Parmeshwar Mandal vs The State Of Bihar & Ors on 26 November, 2013

Equivalent citations: 2014 CRI. L. J. 1046, 2014 (136) AIC (SOC) 21 (PAT), (2014) 1 PAT LJR 377, (2014) 3 ALLCRILR 1, 2014 (2) KLT SN 1.1 (KER)

Author: Jayanandan Singh

Bench: Jayanandan Singh, Aditya Kumar Trivedi

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.1078 of 2012

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Against judgment and order dated 28.8.2012 passed by the Ad-Hoc Additional Sessions Judge IV, Araria in Sessions Trial No.846 of 2003/ Tr. No.259 of 2011, arising out of Jokihat P.S.Case No.169 of 1999.

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1. Parmeshwar Mandal S/O Late Ram Swaroop Mandal R/O Village - Bagnapur, P.S. - Jokihat, Distt. - Araria

.... Appellant/s

Versus

1. The State Of Bihar
2. Khelaland Mandal S/O Late Sakaldeo Mandal
3. Deonarayan Mandal S/O Sakaldeo Mandal
4. Shobhanand Mandal S/O Sakaldeo Mandal
5. Munna @ Ranjeet Kumar S/O Khelaland Mandal
6. Deepak Kumar Mandal S/O Khelanand Mandal
7. Bachu Mandal S/O Shobha Mandal
8. Pankaj Kumar Mandal S/O Deo Narayan Mandal

.... Respondent/s

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Appearance :
For the Appellant/s : Mr. Shivendra Kumar Sinha, Adv.
For the Respondent/s : Mr. A. Sharma, APP

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CORAM: HONOURABLE MR. JUSTICE JAYANANDAN SINGH

And

HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

CAV JUDGMENT

Date: 26-11-2013 This appeal has been filed by the informant against judgment and order dated 28.8.2012 passed by the Ad-Hoc Additional Sessions Judge IV, Araria in Sessions Trial No.846 of 2003/ Tr. No.259 of 2011, arising out of Jokihat P.S.Case No.169 of 1999, acquitting respondent nos.2 to 9 of charges under Sections 341, 342 and 302/34 of the Indian Penal Code framed against them.

2. Since the appellant-informant happens to be cousin father-in- Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 law of the deceased, as pointed out by learned Additional Public Prosecutor, this Court, by order dated 17.5.2013, granted time to learned counsel for the appellant to address the Court on the issue of maintainability of the appeal, preferred by the appellant in terms of the proviso to Section 372 of the Code of Criminal Procedure. Accordingly, the matter was heard on 19.7.2013.

3. It is a settled proposition of law that a right vested in an aggrieved to appeal against any judgment and order of any judicial or quasi judicial authority is a creature of statute, to be preferred before a forum prescribed and according to the procedure laid down. No body can claim this right as a fundamental right or even as a constitutional right. Hence, scope and limitation of this right has also to be governed by the statute creating that right. For that reason this Court considers it appropriate to look back a little to find out the origin of the provisions of right of appeal in our criminal justice system against any judgment and order or acquittal of an accused by any competent court of law.

4. Criminal Justice System of the Country in the present form was first conceived in the Code of Criminal Procedure framed in 1861. Though in this Code, provisions were made for appeals against judgments and orders of conviction, there was no provision for any appeal against acquittal. It was in the Code of Criminal Procedure of 1898 that section 417 was inserted enabling the Government to direct Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court. However, the recommendations of the Law Commission of India, made in its 41st Report, as also in 48 th Report, caused restrictions imposed in such right of appeal of the Government in the section 378 (corresponding to old section 417) of the new Code of Criminal Procedure, 1973 by insertion of concept of „leave to appeal , besides retaining the provision for appeal by a complainant against an order of acquittal passed in a complaint case after obtaining special leave. Though the 1861 Code, the 1898 Code as well as the 1973 Code contained elaborate provisions with regard to different facades of criminal justice system and the right of an accused at different stages, but they were earlier conspicuously silent in respect of the rights of the victim of a crime and his/her right to participate or to have a say in the proceedings of the criminal justice delivery system at any level. In fact, the victims of the crime remained an ignored lot for centuries throughout the Globe and were left to fend for themselves irrespective of the fate meted out to the offender.

5. As per the available records, in Modern Times, it was an English Magistrate, Margery Fry, who, in 1950s, was first to advocate for state compensation for crime victims. This led the British Government to set up its programme in 1964, and taking cue from the Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 ancient Code laid down by Emperor Hammurabi of Bebilonia in 1775 BC, providing for compensation to the victim of a crime in different manner, depending on gravity of suffering, the Government of England, for the first time, drew up an elaborate scheme for payment of compensation to the victims, and was brought into force through the exercise of Royal Prerogative, which practice was adopted by many other countries across the Globe as well. Subsequently, in 1985, United Nations adopted a Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985, recognizing four types of rights and entitlements of

victims, which were, (a) access to justice and fair treatment; (b) right to restitution; (c) compensation and (d) personal assistance and support services, which Declaration was ratified by a large number of countries including India. Since then, „Victimology has become altogether an independent science and subject of debate for legislation, to address issues of providing them medical care, legal assistance, their restitution and compensation. Lately, the Apex Court, by its successive pronouncements, opened the window for a right to the victim of a crime to participate and raise his/her ply of injustice at different stages and in different manner in the criminal justice system. All this led to the submission of 154th Report by the Law Commission in 1996, devoting an independent chapter on „Victimology and making radical recommendations. But, in fact, it was Justice Malimath Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 Committee, which, in its report submitted in April 2003, made series of recommendations to put the victim of a crime back at the centre of criminal proceedings through a series of steps designed to empower him/her and the court. All these led to extensive amendments in the 1973 Code to streamline the criminal justice delivery system, in tune with the need felt on account the advancement in technological field as also in respect of the rights and responsibilities of state as prosecutor vis-à-vis that of the accused as also of the victim.

6. However, since we are dealing with an appeal against acquittal, preferred by the informant and cousin father-in-law of the deceased, in terms of the proviso to Section 372 of the Code of Criminal Procedure, 1973 („the Code for short) it would be rather appropriate for us to confine our discussion to the provisions of the Code related to the matter and requiring notice. Leaving aside the other provisions of the Code, we find that in the Code there is an altogether independent chapter dealing with appeals. This Chapter XXIX of the Code contains all the statutory provisions in respect of right of appeal from any judgment and order of a criminal court, its forum, limitation and qualification. This Chapter begins with Section 372 of the Code. Prior to its amendment by Act 5 of 2009, this Section read as follows :-

> "372. No appeal to lie unless otherwise provided.- No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 being in force."

7. It is significant to notice that this is the first Section of the Chapter and it is also significant to notice that this Section is in negative form and bars all appeals against any judgment or order of a criminal court, except as provided for by the Code or by any other law. Thus, any appeal against any judgment or order of a criminal court has strictly to be governed by the subsequent provisions under this Chapter. After this negative section in the Chapter, provisions are made up to Section 394 in respect of procedure, right, forum, prohibition, limitation, etc. in respect of appeals against any judgment and order of a criminal court which include two more prohibitory provisions, Sections 375 and 376, barring appeals in certain circumstances. However, for the purposes of this case, the provisions in the Chapter, which require to be noticed, are Sections 374, 377 and 378 only.

8. Section 374 vests a right in a convict to appeal to a higher court against any judgment and order of conviction. It has to be noticed that this section itself does not lay day down any period of

limitation for preferring such an appeal by the convict, nor does it provide any restriction, qualification or condition for exercise of this right. However, period of limitation for preferring appeals under the provisions of Code of Criminal Procedure, 1898 (now 1973 Code) against any order of conviction is laid down under entry 115 contained in the Second Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 Division of Schedule of the Limitation Act, 1963, which also contains a provision for extension of the prescribed period in terms of Section 5. Section 377 of the Code gives liberty to the State Government to direct the Public Prosecutor to present an appeal against any order on the ground of inadequacy of sentence. This section grants liberty to the Central Government also to direct the Public Prosecutor to present such an appeal, if the offence was investigated by the Delhi Special Police Establishment, constituted under the Delhi Police Establishment Act, 1946, or by any agency empowered by any Central Act in this regard. This section also does not provide for any period of limitation or any other qualification or condition for presentation of such an appeal. However, the period of limitation laid down in the sub-clause (b) of clause 115 of the schedule of the Limitation Act, 1963 is applicable to appeals under this section also in the same manner.

