issues, and the suit is listed for consideration of a preliminary issue, the court, without a trial, cannot make a roving enquiry into the alleged conduct of the plaintiff, tenability of the claim, the strength and validity and contents of documents, and on that basis dismiss a suit. A suit cannot be short-circuited by deciding issues of fact merely on pleadings and documents produced, without a trial. [para 16-19] [775-A-D; 776-E; 777-D-E]

3.3 In the instant case, the single Judge has adjudicated and decided questions of fact and rendered a judgment, without the evidence tested by cross-examination. The reasonings, findings, assumptions and conclusions of the trial bench leading to the dismissal of the suit while hearing a preliminary issue relating to res judicata, demonstrate assumption of a jurisdiction not vested in it and also acting in the exercise of its jurisdiction illegally and with material irregularity. The

observation of the single Judge that "the facts of this case do not require any opportunity for leading evidence to be given to the plaintiff" violates O. 15, r. 3 of the Code. Where summons have been issued for settlement of issues and where issues have been settled, unless the parties agree, the court cannot deny the right of parties to lead evidence. To render a final decision by denying such opportunity would be highhanded, arbitrary and illegal. Even the Division Bench committed the same error. The High Court recorded factual findings on inferences from the plaintiff's conduct and without holding a trial and without affording an opportunity to the plaintiff to explain her conduct, branded her as an unscrupulous person who abuses the process of court and as a person who utters falsehoods and manipulates documents. Such a procedure is opposed to all principles of natural justice embodied in the Code. At all events, the alleged weaknesses of the case of the plaintiff or her unscrupulousness are not grounds for dismissal of suit without trial. [Para 19-21] [777-E-F; 780-G-H; 781-A-B]

3.4 There is also no basis for levying the costs of Rs.50, 000/-. The Supreme Court has repeatedly stated that in dealing with civil suits, courts will have to follow the provisions of the Code in levying costs. [para 22] [782-F-G]

3.5 The order of the Division Bench of the High Court affirming the order of the single Judge was set aside and the suit restored to the file of the High Court with a direction to decide the same in accordance with law, after giving due opportunity to the parties to lead evidence. [para 24] [783-B-C]

Case Law Reference:

1964 SCR 831	**relied on**	**para 9**

1947 (2) All ER 257	**referred to**	**para 15**
1990 (2) SCR 900	**relied on**	**para 15**
1985 (3) Suppl. SCR 766	**relied on**	**para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8321 of 2010.

From the Judgment & Order dated 07.09.2009 of the High Court of Delhi at New Delhi in R.F.A. (OS) 60 of 2009.

Aman Lekhi, Meenakshi Lekhi, Sachin Jain, Madhur Jain, Sanjai Kumar Pathak for the Appellant.

P.C. Agarwal, Aditya K. Dubey, Varun Thakur, Ramesh Babu M.R., Ambuj for the Respondent.

The order of the Court was delivered by

R.V. RAVEENDRAN, J. 1. Leave granted. Heard. For convenience the appellant and respondent will also be referred to by their ranks in the suit, as 'plaintiff' and 'defendant' respectively.

2. The appellant and respondent entered into a partnership as per deed dated 5.4.2000 to run an Institute for preparing students for competitive examinations, under the name and style of 'Takshila Institute', at No.F-19, LSC, Bhera Enclave, Paschim Vihar, New Delhi.

3. On 29.6.2004, the appellant entered into an "agreement to sell" (Bayana Agreement) under which she agreed to sell the property described as follows:

"An undivided half share, second floor (without roof rights) of built up property bearing No.8, Pocket & Block C9, Sector-8, Rohini, Delhi – 110 085, built on a plot of land area measuring 158.98 Sq.m and 50% share of M/s

Takshila Institute established in the above said property which is hereby agreed to be sold includes all rights, titles, interests, goodwill, electricity equipment, furniture, fixtures including passages, easements facilities privileges etc., which attached thereto or connected therewith."

Clause 13 of the said agreement clarified that the property agreed to be sold included the goodwill of the firm M/s Takshila Institute, having its office at C-9/8, Sector 8, Rohini, Delhi-85 in which the first party is also the partner of 50% and included all rights, interest, claims, title, fittings, furniture, fixtures and all equipment.

4. Under the said agreement, the total consideration agreed was Rs.21,50,000/- and the appellant received Rs.750,000/- as advance. The appellant claimed that in pursuance of the said agreement, she executed a sale deed in regard to the immovable property for Rs.200,000/- and that the respondent promised to pay the balance of Rs.12 lakhs in regard to the other rights and interest agreed to be sold under agreement of sale dated 29.6.2004. She filed Suit No.16/2006 in the District Court, Delhi for recovery of Rs.12 lakhs under the said agreement dated 29.6.2004, alleging that respondent had paid in all Rs.9.5 lakhs towards the agreed price. The said Suit No.16/2006 was decreed in favour of the appellant on 25.11.2006, directing respondent to pay Rs.12 lakhs with interest at 7% per annum with effect from 30.8.2004.

5. Thereafter the appellant filed another suit - C.S. (O.S.)No.302/2007 – in the Delhi High Court against the respondent, for rendition of accounts for the period 5.4.2000 to 31.7.2004, in regard to the partnership firm of Takshila Institute constituted under deed of partnership dated 5.4.2000. In that suit, the appellant alleged that the said partnership was at will and it was dissolved by implication on 31.7.2004, when respondent filed Suit No. 438/2004 against the appellant (and others) for an injunction. She also sought a decree against the respondent for her share of profits in the said partnership and

for a decree for Rs.25.28 lakhs or higher amount in regard to the share of plaintiff with interest thereon. The said suit was resisted by the respondent. Three preliminary grounds of objections were raised in regard to the maintainability of the suit: (a) that the suit was barred by res judicata; (b) that the suit was barred under Section 69 of the Partnership Act, 1932, as it related to an unregistered partnership; and (c) that the suit was liable to be dismissed for material suppression of facts and approaching the court with unclean hands. It was alleged that parties were close relatives and appellant being a government servant, was only a sleeping partner. It was contended that by the agreement of sale dated 29.6.2004, the partnership under deed dated 5.4.2000 was dissolved and all claims of appellant were settled.

6. The issues in the said suit were framed on 17.1.2008 with a direction that the first issue, extracted below, be treated as a preliminary issue:

"Whether the suit is barred by the principle of res judicata as issue raised in the Suit has been directly and substantially been adjudicated between the plaintiff and the defendant in suit no.16/2006 titled as Alka Gupta vs. Narender Kumar Gupta vide an order dated 25.11.2006 by a competent court?

By order dated 13.3.2009, the trial bench (learned Single Judge of the High Court) held that the suit was liable to be dismissed summarily on the following grounds: (i) The appellant had abused the process of court; (ii) the appellant was an unscrupulous person and the suit was based on falsehoods; (iii) the partnership dated 5.4.2000 was illegal and unenforceable as appellant was a government servant; (iv) the suit was barred by Order 2 Rule 2 of the Code of Civil Procedure ('Code' for short); and (v) the suit was barred by principle of constructive res judicata. The suit was accordingly dismissed with costs of Rupees Fifty Thousand. In the preamble to the said order, the trial court observed that on 12.1.2009,

when arguments were on the preliminary issue, it was clarified that arguments were being heard not only on the said preliminary issue, but also the question as to why independent of section 11 and Order 2 Rule 2 of the Code, the suit should not be dismissed summarily on the ground of re-litigation and abuse of process of court. It is further stated that on 16.1.2009, the statement of plaintiff (appellant herein) was recorded and arguments on various aspects were heard on 16.1.2009 and 21.1.2009.

7. Feeling aggrieved, the appellant filed an appeal. An appellate bench of the High Court, by the impugned judgment dated 7.9.2009, dismissed the appeal. The appellant bench affirmed the decision of the trial bench. It however held that as it was agreeing with the learned Single Judge that the suit was barred by Order 2 Rule 2 of the Code and that the appellant had settled all her claims with the respondent under the Bayana Agreement dated 29.6.2004, it was not necessary to decide upon the question as to whether the partnership deed dated 5.4.2000 could be enforced in a court or not. The said order is challenged in this appeal by special leave. For the reasons following, we are of the view that the orders of the learned Single Judge and the Division Bench which ignore several basic principles of Code of Civil Procedure cannot be sustained.

I. A suit cannot be dismissed as barred by Order 2 Rule 2 of the Code in the absence of a plea by the defendant to that effect and in the absence of an issue thereon.

8. We may extract Order 2 Rules 1 and 2 of the Code for ready reference:

> "1. **Frame of suit:** Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

> 2. **Suit to include the whole claim:** (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
>
> (2) **Relinquishment of part of claim:** Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
>
> (3) **Omission to sue for one of several reliefs:** A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

The object of Order 2 Rule 2 of the Code is two-fold. First is to ensure that no defendant is sued and vexed twice in regard to the same cause of action. Second is to prevent a plaintiff from splitting of claims and remedies based on the same cause of action. The effect of Order 2 Rule 2 of the Code is to bar a plaintiff who had earlier claimed certain remedies in regard to a cause of action, from filing a second suit in regard to other reliefs based on the same cause of action. It does not however bar a second suit based on a different and distinct cause of action.

9. This Court in *Gurbux Singh v. Bhoora Lal* [AIR 1964 SC 1810] held :

> "In order that a plea of a bar under O. 2, R. 2(3), Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief;

(3) that being thus entitled to more than one relief the plaintiff without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the latter suit is based there would be no scope for the application of the bar."

Unless the defendant pleads the bar under Order 2 Rule 2 of the Code and an issue is framed focusing the parties on that bar to the suit, obviously the court can not examine or reject a suit on that ground. The pleadings in the earlier suit should be exhibited or marked by consent or at least admitted by both parties. The plaintiff should have an opportunity to explain or demonstrate that the second suit was based on a different cause of action. In this case, the respondent did not contend that the suit was barred by Order 2 Rule 2 of the Code. No issue was framed as to whether the suit was barred by Order 2 Rule 2 of the Code. But the High Court (both the trial bench and appellate bench) have erroneously assumed that a plea of res judicata would include a plea of bar under Order 2 Rule 2 of the Code. Res judicata relates to the plaintiff's duty to put forth all the grounds of attack in support of his claim, whereas Order 2 Rule 2 of the Code requires the plaintiff to claim all reliefs flowing from the same cause of action in a single suit. The two pleas are different and one will not include the other. The dismissal of the suit by the High Court under Order 2 Rule 2 of the Code, in the absence of any plea by the defendant and in the absence of an issue in that behalf, is unsustainable.

II. The cause of action for the second suit being completely different from the cause of action for the first suit, the bar under order 2 Rule 2 of the Code was not attracted.

10. The first suit was for recovery of balance price under

an agreement of sale. The agreement dated 29.6.2004 was not an agreement relating to dissolution of the firm constituted under deed of partnership dated 5.4.2000, or settlement of the accounts of the said partnership. The agreement of sale made it clear that it related to sale of the undivided half share in the second floor at Rohini, 50% (property bearing No.8, Pocket & Block C-9, Sector-8, Rohini, Delhi-110085) and 50% share of the business that was being run in that premises, that is premises at Rohini. The second suit was for rendition of accounts in pursuance of the dissolution of the firm of Takshila Institute constituted under deed of partnership dated 5.4.2000, carrying on business at Bhera Enclave, Paschim Vihar, Delhi-110087 and for payment of the amounts due on dissolution of the said firm.

11. The pleadings in the two suits make it clear that both parties proceeded on the basis that the partnership between appellant and respondent under deed dated 5.4.2000 was only in regard to the business run under the name and style of 'Takshila Insittue' at Bhera Enclave, Paschim Vihar, Delhi–110087. The appellant proceeded on the basis that the property at Rohini and the business carried therein under the name of Takshila Institute, was not a part of the partnership business under deed dated 5.4.2000. Even the respondent in his written statement in the first suit asserted that the partnership dated 5.4.2000 between appellant and respondent did not extend to Takshila Institute at Rohini or other places. In fact appellant clearly contended that respondent was carrying on business under the same name of Takshila Institute at Janakpuri, Ashok Vihar and Kalu Sarai in Delhi and also at Dehradun and Palampur, but they were not partnership businesses. The respondent in his written statement asserted that he alone was carrying on business at those places under the name of Takshila Institute. Therefore, the court could not, before trial, assume that the sale of appellant's share in the immovable property at Rohini and the goodwill and assets of the business carried on at Rohini under the name of Takshila Institute should be taken as

relinquishment or retirement or settlement of share in regard to the partnership business of Paschim Vihar Takshila Institute.

12. The cause of action for the first suit was non-payment of price under the agreement of sale dated 29.6.2004, whereas the cause of action for the second suit was non-settling of accounts of a dissolved partnership constituted under deed dated 5.4.2000. The two causes of action are distinct and different. Order 2 Rule 2 of the Code would come into play only when both suits are based on the same cause of action and the plaintiff had failed to seek all the reliefs based on or arising from the cause of action in the first suit without leave of the court. Merely because the agreement of sale related to an immovable property at Rohini and the business run therein under the name of 'Takshila Institute' and the second suit referred to a partnership in regard to business run at Pachhim Vihar, New Delhi, also under the same name of Takshila Institute, it cannot be assumed that the two suits relate to the same cause of action. Further, while considering whether a second suit by a party is barred by Order 2 Rule 2 of the Code, all that is required to be seen is whether the reliefs claimed in both suits arose from the same cause of action. The court is not expected to go into the merits of the claim and decide the validity of the second claim. The strength of the second case and the conduct of plaintiff are not relevant for deciding whether the second suit is barred by Order 2 Rule 2 of the Code.

III. The second suit was not barred by constructive res judicata.

13. The learned trial bench passed the order on 13.3.2009 on the preliminary issue (Issue No.1) relating to res judicata. But there is absolutely no discussion in the order of the learned Single Judge in regard to the bar of res judicata except the following observation at the end of the order: "Of course it cannot be said that the present suit is barred by res judicata inasmuch as the said claims were not decided in that case. But the principle of constructive res judicata is applicable." This was not interfered by the appellate bench. Both proceeded on the

basis that the suit was not barred by res judicata, but barred by principle of constructive res judicata without assigning any reasons. Plea of res judicata is a restraint on the right of a plaintiff to have an adjudication of his claim. The plea must be clearly established, more particularly where the bar sought is on the basis of constructive res judicata. The plaintiff who is sought to be prevented by the bar of constructive res judicata should have notice about the plea and have an opportunity to put forth his contentions against the same. In this case, there was no plea of constructive res judicata, nor had the appellant plaintiff an opportunity to meet the case based on such plea.

14. Res judicata means 'a thing adjudicated' that is an issue that is finally settled by judicial decision. The Code deals with res judicata in section 11, relevant portion of which is extracted below (excluding Explanations I to VIII):

> "11. Res judicata.—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court"

Section 11 of the Code, on an analysis requires the following essential requirements to be fulfilled, to apply the bar of res judicata to any suit or issue:

(i) The matter must be directly and substantially in issue in the former suit and in the later suit.

(ii) The prior suit should be between the same parties or persons claiming under them.

(iii) Parties should have litigated under the same title in the earlier suit.

(iv) The matter in issue in the subsequent suit must have been heard and finally decided in the first suit.

(v) The court trying the former suit must have been competent to try particular issue in question.

To define and clarify the principle contained in Section 11 of the Code, eight Explanations have been provided. Explanation I states that the expression 'former suit' refers to a suit which had been decided prior to the suit in question whether or not it was instituted prior thereto. Explanation II states that the competence of a court shall be determined irrespective of whether any provisions as to a right of appeal from the decision of such court. Explanation III states that the matter directly and substantially in issue in the former suit, must have been alleged by one party or either denied or admitted expressly or impliedly by the other party. Explanation IV provides that any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. The principle of constructive res judicata emerges from Explanation IV when read with Explanation III both of which explain the concept of "matter directly and substantially in issue".

15. Explanation III clarifies that a matter is directly and substantially in issue, when it is alleged by one party and denied or admitted (expressly or impliedly) by the other. Explanation IV provides that where any matter which might and ought to have been made a ground of defence or attack in the former suit, even if was not actually set up as a ground of attack or defence, shall be deemed and regarded as having been constructively in issue directly and substantially in the earlier suit. Therefore, even though a particular ground of defence or attack was not actually taken in the earlier suit, if it was capable of being taken in the earlier suit, it became a bar in regard to the said issue being taken in the second suit in view of the

principle of constructive res judicata. Constructive res judicata deals with grounds of attack and defence which ought to have been raised, but not raised, whereas Order 2 Rule 2 of the Code relates to reliefs which ought to have been claimed on the same cause of action but not claimed. The principle underlying Explanation IV to Section 11 becomes clear from *Greenhalgh v. Mallard* [1947 (2) All ER 257] thus:

> "….it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that *it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.*
>
> (emphasis supplied)

In *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra* [1990 (2) SCC 715], a Constitution Bench of this Court reiterated the principle of constructive res judicata after referring to Forward Construction Co. v. Prabhat Mandal [1986 (1) SCC 100) thus:

> "an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence."

In this case the High Court has not stated what was the ground of attack that plaintiff-appellant ought to have raised in the first suit but had failed to raise, which she raised in the second suit, to attract the principle of constructive res judicata. The second suit is not barred by constructive res judicata.

IV.A suit cannot be dismissed without trial merely because the court feels dissatisfied with the conduct of the plaintiff.

16. Code of Civil Procedure is nothing but an exhaustive compilation-cum-enumeration of the principles of natural justice with reference to a proceeding in a court of law. The entire object of the Code is to ensure that an adjudication is conducted by a court of law with appropriate opportunities at appropriate stages. A civil proceeding governed by the Code will have to be proceeded with and decided in accordance with law and the provisions of the Code, and not on the whims of the court. There are no short-cuts in the trial of suits, unless they are provided by law. A civil suit has to be decided after framing issues and trial permitting the parties to lead evidence on the issues, except in cases where the Code or any other law makes an exception or provides any exemption.

17. The Code enumerates the circumstances in which a civil suit can be dismissed without trial. We may refer to them (not exhaustive):

(a) Dismissal as a consequence of rejection of plaint under Order 7 Rule 11 of the Code in the following grounds : (i) where it does not disclose a cause of action; (ii) where the relief in the plaint is undervalued and plaintiff fails to correct the valuation within the time fixed; (iii) where the court fee paid is insufficient and plaintiff fails to make good the deficit within the time fixed by court: (iv) where the suit appears from the statement in the plaint to be barred by law; (v) where it is not filed in duplicate and where the plaintiff fails to comply with the provisions of Order 7 Rule 9 of the Code.

(b)Dismissal under Order 9 Rule 2 or Rule 3 or Rule 5 or Rule 8 for non-service of summary or non-appearance or failure to apply for fresh summons.

(c)Dismissal under Order 11 Rule 21 for non-compliance with

an order to answer interrogatories, or for discovery or inspection of documents.

(d) Dismissal under Order 14 Rule 2(2) where issues both of law and fact arise in the same suit and the court is of opinion that the case or any part thereof may be disposed of on an issue of law only and it tries such issue relating to jurisdiction of the court or a bar to a suit created by any law for the time being in force first and dismisses the suit if the decision on such preliminary issue warrants the same.

(e)Dismissal under Order 15 Rule 1 of the Code when at the first hearing of the suit it appears that the parties are not at issue on any question of law or fact.

(f) Dismissal under Order 15 Rule 4 of the Code for failure to produce evidence.

(g)Dismissal under Order 23 Rules 1 and 3 of the Code when a suit is withdrawn or settled out of court.

18. The following provisions provide for expeditious disposal in a summary manner :

(i) Order V Rule 5 of the Code requires the court to determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit (and the summons shall have to contain a direction accordingly). In suits to be heard by a court of small causes, the summons shall be for the final disposal of the suit.

(ii) Order 15 Rule 3 of the Code provides where the parties are at issue on some question of law or of fact, and issues have been framed by the court as hereinbefore provided, if the court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the

suit, and that no injustice will result from proceeding with the suit forthwith, the court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit. (But where the summons has been issued for the settlement of issues only, such a summary course could be adopted only where the parties or their pleaders are present and none of them objects to such a course).

(iii) Order 37 Rule 1 read with Rules 2& 3 of the relating to summary suits.

19. But where the summons have been issued for settlement of issues, and a suit is listed for consideration of a preliminary issue, the court cannot make a roving enquiry into the alleged conduct of the plaintiff, tenability of the claim, the strength and validity and contents of documents, without a trial and on that basis dismiss a suit. A suit cannot be shortcircuited by deciding issues of fact merely on pleadings and documents produced without a trial. In this case, the learned Single Judge has adjudicated and decided questions of fact and rendered a judgment, without evidence tested by cross-examination. We extract below some of the reasonings, findings, assumptions and conclusions of the learned Single Judge leading to the dismissal of the suit when hearing a preliminary issue relating to res judicata, thereby demonstrating assumption of a jurisdiction not vested in it and also acting in the exercise of its jurisdiction illegally and with material irregularity:

"What emerges from the aforesaid is that the plaintiff at the time of inception of the partnership and till date is a government teacher and under the terms of her employment was not entitled to enter into the partnership and was not entitled to earn any profits therefrom. Not only under the terms of her employment, *the plaintiff before the*

Service Tax Authorities also represented that she had only academic interest. It can only mean that she had no profit interest in the partnership. Though the plaintiff has denied that she has filed the clearance certificate aforesaid with the government school in which she is employed but the purpose of plaintiff obtaining the said clearance certificate from the defendant can only be to use the same in the event of any complaint of breach of terms of employment being made against her.

x x x x x x x x x

The question which arises for adjudication is whether a litigant can be permitted to take a stand in the court, diametrically opposite to the stand of that litigant elsewhere. Can there be different stands before the government as employer and before the Taxation Authorities and before the court. Should the courts permit such stand to be taken in the course of judicial proceedings and should the courts come to the rescue of such a litigant in recovering dues which that litigant elsewhere has represented are not due to her.

The aforesaid circumstances leave no manner of doubt that the plaintiff in contravention of the terms of her employment was carrying on business as a partner with the defendant. The question is of enforcement of such a partnership and or the terms thereof by the court.

x x x x x x x x x

In the present case the condition in the term of the employment of the plaintiff as a government teacher, admittedly prohibit her from carrying on any business activity or other vocation for profits. Such condition has been imposed to ensure that the teachers of the government school devote their full energy and time to developing the young minds, rather than treating the

government service as a mere source of income and utilizing their time and skill in earning/making money elsewhere. The plaintiff by entering into the agreement of partnership with the defendant had clearly violated her terms of employment and this Court cannot come to her assistance to enable her to earn profits which she otherwise is not entitled. The plaintiff has admitted to having not shown any profits whatsoever in her Income Tax return. It is inconceivable that the plaintiff who has claimed to be in partnership since the year 1999 or 2000 would not have earned any profits from the partnership and/or if would not have earned would have sat quietly for four years. The plaintiff cannot be permitted to take different stands before different fora. The condition/term of employment prohibiting the plaintiff from entering into partnership is found to be in public interest and the action of the plaintiff of breaching/violating the same is found to be immoral and opposed to public policy. The breach is not found to be trivial or venial. Further, the conduct of the plaintiff thereafter also, as noted above is found to be of subterfuge and plaintiff has been found to be misstating facts. The plaintiff is found to be an unscrupulous person and her case is found to be based on falsehood. This Court refuses to come to the aid of plaintiff and her case is liable to be dismissed summarily.

That even on the facts of this case, I have no doubt that the plaintiff has abused the process of the court. The plaintiff in the Bayana Agreement aforesaid had clearly agreed to the sum of Rs. 21.50 lacs towards her share in the partnership firm inclusive of the value of the Rohini property where the partnership business was being carried on. As far as the Paschim Vihar property is concerned, the issue with respect whereto was raised, the same also finds mention in the said Bayana Agreement and the receipt. The conduct of the plaintiff also shows that all accounts had

been settled and no accounts remained to be taken and for which purpose the suit had been filed. Had the accounts not been settled, the question of the plaintiff instructing the bank to delete her name from the account in the name of the firm and of receiving the original Bayana Agreement and of obtaining the clearance certificate aforesaid would not have arisen. The case set up by the plaintiff is contrary to all the admitted documents.

x x x x x x x x x

I find the present case to be clear beyond all reasonable doubts. The Bayana Agreement and Receipt admittedly executed by plaintiff and the averments of plaintiff in plaint in earlier suit instituted by plaintiff, permit of no controversy. The consideration mentioned therein was in settlement of all claims of plaintiff with respect to her share in partnership. The contemporaneous conduct of plaintiff, of statement on 13th August, 2004 in suit No. 438/2004 instituted by defendant; of taking clearance certificate dated 13th August, 2004 from defendant, of having her name as signatory deleted from the bank account of firm are also in consonance with said documents. The facts of this case do not require any opportunity for leading evidence to be given to the plaintiff. This Court cannot put a case contrary to such documents and conduct to be put to trial. The explanations now given during arguments do not form the basis of suit and pleadings."

(emphasis supplied)

The observation of the learned Single Judge that "the facts of this case do not require any opportunity for leading evidence to be given to the plaintiff" violates Order 15 Rule 3 of the Code. Where summons have been issued for settlement of issues and where issues have been settled, unless the parties agree, the court cannot deny the right

of parties to lead evidence. To render a final decision by denying such opportunity would be highhanded, arbitrary and illegal.