9. As against these two provisions, prescribing for preferring appeals against orders of conviction and sentence, including inadequacy of sentence, Section 378 contains provisions for appeals against judgment and orders of acquittal by a criminal court. It prescribes in sub-section (1) that the District Magistrate, or the State Government, as the case may be, may direct the Public Prosecutor to present an appeal to the higher court against any order of acquittal, with the qualifications in respect of nature of the case and the order, as mentioned. Sub-section Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 (2) of the Section lays down similar provision for Central Government, on similar lines as in Section 377. However, sub-section (3) puts an embargo in maintaining an appeal in the High Court under sub-sections (1) & (2) without leave of the High Court. Under sub-section (4) of this Section it is the complainant of a complaint case who has been granted liberty to present an appeal before the High Court against any order of acquittal, if on an application made by him/her, the High Court grants special leave to him/her. In sub-section (5), a period of limitation has been prescribed for such applications for grant of special leave. Whereas, in the case of complainant being a public servant, the period is six months, for the rest, it is sixty days. Finally, in sub-section (6) it is laid down that, if an application for special leave, preferred in terms of sub-section (4), is refused, no appeal shall lie in terms of sub-section (1) or sub-section (2).

10. The other Section, namely 379 gives liberty to the accused to prefer appeal to the Supreme Court against any judgment and order of conviction and sentence of death or imprisonment for life or for a term of ten years or more passed by the High Court, reversing a judgment and order of his acquittal. One more Section, namely Section 380, gives an overriding right to any one or all convicted, to prefer an appeal from an appealable judgment and order, convicting more than one person. Other sections of the chapter provide for detailed procedure Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 in which appeal has to be preferred, heard and decided.

11. Thus, it is clear that Chapter XXIX of the Code is exhaustive in respect of appeals which may be preferred against any judgment and order passed by a criminal court in exercise of its powers under the Code. It is significant to note that though this Chapter contains elaborate provisions with regard

to the right of the convict or the State or a complainant to prefer appeal against a judgment and order of a court passed in a criminal proceeding, and the procedure and manner in which the same has to be presented, dealt with and decided, earlier it contained no provision for any say to the victim in the matter. Hence, as pointed out earlier, under the growing consciousness of ply of the victim of a crime, and in the background of successive pronouncements of the Apex Court, Malimath Committee Report was accepted and Criminal Procedure Code (Amendment) Act, 2008 (Act 5 of 2009) was promulgated, with effect from 31.12.2009. By this Amendment Act, besides other insertions in the Code, the following proviso was inserted into Section 372:-

> "Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting or a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of convict ion of such Court."

12. What is significant to notice is that this right to appeal, which Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 is clearly in affirmative terms, has been given to the victim by inserting the said proviso in Section 372 itself, which is the opening section of the Chapter, and not by any insertion in Sections 377 or 378, which deal with appeals against inadequate sentence and acquittal. In contra- distinction to wordings of Sections 377 and 378, which are apparently enabling provisions, and only give a liberty to the District Magistrate, State Government, the Central Government, and the complainant, to prefer an appeal by use of the word „may , a victim, under the said proviso to Section 372 has been given a right to prefer appeal by use of the expression „shall have a right to appeal . It is also significant to notice that, whereas in Section 378, grant of leave has been made a condition precedent for entertaining any appeal against acquittal preferred under sub-sections (1) and (2), and grant of special leave for entertaining an appeal by a complainant preferred under sub-section (4), there is no such qualification prescribed in the said proviso to section 372 for a victim to maintain his appeal against an order of acquittal, or against a conviction for a lesser offence or against imposition of inadequate compensation. It has also to be noticed that, whereas for an application for special leave against acquittal by the complainant, period of limitation has been prescribed in the section itself, and for appeals against acquittal under sub-sections (1) or (2) or (4), period of limitation has been prescribed under item 114 of Second Division of Schedule of Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 the Limitation Act, 1963, Legislature has provided no limitation for an appeal by a victim under the said proviso to Section 372, nor has made any insertions for the purpose in the Limitation Act. Hence, in the opinion of this Court, the Legislature, by a conscious act, has put the right of a victim to prefer an appeal under the Code, in terms of the said proviso to Section 372, at a much higher pedestal than the right of a prosecuting agency or a complainant to present an appeal. Any otherwise intention of the Legislature is ruled out from the fact that, had it been so, it would have inserted a new sub-section in Sections 377 or 378, putting his right, with limitations and qualifications, at par with that of the prosecuting agency or the complainant, instead of inserting this right of victim in the opening section of the chapter itself. Besides giving „a right to prefer appeal to the victim the said proviso also lays down that „such an appeal shall lie to the court to which an appeal ordinarily lies against the order of conviction of such court . This features the appeal preferred by the victim against the order of acquittal at par with the appeal preferred by a convict against his conviction.

But, as rightly pointed out by a Division Bench of the Delhi High Court (judgment dated 24.04.2011 in the case of Jagmohan Bhola vs. Dilbagh Rai Bhola & ors), while the admission of appeal of a convict is more or less a formality and a matter of course, in case of an appeal by a „victim , preferred in terms of the said proviso to Section 372 Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 „something more has to be shown before the appeal is admitted. This Court is in conformity with this view, specially because the legal presumption of innocence of the accused, somewhat, becomes stronger with his acquittal. Hence, in the opinion of this Court, the yardsticks laid down by the Privy Council in Sheo Swarup vs. The King Emperor (61 IA 398) and by the long line of Apex Court judgments, for consideration of appeal preferred in terms of Section 378 (old 417) of the Code has to be applied in the case of an appeal preferred in terms of the said proviso to section 372 also.

13. Next question arises as to from which date and at which stage this right to prefer appeal accrues to the victim. This arises for consideration within the judicial parameters because of absence of any indication laid down by the Legislature in the Code by amendment while inserting the said proviso in Section 372. The Proviso has been inserted in Section 372 by Amendment Act 5 of 2009 and it has come into effect from 31.12.2009. Hence, there may be three situations in which question of applicability of this proviso may arise. The first situation may be where occurrence may have happened much prior to the insertion of this Amendment and judgment and order of the Court may have also been pronounced earlier to it. Second situation may be where, though occurrence may have happened prior to the Amendment, but judgment and order may have been passed by the court subsequent Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 to the Amendment. Third situation may be where occurrence may have happened subsequent to the Amendment and the judgment and order was obviously pronounced later on. In the first situation, obviously, the Amendment does not come into play and the right which the victim did not had on the date of judgment and order cannot be claimed subsequently on the basis of this Amendment. In the third situation obviously Amendment stands incorporated in Section 372 much earlier and therefore the victim gets all the right to prefer appeal in terms of the said proviso. Question is whether in the second situation, when the victim did not had a right to prefer appeal when occurrence had happened or the case was instituted or cognizance was taken, does he/she get a right to prefer an appeal, or not, on the basis of this insertion of the proviso in Section 372 before the judgment and order of acquittal.

14. At this stage, it would be appropriate for us to first consider the judgment of the Apex Court in the case of National Commission for Women Vs. State of Delhi and another [AIR 2011 SC (supp.) 392] :

> [(2010) 12 SCC 599]. The genesis of the case before the Apex Court was a judgment and order of conviction dated 21 st of April, 2008, passed by a learned Additional Sessions Judge, Kakarduma Court, Delhi, convicting the accused under Sections 306 and 376 of the Indian Penal Code with award of sentence for the same. Accused preferred an Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 appeal before the High Court. The High Court, after entertaining the appeal on merits, modified the judgment and order of the trial court by its order dated 9th of February,

2009, acquitting the accused under Section 306 IPC and reducing his sentence under Section 376 IPC to the period already undergone. Against the said judgment of the High Court, no appeal was preferred by the State. However, appellant Commission moved the Apex Court, which by order dated 2 nd of April, 2009 granted permission to file Special Leave Petition and ordered notices to be issued to the accused. But when the matter was taken up for hearing, the Apex Court went into the question of maintainability of the Special Leave Petition also, in reference to Section 372 of the Code as amended with effect from 31st of December, 2009. Opening observations of the Apex Court, in this connection, made in paragraph 5 of the judgment, are thus :

"5. Chapter XXIX of the Code of Criminal Procedure deals with "Appeal(s)". Section 372 specifically provides that no appeal shall lie from a judgment or order of a criminal court except as provided by the Code or by any other law which authorizes an appeal. The proviso inserted by Section 372 (Act 5 of 2009) w.e.f. 31st December, 2009, gives a limited right to the victim to file an appeal in the High Court against any order of a criminal court acquitting the accused or convicting him for a lesser offence or the imposition of inadequate compensation. The proviso may not thus be applicable as it came in the year 2009 (long after the present incident) and, in any case, would confer a right only on a victim and also does not envisage an appeal Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 against an inadequate sentence. An appeal would thus be maintainable only under Section 377 to the High Court as it is effectively challenging the quantum of sentence."

15. Thereafter the Apex Court reproduced Section 377 of the Code, providing for appeals on the ground of inadequacy of sentence, and noticed that said section did not, in any manner, authorize an appeal to the Supreme Court. It noticed that the Court does "grant leave to appeal under the discretionary power conferred under Article 136 of the Constitution of India at the behest of the State or the affected private individual but to permit any body or Organization pro-bono publico to file appeal would be dangerous doctrine and would cause utter confusion in the criminal justice system." Hence it came to the conclusion that Special Leave Petition itself was not maintainable. The Court noticed some precedents on the scope and ambit of Article 136 of the Constitution. It further noticed that, in the matter, neither the State, which was complainant, nor the heirs of the deceased, had chosen to file appeal in the High Court. Hence, permission to file Special Leave Petition, granted by order dated 2nd of April, 2009, was revoked and the Special Leave Petition was dismissed as not maintainable.

16. From the reading of the judgment, it would be clear that the entire discussion by the Apex Court revolved around propriety of granting permission to the appellant Commission to file Special Leave Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 Petition and it held that, as an appeal is a creature of statute, it could not lie under inherent power and, to allow anybody or organization „pro- bono publico to file appeal, was a dangerous proposition. The observations of the Court in paragraph 5, as reproduced above, were only for the purpose of noticing the limitation imposed by Section 372 for filing appeal against judgment of a criminal court and the proviso was noticed only for the purpose of change having been introduced in Section 372 of the Code. It was in

that context the observations were made that in the case proviso was not applicable as it came in the year 2009 and in any case it conferred a right only on a victim and did not envisages an appeal in the case of inadequate sentence. Thereafter, the Court noticed the only provision available in Chapter XXIX of the Code for preferring an appeal against inadequate sentence, i.e. Section 377 of the Code. Entire discussion in the judgment thereafter proceeded on the provisions of Section 377 of the Code and scope and limitation of Article 136 of the Constitution of India. However, in paragraph 5, after observing that "the proviso may not itself be applicable as it came in 2009" a casual comment in brackets - (long after the present incident) - was made by the Apex Court. Question is whether by using the words in brackets "long after the present incident" did the Apex Court lay down any law ? It has to be noticed that the judgments of the Trial Court, and of the High Court in appeal, were all of a date much prior to the Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 insertion of the said proviso in Section 372. Even the petition by the appellant Commission had been filed in the Apex Court much earlier and the permission to file Special Leave Petition was also granted much earlier. From the arguments advanced by learned counsel on behalf of the appellant before the Apex Court, as noticed in the judgment, it is clear that no claim was made on behalf of the appellant Commission before the Apex Court to treat the Special Leave Petition as one under the said proviso to Section 372. Entire argument of learned counsel revolved around maintainability of Special Leave Petition. and for it to be considered on merits on the ground that permission had already been granted. The Apex Court found that the permission was wrongly granted as Special Leave Petition on behalf of the Commission, filed under Article 136 of the Constitution of India, was not maintainable. Thus, it is clear that by inserting the words „long after the present incident in brackets in paragraph 5, the Apex Court did not give any finding on any issue, to be treated as law in terms of Article 141 of the Constitution of India. The scope and import of the said proviso to Section 372 was not at all under consideration before the Apex Court in the case nor was considered, examined and decided. In the circumstances, in our opinion, use of expression „long after the present incident in brackets in paragraph 5 of the judgment, can, at best, be treated as only an obiter dictum of the Apex Court and not a law laid Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 down under Article 141 of the Constitution of India. The following observations by a Full Bench of this Court in the case of Rita Mishra Vs. Director, Primary Education, Bihar (1987 PLJR 1090) is an authoritative enunciation of law in the matter:-

> "..... One has to remind himself of the hallowed rule enunciated by Halsbury in Quin v. Leathem (1901 Appeal Cases 495) that what is of essence in a decision is the logic, reasoning and ratio and not every observation found therein nor all that may logically flow from the observations made therein. This has been expressly approved in State of Orissa v. Sudhansu Sekhar Misra (A.I.R. 1968 S.C. 647) with the added warning that it is not a profitable task to extract a sentence here and there from a judgment and to build upon it....."

17. This doctrine has also been explained in Halsbury s Laws of England (Fourth Edition) (Volume 26), thus:-

> "574. Dicta. Statements which are not necessary to the decision, which go beyond the occasion and lay down a rule that it is unnecessary for the purpose in hand are

> generally termed „dicta . They have no binding authority on another court, although they may have some persuasive efficacy. Mere passing remarks of a judge are known as „obiter dicta , whilst considered enunciations of the judge s opinion on a point not arising for decision, and so not part of the ratio decidendi, have been termed „judicial dicta . A third type of dictum may consist in a statement by a judge as to what has been done in other cases which have not been reported."

18. In Stroud s Judicial Dictionary of Words and Phrases (Seventh Edition) (Volume 2 : F-O), this doctrine has been explained thus:-

> Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 "OBITER DICTA. Obiter dicta are what the words literally signify, namely, statements by the way. If a judge thinks it desirable to give his opinion on some point which is not necessary for the decision of the case, that of course has not the binding weight of the decision of the case, and the reasons for the decision (Flower v Ebbw Vale Steel, Iron & Coal Co [1934] 2 K.B. 132, 154)."

19. A judgment of a Division Bench of Chattisgarh High Court in the case of Bhisam Prasad Bareth Vs. Dinesh Mahant & ors. (2012 Cr.L.J. 2157) has also been brought to the notice of this Court. The case arose from a judgment of conviction passed by a learned Magistrate under Sections 147, 323/149, but acquittal under Section 307/149 IPC. The applicant initially filed Criminal Revision before the High Court against acquittal of the accused under Section 307/149 IPC, which, however, was dismissed as withdrawn, with liberty to him to prefer an appeal in terms of the said proviso to Section 372 of the Code. Accordingly, appeal was filed which came for consideration before the Division Bench. The question which directly fell for consideration before the Division Bench was noticed in paragraph 7 of the judgment which was as to "whether the victim shall have a right to prefer appeal against order/judgment passed by a court prior to enforcement of amendment or not ?". The Division Bench noticed the above quoted observations of the Apex Court in paragraph 5 of National Commission For Women (supra) and observed as follows:-

> "12. In the present case also, the impugned Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 judgment has been passed on 18.3.2009, whereas the proviso to Section 372 of the Cr.P.C. was inserted on 31.12.2009, that is to say, long after date of incident i.e. 5.3.2008 and therefore, the proviso to Section 372 of the Cr.P.C. may not thus be applicable in the present case. This is so also, because the right of appeal is a substantive right and not a procedural right and such right vests from the day of the commencement of the proceedings and an appeal is nothing but a continuation of the proceedings. The forum to file an appeal is also determined as soon as the action is instituted."