20. Even the division bench committed the same error. We extract below para 14 of the impugned order which shows that the decision was based on assumption without basis and in the absence of evidence freely referring to and relying upon unexhibited documents :

> "This is not the case of the plaintiff/appellant that the firm was maintaining separate accounts, one for the business being run by it in Rohini and the other for the business being run in Paschim Vihar. Ordinarily, when there is a Settlement between the partners of the firm whereby they agree to part ways, the Settlement effected between them would cover accounts of the entire business being run by them in partnership and it would not be confined only to one part of the business. This is more so when the document executed between the parties at the time of parting ways and setting the disputes does not reserve any right in favour of the outgoing partner, to receive any further payment from the partner who retains the business of the erstwhile firm. *In none of the documents executed between the parties, there is an averment that the accounts of business being run in Paschim Vihar had not been settled or that the plaintiff/appellant would not, in addition to the sum referred in the document, also be entitled to share of the profit earned by the firm from its business in Paschim Vihar.* Vide endorsement made on the receipt dated 29.6.2004, the husband of the appellant recorded that Paschim Vihar Institute Deed would be settled in the name of Dr.Rashmi Gupta for the consideration of Rs.15 lakhs. *This is yet another proof of the fact that the matter relating to Paschim Vihar Institute had also been finally settled between the parties.* During the course of arguments before us, it was contended by

> learned counsel for the appellant that the endorsement was made by the husband of the appellant without authority from her. Since we noticed a gentleman giving instructions to the learned counsel for the appellant, during the course of the hearing before us, we asked her as to who the gentleman was and we were told that he was none other than the husband of the appellant. *This leaves no doubt in our mind that the husband of the appellant was acting on authority from her when he made endorsements on the Bayana Agreement and Receipt dated 29.6.2004.* The shifting stands taken before him have been noted in detail, by the learned Single Judge.
>
> (emphasis supplied)

21. The High Court recorded factual findings on inferences from the plaintiff's (appellant) conduct and branded her as an unscrupulous person who abuses the process of court and as a person who utters falsehoods and manipulates documents without there being a trial and without there being an opportunity to the plaintiff to explain her conduct. To say the least, such a procedure is opposed to all principles of natural justice embodied in the Code of Civil Procedure. At all events, the alleged weakness of the case of the plaintiff or unscrupulousness of plaintiff are not grounds for dismissal without trial.

22. We also fail to understand how costs of Rs.50,000/- could be levied. This Court has repeatedly stated that in dealing with civil suits, courts will have to follow the provisions of Code of Civil Procedure in levying costs.

23. This order should not be construed as a finding on the conduct of the appellant one way or the other. We have examined the matter only for the limited purpose of finding out whether the High Court had proceeded in accordance with law and the provisions of Code of Civil Procedure. If on evidence,

the conduct of the plaintiff or the defendant is found to be unscrupulous or unbecoming, it is open to the court at that stage to decide upon the consequences that should be visited upon her or him.

24. We therefore allow this appeal, set aside the order of the Division Bench of the High Court dated 7.9.2009 affirming the order dated 13.3.2009 of the learned Single Judge and restore the suit to the file of the High Court with a direction to decide the same in accordance with law, after giving due opportunity to the parties to lead evidence.

R.P. Appeal allowed.

B.V. NAGESH & ANR.
v.
H.V. SREENIVASA MURTHY
(Civil Appeal No. 8259 of 2010)

SEPTEMBER 24, 2010

[P. SATHASIVAM AND DR. B. S. CHAUHAN, JJ.]

CODE OF CIVIL PROCEDURE, 1908:

s.96, O. 41, r.31 – Regular first appeal – Decision in – Held: Order 41 deals with appeals from original decrees – Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state: (a) the points for determination; (b) the decision thereon; (c) reasons for the decision; and (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled – The first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for re-hearing and parties have a right to be heard both on questions of fact and law – The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put-forth and pressed by the parties for decision of the appellate court – The appellate court has jurisdiction to reverse or affirm the findings of the trial court – Sitting as a court of appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings – In the instant case, the High Court, after narrating the pleadings of both parties, without framing points for determination and considering both facts and law set aside the judgment and decree of the trail court and modified the same without proper discussion and assigning adequate reasons – The High Court has failed to discharge the obligation placed on it as a first appellate court – The judgment under appeal is cryptic and none of the relevant

aspects have even been noticed – The appeal has been decided in an unsatisfactory manner – The judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal – Accordingly, the impugned judgment and decree of the High Court are set aside and the matter is remanded to it for disposal of the regular first appeal afresh in accordance with law.

Santosh Hazari .Vs. Purushottam Tiwai (Dead) By Lrs. **2001 (1) SCR 948 = 2001 (3) SCC 179 = 2001 (2) JT 407 = 2001 (1) SCALE 712; and** *Madhukar & Ors. Vs. Sangram & Ors.* **2001 (3) SCR 138 = 2001 (4) SCC 756, referred to.**

Case Law Reference:

2001 (1) SCR 948	**referred to**	**para 4**
2001 (3) SCR 138	**referred to**	**para 4**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8259 of 2010.

From the Judgment & Order dated 10.11.2008 of the High Court of Karnataka at Bangalore in R.F.A. No. 1601 of 2003.

Basava Prabhu S. Patil, B. Subrahmanya Prasad, Ajay Kumar M., Rajendra Prasad B., V.N. Raghupawthy for the Appellant.

H.V. Sreenivasa Murthy, Respondent-In-Person.

The following Order of the Cour was delivered

ORDER

1. Leave granted.

2. Heard learned senior counsel for the appellants and respondent appearing in person.

3. The impugned judgment passed by the High Court arose out of regular first appeal filed under Section 96 CPC. It is the grievance of the appellants that the High Court, without adverting to all the factual details and various grounds raised, disposed of the appeal in a cryptic manner. In the light of the above assertion, we verified the impugned judgment of the High Court. The High Court, after narrating the pleadings of both parties, without framing points for determination and considering both facts and law set aside the judgment and decree of the trial Court and modified the same without proper discussion and assigning adequate reasons.

4. How regular first appeal is to be disposed of by the appellate Court/High Court has been considered by this Court in various decisions. Order XLI of C.P.C. deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate Court shall state:

(a) the points for determination;

(b) the decision thereon;

(c) reasons for the decision; and -

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for re-hearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put-forth and pressed by the parties for decision of the appellate Court. Sitting as a court of appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is

avaluable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. [Vide *Santosh Hazari vs. Purushottam Tiwari,* (2001) 3 SCC 179 = JT (2001) 2 SC 407 and Madhukar and Others vs. Sangram and Others, (2001) 4 SCC 756]

5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate Court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the Court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law.

6. Inasmuch as the first appeal is pending from 2003, we request the High Court to dispose of the same as expeditiously as possible. The civil appeal is disposed of accordingly.

R.P. Appeal disposed of.

V.P. SHRIVASTAVA

v.

INDIAN EXPLOSIVES LTD. & ORS.

(Criminal Appeal No. 1843 of 2010)

SEPTEMBER 24, 2010

[D.K. JAIN AND H.L. DATTU, JJ.]

Penal Code, 1860 – ss. 405, 415, 420, 406 and 120-B – Cheating and dishonestly inducing delivery of property, criminal breach of trust and criminal conspiracy – Company in which appellants were senior functionaries entering into tripartite agreement with complainant company and another company – Complainant alleging suppression of the fact by appellants that the company was likely to be declared a sick company – Criminal complaint u/ss. 420, 406 and 120B IPC and ss. 540 and 542 of the Companies Act – Issuance of summons to appellants – Petition u/s. 482 Cr.P.C. – Dismissed by High Court – On appeal, held: No prima facie case made out against appellants in respect of alleged offences u/ss. 420, 406 and 120B – High Court should have quashed the complaint exercising its jurisdiction u/s. 482 Cr.P.C. – Thus, order of High Court set aside and order of magistrate taking cognizance in complaint case quashed – Code of Criminal Procedure, 1973 – s. 482 – Companies Act, 1956 – ss. 540 and 542.

Respondent no. 1 Company (IEL) was engaged in the manufacture and sale of industrial explosives. They used to buy raw materials from 'FCIL'. 'FCIL' entered into a tripartite agreement with respondent no. 1 and 'BCCL'. In terms of the agreement, 'FCIL' supplied raw materials to respondent no. 1. The same was stopped due to breakdown of gas compressor and financial difficulties. 'FCIL' was declared a sick company by the BIFR.

Thereafter, the BIFR directed winding up of 'FCIL'. Respondent no. 1 filed a criminal complaint against the appellants and 'M'-senior functionaries of 'FCIL for offences punishable under Sections 420, 406 and 120B IPC. Respondent no. 1 also filed a suit for recovery of certain amount. The magistrate took cognizance of the complaint and issued summons against the appellants and 'M'. Aggrieved, the appellants and 'M' filed petition under section 482 of the Code of Criminal Procedure, 1973 for quashing the order of summoning them. The High Court dismissed the petition. Therefore, the appellants filed the instant appeals.

Allowing the appeals, the Court

HELD: 1.1 It is plain from a bare reading of Section 415 IPC that to hold a person guilty of cheating, as defined in Section 415 IPC, it is necessary to show that at the time of making the promise he had a fraudulent or dishonest intention to retain the property or to induce the person so deceived to do something which he would not otherwise do. Such a culpable intention right at the time of entering into an agreement cannot be presumed merely from his failure to keep the promise subsequently. [Paras 21 and 24] [801-C; 802-E]

Ram Jas vs. State of U.P **(1970) 2 SCC 740;** *Hridaya Ranjan Prasad Verma and Ors. vs. State of Bihar and Anr.* **(2000) 4 SCC 168;** *S.W. Palanitkar and Ors. vs. State of Bihar and Anr.* **(2002) 1 SCC 241;** *Kuriachan Chacko and Ors. vs. State of Kerala* **(2008) 8 SCC 708;** *Medical Chemicals and Pharma (P) Ltd. vs. Biological E. Ltd. and Ors.* **(2000) 3 SCC 267;** *Hira Lal Hari Lal Bhagwati vs. CBI, New Delhi* **(2003) 5 SCC 257, referred to.**

1.2. In the instant case, a bare reading of the complaint would show that there was not even a whisper

let alone a specific averment that the appellants had dishonestly 'induced' 'IEL' to enter into the said agreement/arrangement. On the contrary, the complaint clearly revealed that 'IEL' was fully conscious of the precarious financial health of 'FCIL' at the time they had decided to enter into contract with 'FCIL' and 'BCCL' to ensure a regular supply of their basic raw material from 'FCIL' so that their production of explosives did not suffer. It is manifest from the complaint that the basis of the complaint was that by deliberately suppressing the fact that 'FCIL' had already been referred to the BIFR after the erosion of its net worth and was likely to be declared a 'sick company', the appellants induced 'IEL' to pay Rs.4,20,41,622/- to 'BCCL' and in return did not supply ammonium nitrate to them. A mere mention of the words 'defraud' and 'cheat' in the complaint, in the setting that these were used, is not sufficient to infer that the appellants had dishonest intention right at the beginning when, demonstrably, after due deliberations a tripartite agreement was signed, which, under the given circumstances at that juncture, was considered to be in the interest of all the three parties to the agreement. [Para 25 and 26] [802-F-G; 803-A-B; 806-E-G]

1.3 At best, the instant case was of breach of contract on the part of 'FCIL', for which the company is already defending a civil suit filed by 'IEL'. The averment strikes at the root of the allegation that at the time of entering into the agreement, the appellants had fraudulent intention to somehow induce 'IEL' to enter into the said agreement and part with a huge sum of money. On their own showing 'IEL' was fully aware of the financial health of 'FCIL' at the time the contract was entered into, as also the reason why 'FCIL' was unable to continue the production of ammonium nitrate. In order to constitute an offence of 'cheating', the intention to deceive should be

in existence at the time when the alleged inducement was made. In the instant case, such an intention cannot be inferred from the allegations in the complaint and averments in the plaint. Therefore, even if the allegations made in the complaint are taken to be correct on their face value, they may amount to breach of terms of contract by 'FCIL' but do not constitute an offence of 'cheating', punishable under Section 420 IPC. [Paras 27 and 28] [807-C; F-H; 808-A]

Anil Mahajan vs. Bhor Industries Ltd. and Anr. **(2005) 10 SCC 228, referred to.**

2.1. In relation to the offence under Section 405 IPC, the first ingredient that needs to be established is entrustment. However, it must be borne in mind that Section 405 IPC does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event. [Paras 32 and 33] [809-G-H; 810-C-E]

Jaswantrai Manilal Akhaney vs. State of Bombay **AIR 1956 SC 575;** *Indian Oil Corpn. vs. NEPC India Ltd. and Ors.* **(2006) 6 SCC 736, relied on.**

Onkar Nath Mishra and Ors. vs. State (NCT of Delhi) and Anr. **(2008) 2 SCC 561;** *Common Cause, A Registered Society vs. Union of India and Ors.* **(1999) 6 SCC 667 – referred to.**

2.2. In the instant case, there is nothing in the complaint which would suggest remotely that the 'IEL' had entrusted any property to the appellants or that the appellants had dominion over any of the properties of the

'IEL', which they dishonestly converted to their own use so as to satisfy the ingredients of Section 405 IPC, punishable under Section 406 IPC. [Para 34] [810-E-F]

3.1. Having come to the conclusion that no *prima facie* case had been made out against the appellants in respect of the alleged offences under Sections 420 and 406 IPC, the question of alleged conspiracy between the appellants does not arise. Nevertheless, in order to bring home the charge of conspiracy within the ambit of Section 120B IPC, it is necessary to establish that there was an agreement between the appellants for doing an unlawful act. The complaint lacks any such substance. [Para 35] [810-G; 811-A]

3.2. No *prima facie* case was made out against the appellants in respect of alleged offences under Sections 420, 406 and 120B IPC and, it was a fit case where the High Court should have exercised its jurisdiction under Section 482 of the Code quashing the complaint against the appellants. Thus, the impugned order is set aside and the order of the magistrate taking cognizance in the complaint case is quashed. [Paras 36 and 37] [811-B-D]

All Cargo Movers (India) Private Limited and Ors. vs. Dhanesh Badarmal Jain and Anr. **(2007) 14 SCC 776;** *R.P. Kapur vs. State of Punjab* **AIR 1960 SC 866;** *Dinesh Dutt Joshi vs. State of Rajasthan and Anr.* **(2001) 8 SCC 570;** *G. Sagar Suri and Anr. vs. State of U.P. and Ors.* **(2000) 2 SCC 636, referred to.**

Case Law Reference:

(2007) 14 SCC 776	**Referred to.**	**Para 12**
AIR 1960 SC 866	**Referred to.**	**Para 16**
(2001) 8 SCC 570	**Referred to.**	**Para 17**

(2000) 2 SCC 636	**Referred to.**	**Para 18**
(1970) 2 SCC 740	**Referred to.**	**Para 22**
(2000) 4 SCC 168	**Referred to.**	**Para 22**
(2002) 1 SCC 241	**Referred to.**	**Para 22**
(2008) 8 SCC 708	**Referred to.**	**Para 22**
(2000) 3 SCC 269	**Referred to.**	**Para 23**
(2003) 5 SCC 257	**Referred to.**	**Para 24**
(2005) 10 SCC 228	**Referred to.**	**Para 26**
(2008) 2 SCC 561	**Referred to.**	**Para 31**
(1999) 6 SCC 667	**Referred to.**	**Para 32**
AIR 1956 SC 575	**Relied on.**	**Para 33**
(2006) 6 SCC 736	**Relied on.**	**Para 33**

CRIMINAL APPELLATE JURISDICTION : Civil Appeal No. 1843 of 2010.

From the Judgment & Order dated 28.2.2007 of the High Court of West Bengal at Calcutta in CRR No. 2898 of 2004.

WITH

Crl. A. No. 1844 of 2010.

Jaideep Gupta, Shweta Bharti, Ahanthem Henry, Saurabh Raj Sinha, Ghanshyam Joshi, Dipak Kumar Jena, Sanjoy Ghosh, Avijit Bhattacharjee for the appearing parties.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. Leave granted.

2. These appeals, by special leave, arise out of the

judgment and order dated 28th February 2007, delivered by the High Court of Calcutta in CRR No.2898 of 2004 in a common petition filed by the two appellants herein and one Mr. A.K. Mukherjee, who is now deceased, under Section 482 of the Code of Criminal Procedure, 1973 (in short "the Code"). By the impugned judgment, the High Court has declined to quash a private complaint filed by respondent No.1 company against the appellants and Mr. A.K. Mukherjee for offences under Sections 420, 406 and 120B of the Indian Penal Code, 1860 (for short "the IPC').

3. Shorn of unnecessary details, the facts, material for the purpose of disposal of these appeals may be stated thus:

Both the appellants in these appeals were senior employees of the Fertilizer Corporation of India Limited (hereinafter referred to as "FCIL"), a government company within the meaning of Section 617 of the Companies Act, 1956.

4. On 20th April 1992, the FCIL's Board of Directors passed a resolution to the effect that the company had become a sick company within the meaning of the Sick Industrial (Special Provision) Companies Act, 1985 (hereinafter referred to as "SICA") and hence a reference should be filed with the Board of Industrial and Financial Reconstruction (hereinafter referred to as "BIFR"). On 6th November 1992, FCIL was declared a "sick company" under Section 3(1)(o) of the SICA by the BIFR.

5. The complainant — Indian Explosives Limited (hereinafter referred to as "IEL"), respondent No.1 in these appeals, is engaged in the manufacture and sale of industrial explosives. Ammonium nitrate is a major raw material for the manufacture of explosives, and the same was procured by IEL from FCIL. Some time in the year 2001, FCIL entered into a tripartite agreement with M/s Bharat Coking Coal Limited (hereinafter referred to as "BCCL") and IEL. As per the arrangement under the agreement, it was agreed that FCIL

would supply ammonium nitrate to IEL and against this supply, IEL would supply explosives of an equivalent value to BCCL, which in turn would supply coal of equivalent value to FCIL. It is an undisputed fact that pursuant to the said arrangement ammonium nitrate was supplied by FCIL to IEL for some time. However, due to the breakdown of a synchronized gas compressor and other financial difficulties, FCIL stopped supplies of ammonium nitrate to IEL.

6. On 2nd November 2001, BIFR formed its final opinion recommending winding up of FCIL and forwarded the same to the High Court of Delhi. Some time in December 2001, FCIL aggrieved by the opinion of the BIFR, preferred a statutory appeal under Section 25 of SICA before the Appellate Authority for Industrial and Financial Reconstruction (hereinafter referred to as "AAIFR"). However, on 16th April 2002, the AAIFR dismissed the said appeal and confirmed the order of the BIFR for the winding up of FCIL. In June 2002, FCIL and its employees preferred a Writ Petition (CWP No.3298 of 2002) before the High Court of Delhi challenging the said order of the AAIFR. The writ petition was disposed of by the High Court by its order dated 26th November 2002, whereby it remitted the matter back to BIFR for fresh consideration on the revival of the closed units of FCIL. BIFR, upon receiving the reference, directed the winding up of FCIL, except the JMO unit and on 2nd April 2004 sent its opinion to the High Court for confirmation.

7. During the pendency of the writ petition before the High Court, the Government of India, on 30th July 2002, issued a memorandum for closing of all the units of FCIL except the Sindhri and JMO units. On 10th September 2002, the Government of India issued yet another memorandum directing closure of the Sindhri unit as well. It was further directed that FCIL shall implement Voluntary Suppression Scheme in all its units, and all the employees shall be discharged of their employment. The appellants herein availed of the Voluntary Suppression Scheme and were discharged from the service of FCIL.

8. On 22nd May 2003, IEL instituted a criminal complaint (Case No. 2560/2003) in the court of Chief Metropolitan Magistrate, Kolkata under Sections 406, 420 and 120B of the IPC read with Sections 540 and 542 of the Companies Act, 1956 against both the appellants and Mr. A.K. Mukherjee.

9. Simultaneously, on 25th May 2003, IEL also filed a Title Suit No. 34 of 2003 before the 4th Civil Judge, Alipore for recovery of the outstanding amount of Rs.4,20,41,622/- along with future and pendelite interest against FCIL. IEL, on 23rd January 2004, obtained and was granted permission by the BIFR to continue with the said civil suit subject to the condition that they will not execute the decree in the suit without the permission of the BIFR.

10. On 30th October 2003, the Chief Metropolitan Magistrate referred the complaint to Metropolitan Magistrate, 8th Court, Kolkata, who issued summons against the appellants and Mr. A.K. Mukherjee. Aggrieved by the order of the Magistrate taking cognizance of the complaint, appellants together with Mr. A.K. Mukherjee preferred the afore-stated petition under Section 482 of the Code for quashing of the order summoning them to stand trial, before the Calcutta High Court.

11. As stated above, the High Court, vide its impugned judgment has dismissed the said petition. The High Court has inter alia, observed that if the fact that FCIL, of which the accused were senior functionaries, had become sick and the question of its winding up was under consideration by the BIFR was made known to the complainant company, it would not have agreed to the proposal of the accused persons. According to the High Court, in order to arrive at a conclusion whether or not on the available materials the accusation against the appellants would be sustained or not, a detailed enquiry by appreciation of the evidence would be required and such an exercise, being entirely a matter of trial, cannot be undertaken in proceedings under Section 482 of the Code.

Hence the present appeals.

12. Mr. Jaideep Gupta, learned senior counsel appearing for the appellants strenuously urged that the complaint deserves to be quashed as it ex-facie lacks the basic ingredients of Sections 420 or 406 IPC. It was argued that in the complaint it is not even averred that the accused had a fraudulent or dishonest intention to induce the complainant to enter into the tripartite agreement. Similarly, there is no allegation that the appellants herein had dishonestly misappropriated or converted to their use any property of IEL, which had been entrusted to them. Further, from a bare perusal of the complaint, it is evident that the complainant was aware of the financial health of FCIL and, therefore, it cannot be said that the appellants had suppressed the fact that FCIL was likely to be declared as a sick company. To buttress the plea, learned senior counsel referred to the plaint in the suit. Relying on the decision in *All Cargo Movers (India) Private Limited & Ors. Vs. Dhanesh Badarmal Jain & Anr.*[1], it was submitted that the averments and the documents in the civil suit could be taken into consideration to find out as to whether the allegations in the complaint were correct. Additionally, learned senior counsel argued that the disputes between FCIL and IEL were essentially civil in nature, and the complaint only against the erstwhile employees of FCIL was mala fide and an abuse of the process of court and, therefore, deserves to be quashed.

13. Per contra, Mr. Sanjoy Ghosh, learned counsel appearing on behalf of the IEL, supported the impugned judgment and argued that the appellants had only disclosed to the IEL that FCIL was going through a financial crunch and, therefore, withholding of material information regarding its moving the BIFR for being declared a sick company was clearly suppression of material facts from IEL with a mala fide intention to induce them to enter into the said agreement with them,

1. (2007) 14 SCC 776.

knowing fully well that FCIL will not be able to honour its commitment under the arrangement. According to the learned counsel, this tantamounts to cheating as also criminal breach of trust within the meaning of Sections 415 and 405 IPC respectively. Learned counsel thus, contended that the High Court was justified in not analyzing and returning a finding on the truthfulness or otherwise of the allegations in the complaint at such a preliminary stage of the proceedings, when only summons have been issued to the appellants to appear in the court and it is always open to the appellants to apply for discharge before the trial court.

14. The question for consideration, therefore, is whether or not in the light of the allegations in the complaint against the appellants, the High Court was correct in law in declining to exercise its jurisdiction under Section 482 of the Code?

15. Before evaluating the contentions advanced on behalf of the parties, it will be useful to briefly notice the scope and ambit of the inherent powers of the High Court under Section 482 of the Code. The section itself envisages three circumstances under which the inherent jurisdiction may be exercised, namely; (i) to give effect to an order under the Code; (ii) to prevent an abuse of the process of court; and (iii) to otherwise secure the ends of justice. Nevertheless, it is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction of the Court. Undoubtedly, the power possessed by the High Court under the said provision is very wide but is not unlimited. It has to be exercised sparingly, carefully and cautiously, ex debito justitiae to do real and substantial justice for which alone the court exists. It needs little emphasis that the inherent jurisdiction does not confer an arbitrary power on the High Court to act according to whim or caprice. The power exists to prevent abuse of authority and not to produce injustice.

16. In one of the earlier cases, in *R.P. Kapur Vs. State of Punjab*[2] this Court had summarised some of the categories of cases where the inherent power under Section 482 of the Code could be exercised by the High Court to quash criminal proceedings against the accused. These are:

> (i) where it manifestly appears that there is a legal bar against the institution or continuance of the proceedings e.g. want of sanction;
>
> (ii) where the allegations in the first information report or the complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;
>
> (iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

17. In *Dinesh Dutt Joshi Vs. State of Rajasthan & Anr.*[3], while dealing with the inherent powers of the High Court, this Court has observed thus: (SCC p. 573, para 6)

> "6. … The principle embodied in the section is based upon the maxim: quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest i.e. when the law gives anything to anyone, it gives also all those things without which the thing itself would be unavailable. The section does not confer any new power, but only declares that the High Court possesses inherent powers for the purposes specified in the section. As lacunae are sometimes found in procedural law, the section has been embodied to cover such lacunae wherever they are discovered. The use of extraordinary powers conferred upon the High Court under this section are however required to be reserved, as far as possible, for extraordinary cases."