20. A judgment of a learned Single Judge of Allahabad High Court in the case of Ashok Kumar Srivastava Vs. State of U.P. & Anr. (application under Section 482 No.5934 of 2012) was also brought to the notice of this Court. In this case, an application was filed before the learned Single Judge for quashing the order of learned Additional Sessions Judge by which he had rejected the

objection of the accused with regard to maintainability of the appeal filed before him by the complainant against the order passed by the Judicial Magistrate acquitting him (accused) under Sections 498A etc. of Indian Penal Code and Section 3/4 of the Dowry Prohibition Act. Learned Single Judge examined the said proviso to Section 372, as well as definition of victim with reference to clause (wa) of Section 2 of the Code in detail. He also examined the statement and object of the Amending Act and two judgments of the High Court of Madhya Pradesh and Bombay respectively, in connection with the cases under Section 138 of the Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 Negotiable Instruments Act, and came to the opinion that any person, who suffered any loss or injury of body or property by reason of an act or omission of the accused, would come under the definition of victim. Hence, learned Single Judge finally concluded that though the word „complainant may be absent from the proviso to Section 372 but, by virtue of definition of victim under the said clause (wa) of Section 2, the victim lady in the case had a right to file an appeal before the learned Additional Sessions Judge in terms of the said proviso to Section 372. The application of the accused under Section 482 of the Code was hence dismissed as devoid of merits.

21. Another judgment of a Division Bench of Andhra Pradesh High Court in the case of Dr. Sudhakar vs. Panapu Sreenivasulu (2013 Cr.L.J. 2764) was also brought to the notice of this Court. In that case, the appeal before the Division Bench was preferred by the brother of the deceased against judgment and order of acquittal dated 30.11.2011 passed in Sessions Case No.24 of 2009, acquitting respondent nos. 1 to 5 for offences punishable under Section 148 IPC and respondent nos. 3 to 5 for offences punishable under Section 302 read with 149 of IPC. The appellant before the Court was the de-facto complainant of the case and a witness on behalf of the prosecution. Hence, it was asserted that he fell in the category of victim in view of definition contained in the said clause (wa) of Section 2 and hence the appeal at his instance in Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 terms of the said proviso to Section 372 was maintainable. This stand of the appellant was challenged by the respondents accused. The Division Bench took pains to examine the U.N. declaration in its Resolution No.40/34 dated 29.11.1985 containing definition of the victim. It also noticed the definition of the victim contained in 154 th Report of Law Commission of India and the provisions of Section 372 as amended. It also noticed the judgment of Apex Court in the case of National Commission for Women (Supra) and a judgment of Kerala High Court for the purposes of deciding the maintainability of appeal preferred by the appellant before it. The Division Bench observed that the word „heir has been interpreted by the Supreme Court in several cases to mean all persons, who were entitled to the property of another under law of inheritance. Applying this test, the Division Bench came to the conclusion that under expression „legal heir contained in the definition of victim under clause (wa) of Section 2, in case of a Hindu, only Class I heir, as per Hindu Succession Act, would be covered. Hence, the appellant before it being Class II heir would not come in the category of „legal heir so as to be covered by the definition of victim and therefore entitled to prefer appeal in terms of the said proviso to Section 372 of the Code. However, the Division Bench also noticed the observations of the Apex Court in the case of National Commission For Women (Supra) and came to the conclusion that it has already been held by the Apex Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 Court that amendment will not be applicable in cases where incident had taken place prior to the amendment and therefore it dismissed the appeal. Findings of the Bench on this issue are contained in paragraph 10 of the judgment and reads thus :

"10. In view of the provisions of Sections 8 and 9 of the Hindu Succession Act, the appellant being a Class - II heir would not inherit anything from his deceased brother, as he is survived by his wife. Thus, the appellant is not entitled to the property of the victim under the applicable law of inheritance. Though the appellant falls in one of the category of heirs as per the Hindu Succession Act, but the Legislature deliberately used the word „legal heir , which strictly means a person who is entitled to the property of the victim under the applicable law of inheritance i.e. Hindu Succession Act. Hence, we are of the considered opinion that when it is the intention of the Legislature to give right of appeal to the legal heir, the appellant will not fall within the definition of "legal heir" and he is not entitled to prefer an appeal to this Court under Section 372 Cr.P.C. against acquittal of the accused. The second issue that falls for our consideration is that the incident has taken place on 07.12.2007 and the amendment to Section 372 Cr.P.C. has come into force w.e.f. 31.12.2009, where the victim can prefer an appeal against acquittal. This issue will not hold us for long, in view of the fact that the Apex Court in National Commission for Women v. State of Delhi, has already held that the amendment is not applicable to cases where the incident has taken place prior to amendment. Therefore, even on this count, the appellant fails, and as such, the appeal is liable to be dismissed as not maintainable."

22. It is clear from the said judgments of Chattisgarh High Court, Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 as well as of the Andhra Pradesh High Court, that the observations of the two Division Benches, to the effect that the said proviso to Section 372 of the Code shall not be applicable in cases in which date of occurrence was prior to the amendment, are based on the said expression used in the brackets in the said paragraph 5 of the Apex Court judgment in the case of National Commission for Women (Supra). As this Court has dealt with and explained above, the expression in paragraph 5 of the said judgment of the Apex Court - long after the present incident - used within bracket, is not a finding of the Apex Court and is only an obiter dictum. This Court has already noticed above that the scope and ambit of the said proviso to Section 372 of the Code and its applicability was not at all an issue before the Apex Court. In fact, it is clear that the notice of said proviso to Section 372 of the Code by the Apex Court was only for the purpose that the same was a new insertion and an addition to the existing provision of Section 372 of the Code and it vested a right in the victim also now to prefer appeal under the three contingencies. Hence, in the opinion of this Court, reliance placed on these words, used in the judgment of the Apex Court, by the Division Benches of Chattisgarh High Court and Andhra Pradesh High Court, for coming to the conclusion that an appeal by a victim, in a case in which occurrence had happened prior to the amendment, was not maintainable, is totally misconceived and misplaced. It may also be Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 pointed out that there is no other expression or observation of the Apex Court in the entire judgment of the said case which could be the basis for such a finding by the Division Benches of the said two High Courts.

23. Proviso to Section 372 of the Code is in two parts. First clause of the said proviso begins with „provided that and ends with „Inadequate compensation and creates a right in the victim to prefer appeal against any order passed by a court either (i) acquitting the accused or (ii) convicting

for a lesser offence or (iii) imposing inadequate compensation. Thereafter, by inserting conjunction „and , another clause has been added in the same sentence by which forum for preferring such appeal has been identified, which relates to procedural part of law. Thus, the said proviso contains both substantive part, creating right in the victim to prefer an appeal, and procedural part, by identifying the forum for filing such an appeal. It is not in dispute that the substantive part of law operates prospectively, unless made retrospective, and the procedural part is presumed to be retrospective within its defined limits. In this context, the observations of the Apex Court in paragraph 12 of its judgment in the case of Sudhir G.Angurs Vs. M.Sanjeevs [(2006)1 SCC 141] is reproduced here below for easy reference :-

> "12. In our view, Mr. G.L. Sanghi is also right in submitting that it is a law on the date of trial of the suit which is to be applied. In support of this submission, Mr. Sanghi relied upon the Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 Judgment in the case of Shiv Bhagwan vs. Onkarmal reported in A.I.R. (1952) Bombay 365, wherein it has been held that no party has a vested right to a particular proceeding or to a particular forum. It has been held that it is well settled that all procedural laws are retrospective unless the Legislature expressly states to the contrary. It has been held that the procedural laws in force must be applied at the date when the suit or proceeding comes on for trial or disposal. It has been held that a Court is bound to take notice of the change in the law and is bound to administer the law as it was when the suit came up for hearing. It has been held that if a Court has jurisdiction to try the suit, when it comes on for disposal, it then cannot refuse to assume jurisdiction by reason of the fact that it had no jurisdiction to entertain it at the date when it was instituted. We are in complete agreement with these observations. As stated above, the Mysore Act now stands repelled. It could not be denied that now the Court has jurisdiction to entertain this suit."