2. AIR 1960 SC 866.

3. (2001) 8 SCC 570.

18. In *G. Sagar Suri & Anr. Vs State of U.P. & Ors.*[4], this Court had opined as follows:

> "Jurisdiction under Section 482 of the Code has to be exercised with great care. In exercise of its jurisdiction the High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

19. Bearing in mind the aforestated legal position in regard to the scope and width of power of the High Court under Section 482 of the Code, we shall now advert to the facts at hand.

20. As noted above, the complaint against the appellant alleges commission of offences by them of cheating and dishonestly inducing delivery of property; criminal breach of trust and of criminal conspiracy punishable respectively under Sections 420, 406 and 120B of the IPC.

21. Section 415 IPC deals with "cheating" and reads as follows:

> *"415. Cheating.*—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally

4. (2000) 2 SCC 636.

induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section."

It is plain from a bare reading of the Section that to hold a person guilty of cheating, as defined in Section 415 of the IPC, it is necessary to show that at the time of making the promise he had fraudulent or dishonest intention to retain the property or to induce the person so deceived to do some thing which he would not otherwise do.

22. The ingredients required to constitute an offence of cheating have been succinctly laid down in *Ram Jas Vs. State of U.P.*[5], as follows:

"(i) there should be fraudulent or dishonest inducement of a person by deceiving him;

(ii)(a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or

(b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and

(iii) in cases covered by (ii)(b), the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property." (*Hridaya Ranjan Prasad Verma & Ors. Vs. State of Bihar & Anr.*[6], *S.W. Palanitkar & Ors. Vs. State of Bihar & Anr.*[7], *Kuriachan Chacko & Ors. Vs. State of Kerala*[8])

5. (1970) 2 SCC 740.

6. (2000) 4 SCC 168.

23. Similar views were echoed in *Medchl Chemicals & Pharma (P) Ltd. Vs. Biological E. Ltd. & Ors*.[9], wherein it was observed that:

"In order to attract the provisions of Sections 418 and 420 the guilty intent, at the time of making the promise is a requirement and an essential ingredient thereto and subsequent failure to fulfil the promise by itself would not attract the provisions of Section 418 or Section 420. Mens rea is one of the essential ingredients of the offence of cheating under Section 420. As a matter of fact Illustration (g) to Section 415 makes the position clear enough to indicate that mere failure to deliver in breach of an agreement would not amount to cheating but is liable only to a civil action for breach of contract."

24. It is well settled that in order to constitute an offence of cheating, it must be shown that the accused had fraudulent or dishonest intention at the time of making the representation or promise and such a culpable intention right at the time of entering into an agreement cannot be presumed merely from his failure to keep the promise subsequently. (Also see: *Hira Lal Hari Lal Bhagwati Vs. CBI, New Delhi*[10]).

25. In the instant case, it has been alleged by IEL that at the time of entering into the tripartite agreement, the appellants, by having suppressed the fact that FCIL was likely to be declared a sick company and was, in fact, declared to be so by the BIFR, had dishonest intention to induce IEL to enter into the said agreement, which amounted to cheating. A bare

7. (2002) 1 SCC 241.

8. (2008) 8 SCC 708.

9. (2000) 3 SCC 269.

10. (2003) 5 SCC 257.

reading of the complaint would show that there is not even a whisper let alone a specific averment that the appellants had dishonestly "induced" IEL to enter into the said agreement/ arrangement. On the contrary, the complaint clearly reveals that IEL was fully conscious of the precarious financial health of FCIL at the time they had decided to enter into contract with FCIL and BCCL to ensure a regular supply of their basic raw material from FCIL so that their production of explosives did not suffer. At this juncture it would be apposite to extract relevant portions of the complaint:

> "6. That the complainant Company approached the accused persons at their office at 41, Chowringhee Road, Kolkatta-700 071 *to supply a large quantity of Ammonium Nitrate and at last the accused persons had agreed to such proposal. The complaint had been to the office of the accused persons on several occasions and had several discussions with this regard with some terms and conditions.*
>
> 7. That the accused persons supplied Ammonium Nitrate to the complaint Company for some time. The accused persons who were officers-in-charge of (sic) and were responsible for the supply of ammonium nitrate to the complainant's company made the following representations to the complainant and other officers of the complainant's Company:-
>
> (a) That it would not be possible for the accused persons to maintain regular supply of Ammonium Nitrate to the complainant's company due to acute shortage of funds the Company of the accused persons was not in position to lift coal from M/S Bharat Coking Coal Ltd. hereinafter referred as "BCCL" which is one of the subsidiaries of Coal India Ltd. and unless regular supply of coal is received by the company of the accused persons from BCCL, the manufacture of Ammonium Nitrate would be hampered and consequently the company of the accused person would not be able to supply the same to the company of the complainant.
>
> (b) That it was represented by the accused persons that as BCCL purchases huge industrial explosives from the complainants company, for using explosives in their coal mines for mining/procuring coal, and as BCCL supplies coal to the company of the accused person, for the purpose of its manufacturing Ammonium Nitrate, which would be supplied to the Company of the complainant, the accused persons would make arrangements with BCCL so that instead of making payment to the company of the accused persons for supply of ammonium nitrate, the Complainant's Company would make an advance payment of Rs. 4,20,41,622/- by supply of explosives to BCCL and the same would be adjusted for its supply of coal to the company of the accused person against supply of Ammonium nitrate of equivalent value by the company of the accused persons to the complainant's company.
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> 8. That on such representations the accused persons induced the complainant and the officers of the company to pay a sum of Rs.4,20,41,622/- and equivalent to BCCL between September 2001 to November 2001 on the specific representations that the accused persons would

supply ammonium nitrate to IEL and the said sum would be adjusted towards the supply of ammonium nitrate.

... ...
....

10. That enquiry revealed that the accused persons deliberately and with fraudulent intentions while making the aforesaid representations to the complainant and other officers of IEL for dishonestly inducing them to pay Rs.4,20,41,622/- and or equivalent to and the said amount an or equivalent was entrusted to BCCL in the false representation of the accused persons and the said entrustment was made to BCCL on the behalf of the accused persons. The accused persons deliberately suppressed that FCIL was already declared to be a "Sick Company" and was referred to BIFR after eroding its net worth and became a 'sick company". The accused persons also suppressed the fact that BIFR was considering winding up of FCIL by recommending to the Hon'ble High Court at Delhi.

11. That it was further learned that the accused persons with deceptive and fraudulent intentions deliberately suppressed that a huge amount was already due to various other suppliers of raw materials and other creditors, that the complainant would have not parted with such a huge amount of Rs.4,20,41,622/- and or equivalent to BCCL if they were not deceived by the false and fraudulent representation of the accused persons and induced to part with the said sum.

12. That the accused persons had therefore acted in collusion and connivance with each other in order to defraud and cheat the company of the complainant to make entrustment of the said sum of Rs.4,20,41,622/- and or equivalent to BCCL for and on the behalf of the company of the accused persons.

13. That the accused persons were party to a criminal conspiracy and criminal design they were in collusion to each other intentionally deceived the complainant and officers of IEL and by their false and fraudulent representation made the company of the complainant to believe that they would supply ammonium nitrate to IEL of Rs.4,20,41,622/- and or equivalent is paid by IEL to BCCL and by such representation induced the complainant and other officers of IEL to pay a sum of Rs.4,20,41,622/- and or equivalent to BCCL knowing it fully well that the representations made by them were false and they would not supply ammonium nitrate to IEL in respect of the said sum advanced by IEL to BCCL on their behalf and thus they have committed offences rendering themselves liable to be prosecuted under the provisions of the Section 120B/420/406 of the Indian Penal Code and also under Section 540/542 of the Companies Act, 1956."

(Emphasis supplied by us)

26. It is manifest from the afore-extracted paragraphs of the complaint that the basis of the complaint is that by deliberately suppressing the fact that FCIL had already been referred to the BIFR after the erosion of its net worth and was likely to be declared a "sick company", the appellants induced IEL to pay Rs.4,20,41,622/- to BCCL and in return did not supply ammonium nitrate to them. In our view, a mere mention of the words "defraud" and "cheat" in para 12 of the complaint, in the setting that these have been used, is not sufficient to infer that the appellants had dishonest intention right at the beginning when, demonstrably, after due deliberations a tripartite agreement was signed, which, under the given circumstances at that juncture, was considered to be in the interest of all the three parties to the agreement. In this regard, it would be useful to advert to the following observations made by this Court in *Anil Mahajan Vs. Bhor Industries Ltd. & Anr.*[11]:

11. (2005) 10 SCC 228.

"The substance of the complaint is to be seen. Mere use of the expression 'cheating' in the complaint is of no consequence. Except mention of the words 'deceive' and 'cheat' in the complaint filed before the Magistrate and 'cheating' in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MoU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay."

27. In our opinion, in the present case, at best, it was a case of breach of contract on the part of FCIL, for which the said company is already defending a civil suit filed by IEL. In this behalf, it is also pertinent to note that in para 5 of the plaint filed by IEL it is averred that:

"While the aforesaid arrangement was continuing and the defendant no.1 supplied various quantities of Ammonium Nitrate malt to the plaintiff in the years 2000-2001, the defendant no. 1 ran into serious difficulties in continuing its production due to breakdown of synchronized gas compressor and the other financial problems…."

28. In our view, the averment strikes at the root of the allegation that at the time of entering into the agreement some time in the year 2001, the appellants had fraudulent intention to somehow induce IEL to enter into the said agreement and part with a huge sum of money. It bears repetition that on their own showing IEL was fully aware of the financial health of FCIL at the time the said contract was entered into, as also the reason why FCIL was unable to continue the production of ammonium nitrate. It needs little emphasis that in order to constitute an offence of "cheating", the intention to deceive should be in existence at the time when the alleged inducement was made. In the instant case, such an intention cannot be inferred from the aforenoted allegations in the complaint and averments in the plaint. In our opinion, therefore, even if the allegations made in the complaint are taken to be correct on

their face value, may amount to breach of terms of contract by FCIL but do not constitute an offence of "cheating", punishable under Section 420 of the IPC.

29. We may now consider whether the allegations in the complaint make out a case of criminal breach of trust, as defined in Section 405 of the IPC, the Section reads as follows:

"405. Criminal breach of trust.—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

Explanation 1.—A person, being an employer of an establishment whether exempted under section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not who deducts the employee's contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Explanation 2.—A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Insurance Corporation established under the Employees' State Insurance Act, 1948 (34 of 1948), shall

be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid."

30. According to the Section, a criminal breach of trust involves the following ingredients:

"(a) a person should have been entrusted with property, or entrusted with dominion over property;

(b) that person should dishonestly misappropriate or convert to his own use that property, or dishonestly use or dispose of that property or wilfully suffer any other person to do so; and

(c) that such misappropriation, conversion, use or disposal should be in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract which the person has made, touching the discharge of such trust."

31. In *Onkar Nath Mishra & Ors. Vs. State (NCT of Delhi) & Anr.*[12], a bench of two Judges of this Court, in which one of us (D.K. Jain, J.) was a member, had observed that two distinct parts were involved in the commission of the offence of criminal breach of trust. The first part consists of the creation of an obligation in relation to the property over which dominion or control is acquired by the accused. The second is the misappropriation or dealing with the property dishonestly and contrary to the terms of the obligation created.

32. Therefore, in relation to the offence under Section 405, IPC, the first ingredient that needs to be established is

12. (2008) 2 SCC 561.

"entrustment." In Common Cause, *A Registered Society Vs. Union of India & Ors.*[13], this Court held that:

"A trust contemplated by Section 405 would arise only when there is an entrustment of property or dominion over property. There has, therefore, to be a property belonging to someone which is entrusted to the person accused of the offence under Section 405. The entrustment of property creates a trust which is only an obligation annexed to the ownership of the property and arises out of a confidence reposed and accepted by the owner."

33. However, it must be borne in mind that Section 405, IPC does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event. (See: *Jaswantrai Manilal Akhaney Vs. State of Bombay*[14] and *Indian Oil Corpn. Vs. NEPC India Ltd. & Ors.*[15].)

34. In the instant case, there is nothing in the complaint which may even suggest remotely that the IEL had entrusted any property to the appellants or that the appellants had dominion over any of the properties of the IEL, which they dishonestly converted to their own use so as to satisfy the ingredients of Section 405 of the IPC, punishable under Section 406 IPC.

35. Having come to the conclusion that no prima facie case had been made out against the appellants in respect of the alleged offences under Sections 420 and 406 IPC, the question of alleged conspiracy between the appellants does not arise.

13. (1999) 6 SCC 667.

14. AIR 1956 SC 575.

15. (2006) 6 SCC 736.

Nevertheless, in order to bring home the charge of conspiracy within the ambit of Section 120B of the IPC, it is necessary to establish that there was an agreement between the appellants for doing an unlawful act. The complaint lacks any such substance.

36. The upshot of the foregoing discussion is that no prima facie case is made out against the appellants in respect of alleged offences under Sections 420, 406 and 120B of the IPC and, in our opinion, it was a fit case where the High Court should have exercised its jurisdiction under Section 482 of the Code quashing the complaint against the appellants.

37. For the aforegoing reasons, the appeals are allowed; the impugned order is set aside and the order of the Magistrate taking cognizance in Complaint Case No.2560 of 2003 is quashed.

N.J. Appeals allowed.

BRUNDABAN MOHARANA & ANR.

v.

THE STATE OF ORISSA

(Criminal Appeal 170 of 2006)

SEPTEMBER 28, 2010

[HARJIT SINGH BEDI AND CHANDRAMAULI KR. PRASAD, JJ.]

INDIAN PENAL CODE, 1860:

s.302/34 – Death of a married woman by burn injuries – Conviction by trail court of in-laws of deceased on the basis of dying declarations – High Court though discarding one dying declaration, but affirming the conviction relying on the dying declaration which was recorded by I.O. u/s.161 CrPC – Held: In a murder case, no presumption in favour of the prosecution arises – The primary pieces of evidence against the accused are the two dying declarations, one made to PW-8 which has been disbelieved by the High Court and the other to PW-9, the I.O., which has been relied upon by the High Court basing its opinion on the fact that this dying declaration was supported by the evidence of PW-3 and PW-7 as well – Both PW-3 and PW-7 were categoric that they had been present when the dying declaration was being recorded by PW-9 and were, therefore, witnesses to the contents of the dying declaration – If a doubt can be cast by the defence that the injured was not in a position to make a dying declaration or that the dying declaration was itself shrouded in mysterious circumstances, the evidence of PW-3 and PW-7 would automatically fall through – The I.O. recorded the dying declaration as a statement u/s 161 Cr.P.C. – In his cross-examination, he stated that condition of the victim was serious, though she was not able to talk, but she spoke in unconscious state – He also admitted that he had not recorded the statement of the Doctor who was treating the

injured – No reliance can, therefore, be placed on this dying declaration as well – The statements of PW-3 and PW-7 allegedly supporting the dying declaration, would, ipso-facto, fall – Even assuming that PW-3 and PW-7 had indeed been present when the dying declaration was recorded, no credence could be attached to such a declaration as it would have been tantamount to tutoring of the injured by these two witnesses who were her uncle and father – The judgment of the High Court cannot be sustained and is set aside – Accused are acquitted – Evidence Act, 1872 – s.32 – Dying declaration – Code of Criminal Procedure, 1973 – s.161.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No(s). 170 of 2006.

From the Judgment & Order dated 09.09.2003 of the High Court of Orissa at Cuttack in Criminal Appeal No. 242 of 1994.

G. Prakash for the Appellants.

Shibashish Misra for the Respondent.

O R D E R

This appeal arises out of the following facts.

1. Amani Moharana, since deceased had been married to Pitabas Moharana, son of appellants 2 and 3 about 5 years prior to the incident. It appears that the in-laws and the family members of the deceased started misbehaving with her soon after the marriage, and at about 7 pm. on 28th October 1990, in the course of a family quarrel Pitabas Moharana assaulted her and then moved towards the outer courtyard. Immediately thereafter, the in-laws of the deceased, that is the present appellants and their daughter Pokani came there and while Pokani caught hold of the deceased and tied her mouth with a towel, Gurubari, the mother-in-law sprinkled kerosene on her body and Brundaban, the father-in-law, set her ablaze. Unable to bear the pain, the deceased ran for her life and fell down near the door steps. She was, however, removed to the Naugaon dispensary where she was given first aid but as her

condition was serious, she was moved to Jagatsinghpur hospital and thereafter to the S.C.B. Medical College & Hospital for treatment where she ultimately died. It is the case of the prosecution that while the deceased was being treated in the Naugaon dispensary she made a statement to Dr. Jena PW-4 and told him that she had been first assaulted by her husband Pitabas Moharana and then set a fire by her-in-laws and sister-in-law. This information was conveyed to PW-1, the uncle of the deceased who lodged a First Information Report under Section 498A, 307/34 of the IPC. It appears that while the deceased was admitted in the S.C.B. Medical College & Hospital PW-8, the attending Doctor, recorded another dying declaration of the deceased whereas PW-9, the Officer In-charge of the Naugaon Police Station had recorded yet another statement under Section 161 of the Cr.P.C. in the Naugaon dispensary. Amani, however, died a short while later on which the offence was converted into one under Section 304-B of the IPC along with the other Sections mentioned above and after investigation the accused were charged for offences punishable under Section 302/34 and in the alternative under Section 304-B/34 and 498-A of the IPC. The trial court relying on the dying declarations recorded by PW-8 and PW-9 convicted the appellants herein and the daughter Pokani under Section 302/34 of the IPC but acquitted the husband Pitabas Moharana. The trial court also found that in the absence of any material, the charge under Sections 498-A and 304-B of the IPC was not made out. An appeal was thereafter taken to the High Court. The High Court observed that the only evidence with regard to the murder were the two dying declarations that had been recorded, one by PW-8, the Doctor in the Medical College and Hospital and the other by PW-9, the Investigating Officer who had recorded her statement also in the Medical Hospital in the form a statement under Section 161 of the Cr.P.C. The Court, however, observed that the dying declaration recorded by PW-8 (Mark 6) had been produced in evidence in the form of a Xerox copy and as there was no evidence to show that the original had been destroyed this document could not be taken in evidence as secondary

evidence. The High Court, accordingly, observed that it was constrained to discard the evidence of PW-8 in so far as it related to the dying declaration made before him. The High Court then examined the dying declaration made to PW-9 and marked as Ex.8. The Court noted that PW-9 had admitted in his cross-examination that though the injured was not in a position to talk, she had nevertheless spoken while in an unconscious state and her statement had, accordingly, been recorded as he was under the impression that she was not completely out of her senses. The Court observed that the dying declaration Ex.8 was also supported by the evidence of PW-3, a relative of the deceased who had been present there and confirmed the contents thereof which were to the effect that Pokani had caught hold of her and stuffed her mouth with a napkin whereas the other two had set her on fire. The Court also observed that a dying declaration had also been made by the deceased to her father PW-7 in similar terms and accordingly concluded that the dying declaration made to PW-9 was supported by the evidence of PW-3 and PW-7. The High Court, accordingly, dismissed the appeal. The present appeal by way of special leave has been filed by the in-laws of the deceased.

2. We see that we are dealing with a case of murder. No presumption in favour of the prosecution thus arises in this case. The primary pieces of evidence against the appellants are the two dying declarations, one made to PW-8 which has been disbelieved by the High Court and the other to PW-9, the Investigating Officer which has been relied upon by the High Court basing its opinion on the fact that this dying declaration was supported by the evidence of PW-3 and PW-7 as well. Both PW-3 and PW-7 were categoric that they had been present when the dying declaration was being recorded by PW-9 and were therefore witnesses to the contents of the dying declarations. In other words, if a doubt can be cast by the defence that the injured was not in a position to make a dying declaration or that the dying declaration was itself shrouded in

mysterious circumstances, the evidence of PW-3 and 7 would automatically fall through. We have, accordingly, gone through the evidence of PW-9 very carefully. In his examination-in-chief, he deposed that on the 28th November 1990, he had received written information about a cognizable offence and a case under Section 498-A and 307 read with Section 34 of the IPC had been registered by him at the Naugaon Police Station and that he had thereafter proceeded to the Naugaon Primary Health Centre and recorded the dying declaration as a statement under Section 161 of the Cr.P.C. In his cross-examination, he stated as under:

> "Amani was lying on the verandah of the P.H.C. When I first reached the P.H.C. I found Amani lying on the verandah, her condition was serious, though she was not able to talk but she spoke in unconscious state and I recorded her statement U/s 161 Cr.P.C. At very first of my asking she did not tell anything but I told near her ear in a little bit loud voice that I am Bada Babu (O.I.C of Police Station) and I had come to know as to how she received injury. Thereafter, she gave her statement which I recorded. This fact I have not noted in my case diary but I replied so when the defence counsel cross examined me about her state of mind."

3. He also admitted that he had not recorded the statement of the Doctor who was treating the injured. We are of the opinion that in the light of the aforesaid statement as the very capacity of the injured to make a statement was in doubt, some support could have been found by the prosecution had the attending doctor been examined or an endorsement taken from him that the injured was fit to make a statement. On the contrary, however, the PW-9 admitted that though the statement had been recorded in the presence of PW-3 and PW-7 as well as the doctor, he had still not taken his opinion. No reliance can, therefore, be placed on this dying declaration as well.

4. As already indicated above, if the dying declaration Ex.8

falls through, the statements of PW-3 and PW-7 allegedly supporting the dying declaration, would, ipso-facto, fall. Even assuming for a moment that PW-3 and PW-7 had indeed been present when the dying declaration was recorded, no credence could be attached to such a declaration as it would have been tantamount to tutoring of the injured by these two witnesses who were her uncle and father. We are, therefore, of the opinion that the judgment cannot be sustained. We, accordingly, allow this appeal, set aside the order of the High Court and direct the appellants to be acquitted.

R.P. Appeal allowed.

SOHAM MAYANKKUMAR VYAS AND ORS.
v.
UNION OF INDIA AND ORS.
(Writ Petition(C) NO. 172 of 2010)

SEPTEMBER 28, 2010

[R.V. RAVEENDRAN AND H.L. GOKHALE, JJ.]

DENTISTS ACT, 1948:

s. 10 (4) (b) – Mauras College of Dentistry, Mauritius – Affiliated to Bhavnagar University – Added by Government of India Notification dated 6.3.2009 at Sl. No. 96 in Part III of the Schedule to the Act – Letter dated 16.2.2010 by Government of India requiring students of Mauras College who had secured BDS degrees from Bhavnagar Univesity to appear for screening test as per DCI Screening Test Regulations, 2009 – Notification dated 6.3.2009 and letter dated 16.2.2010 challenged in writ petitions before the Supreme Court – Held: Though Mauras College is situated outside India, the students of the College who have been granted BDS degrees by Bhavnagar University possess the dental qualifications awarded by an authority in India – Notification dated 6.3.2009 quashed – Government of India directed to consider the request as and when made by Mauras College for inclusion of its name in Column (2) of entry 62 of Part I of the Schedule to the Act -- Until the College is so included, its Indian students will have to undergo the screening test as per the first proviso to Regulation 4 of 2009 Regulations – Dental Council of India Screening Test Regulations, 2009 – Regulation 4 – Education/ Educational Institutions.

Mauras College of Dentistry, Hospital and Oral Research Institute, Mauritius (Mauras College) was granted affiliation to Bhavnagar University in India for the

academic year 2003-04 and the affiliation was renewed for the years 2004-05 and 2005-06. The Government of India, in exercise of its power under clause (b) of sub-s. (4) of s.10 of the Dentists Act, 1948 issued a notification dated 6.3.2009 (Gazetted on 21.3.2009) adding the Mauras College at Sl. No. 96 in Part III of the Schedule to the Act, to the effect that the dental qualifications of the students of the Mauras College were dental qualifications granted by an authority or institution outside India. The Dental Council of India, in exercise of powers conferred by s. 20 read with s. 10 (4) / (5) of the Act, framed the Dental Council of India Screening Test Regulations, 2009 providing for screening test to determine the eligibility of Indian Citizens possessing primary dental qualification awarded by any dental institution outside India for registration with any State Dental Council. The Government of India (Ministry of Health and Family Welfare, Dental Education Section), by letter dated 16.2.2010, required the students of Mauras College who had secured BDS degrees from Bhavnagar University to appear for the screening test as per the 2009 Regulations for recognition of their degrees in India. The instant writ petitions were filed seeking to quash the Notification dated 6.3.2009 and for certain other reliefs.

The questions for consideration before the Court were: (i) "whether the notification dated 6.3.2009 issued under s.10(4)(b) of the Act entering the Mauras College, Mauritius and its BDS degree, at Sl. No. 96 in Part III of the Schedule to the Act is valid?" and (ii) "whether the BDS graduates from Mauras College affiliated to Bhavnagar University, Gujarat have to take the screening test under the DCI Screening Regulations, 2009, for recognition of their BDS degree in India?"

Allowing the writ petitions in part, the Court

HELD: 1. Section 10(4) of the Dentists Act, 1948 will apply only if the dental qualification is granted by an authority or institution outside India, and as a consequence, such qualification will have to be listed under Part III of the Schedule to the Act. The respondents do not dispute the fact that the BDS examinations for the students of Mauras College are held by Bhavnagar University and the degrees are also granted to them by the said University and not by any authority or institution outside India. So long as the Mauras College is affiliated to Bhavnagar University and the said University is the examining body and is the authority which grants the BDS degree dental qualification to the students of Mauras College, s. 10(4) and Part-III of the Schedule to the Act will not apply. As Bhavnagar University is not an authority outside India, the dental qualifications granted by it cannot be included in Part III of the Schedule to the Act even if the college/ institution affiliated to the said University is outside India. Therefore, the notification dated 6.3.2009 is illegal being contrary to and violative of s.10(1) and (4) of the Act and liable to be struck down. [para 12] [832-H; 833-A-C;]

2.1. A 'recognized dental qualification' could be either (i) a dental qualification granted on completion of a course of study in an institution (University or deemed University) whose dental qualification is recognized by the Central Government; or (ii) a dental qualification granted by an authority (whose dental qualifications are recognized by the Central Government) to those who undergo a course of study in an affiliated dental college/ institution, which was established with the previous permission of the Central Government. Thus, where the dental qualification is granted by an authority (that is, a University in India) to which several dental colleges are

affiliated, the term "recognized dental qualification" refers to the dental qualification granted by a University (whose dental qualifications are recognized by the Central Government) by undergoing a course of study in an affiliated college or institution established with the prior permission of the Central Government. [para 13] [833-D-G]

2.2 The Recognized dental qualifications granted by authorities or institutions in India are enumerated in Part I of the Schedule to the Dentists Act, 1948; the recognized dental qualifications granted by authorities or institutions outside India (only for the purpose of registration of Indian citizens when the Register is first prepared under the Act) are enumerated in Part II of the Schedule to the Act; and the recognised dental qualifications granted by any authorities or institutions outside India only when granted to citizens of India, are enumerated in Part III of the Schedule. Having regard to the provisions of sub-ss. (1) and (4) of s. 10 of the Act, if a dental college is situated outside India but the authority which grants the dental qualification in regard to students of that College is in India, recognition of the dental qualifications will be governed by s. 10(1) and will have to be enumerated in Part I of the Schedule. For this purpose, the dental qualifications granted by the Authority should be recognized by the Central Government, and the Institution/College where the course of study is conducted should have the prior permission of the Central Government for offering such course of study. Such recognition and permission, when granted to the University and College respectively results in the University (Authority) and the affiliated College (institutions) being included in Part-I of the Schedule to the Act. [para 14] [833-H; 834-A-D]

2.3 If the dental qualification is not being granted by any authority or institution in India, then the dental qualification will not be recognized u/s. 10(1) or (2) of the Act and, consequently, will not be included under Part-I of the Schedule to the Act. If the dental qualification is granted by an authority or institution outside India is recognized u/s. 10(4) and is included in Part-III of the Schedule, a citizen of India possessing such qualification shall be entitled to registration under the Dentists Act. [para 15] [834-E-F]

2.4 The dental qualification granted by the Bhavanagar University, that is, Bachelor of Dental Surgery - shown by the abbreviation "BDS (Bhavnagar)", granted on or after 3.7.2004, in regard to its affiliated College - Manubhai Patel Dental College and Hospital, Vadodara, Gujarat is a recognized dental qualification by virtue of the said University and College being shown at Sl.No.62 in Part I of the Schedule to the Act. The dental qualification of Bachelor of Dental Surgery obtained by undergoing a course of study at Mauras College is not listed in Part I against Entry No.62 relating to Bhavnagar University. Though the recognition of the dental qualification by the Central Government is with reference to the University (Authority) which grants it, Part I of the Schedule makes it clear that in regard to dental qualification granted by an Indian University, the affiliated College/ Institution where the course of study is undergone should have prior permission of the Central Government. [para 16] [834-G-H; 835-A-B]

2.5 As BDS degrees granted by the Bhavnagar University is recognized only with reference to a College in Gujarat and as Mauras College has not been included in the Second Column of Entry 62 in Part I of the

Schedule to the Act, Mauras College will have to take steps to get its name entered in Entry 62 of Part I, of the Schedule, as an institution affiliated to Bhavnagar University for getting the benefit of 'recognized dental qualification.' [para 17] [835-C-E]

3. In the facts and circumstances of the case, it is directed that

(i) the notification dated 6.3.2009 issued by the Government of India, placing the BDS dental qualifications granted by the Bhavnagar University in regard to the students of the Mauras College of Dentistry at Mauritius, at Entry No.96 of Part III of the Schedule to the Act, is illegal and violative of s. 10(1) and (4) of the Act and is hereby quashed.

(ii) dental qualification (BDS degree) granted by Bhavnagar University to the students of Mauras College of Dentistry shall not be considered to be a degree granted by a foreign authority or institution.

(iii) BDS degrees granted by the Bhavnagar University to the students of Mauras College of Dentistry at Mauritius shall be treated as a recognized dental qualification granted by an authority in India governed by s.10(1) of the Act, if Mauras College, Mauritius is added by the Central Government as an affiliated institution under Column (2) of Entry 62 in Part I of the Schedule to the Act. In such an event, the holders of such degree will be entitled to all benefits and advantages as persons holding recognized dental qualifications u/s. 10(1) of the Act and need not undergo the screening test under the DCI Screening Test Regulations 2009.

(iv) The Central Government is directed to consider any request that may be made by Mauras College of

Dentistry, Mauritius for inclusion of its name in Column (2) of Entry 62 of Part I of the Schedule, in accordance with law.

(v) Unless and until Mauras College is included as an affiliated institution in Column (2) of Entry 62 in Part-I of the Schedule to the Act, the Indian students of Mauras College of Mauritius will have to undergo a screening test as per the first proviso to Regulation 4 of DCI Screening Test Regulations 2009. [para 19] [836-G-H; 837-A-D]

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 172 of 2010.

WITH

W.P. (C) No. 202 of 2010.

Harish N. Salve, Shekhar Naphade, Mitul Shelat, Sanjay R. Hegde, Ramesh K. Mishra, Anil Kumar Mishra, Huzefa Ahmadi, Sakshi Banga, Garima Kapoor, Ejaz Maqbool for the Petitioners.

P.P. Malhotra, ASG, Meet Malhotra, R.K. Rathore, Rohitash S. Nagar, S.S. Rawat (for D.S. Mahra), Madhurima Mridul, Kunal Bahri, Anil Katiyar, Vikas Mehta, Nar Hari Singh for the Respondents.

The order of the Court was delivered by

R.V. RAVEENDRAN J. 1. Counter of first respondent-Union of India filed in court. Heard.

2. The petitioners in W.P. [C] No.172 of 2010 are the students admitted in the year 2006-07 to BDS course conducted by the "Mauras College of Dentistry, Hospital and Oral Research Institute" situated at Mauritius (for short "Mauras College"). The said Mauras College is the first petitioner and

one of its students admitted to BDS course in 2005-06 is the second petitioner in W.P.(C)No.202/2010. Mauras College is affiliated to Bhavnagar University, Gujarat (for short 'the University').

3. The brief facts leading to these writ petitions are as under:

3.1 Mauras College sought affiliation with Bhavnagar University. The Government of Gujarat and the Dental Council of India had initially some reservation about a college situated in a foreign country seeking affiliation with the Bhavnagar University in India. Subsequently, however, the Government of Gujarat granted a 'No Objection Certificate' on 18.2.2003 for setting up the Mauras College affiliated to the said University, subject to prior permission from Dental Council of India and Ministry of External Affairs. The Ministry of External Affairs, Government of India, granted the necessary clearance for setting up the college on 28.8.2003.

3.2 The representatives of the Dental Council of India and the Bhavnagar University visited the Mauras College at Mauritius and satisfied themselves that the College met with the infrastructural and other requirements prescribed by Dental Council of India for grant of permission to establish the Dental College and for grant of affiliation. The Dental Council of India recommended to the Government of India, that Mauras College be approved. On the recommendation of the Academic Council and Executive Council of the University, the Government of Gujarat granted affiliation of Mauras College to the Bhavnagar University for the academic year 2004-05 and renewed the affiliation for 2004-05 and 2005-06.

3.3 The Mauras College follows the syllabus and the method of teaching prescribed by the Bhavnagar University consistent with the guidelines and regulations of Dental Council of India. The examinations for the BDS course of Mauras College are conducted in Mauritius, by the examiners from the

Bhavnagar University deputed from India, exactly at the same time as examinations held in respect of the other Dental College/s in India affiliated to the University.

3.4 The State of Gujarat issued a show cause notice dated 7.1.2006 to the University as to why the affiliation granted to the Mauras College should not be cancelled. The Mauras College filed a Writ Petition [W.P.(Civil) No.57 of 2006] in this court, praying for a direction that its affiliation to the Bhavnagar University shall not be cancelled by the State of Gujarat. During the hearing of the said writ petition by this court, the Union of India and Bhavnagar University confirmed that the statutory inspections of Mauras College at Mauritius had already been conducted and the College was found to be running with requisite infrastructure and facilities, and therefore the recognition and affiliation could be granted. In view of it, this Court allowed the writ petition by order dated 13.7.2009 and directed that the Mauras College shall be taken as affiliated to Bhavnagar University. In pursuance of it the State of Gujarat and the University proceeded on the basis that the Mauras College was affiliated to the University.

4. The Dentists Act, 1948 ('Act' for short) was enacted with the object of regulating the profession of dentistry and for that purpose to constitute the Dental Councils. The Act vests in the Central Government, the power to recognize dental qualifications. The Act also requires prior permission of the Central Government for establishing any new dental college. Section 2(j) defines 'recognized dental qualification' as any of the qualifications included in the Schedule to the Act.

4.1 Section 10 of the Act deals with recognition of dental qualifications. Sub-Section (1) provides that the dental qualifications granted by any authority or institution in India, which are included in Part I of the Schedule shall be recognised dental qualifications for the purpose of the Dentists Act. Sub-section (2) of Section 10 of the Act relates to amendment of Part I of the Schedule and it is extracted below:

"(2) Any authority or institution in India which grants a dental qualification not included in Part I of the Schedule may apply to the Central Government to have such qualification recognised and included in that Part, and the Central Government, after consulting the Council, and after such inquiry, if any, as it may think fit for the purpose, may, by notification in the Official Gazette, amend Part I of the Schedule so as to include such qualification therein, and any such notification may also direct that an entry shall be made in Part I of Schedule against such dental qualification declaring that it shall be a recognised dental qualification only when granted after a specified date".

4.2 Sub-Section (3) of Section 10 of the Act provides that the dental qualifications, granted by any authority or institution outside India, which are included in Part II of the Schedule shall be recognised dental qualifications only for the purposes of the registration of citizens of India when the register is first prepared under Dentists Act. Sub-section (4) of section 10 provides that the dental qualifications granted by any authority or institution outside India, which are included in Part III of the Schedule shall be recognised dental qualifications for the purposes of the Dentists Act, but no person possessing any such qualification, shall be entitled for registration unless he is a citizen of India. Sub-section (5) of Section 10 authorizes the Dental Council to enter into schemes of reciprocity for recognition of dental qualifications awarded by authorities/ institutions in other countries and declaration thereof by the Central Government as recognized dental qualifications.

4.3 Section 10A deals with permission for establishment of new dental college, new courses of study etc. Section 10B relates to non-recognition of dental qualifications in certain cases and Sub-Section (1) thereof is extracted below:

"10B(1) Where any authority or institution is established for grant of recognized dental qualification except with the previous permission of the Central Government in

accordance with the provisions of section 10A, no dental qualification granted to any student of such authority or institution shall be a recognized dental qualification for the purposes of this Act."

4.4 Section 31 of the Act requires the State Government to prepare a Register of dentists for the State. Sub-section (3) of Section 31 provides that the Register of Dentists shall be maintained in two parts A and B, persons possessing recognized dental qualifications being registered in Part A and persons not possessing such qualifications being registered in Part B.

4.5 Section 33 of the Act prescribes a 'recognized dental qualification' as the qualification for entering a person's name entered in the Register when it was first prepared. Section 34 of the Act prescribes the qualification for subsequent registration. Section 34(1) of the Act relevant for our purpose is extracted below:

"34. Qualification for subsequent registration. (1) After the date appointed under sub-section (2) of section 32 a person shall, on payment of the prescribed fee, be entitled to have his name entered on the register of dentists, if he resides or carries on the profession of dentistry in the State and if he-

(i) holds a recognised dental qualification, or

(ii) does not hold such a qualification but, being a [citizen of India], has been engaged in practice as a dentist as his principal means of livelihood for a period of not less than two years before the date appointed under sub-section (2) of section 32 and has passed, within a period of [ten years after the said date], an examination recognised for this purpose by the Central Government:

Provided that no person other than a citizen of India shall

be entitled to registration by virtue of a qualification:

(a) specified in Part I of the Schedule unless by the law and practice of the State or country to which such person belongs persons of Indian origin holding dental qualifications registrable in that State or country are permitted to enter and practice the profession of dentistry in such State or country, or

(b) recognised in pursuance of a scheme of reciprocity, under sub-section (5) of section 10:

Provided further that a person registered in Part B of the register shall be entitled to be registered in Part A thereof, if within a period of ten years after the date of his registration in Part B he passes an examination recognised for the purpose by the Central Government.

5. The government of India issued a notification (S.O.No.73/2004 Gazetted on 8.1.2004) in exercise of its power under Section 10(1) and (2) of the Act and added the following as Sl.No.62 in Part I of the Schedule to the Act:

Authority or Institution	Recognised dental qualification	Abbreviation for registration
62. Bhavnagar University, Bhavnagar,	1. Manubhai Patel Dental College & Hospital, Vadodara, Gujarat (i) Bachelor of Dental Surgery (when granted on or after 3.7.2004)	BDS, (Bhavnagar)

The Government of India by another notification dated 6.3.2009 (Gazetted on 21.3.2009) issued in exercise of its power under Section 10(4)(b) of the Act added the following as Sl.No.96 in Part III of the Schedule to the Act:

Authority or Institution	Recognised dental qualification	Abbreviation for registration
96. Bhavnagar University, Bhavnagar, Gujarat	Mauras College of Dentistry, Mauritius (i) Bachelor of Dental Surgery (If granted to Indian students of the first and second batches, i.e., the Indian students who were admitted during the academic sessions 2003-04 and 2004-05 respectively only).	BDS, Bhavnagarar University, Bhavnagar

6. The Dental Council of India framed the "Dental Council of India Screening Test Regulations 2009" ('Regulations' for short) in exercise of power conferred by section 20 read with section 10(4)/(5) of the Act, providing for conduct of a screening test to determine the eligibility of candidates for registration with any State Dental Council or any other purpose. The said Regulations are applicable only to those Indian citizens possessing a primary dental qualification/PG Diploma/Post Graduate Dental qualification, awarded by any dental institution outside India, who are desirous of getting registration with any State Dental Council or of any other purpose as specified by the Dental Council of India from time to time; and on or after the date of publication of the said Regulations in the official gazette, they shall have to qualify in a screening test conducted by the prescribed authority for that purpose, as per the provisions of section 10(4) or 10(5) of the Act, as the case may be. The first proviso to Regulation (4) provide that all Indian Students who have passed and possessed a dental qualification/degree, which has not been recognized or who have taken admission abroad on or before the date of publication of the Regulations, shall also be eligible to appear

in the screening test.

7. The Government of India (Ministry of Health & Family Welfare, Dental Education Section) required the students of Mauras College who had secured BDS degrees from Bhavnagar University to appear for the screening test as per the DCI Screening Test Regulations, 2009, for recognition of their degrees in India (vide letter dated 16.2.2010 and other similar letters addressed to the students of Mauras College).

8. The petitioners in these two writ petitions have sought (i) quashing the notification dated 6.3.2009 adding Entry No.96 in Part III of the Schedule to the Act; (ii) a declaration that the communications of the Government of India requiring the students of the Mauras College to appear in the screening test is illegal and contrary to Article 14 of the Constitution of India and that the DCI Screening Test Regulations, 2009 are inapplicable to students who have been conferred BDS degree by Bhavnagar University; (iii) a declaration that the BDS degree granted by the Bhavnagar University to the students of Mauras College, Mauritius shall not be considered as a degree granted by a foreign University but shall be considered as a BDS Degree granted by Bhavnagar University in India; and (iv) a declaration that there is no difference between students who were admitted in 2003-04 and 2004-05, and those who were admitted thereafter with a mandamus to Government of India to recognize the degree granted by Bhavnagar University to the students of Mauras College during 2005-06 and thereafter, for the purposes of the Act.

9. The respondents have resisted the petitions by contending that the dental qualifications possessed by the Indian students of Mauras College, Mauritius are 'foreign dental qualifications obtained by citizens of India' and they are therefore required to undergo a screening test as provided by the DCI Screening Test Regulations, 2009.

10. On the contentions raised by the writ petitioners

(Mauras College and its students), following two questions arise for our consideration:

(i) Whether the notification dated 6.3.2009 issued under Section 10(4)(b) of the Act entering the Maruas College, Mauritius and its BDS degree, at Sl.No.96 in the III Schedule to the Act is valid?

(ii) Whether the BDS graduates from Mauras College affiliated to Bhavnagar University, Gujarat have to take the screening test under the DCI Screening Regulations, 2009, for recognition of their BDS degrees in India?

Re : Question (i)

11. Though Mauras College is situated outside India, the BDS students of the Mauras College who successfully complete the course of study and pass the examination conducted by the Bhavnagar University possess the dental qualifications awarded by an authority in India (namely Bhavnagar University). They do not possess any dental qualification awarded by an authority or institution outside India. The notification dated 6.3.2009 which places Mauras College in Part III of the Schedule to the Act proceeds on the basis that BDS degrees granted by Bhavnagar University to the students who have undergone the course of study at Mauras College, Mauritius, are dental qualifications granted by an institution/authority outside India, even though the degree (dental qualification) is granted by a University in India. The notification further restricts the recognition only to the BDS degrees of the batch of Indian students admitted to academic sessions 2003-04 and 2004-05 in Mauras College but not the degrees granted during subsequent batches.

12. Section 10(4) of the Act will apply only if the dental qualification is granted by an authority or institution outside India, and as a consequence, such qualification will have to be listed under Part III of the Schedule to the Act. The respondents do

not dispute the fact that the BDS examinations for the students of Mauras College are held by Bhavnagar University and the degrees are also granted by Bhavnagar University and not by any authority or institution outside India. So long as the Mauras College is affiliated to Bhavnagar University and the said University is the examining body and is the authority which grants the BDS degree dental qualification to the students of Mauras College, Section 10(4) and Part-III of the Schedule to the Act will not apply. As Bhavnagar University is not an authority outside India, the dental qualifications granted by it cannot be included in Part III of the Schedule to the Act even if the college/institution affiliated to the said University is outside India. Therefore the notification dated 6.3.2009 is illegal being contrary to and violative of section 10(1) and (4) of the Act and liable to be struck down.

Re : Question (ii)

13. A 'recognized dental qualification' could be either (i) a dental qualification granted on completion of a course of study in an institution (University or deemed University) whose dental qualification is recognized by the Central Government; or (ii) a dental qualification granted by an authority (whose dental qualifications are recognized by the Central Government) to those who undergo a course of study in an affiliated dental college/institution, which was established with the previous permission of the Central Government. Thus where the dental qualification is granted by an authority (that is, a University in India) to which several dental colleges are affiliated, the term "recognized dental qualification" refers to the dental qualification granted by a University (whose dental qualifications are recognized by the Central Government) by undergoing a course of study in an affiliated college or institution established with the prior permission of the Central Government.

14. Recognized dental qualifications granted by authorities or institutions in India are enumerated in Part I of the Schedule to the Act; the recognized dental qualifications granted by

authorities or institutions outside India (only for the purpose of registration of Indian citizens when the Register is first prepared under the Act) are enumerated in Part II of the Schedule to the Act; and the recognised dental qualifications granted by any authorities or institutions outside India only when granted to citizens of India, are enumerated in Part III of the Schedule. Having regard to the provision of sub-sections (1) and (4) of Section 10 of the Act, if a dental college is situated outside India but the authority which grants the dental qualification in regard to students of that College is in India, recognition of the dental qualifications will be governed by Section 10(1) and will have to be enumerated in Part I of the Schedule. For this purpose, the dental qualifications granted by the Authority should be recognized by the Central Government and the Institution/College where the course of study is conducted should have the prior permission of the Central Government for offering such course of study. Such recognition and permission, when granted to the University and College respectively results in the University (Authority) and the affiliated College (institutions) being included in Part-I of the Schedule to the Act.

15. If the dental qualification is not being granted by any authority or institution in India, then the dental qualification will not be recognized under section 10(1) or (2) of the Act and consequently will not be included under Part-I of the Schedule to the Act. If the dental qualification is granted by an authority or institution outside India is recognized under section 10(4) and is included in Part-III of the Schedule, a citizen of India possessing such qualification shall be entitled to registration under the Dentists Act.

16. The dental qualification granted by the Bhavanagar University, that is, Bachelor of Dental Surgery - shown by the abbreviation "BDS (Bhavnagar)", granted on or after 3.7.2004, in regard to its affiliated College - Manubhai Patel Dental College and Hospital, Vadodara, Gujarat is a recognized dental qualification by virtue of the said University and College

being shown at Sl.No.62 in Part I of the Schedule to the Act. The dental qualification of Bachelor of Dental Surgery obtained by undergoing a course of study at Mauras College is not listed in Part I against Entry No.62 relating to Bhavnagar University. Though the recognition of the dental qualification by the Central Government is with reference to the University (Authority) which grants it, Part I of the Schedule makes it clear that in regard to dental qualification granted by an Indian University, the affiliated College/Institution where the course of study is undergone should have prior permission of the Central Government.

17. Though the learned counsel for Union of India had submitted during the hearing of WP(C) No.57/2006 before this Court that Mauras College was having the requisite infrastructure and recognition may be given, the final order of this Court dated 13.7.2009 contained only a direction in regard to affiliation to Bhavnagar University. There was no direction to Central Government to recognize the Mauras College or treat it as having the 'prior permission' of the Central Government. As BDS degrees granted by the Bhavnagar University is recognized only with reference to a College in Gujarat and as Mauras College has not been included in the Second Column of Entry 62 in Part I of the Schedule to the Act, Mauras College will have to take steps to get its name entered in Entry 62 of Part I, as an institution affiliated to Bhavnagar University for getting the benefit of 'recognized dental qualification.'

18. The learned Additional Solicitor General appearing for the respondents submitted that the dental students have to undergo a specialized technical course; and that could be done only if proper infrastructure and equipment facilities are available in the college and the hospital attached to it, and the teaching faculty are competent and qualified, so that the dental graduates coming out of the college will be well-versed in dental sciences and will be in a position to treat the citizens in a safe and appropriate manner. He pointed out that to prevent half-baked dentists treating dental patients, provisions have been

made in the Dentists Act for recognizing dental qualifications and for holding screening tests for Indian citizens holding primary dental qualifications awarded by dental institutions outside India. He submitted that as the Mauras College is situated outside India in Mauritius and there is no way of Dental Council and the Central Government ensuring that they possess and continue to possess the requisite infrastructure, equipment and faculty, it is necessary that the students of such a dental college will have to undergo the screening tests. There is no doubt that the doctors and dentists who are permitted to practice in India should undergo appropriate courses of study so that they can efficiently and effectively treat the patients. But the issue before us is about the status of a dental qualification granted by a University in India in pursuance of a course of study undergone in an affiliated college outside India.

19. In view of the above, these writ petitions are allowed in part as follows:

(i) It is declared that the notification dated 6.3.2009 issued by the Government of India, placing the BDS dental qualifications granted by the Bhavnagar University in regard to the students of the Mauras College of Dentistry at Mauritius, at Entry No.96 of Part III of the Schedule to the Act, is illegal and violative of sections 10(1) and (4) of the Act and is hereby quashed.

(ii) It is declared that dental qualification (BDS degree) granted by Bhavnagar University for the students of Mauras College of Dentistry shall not be considered to be a degree granted by a foreign authority or institution.

(iii) It is declared that BDS degrees granted by the Bhavnagar University to the students of Mauras College of Dentistry at Mauritius shall be treated as a recognized dental qualification granted by an authority in India governed by section 10(1) of the Act, if Mauras College, Mauritius is added by the Central Government as an affiliated institution under Column (2)

of Entry 62 in Part I of the Schedule to the Act. In such an event, the holders of such degree will be entitled to all benefits and advantages as persons holding recognized dental qualifications under section 10(1) of the Act and need not undergo the screening test under the DCI Screening Test Regulations 2009.

(iv) The Central Government is directed to consider any request that may be made by Mauras College of Dentistry, Mauritius for inclusion of its name in Column (2) of Entry 62 of Part I of the Schedule, in accordance with law.