24. At this stage, it is also useful for this Court to refer to a recent judgment of the Apex Court in the case of Ramesh Kumar Soni Vs. State of Madhya Pradesh (AIR 2013 SC 1896). Related issue, which fell for consideration before the Court was in respect of operation of a 2007 State Amendment in the First Schedule of the Code of Criminal Procedure, 1973, changing the forum for trial of all cases related to offences punishable under Sections 467, 468 and 471 by the Court of Sessions only, instead of by a First Class Magistrate, which a Full Bench of the High Court, on reference, had held as not applicable to pending cases in the courts of First Class Judicial Magistrates, on the Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 ground that the Amendment Act did not contain a clear indication that such cases also had to be made over to the court of Sessions. The Apex Court examined the issue of retrospective operation of a procedural law prescribing a forum, in context of many earlier judgments of the Court and held the Amendment as affecting pending proceedings also before the Magistrates. Hence it applied the principles of prospective overruling and overruled the said Full Bench judgment of the High Court, but saved the cases which might have been transferred back to the courts of First Class Magistrates by virtue of the said Full Bench judgment. The Court noticed, with approval, its view in an earlier judgment in the case of New India Insurance Company Ltd. Vs. Smt. Shanty Mishra, Adult [AIR 1976 SC 237 : (1975)2 SCC 840] that, unless by express words the new forum is available only to causes of action arising after the creation

of the forum, the general rule is to make it retrospective.

25. Since in the opinion of this Court, first clause of the said proviso of Section 372 creates a substantive right in the victim to prefer appeal and the second clause identifies forum for preferring such an appeal, it has to be accepted that the two clauses shall apply in different manner. However, so far as forum of appeal is concerned, the second clause of the said proviso does not create any new forum for appeal by the victim against any judgment and order of a criminal court in the Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 three contingencies mentioned in the first clause. It only lays down that the forum where „an appeal ordinarily lies against the order of conviction of such court will be the forum for a victim also to prefer appeal. Therefore, it is not a case where a new forum was created which had to be necessarily available or applicable on the date of occurrence or the date of institution of the case or on the date of cognizance in the matter. The second clause only allows the victim to prefer appeal before the same existing forum where a convict had a right to prefer appeal upon conviction from the same court. It is, in fact, the right vested in a victim to prefer appeal, which is a new insertion in the Code under first clause of the said proviso to Section 372. This substantive right, vested in a victim is at par with the right of a convict to prefer an appeal and, as pointed out above, higher than the right of appeal of the State or the Central Government, as the case may be, or of a complainant in a complaint case. Question is as to at what point of time a victim gets opportunity to exercise this right. When the occurrence happens or the case is instituted or cognizance is taken, the wheels of criminal justice system is yet to gather momentum. At that point of time, it is not even clear whether all the accused have been apprehended or will be apprehended; whether they will be put on trial; whether sufficient evidenced will be produced in the trial by the prosecution side to ensure his/their conviction, or not. It cannot be logically accepted that at that Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 very point of time itself a right to the victim must exist so that, in case, at any point of time in distant future, trial finally ends in acquittal or with a conviction for lesser offence or by imposing inadequate compensation, he/she may maintain his/her appeal under the said proviso to Section 372. In the opinion of this Court, this cannot be the intention of the legislature while vesting a right of appeal in the victim by the first clause of the said proviso. It may be point out that, the first clause of the said proviso is verbatim copy of the recommendations of the Malimath Committee, submitted as far back as in the year 2003. In the report, Justice Malimath extensively dealt with precarious position of victim in criminal justice system of the Country and made recommendations, which included recommendations to vest the victim also with a right to appeal. This very recommendation was finally adopted in the form of amendment in Section 372 of the Code. Hence, clearly it could not be the intention of the Legislature to vest this right of appeals in only those victims in whose cases the occurrence had happened after the amendment. If that could be accepted as a necessary condition for exercise of the right by a victim, then, for years to come, this right of the victim to prefer an appeal in terms of the said proviso would have remained illusory, in spite of the amendment. The Central Government, by Notification No. S.O. 3313(E) dated 30th December, 2009, appointed 31st day of December 2009, as the date for the Act. 5 of Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 2009 to come into force, which was published in Gazette of India, Ext., Pt.II, S.3(ii), dated 30-12-2009. Hence, in absence of any express intention notified by the Legislature to the contrary, it has to be concluded that the right of victim, to prefer an appeal in terms of said proviso to Section 372, became available to the victim(s) of all cases in which orders

were passed by any criminal court acquitting the accused or convicting him for a lesser offence or imposing inadequate compensation, on or after 31st of December, 2009. In other words, date of judgment of a criminal court has to be necessarily treated as the relevant date for applying the test of maintainability of appeal by the victim under three contingencies laid down under the proviso to Section 372 of the Code, irrespective of the date of occurrence, institution of the case, cognizance or commitment.

26. Here we must also consider a Full Bench judgment of Punjab and Haryana High Court delivered on 18 th March, 2013 in M/s Tata Steel Ltd. Vs. M/s Atma Tube Products Ltd. & Ors, [2013(1) ILR 719 (P & H)]. On reference, the Full Bench formulated the following questions for consideration :

> (A) What is the true import and meaning of the expression „victim as defined under Section 2(wa) read with proviso to Section 372 Cr.P.C. ?
>
> (B) Whether „complainant in a private complaint-case, who is also the „victim and the „victim other than the „complainant in such cases are entitled to present appeal against the order of acquittal under proviso to Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 Section 372 or have to seek „special leave to appeal from the High Court under Section 378(4) Cr.P.C. ?
>
> (C) Whether the „rights of a victim under the amended Cr.P.C. are accessory and auxiliary to those perceived to be the exclusive domain of the „State ?
>
> (D) Whether presentation of appeal against acquittal is a „right or an „obligation of the „State stemming from the Constitution ?
>
> (E) Where would the appeal of a „victim preferred under proviso to Section 372 lie when the State also prefers appeal against that order of acquittal under Cloause (a) of Section 378(1) CrPC ?
>
> (F) Whether proviso to Section 372 CrPC inserted w.e.f.

December 31, 2009 is prospective or retrospective in nature and whether a revision petition pending against an order of acquittal before the insertion of the said proviso, can be converted into an appeal and transferred to the Court of competent jurisdiction ? (G) What would be the period of limitation for a „victim to prefer an appeal under proviso to Section 372 CrPC?

27. Before embarking upon consideration of the issues formulated by it, the Full Bench delved into the „Legislative History and Emerging Principles of Criminal Jurisprudence in terms of International Scenario as well as Indian Perspective. It referred to UN Declaration of 1985, European Union Covenants, two enactments of USA of 1984 and 1990 and amendments in them by an Act in 2004 and Acts of Australia and Canada, in respect of rights and liberties of a „victim . In Indian Perspective it referred to many judgments of the Apex Court, the 154 th Report of Law Commission, the Malimath Committee Report, 2003, Patna High Court CR. APP (DB) No.1078 of

2012 dt.26-11-2013 and made special reference to some judgments of the Apex Court „which built up the victim s right brick by brick, revolutionalised the conventional criminal justice system and sensitized its stakeholders, notwithstanding the fact that statutory initiatives through the desired amendments in the Code of Criminal Procedure, 1973 (in short „the Code) were still illusory . Thereafter, the Full Bench embarked upon consideration of the questions formulate, one by one. In paragraph 70 of the judgment, it summarized the legal position, in context of a „victim recognized and conferred under the Code, before and after amendment of 2009 and finally answered this question in paragraph 139 in the following manner:-

> Question - (A)
>
> (i) The expression "victim" as defined in Section 2(wa) includes all categories of his/her legal heirs for the purpose of engaging an advocate under Section 24(8) or to prefer an appeal under proviso to Section 372 of the Code.
>
> (ii) However, legal heirs comprising only the wife, husband, parent and child of a deceased victim are entitled to payment of compensation under Section 357(1)(c) of the Code. Similarly, only those dependents of a deceased victim who have suffered loss or injury as a result of the crime and require rehabilitation, are eligible to seek compensation as per the Scheme formulated under Section 357-A of the Code.