(v) Unless and until Mauras College is included as an affiliated institution in Column (2) of Entry 62 in Part-I of the Schedule to the Act, the Indian students of Mauras College of Mauritius will have to undergo a screening test as per the first proviso to Regulation (4) of DCI Screening Test Regulations 2009.

R.P Writ Petitions partly allowed.

RAJA GOUNDER & ANR.

v.

STATE OF TAMIL NADU

(Criminal Appeal No. 632 of 2005)

SEPTEMBER 28, 2010

[HARJIT SINGH BEDI AND R.M. LODHA, JJ.]

PENAL CODE, 1860:

s.302 – Fratricide – Property dispute among brothers – Conviction by courts below – Pleas of delay in FIR, non-examination of independent witness, person cited as PWs deposing as DW, discrepancy in oral testimony and medical evidence – HELD: All these issues have been examined by courts below – Incident occurred in the night, delay in lodging FIR by young widow has been satisfactorily explained – Since dispute existed within the family, independent witness would not ordinarily be available – There is nothing unusual that the mother of the deceased and the accused, who had been cited as PW, appeared in court as a DW – There is no discrepancy vis-à-vis the oral and the medical evidence – It would not have been possible to the eye-witness to identify every blow given by the assailants – The Court is not inclined to interfere with the judgments of the courts below – Delay in lodging FIR – Evidence – Person cited as PW, deposing as DW – Variance in ocular version and medical evidence.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 632 of 2005.

From the Judgment & Order dated 09.07.2004 of the High Court of Judicature at Madras in Crl. A. No. 573 of 2001.

K. Sarada Devi for the Appellants.

S. Thananjayan for the Respondent.

The following order of the Court was delivered

O R D E R

We have heard learned counsel for the parties in extenso.

We find that two Courts have found against the appellants more particularly that PW.1 the first informant, the wife of the deceased, is also the sister-in-law of the appellants as the deceased and the appellants were brothers. It has also come in evidence that the relations between the parties were strained on account of a land dispute and this was the motive for the murder.

It has been contended by Mrs. K. Sarada Devi, the learned counsel for the appellants, that there were several suspicious circumstances in the prosecution evidence in as much that the FIR had been lodged after 13 hours and there was no explanation forthcoming to explain the delay and this delay has been utilized by the prosecution to evolve a false story and that PW.2 the sister of the deceased and the appellants who had been cited as witness had not been produced as a witness. In addition, it has been argued that in the FIR, PW.1 had referred to two injuries caused to the deceased but eight injuries had been detected during the post-mortem.

We find that all these issues have been examined by the Courts below and it has been found that the delay in the lodging the FIR had been explained as the incident had happened at 10.00 p.m. at a little distance from the house of the deceased, and PW.1, a young woman, would have been in a great distress and had first sent information to her parents in their village some distance away and had thereafter left for the police station to lodge the report. We find that the conduct of PW.1 was perfectly compatible with the behaviour of a young widow who had seen a brutal attack on her husband. It is true that no independent witness has been examined but in the background that a dispute existed within the family, independent witnesses would

not ordinarily be available. We thus have absolutely no reason to doubt the evidence of PW.1 as she would be the last person to involve the appellants in a false case leaving out the real assailants. We are not surprised that the mother of the deceased and the appellants who had been cited as a PW but had instead appeared in Court as a defence witness, as this is a common tendency in fratricides, and particularly where parents are involved as witnesses in as much that after tempers cool and there is time for reflection they find that while one child has been murdered and the other faces the prospect of serving a long sentence on their evidence which will, without a doubt, be believed, invariably makes their resile from their police statements. We also find no discrepancy vis.-a-vis. the ocular and medical evidence. We notice that the incident happened in the dead night and it would not have been possible for the PW.1 to see all the blows striking the deceased and to identify every blow given by the appellants in the darkness, would have smacked of tutoring of the witness. Two courts have found against the appellants on a minute appreciation of the evidence on this aspect as well. We are thus not inclined to interfere in this appeal.

Dismissed.

R.P. Appeal dismissed.

K. MANORAMA

v.

UNION OF INDIA REP. BY GENL. MANAGER SOUTHERN RAILWAY & ORS.

(Civil Appeal No. 2379 of 2005)

SEPTEMBER 29, 2010

[R.V. RAVEENDRAN AND H.L. GOKHALE, JJ.]

Service law:

Reservation in promotion – Two posts – Selection – Challenged by appellant on the ground that the first appointee was promoted on his merit and not because he was a Scheduled Caste and therefore the appellant ought to have been promoted on the basis of her status as a Scheduled Caste candidate in place of the second appointee – Held: The first appointee belonged to a Scheduled Caste and was selected essentially because it was a Scheduled Caste vacancy, which came to be allotted to him, keeping aside other candidates – First appointee had, in fact, got marks lesser than the second appointee and his selection was basically because he was a Scheduled Caste candidate – Even otherwise, the principle that 'when a member belonging to a Scheduled Caste gets selected in the open competition field on the basis of his own merit, he will not be counted against the quota reserved for Scheduled Castes, but will be treated as open candidate', will apply only in regard to recruitment by open competition and not to the promotions effected on the basis of seniority-cum-suitability.

Reservation in promotion – When a single post cadre becomes a multi-post cadre, and consequently two seats become available, one out of the two seats has to be treated as a reserved seat.

Appellant belonging to a scheduled caste, was working as Chief Law Assistant in Southern Railways. The post higher to that post was that of the Assistant Law Officer. Initially 'Assistant Law Officer' was a single post cadre. It was filled up by an open category candidate in the year 1991. Subsequently two posts were created. The posts were to be filled up on the basis of seniority-cum-suitability. A notification holding 10 senior most candidates eligible for being considered for the two posts was issued on 10.11.1994. To determine their suitability, a written examination was held. Eight Law Assistants obtained qualifying marks and became eligible for being called for the interview. The concerned committee recommended respondent nos. 3 and 4 for those two posts. Out of them, respondent no. 3 was a Scheduled Caste candidate. The promotion order for both of them was issued on 26.5.1995.

The appellant challenged the appointment of respondent no.4 on the ground that respondent no.3 was promoted to the post of Assistant Law Officer on his merit and not because he was a Scheduled Caste and, therefore, the appellant ought to have been promoted on the basis of her status as a Scheduled Caste candidate in place of respondent no.4.

The Central Administrative Tribunal allowed the OA and declared that the selection of respondent no. 3 was in an unreserved vacancy on his own merit. It directed respondents nos. 1 and 2 to empanel the appellant in the reserved category provided that she was qualified according to the marks and seniority in the selection made, and there was no Scheduled Caste candidate above her either on marks or in seniority. The selection of respondent no. 4 was held to be erroneous. However, since he had retired in the meanwhile, the emoluments

received were directed not to be disturbed. The tribunal further directed that the appellant if found fit, would be deemed to be entitled to the seniority in the service from the date of selection of respondent no. 3, though she would not get the salary till the date she actually assumed charge of the higher post.

Respondent nos.1 and 2 filed writ petitions before the High Court which were allowed. The instant appeal was filed challenging the order of the High Court.

Dismissing the appeal, the Court

HELD: 1. One out of the two vacancies which occurred in the year 1994 had to be treated as reserved. This was because the first point in the roster was otherwise meant for a reserved candidate. Since, in 1991, it was a single post cadre, it had been treated as unreserved. When a single post cadre became a multi-post cadre, and consequently two seats became available in 1994, the Department had to treat one out of the two seats as a reserved seat. [Para 11] [849-H; 850-A-B]

2. The chart of the marks obtained by the candidates depicted that respondent no. 4 had obtained the highest marks i.e. 128. Two general category candidates were next to him with 127 and 125 marks respectively. Thereafter, respondent no.3 and two other candidates got 124 marks. Respondent no.3 was selected out of them, essentially because it was a Scheduled Caste vacancy, which came to be allotted to him, keeping aside other candidates. Not only that, but he was placed at number one and respondent no. 4 (having higher marks) was placed at number two. The tribunal had held that if respondent no. 3 got marks lesser than that of respondent no. 4, only then he can be said to be selected against Scheduled Caste point. The tribunal did not

realize that respondent no.3 had, in fact, got marks lesser than respondent no.4 and his selection was basically because he was a Scheduled Caste candidate. Even otherwise, the principle that when a member belonging to a Scheduled Caste gets selected in the open competition field on the basis of his own merit, he will not be counted against the quota reserved for Scheduled Castes, but will be treated as open candidate, will apply only in regard to recruitment by open competition and not to the promotions effected on the basis of seniority-cum-suitability. [Para 14] [854-G-H, 855-A-D]

3. The appellant had relied upon the Rules governing the promotion of subordinate staff and had argued before the High Court that the candidates who obtained 80% marks or above are to be placed at the top indicating that they are to be selected irrespective of the community factor. However, none of the candidates had obtained more than 80% marks, and therefore, could not be considered as outstanding to be eligible on that footing. On that count also selection of respondent no.3 could not be considered as one only on merit irrespective of the community factor. [Para 15] [855-E; 856-B]

R.K. Sabharwal and Ors. v. State of Punjab and Ors. **1995 (2) SCC 745 – held inapplicable**

Ajit Singh Januja and Ors. v. State of Punjab and Ors. **1996 (2) SCC 715 – referred to.**

Case Law Reference:

1995 (2) SCC 745	**held inapplicable**	**Paras 4, 5,14**
1996 (2) SCC 715	**referred to**	**Para 5**

CIVIL APPELLATE JURISDICTION : Civil Appeal No.

2379 of 2005.

From the Judgment & Order dated 28.01.2003 of the High Court of Judicature at Madras in Writ Petition No. 1311 of 1999.

C.K. Chandarsekkar, S.R. Setia for the Appellant.

A.K. Ganguly, V. Mohan, Shweta, A.K. Sharma, Shreekant N. Terdal, V. Balachandran, V. Ramasubramanian, A. Lakshmi Narayanan for the Respondents.

The Judgment of the Court was delivered by

GOKHALE, J. 1. This appeal seeks to challenge the judgment and order dated 28.1.2003 rendered by the Madras High Court allowing Writ Petition No. 1311 of 1999 filed by the Respondent Nos. 1 and 2, and setting aside the order passed by the Central Administrative Tribunal dated 27.11.1998 which had allowed the Original Application No. 891 of 1996 filed by the appellant herein. The O.A. filed by the appellant thus stood dismissed by the impugned judgment and order of the High Court.

2. Short facts leading to this appeal are as follows:- At the relevant time in November 1994, the appellant was working as a Chief Law Assistant which was a Group-'C' post in the Southern Railways. The post higher to this post is that of the Assistant Law Officer which is a Group-'B' post. At the relevant time the total cadre strength of Assistant Law Officers in Southern Railway was three. Initially when 'Assistant Law Officer' was a single post cadre, in the year 1991, it was filled by an open category candidate. Subsequently, when two more posts were created in the year 1994, reservation was applicable. The posts were to be filled on the basis of seniority-cum-suitability. A notification holding 10 senior most candidates

eligible for being considered for the two posts was issued on 10.11.1994. (The second respondent herein is the Chief Personal Officer of Southern Railways). To determine their suitability, a written examination was held. Eight Law Assistants obtained qualifying marks and became eligible for being called for the interview (one out of them opted out). The concerned committee recommended Respondent Nos. 3 and 4 for those two posts. Out of them, Respondent No. 3 is a Scheduled Caste candidate. Accordingly, the promotion order for both of them was issued on 26.5.1995.

3. The appellant also belongs to a Scheduled Caste and was of the view that the Respondent No. 3 (Mr. M. Siddiah), was promoted to the post of Assistant Law Officer on his merit and not because he was a Scheduled Caste candidate. It was her contention that instead of Respondent No. 4 (Mr. K. Rajagopalan Nair) belonging to the open category, she should have been promoted to the post of Assistant Law Officer on the basis of her status as a Scheduled Caste candidate. She, therefore, represented to the Chairman of the Railway Board on 14.2.1996 but there was no response. She, therefore, filed the above referred O.A. in the Central Administrative Tribunal (hereinafter referred to as Tribunal) at Chennai. The respondents Nos. 1 and 2 filed their reply statement before the Tribunal and pointed out that as per the Railway Board's decision dated 29.7.1993 in small cadres having less than 4 posts, reservation had to be provided as per the 40 point roster when no SC/ST candidate was available in the Cadre. As per model 40 point roster the first point will have to be filled by a Scheduled Caste candidate, and the next two points were to be treated as unreserved. In para 1 & 2 of their reply the Respondent Nos. 1 and 2 stated as follows:-

> "*In this selection, the roster points to be filled up for the two vacancies were point Nos. 2 and 3. Both the points are UR (i.e Un-Reserved) points. As the first point which was a SC point was filled up by an UR candidate, being*

a single vacancy, out of the two vacancies for which notification was issued, one post was treated as SC."

4. The appellant submitted before the C.A.T. that if a Scheduled Caste candidate competes for a non-reserved post and is selected, he should not be counted against the quota reserved for Scheduled Castes. According to the appellant, if the senior most among eligible candidates belongs to a Scheduled Caste, on being promoted, he should be treated as an open category candidate and should not be counted against the quota for Scheduled Castes. The judgment of a Constitution Bench of this Court in *R.K. Sabharwal and Ors. vs. State of Punjab and Ors.* [1995 (2) SCC 745] was relied upon in support.

5. The Central Administrative Tribunal accepted this submission and noted that the preposition in the *R.K. Sabharwal and Ors.* (supra) had been reiterated in para 11 of *Ajit Singh Januja and Ors. vs. State of Punjab and Ors.* [1996 (2) SCC 715], wherein after referring to the judgment in R.K. Sabharwal (supra) a bench of 3 Judges had observed that if a Scheduled Caste candidate has been appointed / promoted on his own merit, than such candidate shall not be counted towards the percentage of reservation fixed for them as stated in R.K. Sabharwal's case.

6. The Tribunal therefore, allowed the O.A. by its order dated 27.11.1998. It declared that the selection of Respondent No. 3 was in an unreserved vacancy on his own merit. It directed Respondents Nos. 1 and 2 to empanel the appellant in the reserved category provided that she was qualified according to the marks and seniority in the selection made, and if there was no SC candidate above her either on marks or in seniority. The Selection of Respondent No. 4 was held to be erroneous. However, since he had retired in the meanwhile, the emoluments received were directed not to be disturbed. The Tribunal further directed that the appellant if found fit, will be

deemed to be entitled to the seniority in the service from the date of selection of Respondent No. 3, though she will not get the salary till the date she actually assumed charge of the higher post.

7. Being aggrieved by this judgment and order Respondent Nos. 1 and 2 filed Writ Petition No. 1311 of 1999 in the High Court of Madras. The High Court allowed the Writ Petition and set aside the order of the Tribunal. Being aggrieved thereby, the appellant has filed the present appeal.

8. The main-stay of the argument of the appellant was, as stated earlier, that since Respondent No. 3 had been selected on merits he should not be considered as occupying a Scheduled Caste seat. The Scheduled Caste vacancy must therefore go to the next Scheduled Caste candidate as per the order of merit, and the appellant was that next candidate. Respondent No. 4 (Mr. K. Rajagopalan Nair) should not have been therefore promoted as an open category candidate and that post should have been allotted to the appellant. The appellant relied upon the Railway Board order dated 29.7.1993 in this behalf, which was issued to implement a full-bench decision of the Tribunal at Hyderabad, which states that where ST/SC candidates were promoted on their own merit, their seniority should not be counted as reserved candidates. The relevant part of the Railway Board's letter dated 29.7.1993 clarifies as follows in para (VI):-

"*(VI) Whether a person belonging to SC/ST promoted on his own merit and seniority should be treated as reserved candidate for counting available SC/ST candidates-*

As per judgment of the Full Bench of Central Administrative Tribunal/Hyderabad, the SC/ST candidates who have been promoted on their own merit and seniority should not be counted as reserved candidates. It has further been laid

down in Board's letter dated 16.06.1992 that SC/ST candidate can be placed on the panel/select list even in excess of the reserved quota in case such candidates qualify against general posts on merit/seniority. These SC/ST candidate should be excluded for the purpose of counting the available SC/ST candidates while computing the reserved quota."

9. Now, as far as this aspect is concerned, Respondent Nos. 1 and 2 had made it clear that where the posts were less than 4, the 40 point roster was expected to be applied. As per that roster the first point was meant for a Scheduled Caste candidate and second and third points were meant for candidates from unreserved category. There is a note below this model roster which reads as follows:-

"*Note—If there are only two vacancies to be filled in a particular year, not more than one may be treated as reserved and if there is only one vacancy, it should be treated as unreserved. If on this account, a reserved point is treated as unreserved, the reservation may be carried forward to the subsequent three recruitment years."*

10. It was submitted on behalf of Respondent Nos. 1 and 2 that in view of this note, and the first vacancy in the year 1991 having been treated as unreserved, when two vacancies occurred subsequently, one out of them was being treated as reserved. This was as per the above note which stated that where the reserved point is treated as unreserved, the reservation is to be carried forward. Respondent Nos. 1 and 2 therefore, had to treat one of the two vacancies as a reserved vacancy.

11. In our view, the submission of the respondents Nos. 1 and 2 is well taken. They had to treat one out of the two

vacancies which occurred in the year 1994 as reserved. This is because the first point in the roster was otherwise meant for a reserved candidate. Since, in the year 1991, it was a single post cadre, it had been treated as unreserved. When the single post cadre became a multi-post cadre, and consequently two seats became available in 1994, they had to treat one out of the two seats as a reserved seat. The selection of Mr. Siddiah, therefore, as a Scheduled Caste candidate cannot be faulted.

12. The submission of the appellant was that Respondent No. 3 had been selected on his merit and that Mr. K.Rajagopalan Nair was placed in the panel contrary to the Railway Board letter dated 14.4.1983. Respondents Nos. 1 and 2 had denied this averment in para 10 of their additional reply before the Tribunal. In para 14 of its order the Tribunal observed as follows:-

"*14. Reference made in paragraph 10 have no bearing on the point for decision in this case. It is also the contention on behalf of the respondents that since respondent No. 3 is the senior most in the SC quota he is empanelled. The question is, he has obtained the highest number of marks in the said selection. Therefore, the question of he being the SC candidate is evaporated on account of his being the meritorious candidate in the entire selection. If respondent No. 4 has come up in the marks over that of respondent No. 3 and the question of the respondent 3 being the senior in the SC candidates, then respondent No. 3 would have been justified being empanelled in the reserved vacancy. But that was not the case here.*

13. Respondents Nos.1 and 2 point out that this finding is erroneous on facts. The chart of the marks obtained by the candidates has been produced before us. The chart reads as follows.

SELECTION FOR THE POST OF ASSISTANT LAW OFFICER IN SCALE RS. 2000-3500
VIVA VOICE ON 27.04.1995
NUMBER OF VACANCIES 2 (SC-1: UR-1)

COMMITTEE MEMBERS:
1. SDGM
2. FA & CAO
3. CPO
4. CELE SHRI R. MOHAN DAS

Sl. No.	Name & Desig-nation	Date of Birth	Date of appoint-ment	Date of promo-tion to present grade	Educa-tional quali-fication
1.	**M. SIDDAIAH (SC) CLA/HQRS**	04.08.43	16.6.65	9.5.85	B.Sc, B.L.
Marks Obtained Total (200 marks)				Total	Remarks
Profes-sional Ability (150)	Record of service (25)	Personality address & leadership/ Academic Technical/ Qualification (25)			
91	15	18		**124**	

Sl. No.	Name & Desig-nation	Date of Birth	Date of appoint-ment	Date of promo-tion to present grade	Educa-tional quali-fication
2.	**K. RAJAGOPALAN NAIR ASST. SEC. (ADHOC) RRT**	24.08.39	16.11.63	01.04.87	B.Sc.,LLB
Marks Obtained Total (200 marks)				Total	Remarks
Profes-sional Ability (150)	Record of service (25)	Personality address & leadership/ Academic Technical/ Qualification (25)			
91	21	16		**128**	

Sl. No.	Name & Desig-nation	Date of Birth	Date of appoint-ment	Date of promo-tion to present grade	Educa-tional quali-fication
3.	**V. SUBRAMANIAN L.O. (ADHOC) ICF**	10.03.40	31.5.62	23.11.87	B.A., B.G.L. Diploma in Labour Laws with Admn. Law
Marks Obtained Total (200 marks)				Total	Remarks
Profes-sional Ability (150)	Record of service (25)	Personality address & leadership/ Academic Technical/ Qualification (25)			
92	18	17		**127**	

Sl. No.	Name & Desig-nation	Date of Birth	Date of appoint-ment	Date of promo-tion to present grade	Educa-tional quali-fication
4.	**M. ABDUL KHADER**	01.11.43	11.09.64	01.04.90	B.A, LLB

	CLA/DPO/ O/MYS				
Marks Obtained Total (200 marks)				Total	Remarks
Profes-sional Ability (150)	Record of service (25)	Personality address & leadership/ Academic Technical/ Qualification (25)			
92	17	15		**124**	

Sl. No.	Name & Desig-nation	Date of Birth	Date of appoint-ment	Date of promo-tion to present grade	Educa-tional quali-fication
5.	**K. MANORAMA (SC) CLA/HQRS**	22.12.60	13.11.81	24.07.90	B.A.,B.L.

Marks Obtained Total (200 marks)			Total	Remarks
Profes-sional Ability (150)	Record of service (25)	Personality address & leadership/ Academic Technical/ Qualification (25)		
91	15	16	**122**	

Sl. No.	Name & Desig-nation	Date of Birth	Date of appoint-ment	Date of promo-tion to present grade	Educa-tional quali-fication
6.	**R. MUTHUSAMY CLA/DPO/O/ MAS**	05.05.55	22.12.79	03.4.91	B.Sc, LLB

Marks Obtained Total (200 marks)			Total	Remarks
Profes-sional Ability (150)	Record of service (25)	Personality address & leadership/ Academic Technical/ Qualification (25)		
91	16	17	**124**	

	CLA/DPO/ O/MYS				
Marks Obtained Total (200 marks)				Total	Remarks
Profes-sional Ability (150)	Record of service (25)	Personality address & leadership/ Academic Technical/ Qualification (25)			
92	17	15		**124**	

Sl. No.	Name & Desig-nation	Date of Birth	Date of appoint-ment	Date of promo-tion to present grade	Educa-tional quali-fication
5.	**K. MANORAMA (SC) CLA/HQRS**	22.12.60	13.11.81	24.07.90	B.A.,B.L.

Marks Obtained Total (200 marks)			Total	Remarks
Profes-sional Ability (150)	Record of service (25)	Personality address & leadership/ Academic Technical/ Qualification (25)		
91	15	16	**122**	

Sl. No.	Name & Desig-nation	Date of Birth	Date of appoint-ment	Date of promo-tion to present grade	Educa-tional quali-fication
6.	**R. MUTHUSAMY CLA/DPO/O/ MAS**	05.05.55	22.12.79	03.4.91	B.Sc, LLB

Marks Obtained Total (200 marks)			Total	Remarks
Profes-sional Ability (150)	Record of service (25)	Personality address & leadership/ Academic Technical/ Qualification (25)		
91	16	17	**124**	

Sl. No.	Name & Desig-nation	Date of Birth	Date of appoint-ment	Date of promo-tion to present grade	Educa-tional quali-fication
7.	**T.P. BHASKAR CLA/MAS**	26.08.55	31.07.91	24.7.91	MA, LLB

Marks Obtained Total (200 marks)			Total	Remarks
Profes-sional Ability (150)	Record of service (25)	Personality address & leadership/ Academic Technical/ Qualification (25)		
95	15	15	**125**	

(R. MOHANDAS) (V. NATARAJAN) (P.MURUGAN)

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14. As can be seen from this chart it was Respondent No. 4 who had obtained the highest marks i.e. 128. Mr. V. Subramanian and Mr. T.P. Bhaskar are next to him with 127 and 125 marks respectively. Thereafter, there are other candidates i.e. Mr. Siddaiah, Mr. Abdul Khader and Mr. Muthusamy who all get 124 marks. Mr. Siddaiah has been selected out of them, essentially because it was a Scheduled Caste vacancy which came to be allotted to him keeping aside

other candidates. Not only that, but he was placed at number one and respondent No. 4 (having higher marks) was placed at number two. The Tribunal held that if Respondent No. 3 got marks lesser than that of Respondent No. 4, only then he can be said to be selected against Scheduled Caste point. The Tribunal did not realize that the third Respondent had in fact got marks lesser than the fourth Respondent, and his selection was basically because he was a Scheduled Caste candidate. In view of this position, there is no occasion to apply the instruction contained in Railway Board's letter dated 29.7.1993 nor the propositions in R.K. Sabharwal's judgment (supra) to the present case. Even otherwise, the principle that when a member belonging to a Scheduled Caste gets selected in the open competition field on the basis of his own merit, he will not be counted against the quota reserved for Scheduled Castes, but will be treated as open candidate, will apply only in regard to recruitment by open competition and not to the promotions effected on the basis of seniority-cum-suitability.

15. The appellant had argued before the High Court that the candidates who obtained 80% marks or above are to be placed at the top indicating that they are to be selected irrespective of the community factor. In appellant's submission Mr. M. Siddiah, had to be considered as one such candidate. Now the two relevant rules 204.8 and 204.9 read as follows:-

"***204.8*** *The successful candidates shall be arranged as follows:*

(1) Those securing 80% marks and above graded as 'Outstanding'.

(2) Those securing between 60% marks and 79% marks graded as 'Good'.

204.9 The panel should consist of employees who had qualified in the selection, corresponding to the number of vacancies for which the selection was held. Employees

securing the gradation 'Outstanding' will be placed on top followed by those securing the gradation 'Good' interse seniority within each group being maintained.'

It is to be noted, as seen from the marks which have been referred to earlier, that none of the candidates obtained more than 80% marks, and therefore, could not be considered as outstanding to be eligible on that footing. On this count also Mr. M. Siddiah's selection cannot be considered as one only on merit irrespective of the community factor.

16. In the circumstances, there is no error in the judgment and order rendered by the High Court. The appeal is, therefore, dismissed. Original Application, filed by the first respondent before the Administrative Tribunal, shall stand dismissed.

D.G Appeal dismissed.

ARVIND KUMAR MISHRA
v.
NEW INDIA ASSURANCE CO. LTD. AND ANR.
(Civil Appeal No. 5510 of 2005)

SEPTEMBER 29, 2010

[AFTAB ALAM AND R.M. LODHA, JJ.]

Motor Vehicles Act, 1988 – s. 166 – Compensation – Claim for – Motor accident of final year engineering student, aged 25 years – 70% permanent disability – Compensation of Rs. 2,50,000 with interest @ 9 % p.a. by tribunal – Enhanced to Rs. 3,50,000/- by High Court – On appeal held: Tribunal as well as High Court erred in not taking appropriate multiplier of an appropriate multplicand while assessing compensation – In view of the facts, taking multiplicand as Rs. 42,000/- p.a. and operative multiplier as 18, compensation is enhanced to Rs. 9,06,000/- with simple interest @ 9% p.a. – Claimant also entitled to cost of Rs. 15,000/-.

The appellant, final year engineering student aged about 25 years, met with the serious accident due to rash and negligent driving by the driver of the truck. It was certified that the appellant suffered 70% permanent disablement. The appellant filed an application under Section 166 of the Motor Vehicles Act, 1988. The tribunal awarded compensation of Rs. 2,50,000/- with interest @ 9% per annum, holding the owner of the vehicle and the insurer liable to pay compensation to the appellant. The High Court enhanced the compensation to Rs. 3,50,000/-. Aggrieved, by the compensation awarded by the High Court, the appellant filed the instant appeal.

Partly allowing the appeal, the Court

HELD: 1.1 The conventional basis of assessing

compensation in personal injury cases - and that is now a recognized mode as to the proper measure of compensation - is taking an appropriate multiplier of an appropriate multiplicand. In the instant case, the tribunal as well as the High Court seriously erred in not assessing the compensation for personal injury to the appellant in accord with the recognized mode - by taking an appropriate multiplier of an appropriate multiplicand. [Paras 7 and 9] [864-C-D; 865-E]

General Manager Kerala State Road Transport Corporation, Trivandrum v.. Susamma Thomas (Mrs.) and Ors **(1994) 2 SCC 176 – affirmed.**

1.2 The appellant at the time of accident was a final year engineering (Mechanical) student in a reputed college. He was a remarkably brilliant student having passed all his semester examinations in distinction. Due to the accident he suffered grievous injuries and remained in coma for about two months. His studies got interrupted as he was moved to different hospitals for surgeries and other treatments. For many months his condition remained serious and his right hand was amputated and vision seriously affected. These multiple injuries ultimately led to 70% permanent disablement. He was rendered incapacitated and a career ahead of him in his chosen line of mechanical engineering got dashed for ever. He is now in a physical condition in which he would require domestic help throughout his life. He has been deprived of pecuniary benefits which he could have reasonably acquired had he not suffered permanent disablement to the extent of 70% in the accident. [Para 10] [865-F-H; 866-A]

1.3 On completion of Bachelor of Engineering (Mechanical) from the prestigious institute like B.I.T., it can be reasonably assumed that he would have got a good

job. The appellant stated in his evidence that in the campus interview he was selected by Tata as well as Reliance Industries and was offered pay package of Rs. 3,50,000/- per annum. Even if that is not accepted for want of any evidence, there would not have been any difficulty for him in getting some decent job in the private sector. Had he decided to join government service and got selected, he would have been put in the pay scale for Assistant Engineer and would have at least earned Rs. 60,000/- per annum. Wherever he joined, he had a fair chance of some promotion and remote chance of some high position. But uncertainties of life cannot be ignored taking relevant factors into consideration. It is fair and reasonable to assess his future earnings at Rs. 60,000/- per annum taking the salary and allowances payable to an Assistant Engineer in public employment as the basis. Since he suffered 70% permanent disability, the future earnings may be discounted by 30% and, it is estimated upon the facts that the multiplicand should be Rs.42,000/- per annum. The appellant at the time of accident was about 25 years. As per the decision of this Court in **Sarla Verma's* case the operative multiplier would be 18. The loss of future earnings by multiplying the multiplicand of Rs. 42,000/- by a multiplier of 18 comes to Rs. 7,56,000/-. The damages to compensate the appellant towards loss of future earnings must be Rs. 7,56,000/-. The tribunal awarded him Rs. 1,50,000/- towards treatment including the medical expenses. The same is maintained as it is and, the total amount of compensation to which the appellant is entitled is Rs. 9,06,000/- . [Para 11] [866-B-H; 867-A]

Sarla Verma (Smt.) and Ors. v. Delhi Transport Corporation and Anr.* **(2009) 6 SCC 121 – relied on.

1.4 The submission that the appellant is entitled to compensation in accordance with the multiplier specified

in the Second Schedule appended to the 1988 Act only, overlooks the fact that the appellant made his claim under Section 166 of the 1988 Act and not under Section 163A. The Second Schedule has no application to the claim petition made under Section 166 of the 1988 Act. [Para 12] [867-B-D]

Reshma Kumari and Ors. v. Madan Mohan and Anr. **(2009) 13 SCC 422 – referred to.**

1.5 The compensation awarded by the High Court in the sum of Rs. 3,50,000/- is enhanced to Rs. 9,06,000/-. The appellant would be entitled to 9% simple interest per annum on the enhanced amount from August 7, 2002 until the date of actual payment. The appellant would also be entitled to the costs of the appeal which is quantified at Rs. 15,000/-. [Para 13] [867-E-F]

Case Law Reference:

(1994) 2 SCC 176	**Referred to.**	**Para 8**
(2009) 6 SCC 121	**Referred to.**	**Para 12**
(2009) 13 SCC 422	**Referred to.**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5510 of 2005.

From the Judgment & Order dated 12.01.2004 of the High Court of Jharkhand at Ranchi in M.A. No. 71 of 2003.

Shree Prakash Sinha, Vijay Kumar, Shekhar Kumar, S. Chandra Shekhar for the Appellant.

A.K. Raina, Anil Kumar Jha for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The present appeal, by special leave,

raises the issue, indeed the only issue, of assessment of loss of earnings in respect of the victim of a motor accident who was certified 70% permanent disablement.

2. Arvind Kumar Mishra – appellant – a student of engineering final year at Birla Institute of Technology, Mesra (B.I.T.) at the time of accident was seriously injured as a result of a truck bearing registration No. DEG 3291 being negligently driven on June 23, 1993. The truck coming from the opposite direction hit the motorcycle and the appellant riding the motorcycle was thrown on the road. He sustained multiple injuries; diffused multifocal damage of brain with interventricular hemorrhage; optic atrophy in right eye and 3+ relative afferent papillary in left eye; amputation of right hand distal to carpometacarpal joint level; compound fracture of shaft of tibia (left); total bronchial plexus palsy; blocking of anterior wall of the trachea at the level of the 3rd and 4th cartilaginous rings and disfiguration. He was treated by several doctors at various hospitals namely, R.M.C.H, Ranchi, C.C.L .Hospital, Gandhinagar, Christian Medical College and Hospital, Vellore and Shankar Netralaya, Madras. He had to undergo few surgical operations. After a little recovery, he made an application under Section 166 of the Motor Vehicles Act, 1988 (`the 1988 Act') claiming total compensation in the sum of Rs. 22 lakhs which included the expenditure already incurred by him up to that time to the extent of Rs. 1,50,000/- for his treatment.

3. The offending vehicle was insured with the New India Assurance Company Ltd. ('the insurer'). The owner as well as insurer contested the claim petition. The appellant passed out Bachelor of Engineering during the pendency of the claim petition. He examined himself and tendered some of the doctors who treated him in evidence. The vouchers of the expenditure incurred by him on his treatment at various hospitals were also produced.

4. The Motor Vehicle Accident Claims Tribunal, Ranchi (for

short 'the Tribunal') in its award dated December 19, 2002 held that the accident occurred due to rash and negligent driving of the truck bearing registration No. DEG 3291. It also held that the owner of the vehicle and the insurer were liable to pay the compensation to the appellant. As regards quantum of compensation, the Tribunal allowed the total compensation of Rs. 2,50,000/- along with the interest @ 9% per annum from August 7, 2002 by considering the matter as follows:

> ".....under the head of pecuniary damages the amount which has been amended (sic) by the claimant in his treatment including medical expenditure other material loss, a total lump sum compensation amount of Rs. 1,50,000/- (Rupees one lac and fifty thousand only) is being granted to the claimant. So far as non-pecuniary damages are concerned from the evidence itself it is very much clear that injured was a brilliant student of engineering Final year at B.I.T. Mesra, and due to said accident he has lost his future career. He has also suffered from mental and physical shock and has to be suffered in future. There is also damages and the loss of expectation of life on account of the injuries sustained by him. He has to face inconvenience, hardship, discomfort disappointment and mental stress till his life, therefore, a lump sum compensation amount of Rs. 1,00,000/- (Rupees one lac only) is being granted to the claimant. The total compensation came to Rs. 2,50,000/- (Rupees two lac and fifty thousand only) which the claimant is entitled with interest @ 9% per annum."

5. The claimant, dissatisfied with the assessment of compensation by the Tribunal, approached the High Court of Jharkhand, Ranchi. The High Court increased the amount of compensation from Rs. 2,50,000/- to Rs. 3,50,000/- having considered the matter thus:

> "On an application under Section 166 of the Motor Vehicles

Act, 1988 vide Compensation Case No. 183 of 1993 the Motor Vehicles Accident Claims Tribunal, Ranchi, assessed a sum of Rs. 1,50,000/- to be paid to him under the head pecuniary damages i.e. the amount which was expended by him towards his treatment including the medical expenses and a sum of Rs. 1,00,000/- was granted towards non pecuniary damages. i.e. for his permanent disablement to the extent of 70% for the loss of right wrist and paralysis of right upper limb as also for loss of vision in his right eye.

Keeping into consideration the nature of disability the appellant had to sustain and loss of his future expectancy in life, we are of the view that he was entitled to a sum of Rs. 2,00,000/- on account of non pecuniary loss. Accordingly, we modify the impugned judgment and award to the extent that instead of total amount of Rs.2,50,000, the claimant is entitled to get Rs. 3,50,000/-. It is stated that the award amount with interest granted by the tribunal had already been paid. Hence, we make it clear that there will be no interest payable on the compensation amount if the said amount is deposited before the tribunal within six weeks, failing which the interest @9% per annum as granted by the tribunal shall be payable on the enhanced amount also from 07/08/2002."

6. It is not necessary to discuss the liability of the respondents. That was disputed, but the matter has been considered, and the Tribunal found that due to rash and negligent driving by the driver of the truck (DEG 3291), the accident took place in which the appellant sustained serious multiple injuries and, therefore, owner and insurer were liable to him for the damage. There was no appeal with regard to that matter before the High Court.

7. We do not intend to review in detail state of authorities in relation to assessment of all damages for personal injury. Suffice it to say that the basis of assessment of all damages

for personal injury is compensation. The whole idea is to put the claimant in the same position as he was in so far as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered. In some cases for personal injury, the claim could be in respect of life time's earnings lost because, though he will live, he cannot earn his living. In others, the claim may be made for partial loss of earnings. Each case has to be considered in the light of its own facts and at the end, one must ask whether the sum awarded is a fair and reasonable sum. The conventional basis of assessing compensation in personal injury cases – and that is now recognized mode as to the proper measure of compensation – is taking an appropriate multiplier of an appropriate multiplicand.

8. In *General Manager Kerala State Road Transport Corporation, Trivandrum v.. Susamma Thomas (Mrs.) and Ors*[1]., this Court laid down the following principles:

"13. The multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalizing the multiplicand by an appropriate multiplier. The choice of the multiplier is determined by the age of the deceased (or that of the claimants whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should also be consumed-up over the period for which the dependency is expected to last."

17. The multiplier represents the number of years' purchase on which the loss of dependency is capitalised. Take for instance a case where annual loss of dependency is Rs 10,000. If a sum of Rs 1,00,000 is invested at 10% annual

interest, the interest will take care of the dependency, perpetually. The multiplier in this case works out to 10. If the rate of interest is 5% per annum and not 10% then the multiplier needed to capitalise the loss of the annual dependency at Rs 10,000 would be 20. Then the multiplier, i.e., the number of years' purchase of 20 will yield the annual dependency perpetually. Then allowance to scale down the multiplier would have to be made taking into account the uncertainties of the future, the allowances for immediate lump sum payment, the period over which the dependency is to last being shorter and the capital feed also to be spent away over the period of dependency is to last etc. Usually in English Courts the operative multiplier rarely exceeds 16 as maximum. This will come down accordingly as the age of the deceased person (or that of the dependants, whichever is higher) goes up."

9. The principles laid down in *Susamma Thomas*[1] still hold the field; the only variation has been in respect of maximum multiplier. In the present case the Tribunal as well as the High Court seriously erred in not assessing the compensation for personal injury to the appellant in accord with the recognized mode i.e., by taking an appropriate multiplier of an appropriate multiplicand.

10. The appellant at the time of accident was a final year engineering (Mechanical) student in a reputed college. He was a remarkably brilliant student having passed all his semester examinations in distinction. Due to the said accident he suffered grievous injuries and remained in coma for about two months. His studies got interrupted as he was moved to different hospitals for surgeries and other treatments. For many months his condition remained serious; his right hand was amputated and vision seriously affected. These multiple injuries ultimately led to 70% permanent disablement. He has been rendered incapacitated and a career ahead of him in his chosen line of mechanical engineering got dashed for ever. He is now in a

physical condition that he requires domestic help throughout his life. He has been deprived of pecuniary benefits which he could have reasonably acquired had he not suffered permanent disablement to the extent of 70% in the accident.

11. On completion of Bachelor of Engineering (Mechanical) from the prestigious institute like B.I.T., it can be reasonably assumed that he would have got a good job. The appellant has stated in his evidence that in the campus interview he was selected by Tata as well as Reliance Industries and was offered pay package of Rs. 3,50,000/- per annum. Even if that is not accepted for want of any evidence in support thereof, there would not have been any difficulty for him in getting some decent job in the private sector. Had he decided to join government service and got selected, he would have been put in the pay scale for Assistant Engineer and would have at least earned Rs. 60,000/- per annum. Wherever he joined, he had a fair chance of some promotion and remote chance of some high position. But uncertainties of life cannot be ignored taking relevant factors into consideration. In our opinion, it is fair and reasonable to assess his future earnings at Rs. 60,000/- per annum taking the salary and allowances payable to an Assistant Engineer in public employment as the basis. Since he suffered 70% permanent disability, the future earnings may be discounted by 30% and, accordingly, we estimate upon the facts that the multiplicand should be Rs.42,000/- per annum. The appellant at the time of accident was about 25 years. As per the decision of this Court in *Sarla Verma (Smt.) and Ors. v. Delhi Transport Corporation and Anr*[2]. the operative multiplier would be 18. The loss of future earnings by multiplying the multiplicand of Rs. 42,000/- by a multiplier of 18 comes to Rs. 7,56,000/-. The damages to compensate the appellant towards loss of future earnings, in our considered judgment, must be Rs. 7,56,000/-. The Tribunal awarded him Rs. 1,50,000/- towards treatment including the medical expenses. The same is maintained as it is and, accordingly, the total

amount of compensation to which the appellant is entitled is Rs. 9,06,000/- .

12. Before we close, we must notice in all fairness to the learned counsel for the insurer his submission that the appellant is entitled to compensation in accordance with the Second Schedule appended to the 1988 Act only. This submission overlooks the fact that the appellant made his claim under Section 166 of the 1988 Act and not under Section 163A. It is true that in *Reshma Kumari & Ors. v. Madan Mohan & Anr.,*[3] a two-Judge Bench of this Court has referred the question whether multiplier specified in the Second Schedule should be taken to be a guide for calculation of the amount of compensation payable in a case falling under Section 166 to the larger bench and the said question is not yet authoritatively decided. However, in a case such as the present case, we find no justification to await decision of the larger bench on the aforenoticed question as there are already few decisions of this Court taking a view that the Second Schedule has no application to the claim petition made under Section 166 of the 1988 Act.

13. In the result, the appeal is allowed in part and the compensation awarded by the High Court in the sum of Rs. 3,50,000/- is enhanced to Rs. 9,06,000/-. The appellant shall be entitled to 9% simple interest per annum on the enhanced amount from August 7, 2002 until the date of actual payment. The appellant shall also be entitled to the costs of this appeal which we quantify at Rs. 15,000/-.

N.J Appeal partly allowed.

STATE OF ANDHRA PRADESH
v.
VISWANADULA CHETTI BABU ETC.
(Criminal Appeal No. 131 of 2004 etc.)

SEPTEMBER 30,2010

[HARJIT SINGH BEDI AND CHANDRAMAULI KR. PRASAD, JJ.]

SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) RULES, 1995:

r.7 – Investigating Officer –Held: In view of the clear mandate of the Rules, it was only a specified Deputy Superintendent of Police who could investigate an offence under the Act – Any officer below that rank and not specified as per Rule 7, would not be entitled to investigate any such offence – In the instant case, the investigation has been made by an officer of the rank of an Assistant Sub-Inspector of Police – This was not permissible – The judgment of the High Court in this respect, upheld –Investigation.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 131 of 2004.

From the Judgment & Order dated 24.7.2002 of the High Court of Judicature of Andhra Pradesh at Hyderabad in Criminal Appeal No. 1016 of 1996.

I. Venkata Narayana, D. Mahesh Babu and D. Bharati Reddy for the Appellant.

Leela Sarveswar and V.N. Raghupathy for the Respondent.

The following Order of the Court was delivered

O R D E R

We have heard learned counsel for the parties.

Rule 7 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995, framed under the Andhra Pradesh Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 reads as under:

> "7. Investigating Officer (1) An offence committed under the Act shall be investigated by a police officer not below the rank of Deputy Superintendent of Police. The investigating officer shall be appointed by the State Government/Director General of Police/Superintendent of Police after taking into account past experience, sense of ability and justice to perceive the implications of the case and investigate it alongwith right lines within the shortest possible time.
>
> (2) The investigating officer so appointed under sub-rule(1) shall complete the investigation on top priority basis within thirty days and submit the report to the Superintendent of Police who in turn will immediately forward the report to the Director General of Police of the State Government.
>
> (3) The Home Secretary and the Social Welfare Secretary to the State Government, Director of Prosecution, the officer-in-charge of Prosecution and the Director General of Police shall review by the end of every quarter the position of all investigations done by the investigating officer."

A bare perusal of the Rule would reveal that the State Government/the Director General of Police/ Superintendent of Police after taking into account the experience etc. of a Deputy Superintendent of Police shall appoint him as the Investigating Officer in cases under the above Act. Sub-rule (3) further provides that the Home Secretary and the Social Welfare

Secretary to the Government and other officers in charge shall review the working of the Deputy Superintendent of Police and the investigations done by him at the end of every quarter. It is therefore apparent that authority to investigate has to be conferred on a specified officer not below the rank of Deputy Superintendent of Police.

We are, therefore, of the opinion that in view of the clear mandate of the Rules, it was only a specified Deputy Superintendent of Police who could investigate an offence under the Act. An investigation done by any officer below that rank and not specified as per Rule 7 would not be entitled to investigate any such offence. In the present matter the investigation has been made by an officer of the rank of an Assistant Sub-Inspector of Police. This was not permissible. We endorse the judgment of the High Court in this respect.

The appeals stand dismissed.

R.P. Appeals dismissed.

RATHINAM @ RATHINAN
v.
STATE OF TAMIL NADU AND ANR.
(Criminal Appeal Nos. 905-906 of 2007 Etc.)

OCTOBER 6, 2009

[HARJIT SINGH BEDI AND R. M. LODHA, JJ.]

Penal Code, 1860:

ss. 376, 302 and 201 – Rape and murder – For the same incident, consequent upon the initial investigation another person was prosecuted – His trial ended in acquittal – During that trial, further investigation was ordered as a result of which the appellant was charged with the main offences of rape and murder – Acquittal by trial court – Conviction by High Court – HELD: The testimony of the sole witness projected as the eye-witness of the crime was discarded by the trial court as his statement was recorded for the first time in the further investigation after four years of the incident – Moreover, he was declared hostile in the earlier sessions trial – His statement in the instant case is comprehensively different vis-à-vis his statement in the earlier sessions trial – The other witness deposed only about removal and disposal of the dead body – He is not an eye-witness to rape and murder – His statement was also recorded for the first time during further investigation – There was no satisfactory reason for these witnesses not to tell about the incident earlier – High Court erred in basing the conviction on the evidence of these witnesses – Judgment of High Court set aside and appellant acquitted – Appeal against acquittal – Evidence.

EVIDENCE – Witnesses making statements about the incident for the first time during further investigation after four years of incident – HELD: The best check on the veracity of

a witness is the test of normal human behaviour – If the behaviour of a witness is unnatural and grossly against normal human conduct, that itself is a strong circumstance in doubting his evidence – The conduct of the witnesses in not coming forth as witness for about four years, measured by any yardstick, is unacceptable.

Appeal agains acquittal:

Appeal before High Court against acquittal of accused of offences punishable u/ss 376, 302 and 201 IPC – Conviction by High Court – HELD: Interference by High Court in an appeal against acquittal sparingly should be made in a situation where findings of trial court are perverse and not possible on the evidence and, if two views are possible, the one leading to acquittal should not be disturbed.

Administration of Criminal Justice:

Decision making process – HELD: Court must make a dispassionate assessment of evidence and must not be swayed by the horror of the crime or the character of the accused and the judgment must not be clouded by the facts of the case – Judgments/Orders.

'C', the daughter of PW-1, was working in the Textile Waste Cotton Mill owned by 'MS', the mother of A-1. According to the prosecution case, 'C' left for the Mill in the evening of 22.12.1995 as on that date she was to work in the night shift starting from midnight. On the following day when she did not reach home, her mother, PW-1 searched for her, and saw her body in a well. As a result of the initial investigation, A-4, a worker of the Mill, was tried for offences of rape and murder. During his trial, further investigation was made, statements of PW-4 and PW-5, who were stated to have been present in the Mill at the time of the incident, were recorded by the Police. In the second final report pursuant to the further

investigation, A-1 was implicated as the main accused of the offences of rape and murder, and four others including A-4, were charged with the offence punishable u/s 201 IPC. In the first trial of A-4, PW-4 was declared hostile and A-4 was acquitted. In the second trial (giving rise to the instant appeal), the trial court acquitted all the accused. However, the High Court relied upon the evidence of PW-4 and PW-5 and convicted A-1 u/ss 376 and 302 IPC and sentenced him to ten years RI and life imprisonment for the respective offences with a fine of Rs. 2 lakhs to be paid to PW-1. A-2 and A-4 were convicted u/s 201 IPC. However, acquittal of A-3 and A-5 was maintained. Aggrieved, the A-1 filed Crl. A. No. 905-906 of 2007. Crl. A. No. 1619/2007 was filed by the Investigating Officer who conducted the investigation from 23.12.1995 to 23.3.1996. The allegation against him was that he had deliberately shielded the real offenders and was liable for the offence punishable u/s 201 IPC. The trial court acquitted him, but the High Court reversed his acquittal.