28. Thereafter, the Full Bench entered into consideration of Question (B) from paragraph 71 onwards and summarized its discussion Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 in paragraph 83, and finally answered it in paragraph 139 in the following manner :-

> Question - (B)
>
> (iii) The „complainant in a complaint-case who is also a „victim and the „victim other than a „complainant in such case, shall have remedy of appeal against acquittal under Section 378(4) only, except where he/she succeeds in establishing the guilt of an accused but is aggrieved at the conviction for a lesser offence or imposition of an inadequate compensation, for which he/she shall be entitled to avail the remedy of appeal under proviso to Section 372 of the Code.
>
> (iv) The „victim , who is not the complainant in a private complaint-case, is not entitled to prefer appeal against acquittal under proviso to Section 372 and his/her right to appeal, if any, continues to be governed by the unamended provisions read with Section 378(4) of the Code.
>
> (v) Those „victims of complaint-cases whose right to appeal have been recognized under proviso to Section 372, are not required to seek „leave or „special leave to appeal from the High Court in the manner contemplated under Section 378(3) & (4) of the Code.

29. The discussion of the Full Bench on Question (C) are contained in the judgment from paragraph 84 and up to 93 and that of (D) from paragraphs 94 to 96 and they are jointly answered in paragraph 139 in the following manner :-

> Questions - (C) and (D)
>
> (vi) The right conferred on a „victim to present appeal under proviso to Section 372 is a substantive and independent right which is neither inferior to nor contingent up-on the filing of appeal by the State in that case. Resultantly, the condition of seeking „leave to appeal or „special leave to Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 appeal as contained in Section 378(3) & (4) cannot be imposed for the maintainability of appeal by a „victim under proviso to Section 372 of the Code.

30. Question (E) has been discussed by the Full Bench from paragraph 97 and its findings on it are in paragraph 120 and has been answered in paragraph 139 in the following manner :-

> Question - (E)
>
> (vii) In view of proviso to Section 372 an appeal preferred by a „victim against the order of acquittal passed by a Magistrate in respect of a cognizable offence whether bailable or non bailable shall lie to the Court of Session, the State s appeal under Section 378(1)(a) of the Code against that very order shall also be entertained and/or transferred to the same Sessions Court.

31. The discussion and findings on Question (F) finds place in the judgment of the Full Bench in paragraphs 121 to 126 and its answer finds place in paragraph 139 which is as follows :-

> Question - (F)
>
> (viii) The proviso to Section 372 inserted w.e.f. December 31, 2009 is prospective in application and only those orders which have been passed on or after December 31, 2009, irrespective of the date of occurrence or registration of FIR or filing of complaint, shall be appealable at the instance of a „victim under the afore-stated proviso.

Consequently, a revision petition preferred against an order of acquittal passed prior to December 31, 2009 cannot be converted into an appeal and shall be decided accordingly.

32. Consideration of last question in the judgment of the Full Bench is in paragraph 127 to 138 and its answer in paragraph 139 is as Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 follows :-

> Question - (G)

(ix) Subject to the exception carved out in para-138 of this order, the period of limitation for an appeal by a „victim.

Under proviso to Section 372 of the Code shall be as under :-

(a) In case of acquittal -		
(i) Where appeal lies 90 days To the High Court		Date of order appealed against
(ii) Where appeal lies 60 days to any other Court		Date of order appealed against
(b) Any other sentence or order -		
(i) to the High Court	60 days	The date of sentence or order
(ii) to any other Court	30 days	The date of sentence or order

33. Coming to the findings and answers to the questions by the Full Bench, this Court finds that the second answer by it to question (A) is not relevant for issues before this Court. However, in the first answer the Full Bench has held that definition of „victim in Section 2(wa) includes all categories of his/her legal heirs. This answer itself does not make it clear as to whether all legal heirs have parallel rights to prefer an appeal under the said proviso to Section 372 or have to be held as one category having preferential right to prefer appeal, in exclusion of others, depending on the degree of relationship. The discussion on this question by the Full Bench is contained in paragraphs 37 to 70. In Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 paragraph 70 the findings from the discussions have been summarized wherein also it has been held that the legal heirs of a victim can be permitted to file appeal under the said proviso to Section 372 of the Code, and to engage lawyer under Section 24(8) of the Code. In this paragraph legal heirs, for the purposes of payment of compensation in terms of Section 357(1)(c), and for the purpose of rehabilitation in terms of Section 357(a) of the Code, have been distinguished. In the discussion, the Full Bench has considered several judgments of different Courts and has also considered the meaning of „loss and „injury and has held in paragraph 48 that "the words „loss and „injury used in Section 2(wa) are synonymous". For analysis of the word „legal heir the Full Bench has referred to different dictionaries and judgments and has held in paragraph 57 thus :-

> "(57). It thus appears that every heir who, in law, is entitled to succeed to the estate of a deceased „victim in one or the other eventuality, shall fall within the ambit of Section 2(wa) of the Code, even if the estate of such deceased „victim is to devolve upon the legal heirs as per the order of preference prescribed under the personal law of such „victim . This conclusion of ours is also compatible with the other provisions of the Code."

34. It has been further observed in paragraph 64 that the powers to the appellate court to call for the records and examine it in terms of proviso to Section 372 are available „on presentation of appeal by any Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 „legal heir irrespective of his proximity with the deceased under the personal law and any narrow construction would defeat the very legislative object behind insertion of Section 2(wa) and proviso to Section 372 of the Code and re-introduce the mischief which the Legislature has intended to remove . The Full Bench has again clarified in subsequent paragraph that the expression „legal heir deserves to be give widest amplitude and every class and category of legal heirs of the deceased can have perfect remedy under the said proviso to Section 372 and all legal heirs, irrespective of their classification under the personal law, can be permitted to prefer appeal under the said proviso. Finally in paragraph 67, the Full Bench gave a finding that the expression „legal heir , within the meaning of Section 2(wa) of the Code, does not exclude other than the Class-I legal heirs of a deceased „victim , nor the right to „engage an advocate or prefer an appeal is restricted to those persons only to whom compensation is payable under Sections 357, 357-A of the Code or under the Fatal Accidents Act, 1855.

35. It is fit to be noticed first that the very purpose of insertion of the said proviso in Section 372 of the Code, giving unqualified right to a victim to file appeal, with definition of victim under Section 2(wa), was felt because of the ignorance of the victim in the whole criminal justice system, being noticed and pointed out by the Apex Court in its earlier judgments. It may be pointed out that the very setting up of Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 Malimath Committee by the Central Government was to give the „victim - the de-facto sufferer - his/her rights and due place in the criminal justice system and give him/her legal standing and right to participate in criminal proceedings at various levels, which were being held, or about to be held, for the crime committed directly against him/her. It is accepted that, in theory, a crime is against the humanity and affects the social order and damages the social fabric of the Country, which the Government has the duty to protect and preserve. Hence, apart from the cases of complaint being filed by the complainant directly in Court and prosecuted, it is the State, which is the prosecutor in a criminal proceeding, to book the guilty charged of disturbing the social fabric by committing crime against the humanity itself. But fact remains that, besides the general injury to the humanity committed by the criminal, an individual(s) of the society is the de-facto sufferer, who is targeted and who directly suffers loss and injury on account of the crime committed. Therefore, the recommendations of the Malimath Committee were made keeping the victim personally, or through his/her legal representation (in case circumstances so necessitate), at the centre of the criminal proceeding and to give him/her a say and right to participate in the proceeding at different levels. This was the spirit behind various recommendations made by Justice Malimath, which was by and large accepted by the Government followed by the amendment Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 in the Code.

36. Now coming back to the issue, „victim has been defined in the Code, by inserting clause (wa) in Section 2 by amendment, in the following manner :-

> (wa). "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir;

37. This definition of „victim has three parts. To achieve more clarity it can be dissected in the following manner :-

Victim -

- means a person who has suffered any loss or injury ... and the expression „victim includes
- his or her guardian or
- legal heir.