Allowing the appeals, the Court

HELD: 1.1. Interference by the High Court in an appeal against acquittal should be made sparingly in a situation where the findings of the trial court are perverse and not possible on the evidence and if two views are possible the one leading to acquittal should not be disturbed. The presumption of innocence which is always raised in favour of an accused is further strengthened by an acquittal and bolsters the claim of the accused. [para 8] [887-E-G]

Arulvelu and Anr. vs. State **2009 (14) SCR 1081 = (2009) 10 SCC 206 – relied on.**

1.2. It has been emphasized repeatedly by this Court

that a dispassionate assessment of the evidence must be made and that the court must not be swayed by the horror of the crime or the character of the accused and that the judgment must not be clouded by the facts of the case. [para 5] [885-C-D]

Kashmira Singh vs. State of Madhya Pradesh AIR 1952 SC 159; and *Ashish Batham vs. State of M.P.* **2002 (2) Suppl. SCR 146 = (2002) 7 SCC 317 – referred to.**

2.1. In it significant to note that in the initial investigation, a charge-sheet had been filed against A-4 only for the offences of rape and murder. In the course of the trial of 9+A-4, all the witnesses had turned hostile and it was at that stage that further investigation was ordered on an application made by the prosecuting agency. This factor has been noticed by the High Court as well. Curiously, on the filing of the final report after further investigation, the Inspector, namely, 'Ab', who had filed the final report in the case against A-4 alone, moved the court that A-4 could not be tried in the new sessions trial. The trial Judge passed an order accepting the plea and the trial of A-4 proceeded separately as the sole accused in a different sessions case, though with respect to the same incident. The trial of A-4 ended in acquittal and the State went in appeal in the High Court in that case also, but without success. [para 9] [887-H; 888-A-D]

2.2. Assuming that the death of the victim was homicidal and that she had been raped before the murder, the statements of PWs.4 and 5 must be examined keeping in view the background of the case, as the fate of the appeal would hinge on their evidence. PW4 had appeared as a prosecution witness in the sessions trial against A-4 as well and had been declared

hostile. In the instant case, PW4's statement is comprehensively different vis-à-vis the statement he had given in the other sessions trial. Several reasons had weighed with the trial Judge while discarding the evidence of PW-4. In his cross-examination he admitted that he had not referred to his meeting with PW1 although he had met her the very next day and had undertaken to convey the entire information to her and that he had not even given any information to Inspector 'Ab' or during his examination-in-chief in the A-4's sessions trial and it was for the first time in the year 1998 in the further investigation that he had named the appellant and others. He also admitted that he had been working in the mill for about three and half years after 1993 and further clarified that he had worked till the year 1998. Thus, several reasons weighed with the trial Judge while discarding the evidence of PW-4. [para 10] [888-E-H; 889-A]

2.3.The High Court concluded that PW-4 as well as the deceased had been employed in the mill at the relevant time and also noted that PW-4 had made a statement for the first time only during further investigation. The High Court, however, glossed over the fact that PW-4 had been projected as an eye witness in the sessions trial pertaining to A4 and his statement had been disbelieved and he had been declared hostile, but found it proper to believe his evidence in the instant case. [para 11] [890-E-F]

2.4. The inferences drawn by the High Court that PW-4 was a timid and shy person, are somewhat unusual, more particularly, as the witness was not before the High Court which could have seen his demeanor, and belie the principle that it is for the prosecution to prove its case beyond reasonable doubt. The High Court then goes on to say that it was on account of fear that PW-4 had not come forth in time and that it was after he had left the employment of the mill, that he had gathered the courage

to do so. The trial court noted that as per his statement he had left the employment some time in 1996. The High Court's finding that he had left in 1998, therefore, appears to be erroneous. It is open to the defence to contend that the statement of this witness that he had worked till 1996 which is beneficial to the accused must be accepted. In this view of the matter, the observation of the High Court that PW-4 continued to be under the fear of the mill owner up till the year 1998 is palpably wrong. [para 11, 12] [891-A-G]

2.5. PW-1, in her examination-in-chief stated that when she met PW-4 on the day after the rape and murder she asked him to come out with the true story to which he replied that he would tell her the following day or on some other day. Concededly, she never made any enquiry from him thereafter. Her statement about PW-4 witnessing the incident is at complete variance with the prosecution case even after further investigation. Therefore, in view of this uncertain evidence, the reliance of the High Court on PW-4 was not called for. The High Court has gone wrong on this aspect. [para 13, 14] [892-A-B-H; 893-A]

2.6. PW-5 was a witness to the removal and disposal of the dead body. His statement was also recorded for the first time in the year 1999. Admittedly, PW5 is not an eye-witness to the rape and murder. The trial court has rejected his evidence for reasons similar to the case of PW-4 and, in particular, the fact that his statement had also been recorded for the first time during further investigation by PW66. The High Court has, however, explained this gap of six years by stating that there was no evidence to show that this witness had been seen in the village after the incident. The High Court has observed that as the earlier investigation was deliberately misdirected, there was reason enough to believe PW5. Curiously enough, it has also been observed that PW5

had left the village, after the murder, though PW-5 does not say so himself. Moreover, it is significant that PW4, in his evidence or even in his statement u/s164 CrPC. did not even refer to the presence of PW5 in the mill premises on the day in question. It is for this reason that the trial court had concluded that the possibility that PW5 had not been present or employed in the mill could not be ruled out. It is equally true that PW5 in his evidence does not say that he was threatened by anyone to keep quite about the incident, and the High Court has chosen to draw an inference (without any material) that he had kept away as he felt that he may be implicated in the murder. [para 15-16] [893-B-E; 894-F-H; 895-A]

2.7. It must be remembered that the best check on the veracity of a witness is the test of normal human behaviour. If the behaviour of a witness is unnatural and grossly against normal human conduct that itself is a strong circumstance in doubting the story projected by him. The conduct of PW-4 and PW-5 in not coming forth as witnesses for about 4 years is, thus, unacceptable measured by any yardstick. [para 17] [895-F-G]

3. The other circumstances with regard to the recoveries etc. do not implicate the appellant in any manner. The judgment of the Division Bench of the High Court is set aside and the appellant is acquitted. [para 18] [895-H; 896-A]

Crl. Appeal No. 1619/2007

4. In the light of what has been held in the connected Criminal Appeal Nos. 905-906 of 2007, it is not possible on the evidence to ascertain as to whether the appellant was, in fact, guilty of the offence alleged against him. He is accordingly acquitted. [896-C-D]

Case Law Reference:

AIR 1952 SC 159	**referred to**	**para 5**
2002 (2) Suppl. SCR 146	**referred to**	**para 5**
2009 (14) SCR 1081	**relied on**	**para 8**

CRIMINAL APPELLATE JURISDICTION : CRIMINAL APPEAL NOS. 905-906 of 2007.

From the Judgment & Order dated 4.4.2007 of the High Court of Judicature at Madras in Criminal Appeal No. 152 of 2001 and Criminal R.C. No. 239 of 2001.

WITH

Crl. Appeal No. 1619 of 2007.

Ranjit Kumar and K.V. Vishwanathan, B. Ragunath, Vijay Kumar and V. Mohana for the Appellant.

S. Thananjayan for the Respondent.

The following order of the Court was delivered

O R D E R

By this judgment we propose to dispose of Criminal Appeal nos. 905-906 of 2007. The facts have been taken from Criminal Appeal no. 905 of 2007. They are as under:

1. Accused no.1, Rathinam is the son of the owner of Sundaram Textiles Waste Cotton Mill, Madam Sundarammal, situated at Erumal Thottam, Chinnavedampatti. Ten persons were employed in the mill working in three shifts – the day shift from 7.00 a.m. to 4.00 p.m., the half night shift from 4.00 p.m. to midnight and the night shift from midnight to 7.00 a.m. on the next day. The deceased Chitra, PW 4 Ravi, PW 5 Andy, PW 6 Palanisamy, PW 14 Aruchami and a few other ladies

were working in the mill as well. On 22nd December 1995 accused no.4 Sundaram, his wife Kalamani and one Sivakami attended the day shift which was over by 3.30 p.m. whereafter PW's Ravi and Andy and some lady workers including Vadivu, Vijaya, Poongodi and Yasotha were to attend the half night shift from 4.00 p.m. to midnight. Of the four ladies referred to above, the first three were working in the Spinning Section of the mill. PW Ravi also reached the mill for his duty and while he was working on his machine in the Cording Section he was asked by Madam Sundarammal to look after the work as she was unwell and was leaving for the hospital alongwith her brother. It appears that there was an electricity breakdown between 6.13 p.m. and 7.19 p.m. and as several guests also came visiting, Madam Sundarammal did not go the hospital. PW Ravi also told her that he was going to buy coconuts and fruit for the pooja, as it was a Friday, and he was directed by her to get a packet of gold filter cigarettes for Rathinam as well. Ravi thereafter left for the shop belonging to PW7 and as he came to the spinning section of the mill, he met the deceased who was to work the night shift and told her that he was going out to buy coconuts and cigarettes. Ravi returned with the aforesaid articles and handed them alongwith the balance change to Madam Sundarammal. As he was entering the spinning section he noticed that a tiffin box and a bag belonging to the deceased were lying at the entrance and also heard her voice from inside the premises and accused no.2 Dhanusu coming out from the building. Ravi thereupon enquired from Dhanusu as to what was happening on which he made a vague reply and advised him to go to his own section and to see that nobody came in that direction. Ravi went outside but returned after a short while as he was overtaken by curiosity and again entered the spinning section through a side gate and found Dhanusu standing near the wall and Rathinam pushing the deceased on to the floor and saying that she should not be afraid and not to worry as he was with her. On seeing all this Ravi returned to his own department but was soon called by Dhanusu and asked to assist in carrying the deceased to the bed room as she had become

unconscious. He was later told that she was dead and was also threatened that if he revealed the facts to anybody, he would face dire consequences. Ravi was thereafter asked to get liquor, which he obtained from M.R. Wines and after consuming the same, accused nos. 1, 2, 3 and 4 asked Ravi to wait near the spinning room whereafter the body was carried outside towards the road leading to Chinnavedampatty. Ravi was, however, advised to go inside and work on his machine. It also appears that PW Andy who was working in the mill at about 8.15 p.m. had also seen accused nos. 1, 2 and 4 carrying the body towards the road. He, however, continued to work on his machine and after having completed his allotted work, and after taking Madam Sundarammal's permission, left for his residence. In the meanwhile accused no.5 Krishnan also reached the mill premises at about 11.30 p.m. and saw that accused nos. 1, 2 and 4 had returned to the mill. PW 11 Palanisamy too reached the mill premises at about 11.55 p.m. whereupon Ravi left for his residence and after having watched TV for sometime, went to sleep. The next morning, Bakyam PW 1, the mother of the deceased, alarmed at the fact that her daughter had not returned home, came to the mill and asked Madam Sundarammal, as to the whereabouts of her daughter. She was told that she had not come to work the previous day. Alarmed yet further, Bakyam PW 1 set out to look for her and in that process found a watch, a 10 paisa coin, one ear ring and one hair pin near the well and on looking inside, she saw her daughter's body lying there. PW 1 also identified the watch that she had picked up, as belonging to Madam Sundarammal on which she confronted her with the fact whereafter Madam Sundarammal threatened her and did not permit her to even make a phone call. PW 1 thereafter left the mill premises and while on the way out met Ravi PW and enquired from him as to the deceased's whereabouts. Ravi, in reply, told her that he would tell her the story the next day. She also met Aruchamy PW 14 who took her to the house of one K. Vellingiri of the Communist Party of India whereafter PW 14 conveyed the information about the murder to the police on phone. On

receiving the information, Sub-Inspector Saraswathy PW 56 alongwith a police party reached the factory premises and the well and recorded the statement of PW 1 on which an FIR was duly registered. The investigation into the murder was thereafter handed over to Inspector Anbazhagan on the directions of the Assistant Commissioner of Police, Selvraj. The Inspector also reached the scene of occurrence at about 6.30 p.m. and met PW 1 and the other relatives of the deceased, Madam Sundarammal, Andy PW and several others and also enquired about the whereabouts of Ravi PW. The dead body was also taken out of the well and was sent for the post-mortem examination which was duly conducted by Dr. Ramalingam PW 60 who found several injuries thereon including a ligature mark on both sides of the neck and a large number of other injuries including injuries on the genital organs. A finger print expert was also summoned who lifted some prints from the tiffin box and found that they matched the finger prints of Sundaram accused no.4. Sundaram aforesaid also made an extra judicial confession before Ruthramoorthy PW 24 which was duly recorded. PW 1 however made her independent inquiries and received information that the rape and murder had been committed only by Rathinam, A-1 and that Sundaram, A-4 was innocent. The Communist Party of India also took up the matter with the Chief Minister and other senior officials and an enquiry by the CBCID was ordered which was carried out by senior officers including Inspector Pichai. A report was thereafter forwarded to the Commissioner of Police by the Assistant Commissioner of Police Selvraj that the allegations made by PW 1 with respect to Rathinam were unfounded and that the culprit was indeed Sundaram. PW 1 nevertheless persisted in her efforts and compelled the prosecution to make an application for further investigation and after an order by the Court, the further investigation was duly taken up by PW-66 Inspector Samuthrakani. This officer again recorded the statements of all the witnesses referred to above and also several other witnesses in addition and also had their statements recorded under Section 164 of the Crl.P.C. A

charge sheet was thereafter filed against Rathinam and 5 others including Sundaram aforesaid. They were duly brought to trial and whereas Rathinam was charged for offences punishable under Sections 376 and 302 read with Sections 120B and 201 of the IPC, the others were charged under Section 120B and 201 of the IPC.

2. The Trial Court examined the matter very comprehensively and observed that two reports had been filed by the investigating agencies which were at variance with each other in as much that the first final report attributed the rape and murder to Sundaram accused no.4 whereas the second final report after further investigation implicated Rathinam accused no.1 as the main accused and the others for the offence under Section 201 of the Indian Penal Code. The Court observed that it was the duty of the Prosecution to establish the guilt of the accused beyond reasonable doubt and the two widely different theories cast a doubt on the prosecution story. The Court further opined that the incident had happened in the late evening of 22nd December 1995 and it was for the prosecution to prove through the so called eye-witnesses PWs 4 and 5 that all 6 accused had been involved in the incident as that was the finding of the investigating agencies after further investigation. The Court then examined the evidence and concluded that from a perusal of the various documents as well as the ocular evidence, that the deceased, who was to work the 12.00 midnight to 7.00 a.m. shift had not turned up for her work and the possibility that she had been raped and murdered well before midnight, could not be ruled out. The Court found that as per the statements of PW 1 her neighbour PW-2, and PW-3 the niece of the deceased that the latter had left for the mill with her mother at about 5.30 to 5.45 p.m. on the 22 December 1995 and thereafter PW 1 had returned home alone. The Court then examined the evidence of PW 1 and PW 4 and observed that PW 1 had stated that she had left her daughter on the road near the mill and therefore there was thus no reason whatsoever to accept the presence of the deceased inside the

premises at about 6.00 p.m. as her shift was to start at midnight. The Court held that the explanation tendered by the prosecution about the presence of the deceased at 6.00 p.m. (that she was also doubling as a domestic servant in the house of Madam Sundarammal) could not be believed as there was absolutely no evidence to that effect. The Court, further, observed that Ravi's statement pertaining to the murder had been recorded by the investigating officer for the first time on further investigation about 4 years of the date of the incident and he had also admitted that during this period of four years he had not revealed the facts of the incident to anyone including his co-workers, the relatives of the deceased, the CID or the police officials and this behaviour belied the truthfulness of his evidence. The evidence of PW5 Andy who was a witness qua the offence under Section 201 of the IPC was also rejected by the trial court for the reason that he had not revealed the story to anyone and his statement too had been recorded by the first time in the year 1999 on further investigation; though he remained employed in the mill for several years after the crime. The trial court, accordingly, acquitted all the accused.

3. The matter was thereafter taken in appeal before the High Court at the instance of the State. The High Court, while noticing that the entire prosecution story with regard to the rape and murder rested on the statements of PW4 Ravi and PW5 Andy (who was primarily the witness for destruction of evidence), went into the matter independently. While dealing with the statement of PW4, it noted that though he was the witness to the rape and murder on 22nd December 1995 he had not informed anybody including PW1, the mother of the deceased nor his co-workers, the police or the members of the Communist Party which had taken up the case on behalf of the complainant for a period of four years and it was for the first time during further investigation that he had made a statement in the year 1998. The Court found that though this conduct was rather unusual yet in the light of the fact that he was a young boy of about 17 years of age at the time of incident and could

have been intimidated by the circumstances, was perhaps a reason which could justify the delay. The Court fortified its conclusion by holding that the defence had not really challenged the factum that PW4 had been employed in the mill and his presence, therefore, during the incident was explained. The Court further held that there was ample evidence to show that the deceased was also an employee in the mill and was employed even on 22nd December 1995 i.e. on the date she had met her death and the possibility therefore that the incident had happened in the mill premises and had been seen by PW4, was a reality. The Court then examined the statement of PW5 to the effect that he had seen three of the accused carrying the body and throwing it into the well and was therefore a witness to the offence under Section 201 of the IPC and though his statement too had been recorded for the first time in the year 1999, once again reversed the finding of the trial court and held that PW5 was a good witness and his evidence inspired confidence. The High Court, accordingly, allowed the appeal and awarded A1 Rathinam, the present appellant, a sentence of 7 years RI under Section 376 of the IPC, life under Section 302 of the IPC and 3 years RI for the offence under Section 201 of the IPC. Compensation of Rs.2,00,000/- to be paid by the appellant was also ordered for PW1, the mother of the deceased. A2 was sentenced under Section 201 of the IPC to 2 years RI and to a fine of Rs.5,000/- and in default to undergo RI for 6 months. A4 Sundaram was sentenced to undergo RI for one year for the offence under Section 201 of the IPC. The acquittal of A3 and A5 was, however, maintained. The present appeal has been filed by Rathinam, A1 alone.

4. Before we embark on a consideration of the submissions made by the learned counsel for the parties, we would like to quote from the judgment of the High Court:

> "Let not the mighty and the rich think that Courts are their paradise and in the legal arena they are the dominant players; let this judgment make it clear that the weak and

the poor would also have a level playing ground in the legal battle; and the 'Sun' cannot be kept under clouds for all time to come, the truth, which may remain buried for sometime under the thick carpet woven by the mighty, would also come out in it's great splendour and the Majesty of Law will march on forever, unmindful of people who come before it but ensuring that they are treated alike."

5. We must, however, understand that a particularly foul crime imposes a greater caution on the court which must resist the tendency to look beyond the file, and the insinuation that the rich are always the aggressors and the poor always the victims, is too broad and conjectural a supposition. It has been emphasized repeatedly by this Court that a dispassionate assessment of the evidence must be made and that the Court must not be swayed by the horror of the crime or the character of the accused and that the judgment must not be clouded by the facts of the case. In *Kashmira Singh vs. State of Madhya Pradesh* AIR 1952 SC 159 it was observed as under:

"The murder was a particularly cruel and revolting one and for that reason it will be necessary to examine the evidence with more than ordinary care lest the shocking nature of the crime induce an instinctive reaction against a dispassionate judicial scrutiny of the facts and law."

Likewise in *Ashish Batham vs. State of M.P.* (2002) 7 SCC 317 it was observed thus:

"Realities or truth apart, the fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely, carried away by the heinous nature of the crime or the gruesome manner in which it was found to have been committed. Mere suspicion, however, strong

or probable it may be is no effective substitute for the legal proof required to substantiate the charge of commission of a crime and graver the charge is, greater should be the standard of proof required. Courts dealing with criminal cases at least should constantly remember that there is a long mental distance between "may be true" and "must be true" and this basic and golden rule only helps to maintain the vital distinction between "conjectures" and "sure conclusions" to be arrived at on the touchstone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record."

6. We must, therefore, keep aside the High Court's observations, profound as they are, in assessing the evidence. In this background, we must examine Mr. Ranjit Kumar's first argument with regard to the interference of the High Court in an appeal against acquittal. He has pointed out that though it was open to the High Court to re-appraise the evidence in a criminal matter, yet interference in a judgment of acquittal was to be made if it was palpably perverse and not possible on the evidence and that if two views were possible the one taken by the trial court was not to be disturbed. It has also been emphasized that the presumption of innocence which was available to an accused till proved guilty before a court of law was greatly strengthened by an acquittal recorded by the trial court and for this additional reason as well, the High Court ought to be slow in interfering with such an order. It has also been pointed out that the case was concededly one of rape and murder but the High Court had laboured its judgment in page after page by alluding to the medical evidence on these two facets, but had completely misread and wrongly assessed the evidence of PW4 and PW5 who were the only two material witnesses to the incident and whose statements had been disbelieved by the trial court for very good reasons. It has been submitted that the case against the appellant was uncertain as

in the two initial investigations the rape and murder had been attributed to A4 Sundaram, and it was during the course of his trial proceedings that a further investigation had been ordered by the court whereafter the entire scenario had changed and the rape and murder attributed to the appellant whereas the other accused including Sundaram, were sought to be implicated for the offence under Section 201 of the IPC. Mr. Ranjit Kumar, has in this background, pleaded that the prosecution itself being uncertain as to the widely differing theories projected by three investigating officers from different agencies, the appellant was entitled to claim an acquittal.

7. The learned counsel for the State has, however, emphasized that the High Court was justified in interfering on the premise that the appellant belonged to an affluent family and was in a dominant position over Ravi and Andy and it was for that reason that they had withheld the information with regard to the incident for a period of 4 years, that is, when the further investigation taken over by PW-66 and it was only at that stage that they were emboldened to come out and to give their statements.

8. The first question raised by the learned counsel which requires to be dealt with is with regard to the interference of the High Court in an acquittal appeal. It is now beyond dispute that interference in such an appeal should be made sparingly in a situation where the findings of the High Court are perverse and not possible on the evidence and if two views are possible the one leading to acquittal should not be disturbed. The presumption of innocence which is always raised in favour of an accused is further strengthened by an acquittal and bolsters the claim of the accused. The aforesaid time honored principles have been recently set out in the judgment of this Court in *Arulvelu and Anr. vs. State* (2009) 10 SCC 206.

9. It is in this background that the facts of the case now need to be examined. We must re-emphasize that in the initial investigation, a charge-sheet had been filed with respect to A4

Sundaram only for the rape and murder and it was during his trial that further investigation was ordered by the Court in circumstances already mentioned above. This factor has been noticed by the High Court as well. The High Court further noted that in the course of the trial of Sundaram that all the witnesses had turned hostile and it was at that stage that further investigation was ordered on an application made by the prosecuting agency. Curiously on the filing of the final report after further investigation, Inspector Anbazhagan who had filed the final report in the case against Sundaram alone moved the Court that Sundaram could not be tried in the new sessions trial. The trial Judge passed an order accepting the plea and the trial of Sundaram proceeded separately as the sole accused in a different sessions case, though with respect to the same incident. This trial also ended in acquittal and the State went in appeal in the High Court in that case also, but without success.

10. At the very outset, we will assume that the death of the victim was homicidal and that she had been raped before the murder. With this background, we must examine the statements of PWs.4 and 5 as the fate of the appeal would hinge on their evidence. PW4 Ravi had appeared as a prosecution witness in the sessions trial against Sundaram as well and had been declared hostile. In the present case, PW4's statement is comprehensively different vis-à-vis the statement he had given in the other sessions trial. In his cross-examination he admitted that he had not referred to his meeting with PW1 Bagyam, although he had met her the very next day and had undertaken to convey the entire information to her and that had not even given any information to PW Inspector Anbazhagan or during his examination-in-chief in the Sundaram's Sessions Trial and it was for the first time in the year 1998 in the further investigation that he had named the appellant, and the others. He also admitted that he had been working in the mill for about three and half years after 1993 and further clarified that he had worked till the year 1998. We see from the judgment of the Trial

Judge that several reasons had weighed with him while discarding the evidence of PW4. We reproduce herein below the relevant portion of the said judgment:

> "The question that follows is, whether in the face of the evidence of PW4, both in his chief examination and in cross examination, could the reasons given by the learned trial Judge for disbelieving him can be said to be plausible reasons or are they palpably wrong? Now let us go into the reasons given by the learned trial Judge. In sum and substance, the learned trial Judge had decided to disbelieve the evidence of PW4 mainly for the following reasons:
>
> "PW4 was totally silent about the incident till the re-investigation was done by PW66; there was utter darkness at the time when the crime is shown to have been committed and therefore it would not have been possible for PW4 to witness the crime; installation of the machines inside the mill premises would have definitely obstructed/ would not have enabled PW4 from viewing the crime; when the dead body was moved out of the mill premises, everyone would have been in a position to see and therefore the accused would not have dared to take the dead body of the mill premises as spoken to by PW4; the conduct of PW4 before, during and after the occurrence, if taken into account together, would show that PW4 could not be an eye witness at all; till the crime was committed, there was no threat at all to PW4 to act in any particular manner; PW4's evidence shows that for concealing the dead body, the witnesses have taken a longer route than the shorter one available, which is against the normal conduct of any offender; PW4 was calm and composed at all times prior to the occurrence; during the occurrence and immediately after the occurrence and even after the occurrence till such time re-investigation commenced; if really PW4 informed PW1 within five or six months after the crime about the incident, then in Exs.P1 and P2, the names of all the accused are not mentioned; though the silence on the part of PW4 could be appreciated so long as he was under the employment of the offender i.e., till Deepavali 1996, he continued silence thereafter till re-investigation commenced would go against his oral evidence before court now; if really PW4 was under threat from any quarters, then, there is no reason as to why he chose to implicate A4 at the first instance; the evidence of his witness in S.C.No.110/1998 eliminating the presence of PW1's daughter in the mill premises during the occurrence time would doubt his evidence now that the victim was present in the mill premises at the occurrence time; the prosecution had not established the presence of PW1's daughter inside the mill premises and for this reason the learned Judge was not inclined to believe the evidence of PW1."

11. The High Court also examined these findings and concluded that Ravi as well as the deceased had been employed in the mill at the relevant time and noted that Ravi had made a statement for the first time only during further investigation. The High Court, however, glossed over the fact that Ravi had been projected as an eye witness in the sessions trial pertaining to Sundaram A4 and his statement had been disbelieved and he had been declared hostile. We are somewhat surprised that in this situation the High Court found it proper to believe his evidence in the present case. This is what the High Court had to say:

> "Let us now find out from the evidence of PW4 as to whether he was under any compulsion at any point of time to speak other than the truth. We hereunder extract the relevant portions in his evidence in this regard. Before extracting the relevant portions of his evidence, we want to understand the character of this witness. He appears to be a timid person. On the day when he gave evidence

in court in 1998 in S.C.No.110/1998, he was hardly 20 years of age. Therefore he would have been 17 years of age or so on the date of occurrence. He appears to be such a shy person that he does not even express in court by clear words that the victim was raped. From his evidence we find that he is avoiding any expression on sex and sexual activities. Therefore it is clear that PW4 is such a timid and shy person."

Note : S.C. No.110/98 was the Sessions Trial of Sundaram.

To our mind, the above inferences drawn are somewhat unusual, more particularly (as the witness was not before the High Court which could have seen his demeanor) and belie the principle that it is for the prosecution to prove its case beyond reasonable doubt.

12. The Court then goes on to say that it was on account of fear that Ravi had not come forth in time and that it was after he had left the employment of the mill, that he had gathered the courage to do so. The trial Judge noted as per his statement he had left the employment some time in 1996. The High Court's finding that he had left in 1998 therefore appears to be erroneous. In his examination-in-chief recorded on 17th August 2000, PW4 deposed that he had worked in the mill about three and half years from 1993 but again said that he had worked till 1998. We are of the opinion that it is open to the defence to contend that the statement of this witness that he had worked till 1996 which is beneficial to the accused must be accepted. In this view of the matter, the observation of the High Court that Ravi continued to be under the fear of the mill owner up till the year 1998 is palpably wrong as he has already left the services of the mill some time in the year 1996 and that he had appeared as a witness in the sessions trial pertaining to Sundaram in the year 1998 in which he did not give a statement as in the present matter and did not support the prosecution and was declared hostile.

13. Some support for the prosecution story could perhaps have been found from the statement of PW1, Thirumathi Bagiyam, the mother of the victim. In her cross-examination-in-chief she supported the plea taken by Ravi that when she had met him on the day after the rape and murder she had asked him to come out with the true story to which he had replied that he would tell her the next day or on some other day. Concededly, she never made any enquiry from him thereafter. In cross-examination, she has given very peculiar story. She pointed out that she had given details to Thangavel by going on the instructions of the Communist Party and further stated as under:

"That I went to CBCID Office and saw Sundarasamy, who was in custody, and he told me that when he was in his place after day shift was over, his colleague Ravi had came at about 7.00 P.M. and told that their owner called him; that he went to Mill at about 7.30 P.M. and heard sound from inside room, he peeped the room, where Thanuskodi, son of co-brother of their owner, had attacked Chitra with iron rod and Aunty and their owner's were there; that after some time they all have put Chitra in a cotton bale and cover her and he had directly seen that occurrence. I have not given that information. If it is say so that I have further said to Thangavel that Sundarasami had told me that the above said three persons and Ammasai have taken the body of Chitra and thrown into well of Rangasami Gounder at about 11.00 P.M. and threatened him not to disclose what he had seen on that night, I have not told such things to Thangavel. If it is say so that I have further said to Thangavel that Sundarasami had told me that since there was illicit intimacy in between Rathinam and Chitra, they have murdered her. I have not stated so. When I was inquired by Inspector of Police, CBCID, they have recorded my statement and obtained my signature."

14. It will be seen that this statement is at complete

variance with the prosecution case even after further investigation. Mr. Ranjit Kumar, therefore, appears to be right in submitting that in this uncertain evidence, the reliance of the High Court on Ravi's was not called for. We, therefore, find the High Court has gone wrong on this aspect.

15. Although the matter would, in the light of what has been held above, need no further discussion as the other material witness PW5 Andy was a witness to the removal and disposal of the dead body yet as the matter has been argued at length on this aspect, we have chosen to go into the evidence of this witness as well. As already mentioned above, Andy's statement was also recorded for the first time in the year 1999. Admittedly, PW5 Andy is not an eye witness to the rape and murder. The trial court has rejected his evidence for reasons similar to the case of PW Ravi and in particular the fact that his statement had also been recorded for the first time during further investigation by PW66. The High Court has, however, explained this gap of six years by stating that there was no evidence to show that this witness had been seen in the village after the incident. The High Court has observed that as the earlier investigation was deliberately misdirected, was reason enough to believe PW5. We notice, however, that trial court had given not one but several reasons for disbelieving this witness and they have been noted in the High Court's judgment as under:

"(a) For the first time he was examined only in the year 1999 during re-investigation done by PW66;

(b) no steps were taken to examine him earlier;

(c) PW5's presence in the mill on the day of occurrence is not established;

(d) PW4 does not speak about the presence of PW5 in his statement recorded under 164 of the Code of Criminal Procedure during re-investigation;

(e) gunny bags stuffed with cotton would be hung in the

roof railings in the mill and his would have disabled PW5 from seeing the movement of the offenders outside the mill premises;

(f) PW5's conduct in continuing his work normally, despite knowing that the offence had been committed and even thereafter not divulging the crime to anybody would go against him;

(g) PW6 not corroborating PW5's evidence that he asked him about the watch (M.O.13) and PW6 replying that he had sold it to A4 would affect PW5's evidence;

(h) though witnesses admitted that sniffer dog was brought to the crime scene, the dog track record is not produced and therefore an adverse inference must be drawn against the prosecution;

(i) when there was no threat to PW5, there is no reason for him to be absent in the crime village; and lastly

(j) how PW66 came to know that PW5's examination may throw light."

16. Curiously enough, it has also been observed that PW5 had left the village, after the murder, though PW-5 does not say so himself. Moreover, it is significant that PW4 did not even refer to the presence of the PW5 in the mill premises on the day in question in his evidence or even in his statement under Section 164. It is for this reason that the trial court had concluded that the possibility that PW5 had not been present or employed in the mill could not be ruled out. It is equally true that PW5 in his evidence does not say a single word that he was threatened by anyone to keep quite about the incident, and the High Court has chosen to draw an inference (without any material) that he had kept away as he felt that he may be

implicated in the murder. While referring to the evidence of PW 4 and 5, the High Court held :

> "The conclusion arrived at by the learned trial Judge that PWs.4 and 5 did not respond in the manner in which the learned trial Judge expected them to respond after seeing the crime and therefore their evidence should be disbelieved, does not stand to rhyme or reason. *Courts have been consistently holding that response of a person as a witness after seeing the crime would vary from individual to individual and therefore there cannot be any uniform rule that a witness has to respond only in a particular manner.* In other words, the court, before which evidence of such witnesses come up for evaluation, must evaluate it, taking into account the several circumstances available in that case. In evaluating the evidence of PWs.4 and 5, in the background of the circumstances in which they were placed right from the date on which the occurrence was committed, we find that both PWs.4 and 5 are truthful and natural witnesses and there are no legal and justifiable reasons to disbelieve their evidence. As noted earlier, rejection of their evidence by the lower court is based on surmises and conjectures and facts perceived by the learned trial Judge at the time of local inspection held sometime in the year 2000."

17. With great respect to the Division Bench, we differ with the rather broad proposition highlighted above. It must be remembered that the best check on the veracity of a witness is the test of normal human behaviour. To our mind, if the behaviour of a witness is unnatural and grossly against normal human conduct that itself is a strong circumstance in doubting the story projected by him. The conduct of PW-4 and PW-5 in not coming forth as witnesses for about 4 years is, thus, unacceptable measured by any yardstick.

18. In the light of what has been held above, the other circumstances with regard to the recoveries etc. do not implicate

the appellant in any manner. We, accordingly, allow the appeals, set aside the judgment of the Division Bench and order the acquittal of the appellant.

CRIMINAL APPEAL No.1619/2007: We have heard the learned counsel for the parties as well. The appellant herein was the Investigating Officer from 23.12.1995 to 23.3.1996 in the rape and murder of Chitra. The allegation against the appellant was that he had deliberately shielded the real offenders in the murder case and was accordingly liable for the offence under Section 201 of the IPC. The Sessions Court acquitted the appellant, which judgment has been reversed by the High Court, leading to this appeal. In the light of what has been held above in the connected Criminal Appeal Nos. 905-906 of 2007, we find that the present appeal needs to be allowed as it is not possible on the evidence to ascertain as to whether the appellant was, in fact, guilty of the offence alleged against him. We make an order in the above terms and order his acquittal.

R.P. Appeals allowed.

RAM CHANDER TALWAR & ANR.
v.
DEVENDER KUMAR TALWAR & ORS.
(Civil Appeal No. 1684 of 2004)

OCTOBER 06, 2010

[AFTAB ALAM AND R.M. LODHA, JJ.]

BANKING REGULATION ACT, 1949:

s.45ZA(2) – Nominee's right in relation to the deposit made by deceased – Held: All the monies receivable by the nominee by virtue of s.45 ZA(2) would form part of the estate of the deceased depositor and devolve according to the rule of succession to which the depositor may be governed – Section 45 ZA(2) merely puts the nominee in the shoes of the depositor after his death and clothes him with the exclusive right to receive the money lying in the account – It gives him all the rights of the depositor so far as the depositor's account is concerned – But it by no stretch of imagination makes the nominee the owner of the money lying in the account – Banking Regulation Act is in no way concerned with the question of succession – The High Court has rightly rejected the appellant's claim – The provision u/s.6(1) of the Government Saving Certificate Act,1959 is materially and substantially the same as the provision of s.45ZA(2) of the Banking Regulation Act – Government Saving Certificate Act,1959 – s.6(1) – Succession – Banks/Banking.

V.N. Khanchandani & Anr. v. *V.L. Khanchandani & Anr.*, **(2000) 2 Suppl. SCR 415, relied on.**

Case Law Reference:

(2000) 2 Suppl. SCR 415 relied on para 5

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1684 of 2006.

From the Judgment & Order dated 20.9.2004 of the High Court of Delhi at New Delhi in FAO No. 201 of 2004.

Swetank Shantanu, Satyajit Patra, Karan Chawla (for Ajay Kumar Talesara) for the Appellants.

Sanjay Goswami, H.K. Balajee, A.S. Bhasme, Arvind Kumar Gupta for the Respondents.

The following Order of the Court was delivered

O R D E R

Heard counsel appearing for the appellants.

Appellant no.1, who was the nominee in the bank account held by his deceased mother claims full rights over the money lying in the account, to the exclusion of the respondent who is none else than his full brother. The claim is based on section 45 ZA of the Banking Regulation Act, which according to him, makes the nominee of the depositor the sole beneficiary, vested with all the rights of sole depositor.

Mr. Swetank Shantanu, counsel appearing for the appellants, strenuously argued that by virtue of sub-section 2 of section 45 ZA, the nominee of the depositor, after the death of the depositor acquires all his/her rights to the express exclusion of all other persons and, therefore, the respondent can not lay any claim to the money in the account or in regard to the articles that might be lying in the bank locker held by their deceased mother.

The submission is quite fallacious and is based on a complete misconception of the provision of the Act. Sub-section 2 of the 45ZA, reads as follows:-

45ZA xxx xxx xxx xxx

(2) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of such deposit, where a nomination made in the prescribed manner

purports to confer on any person the right to receive the amount to deposit from the banking company, the nominee shall, on the death of the sole depositor or, as the case may be, on the death of all the depositors, become entitled to all the rights of the sole depositor or, as the case may be, of the depositors, in relation to such deposit to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

xxx xxx xxx xx

(emphasis added)

Section 45ZA(2) merely puts the nominee in the shoes of the depositor after his death and clothes him with the exclusive right to receive the money lying in the account. It gives him all the rights of the depositor so far as the depositor's account is concerned. But it by no stretch of imagination makes the nominee the owner of the money lying in the account. It needs to be remembered that the Banking Regulation Act is enacted to consolidate and amend the law relating to banking. It is in no way concerned with the question of succession. All the monies receivable by the nominee by virtue of section 45 ZA(2) would, therefore, form part of the estate of the deceased depositor and devolve according to the rule of succession to which the depositor may be governed.

We find that the High Court has rightly rejected the appellant's claim relying upon the decision of this Court in *V.N. Khanchandani & Anr. v. V.L. Khanchandani & Anr.,* (2000) 6 SCC 724. The provision under Section 6(1) of the Government Saving Certificate Act, 1959 is materially and substantially the same as the provision of Section 45ZA(2) of the Banking Regulation Act, 1949, and the decision in V.N. Khanchandani applies with full force to the facts of this case.

We find no merit in this appeal. It is, accordingly, dismissed.

R.P. Appeal dimissed.

STATE OF HARYANA AND OTHERS
v.
KASHMIR SINGH AND ANOTHER ETC. ETC.
(Civil Appeal No. 8690-8701 of 2010)

OCTOBER 06, 2010

[MARKANDEY KATJU AND T.S. THAKUR, JJ.]

Service Law:

Punjab Police Rules, 1934 – r. 1.5 – Limits of jurisdiction and liability to transfer – Transfer orders of various police personnel of various grades from one district/range to another – Challenge to – Transfer orders quashed by High Court – On appeal, held: Police establishment of a State constitutes one police force and its members are liable to be posted anywhere in the State – Transfer can be done from one district/ range to another and there is no absolute prohibition for doing so – Transfer/posting of policemen should be left to the discretion of the State Authorities – They are the best to assess the necessities of the administrative requirements of the situation – Transfer being an incidence of service and purely administrative matters, courts should be very reluctant to interfere in transfer orders as long as they are not clearly illegal – Courts should maintain judicial restraint – Thus, order of High Court set aside – Judicial restraint – Administrative law – Indian Police Act, 1861 – ss. 2 and 4.

The respondents-Constables, Head Constables, Exemptee Head Constables, Assistant Sub-Inspectors and Sub-Inspectors, serving in various districts in the State of Haryana were ordered to be transferred to other districts and ranges. The respondents challenged the transfer orders. The Division Bench of the High Court quashed the transfer orders. Therefore, the appellants-State filed the instant appeals.

Allowing the appeals, the Court

HELD: 1. A perusal of the relevant provisions of the Indian Police Act, 1861 clearly shows that the entire police establishment under the State Government is one integrated police force, though for better administration the State has been sub-divided into districts/ranges. Rule 1.5 of the Punjab Police Rules, 1934 clearly shows that police officers constitute one police force and are liable to be posted anywhere in the State. Moreover, Rule 1.5 also clearly states that no sub-division of the force territorially or by classes, affects this principle. A plain perusal of the shows that transfer can be done from one district to another district or even to another range, and there is no absolute prohibition for doing so. However, in such a case, the seniority of Constables and Head Constables at the district level and of ASIs and SIs at the range level is maintained in the parent district/range despite the transfer. Promotion/confirmation is also given strictly as per the seniority in the parent district/range level, as per Memo No. 43515-22/E-(III) dated 10.8.2010. [Paras 12 and 13] [906-F-H; 907-A-B]

2.1 Transfer ordinarily is an incidence of service, and the courts should be very reluctant to interfere in transfer orders as long as they are not clearly illegal. In particular, transfer and postings of policemen must be left in the discretion of the concerned State Authorities which are in the best position to assess the necessities of the administrative requirements of the situation. The concerned administrative authorities may be of the opinion that more policemen are required in any particular district and/or range than in another, depending upon their assessment of the law and order situation and/or other considerations. These are purely administrative matters, and the courts must not ordinarily

interfere in administrative matters and should maintain judicial restraint. [Para 14] [907-C-E]

2.2 The High Court took a totally impractical view of the matter. If the view of the High Court is to prevail, great difficulties would be created for the State administration since it would not be able to transfer/deploy its police force from one place where there might be relative peace to another district or region/range in the State where there might be disturbed law and order situation and thus, the requirement of more police. The courts should not interfere with purely administrative matters except where it is absolutely necessary on account of violation of any fundamental or other legal right of the citizen. After all, the State administration cannot function with its hands tied by judiciary behind its back. There must be some free-play of the joints provided to the executive authorities. [Para 16] [908-C-E]

Tata Cellular vs. Union of India **AIR 1996 SC 11 – relied on.**

Jawaharlal Nehru University vs. Dr. K.S. Jawatkar and Ors. **(1998) Suppl. 1 SCC 679;** *G.Varandani vs. Kurukshetra University and Anr.* **(2003) 10 SCC 14 – held inapplicable.**

Divisional Manager, Aravali Golf Club and Anr. vs. Chander Hass and Anr. **JT 2008(3) SC 221;** *Common Cause vs. Union of India and Ors.* **(2008) 5 SCC 511 – referred to.**

3. The impugned judgment of the High Court is set aside and the writ petitions are dismissed. [Para 18]

Case Law Reference:

AIR 1996 SC 11	**Relied on.**	**Para 14**
(1998) Suppl. 1 SCC 679	**held inapplicable.**	**Para 15**

(2003) 10 SCC 14	**held inapplicable.**	**Para 15**
JT 2008(3) SC 221	**Referred to.**	**Para 17**
(2008) 5 SCC 511	**Referred to.**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8690-8701 of 2010.

From the Judgment & Order dated 31.05.2006 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 6941, 7109, 7607, 7665, 7695, 7837, 8018, 8310, 8636, 8704, 8814 & 9117 of 2006.

Manjit Singh, AAG, Kamal Mohan Gupta for the Appellants.

Jagdev Singh Manhas for the Respondents.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J. 1. Leave granted.

2. These appeals have been filed against the common impugned judgment of the Punjab and Haryana High Court dated 51.5.2006 in CWP Nos. 7695, 7607, 7665, 7837, 8636, 8704, 8814, 9117, 6941, 8018 and 8310 of 2006.

3. Heard learned counsel for the parties and perused the record.

4. The respondents herein were serving in various districts in the State of Haryana as Constables, Head Constables, Exemptee Head Constables, Assistant Sub-Inspectors and Sub-Inspectors (hereinafter in short as ASI and SI, respectively). They were ordered to be transferred to other districts and ranges by the Inspector General of Police. The respondents challenged the transfer orders contending that in view of the Punjab Police rules so far as Constables, Head Constables and Exemptee Constables are concerned, they could not be transferred outside the district, and so far as ASI and SIs are

concerned, they could not be transferred outside the range.

5. This contention has been upheld by the Division Bench of the High Court and hence these appeals.

6. With respect, we are unable to agree with the High Court.

7. Section 1 of the Indian Police Act 1861 defines a 'general police district' as follows :

> "the words 'general police district' shall embrace any presidency, State of place, or any part of any presidency, State or place, in which this Act shall be ordered to take effect".

8. Section 2 of the Act states as follows :

> "**Constitution of the force**. - The entire police establishment under a State government shall, for the purposes of this Act, be deemed to be one police force and shall be formally enrolled, and shall consist of such number of officers and men, and shall be constituted in such manner, as shall from time be ordered by the State Government".

9. Section 4 of the Act states as follows:

> "**Inspector-General of Police, etc**. - the administration of the police throughout a general police-district shall be vested in an officer to be styled the Inspector-General of Police, and in such Deputy Inspectors-General and Assistant Inspectors-General as to the (State Government) shall seem fit.
>
> The administration of the police throughout the local jurisdiction of the Magistrate of the district shall, under the general control and direction of such Magistrate, be vested in a District Superintendent and such Assistant

District Superintendents as the (State Government) shall consider necessary".

10. Thus a perusal of the relevant provisions of the Police Act clearly shows that the State police is one integral unit and does not consist of separate independent units. The overall administrative control of the police in the State is with the Inspector-General of Police (now the Director-General of Police).

11. We may now also consider the relevant Rules in the Punjab Police rules 1934 (hereinafter referred to as the 'Rules'). Rule 1.4 of the Rules states as follows :

"**Rule 1.4** – **Administrative Division**: - The districts of the province are grouped in Ranges and the administration of all police within each such range is vested in a Deputy Inspector General under the control of the Inspector-General of Police.

The training school is under the district control of the Inspector-General subject to such delegation of powers as he may make to one or other of the range Deputy Inspector General. The Criminal Investigation Department is administered by a Deputy Inspector General, who also supervises the Finger Print Bureau".

Rule 1.5 – **Limits of jurisdiction and liability to transfer** – All police officers appointed or enrolled in either of the two general police districts constitute one police force and are liable to, and legally empowered for, police duty, anywhere within the province. No sub-division of the force territorially or by classes, such as mounted and foot police, affects this principle.

Every police officer shall be liable to serve at any place, whether within or outside the State of Haryana and in any organization under the Central government or being ordered so to do by the appointing authority. Every police

officer is empowered to under Section 3 of the Police Act 1888 (Central Act 3 of 1988), when necessary, to exercise the powers, functions and privileges of a police officer in any part of India. In the exercise of such functions a police officer is deemed to be a member of the police force of the State of Union of India, in which he is at the time".

"**Rule 12.26** – **Inter District Transfers**. - Exchange of appointment lower subordinates in districts of the same range or between such police officers in the railway and district police, may be effected subject to the approval of the Superintendents concerned (or of the Assistant Inspector General in cases affecting the railway police). A lower subordinate may be transferred to fill a vacancy in a district other than that in which he is serving only with the sanction of the Deputy Inspector General of the range. In cases of transfer from and to districts in different ranges, or from and to districts in different ranges, or from and to the railway police, the sanction of both Deputy Inspector General concerned and the Superintendent of Police Railways is required".

"**Rule 14/15** - 14.15(1) – All enrolled police officers are, under Section 22 of the Police Act, liable for service in any part of the general police district".

12. A perusal of the relevant provisions of the Police Act and the Rules thus clearly shows that the entire police establishment under the State Government is one integrated police force, though for better administration the State has been sub-divided into districts/ranges. Rule 1.5 of the Rules clearly shows that police officers constitute *one police force* and are liable to be posted anywhere in the State. Moreover, Rule 1.5 also clearly states that no sub-division of the force territorially or by classes, affects this principle. Transfer from one district to another district or from one range to another range can be effected, though with the sanction of certain authorities mentioned in Rule 12.26.

13. Thus, a plain perusal of the Punjab Police Rule shows that transfer can be done from one district to another district or even to another range, and there is no absolute prohibition for doing so. However, in such a case, the seniority of Constable and Head Constables at the district level and of ASI and SI at the range level is maintained in the parent district/range despite the transfer. Promotion/confirmation is also given strictly as per the seniority in the parent district/range level, as per Memo No. 43515-22/E-(III) dated 10.8.2010.

14. Transfer ordinarily is an incidence of service, and the Courts should be very reluctant to interfere in transfer orders as long as they are not clearly illegal. In particular, we are of the opinion that transfer and postings of policemen must be left in the discretion of the concerned State authorities which are in the best position to assess the necessities of the administrative requirements of the situation. The concerned administrative authorities may be of the opinion that more policemen are required in any particular district and/or another range than in another, depending upon their assessment of the law and order situation and/or other considerations. These are purely administrative matters, and it is well-settled that Courts must not ordinarily interfere in administrative matters and should maintain judicial restraint vide *Tata Cellular vs. Union of India* - AIR 1996 SC 11.

15. The High Court in the impugned judgment has relied upon the decision of this Court in *Jawaharlal Nehru University vs. Dr. K.S. Jawatkar and others* – (1998) Suppl. 1 SCC 679. After carefully considering the said decision we are of the opinion that it has no relevance in the present case. In that decision the facts were that the employees of the Jawaharlal Nehru University were sought to be transferred to the Manipur University as the centre of post graduate studies set up by the Jawaharlal Nehru University at Manipur was closed down and the centre was transferred to Manipur University. This Court held that an employee of one University cannot be transferred to

another University without his consent. We fail to understand what relevance this decision has with the present case. In the present case, it is not that the respondent employees are being transferred from one employer to another employer. Here the employer remains the same i.e. the State of Haryana. Hence, the aforesaid decision has no relevance in the present case. For the same reason *G.Varandani vs. Kurukshetra University and another* – (2003) 10 SCC 14 also has no relevance.

16. In our opinion, the High Court has taken a totally impractical view of the matter. If the view of the High Court is to prevail, great difficulties will be created for the State administration since it will not be able to transfer/deploy its police force from one place where there may be relative peace to another district or region/range in the State where there may be disturbed law and order situation and hence requirement of more police. Courts should not, in our opinion, interfere with purely administrative matters except where absolutely necessary on account of violation of any fundamental or other legal right of the citizen. After all, the State administration cannot function with its hands tied by judiciary behind its back. As *Justice Holmes* of the US Supreme Court pointed out, *there must be some free-play of the joints provided to the executive authorities.*

17. This Court also held in *Divisional Manager, Aravali Golf Club & another vs. Chander Hass & another* – JT 2008(3) SC 221 and *Common Cause vs. Union of India & others* – (2008) 5 SCC 511 that Judges must observe judicial restraint and must not ordinarily encroach into the domain of the legislature or the executive.

18. For the foregoing reasons, these appeals succeed and are hereby allowed. The impugned judgment of the High court is set aside and the writ petitions before the High Court stand dismissed. No costs.

N.J. Appeal allowed.