38. It may be pointed out that the definition of „victim contained in the 154th Report of the Law Commission was too wide and sweeping, which has not been accepted by the Legislature. Instead Legislature has chosen to define the expression „victim in much narrower terms by including only the above three category of persons in the definition who get a vested right to appeal in terms of the said proviso to section

372. In the opinion of this Court, in the first category, any person, who can establish before the Court, to its satisfaction, that he has suffered „loss or „injury , as a result of the crime complained of, can qualify as Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 „victim . Hence, if the subject of the crime is dead or incapacitated to the extent or suffers from such a disability that he/she cannot take steps to exercise his/her right under the said proviso to Section 372, any of his/her next of kin, who can establish before the Court, to its satisfaction, that the crime had caused „loss or „injury to him/her also, besides to the subject of the crime, can, in the opinion of this Court, maintain an appeal under the said proviso. The expressions „loss or „injury , have not been defined in the Code. Hence, by virtue of Section 2(y) of the Code, definition of injury given in Section 44 of the Indian Penal Code has to be imported to determine the scope and limitation of the word „injury in Section 2(wa). Section 44 of the Indian Penal Code defines „injury denoting „any harm whatever illegally caused to any person in body, mind, reputation or property . So far as the word „loss used in the said proviso is concerned, its definition is also not available in the Code. The nearest definition is available in section 23 of the Indian Penal Code which defines „wrongful loss . But this definition is confined to loss of property only. On the other hand, dictionary meaning of „loss , and its types, runs into many pages in the Black s Law Dictionary and Oxford Advanced Learner s Dictionary. However, as held by the said Full Bench also, in the opinion of this Court, the expression „loss used in the said proviso to Section 372, has to be understood as synonymous to the word „injury used therein, and in the Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 context of the definition of „injury appearing in the Penal Code only, and not with the aid of its dictionary meaning. In this context, the following observations of the Apex Court in the case of CCE Vs. Fiat India (P) Ltd. [(2012)9 SCC 332] settles down the rule of interpretation in clear terms :

> "39. It is well settled that whenever the legislature uses certain terms or expressions of well-known legal significance or connotations, the courts must interpret them as used or understood in the popular sense if they are not defined under the Act or the Rules framed thereunder. "Popular sense" means "that sense which people conversant with the subject-matter, with which the statute is dealing, would attribute to it."

(emphasis supplied)

39. Therefore, this Court is of the opinion that, it has to be ultimately left to the prudence of the Court to assess whether the appellant before it had actually suffered any „loss or „injury in the course of the crime complained of, or not, so as to be eligible to maintain his appeal in terms of the said proviso. By not providing the definitions of the expressions in the Code, or qualifying them in any manner, the Legislature clearly intended to leave it to the Court, to arrive at a conclusion independently in respect of standing of an appellant before it, in the facts and circumstances of each case, as and when it may be called upon to do so.

40. The other two categories, included in the definition of Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 „victim - guardian and legal heir - have also been given the liberty to step into the shoes of a „victim , by virtue of the language of the said definition clause, notwithstanding the fact that they may not have suffered any „loss or „injury on account of the crime complained of. Here again the expressions „guardian and „legal heir are not explained in the clause itself nor have been defined in the Code. As against this, if we refer to Sections 198, 198(1((a), 256 and 394 of the Code, it is clear that wherever the Legislature intended to clarify the persons eligible to take steps in a criminal proceeding under the Code, it did clarify it in clear terms. Hence, this deliberate omission by the Legislature to define „guardian or „legal heir in the Code, in the opinion of this Court, clearly depicts its intention to leave an appellant, preferring an appeal under the said proviso to Section 372 of the Code, solely on the basis of his/her status as a „guardian or a „legal heir , to establish the legal heirs of his status as such, either in terms of and under the provisions of the laws governing the field, with all their limitations and qualifications, or otherwise also (e.g. a judicial order).

41. In the opinion of this Court, the wide interpretation given by the Full Bench to the expression „legal heir may lead to unwarranted results, in as much as, for example, if all the heirs of a Hindu, as the per the Hindu Succession Act, 1956, i.e. class I heirs, class II heirs, agnates and cognates, get simultaneous right to prefer an appeal in terms of the Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 proviso to section 372, it may virtually open gates for „pro bono publico appeals, denounced by the Apex Court, and may expose the accused to perpetual risk of harassment on account of malafide litigations. This Court is also of the opinion that, if such liberal interpretation of the expression „legal heir is allowed to be read in clause 2(wa), the status of „legal heir itself may become a major and primary issue in a given case, essentially to be decided first on examination of evidence, documentary as well as oral. In this context, this Court is also of the opinion that, if once an appeal against any of the three kinds of order, mentioned in the said proviso, preferred by a person claiming to have suffered loss or injury or a „guardian or a „legal heir , is

entertained on merits by the appellate court, to whatever result, no fresh/second appeal by any other party/person can/should be entertained against the same order.

42. Therefore, this Court, with all humility, is unable to accept the said conclusion of the Full Bench and respectfully agrees with the judgment of the Delhi High Court [2007(8) (AD) (Delhi) 478], and other judgments referred to in the judgment of the Full Bench, and the with the judgment of the Andhra Pradesh High Court in the case of Dr.Sudhakar (supra) on the issue, in which it has been held that, for the purposes of determining the locus standi of the legal heir of a victim to file an appeal under the said proviso to Section 372, the court has to Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 necessary fall back upon the line of succession to his property laid down in his/her personal law. This Court also endorses the view of Guwahati High Court (Agartalla Bench) in Gaurang Deo Nath [Cr.Appeal No.13 of 2011 (C)], that in case of allegations of crime being committed was on the husband of the deceased (e.g.- u/s 304B IPC), father of the lady (or her any close relation) may also come within the definition of „victim , on account of loss or emotional injury suffered by him, so as to maintain his appeal under the said proviso to Section 372 of the Code. The two examples, cited by the Full Bench in paragraph 65, to justify „widest amplitude given to the expression „legal heir , are misconceived. In both the examples the order of succession, in terms of the personal law, still remains open and therefore the apprehension of the right of appeal granted to the victim under the said proviso to Section 372 of the Code getting frustrated, is unfounded.

43. The second question was discussed by the Full Bench from paragraphs 71 to 82 and it was summed up in paragraph 83 and answered in paragraph 139, as reproduced above. The Full Bench has tried to distinguish between a case investigated by the police on a complaint/information received and report submitted and a case of complaint filed by a complainant in the court directly and proceeded with under chapter XV of the Code, and has held that a complainant in a complaint case and a victim other than the complainant in the complaint Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 case has the only remedy by way of an appeal under Section 378(4) of the Code against an order of acquittal, except in cases where guilt is established but conviction is for lesser offence or with imposition of inadequate compensation, in which case only he/she will have a right to appeal under proviso to Section 372 of the Code.

44. With all reverence to the Full Bench, this Court is unable to agree with this proposition of law also. If that would have been the intention of the Legislature, instead of giving unfettered right to the victim to file appeal in the opening section of the Chapter itself, it could have added one more sub-section in Section 378 itself. It has to be presumed that when unfettered right of appeal was being conferred upon the victim in the opening section of the Chapter itself, the Legislature was conscious of the restricted right of appeal granted to the State and the complainant under Section 378 of the Code. The recommendations in the Malimath Committee Report, which has been adopted and implemented in the form of amendment in various provisions of the Code of Criminal Procedure by Act 5 of 2009, would show that, by the amendment, victim was intended to be placed at much higher pedestal in criminal justice delivery system than the State (prosecuting agency) or the complainant. Therefore, instead of adding one more sub-section in Section 378, providing for a right of appeal to a victim also, at par with the complainant of a complaint case, or with Patna High

Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 State in a police case, he/she has been conferred upon the right in the opening section of the Chapter itself without any qualifications. Clearly by introducing this amendment, the Legislature has recognized the victim in his/her independent capacity in the criminal justice delivery system than the State or informant or complainant. If the interpretation of the Full Bench is accepted, it will result into the victim getting a right to file an appeal only for a lesser wrong done to him/her by a criminal court, i.e. for convicting the accused for lesser offence or for awarding lesser compensation, but will not be able to file an appeal, without a special leave, for greater wrong done to him/her by acquitting the accused altogether. Therefore, this Court is of the opinion that no distinction can/should be made between a case instituted by a complainant/informant with the police and by a complainant before the Court directly, for the purposes of determining the scope and ambit of right of a victim to file an appeal under the said proviso to Section 372. Consequently, this Court is of the opinion that, any person, covered under the definition of „victim as contained in clause (wa) of Section 2 of the Code, and thus getting a right to file an appeal in terms of the said proviso to Section 372, cannot be held, in any way, handicapped in exercise of his/her said right by the provisions of Section 378 of the Code specially in the background of disadvantageous status of victim in the present criminal justice delivery system in the country. This view of Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 the Court, on this issue, stand buttressed also by the findings of the Full Bench in respect of question (C) holding that the victim is not obligated to seek „leave or „special leave of the High Court for presentation of appeal under the said proviso to Section 372 of the Code and also by the learned Single Judge of Allahabad High Court in the case Ashok Kumar Srivastava (supra) and by a Division Bench of Delhi High Court in its judgment dated 24.01.2011 in the case of Jagmohan Bhola Vs. Dilbagh Rai Bhola & Ors.

45. Questions (D) and (E) do not arise in the present case before us and hence this Court is not required to go into the discussions, findings and answers given by the Full Bench on the same.

46. Answer to question (F) has been reproduced above in the judgment. This Court finds the same as correct interpretation of law. As already discussed above, this Court endorses the view that remedy of appeal, under proviso to Section 372, has to be held available to a victim against all orders, which have been passed on or after 31st December, 2009 by a criminal court, irrespective of the date of occurrence or registration of F.I.R. or filing of a complaint or date of cognizance of offence. Interpretation of Madhya Pradesh High Court, otherwise opinions of Chattisgarh High Court and Andhra Pradesh High Court, discussed above, which are based on an obiter dictum of the Apex Court, in the opinion of this Court, are not correct and the view Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 expressed by the Full Bench of Punjab and Haryana High Court in this respect does reflect the correct legal position.

47. In answer to Question (G), the Full Bench has found that no period of limitation emerges for filing of an appeal by the victim under the said proviso to Section 372 of the Code from the interpretation of the provisions of the Code. Hence, taking recourse to Article 114 and 115(B) of the Schedule of the Limitation Act, 1963 read with Section 378 of the Code, Full Bench has laid down limitation for preferring appeal by a victim in terms of the said proviso to Section 372 of the Code. With all humility, this Court finds that, since limitation has been prescribed by the Full Bench by a

judicial fiat, and has not been read into the provisions of the Code itself, or in the Limitation Act, 1963, the same operates only within the territorial jurisdiction of Punjab and Haryana High Court and is not applicable beyond that. Moreover, this Court has already pointed out above that the „victim has been put on much higher pedestal than the State or the Central Government or a complainant, in the matter of preferring appeal against acquittal by a criminal court. Hence, prescribing the same limitation for preferring appeal by a victim, as applicable in the case of an appeal by the State Government or the Central Government or a complainant, will amount to putting fetters and circumscribing the right of a victim, not intended and prescribed by the Legislature. Judicial discipline requires from Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 courts to refrain from supplying any casus omissus in the legislation, for it is duty of the court to interpret, and not to legislate. A Constitution Bench of the Apex Court in the case of Dadi Jagannadham vs. Jammulu Ramulu [(2001) 7 SCC 71] has enunciated the principles to be followed by the courts in this regard, in the following manner:-

> "13. We have considered the submissions made by the parties. The settled principles of interpretation are that the Court must proceed on the assumption that the legislature did not make a mistake and that it did what it intended to do. The Court must, as far as possible, adopt a construction which will carry out the obvious intention of the legislature. Undoubtedly if there is a defect or an omission in the words used by the legislature, the Court would not go to its aid to correct or make up the deficiency. The Court could not add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result. The Court cannot aid the legislature s defective phrasing of an Act, or add and mend, and, by construction, make up deficiencies which are there."

48. In the circumstances, the answer to the question by the Full Bench of Punjab and Haryana High Court, and the observation of a Division Bench of this Court in the case of Raghunath Yadav vs. State of Bihar [2010(4) PLJR 351], made on an office objection, and referred to by the said Full Bench, are per incuriam the settled principle, as emanating from the observations of the said Constitution Bench reproduced above. Even the liberal view, flowing from the observations Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 of Lord Denning, L.J. [in (1949) 2 All ER 155] ... A judge must not alter the material of which the Act is woven, but he can and should iron out the creases ... does not justify the said approach of the Full Bench. Hence, in the opinion of this Court, it is best to leave it to the prudence of the Court concerned to determine, in the facts and circumstances of a particular case, as to whether the appeal of the victim was entertainable, or not, on the ground of absence of a bonafide explanation for delay.

49. In the circumstances, after consideration of the entire matter, conclusions of this Court are as follows:-

> (1) - By virtue of the Proviso, as inserted in section 372 of the Code of Criminal Procedure, 1973 by the Criminal Procedure Code (Amendment) Act, 2008 (Act 5 of 2009), a „victim has been put at a higher pedestal, than a prosecuting agency or a complainant, in the matter of preferring an appeal against any order of a criminal

court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation. This Proviso gives an unqualified „right to a „victim to prefer an appeal in its terms, as against the enabling sections 377 and 378, which only give liberty to a District Magistrate, the State Government, the Central Government and the complainant, as the case may be, to prefer an appeal against an order of sentence on the ground of its inadequacy or against an order of acquittal.

Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 (2) - The right of a „victim to prefer an appeal in terms of the said proviso to Section 372 is an unqualified right and no „leave to appeal or „special leave is required to be obtained by him/her for the purpose, as required by the State or the complainant for maintaining an appeal in terms of Section 378 of the Code. (3) - No limitation of time has been provided by the Legislature for exercise of such a right of appeal by the „victim in terms of the said Proviso. Hence, in the fact and circumstances of each case, the Court has to determine as to whether the appeal was entertainable, or not, on the ground of absence of bonafide explanation for delay by the appellant. The limitation laid down by the Full Bench of Punjab and Haryana High Court is a judicial fiat and not based on interpretation of the provisions of the Code or the Limitation Act, 1963. Hence the same is applicable only within the territorial jurisdiction of that High Court and not beyond.

(4) - However, in view of the legal presumption of innocence in favour of the accused, the yardsticks laid down by judicial pronouncements for consideration of appeals under Section 378 shall be applicable in case of an appeal under he said proviso to Section 372.

(5) - The expression - long after the present incident - used under Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 brackets by the Apex Court in paragraph 5 of its judgment in case of National Commission for Women vs. State of Delhi and another [AIR 2011 SC (sup.) 392] : [(2010) 122 SCC 599] is only an obiter dictum of the Court and it does not lay down a law in terms of Article 141 of the Constitution of India. (6) - Proviso to section 372 of the Code came into operation w.e.f.

December 31, 2009. Hence, in absence of any legislative intent to the contrary, in all cases, in which a judgment and order has been passed by a criminal court on and after that date, a right accrues to the „victim to prefer appeal in terms of the said Proviso, irrespective of the date of occurrence and any subsequent event in the case prior to such judgment and order. (7) - If the subject of the crime is dead or incapacitated to the extent or suffers from such a disability that he/she cannot take steps to exercise his/her right under the Proviso to Section 372, any of his/her next of kin, who can establish before the Court, to its satisfaction, that the crime had caused „loss or „injury to him/her also, besides to the subject of the crime, can maintain an appeal under the said proviso.

(8) - The „loss and „injury to an appellant before it (if he/she is other than the de-facto sufferer) has to be assessed by the Court in each and every case in the backdrop of definition of „injury Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 provided in section 44 of the Indian Penal Code, and not beyond it, before entertaining the appeal, in terms of the proviso to Section 372 on merits.

(9) - If any person prefers an appeal in terms of the proviso to Section 372, solely on the basis of his status as a „guardian or a „legal heir , he/she will have to establish the legal basis of his/her such status in reference to the law, as may be applicable in the matter, with all its limitations and qualifications, or otherwise also (e.g. judicial order).

(10) - Once an appeal preferred in terms of the said proviso to Section 372, against an order is entertained by an appellate court on merits, to whatever result, no fresh/second appeal by any party/person can/should be entertained against the same order.

(11) - No distinction can be made between a case instituted by a complainant/informant with the police and by a complainant before the Court directly, and an absolute right of a victim (a complainant or not) to file an appeal under Proviso to Section 372 does not get fettered by any other section of the Code contained in Chapter XXIX, which includes Section 378.

50. Now coming to the case at hand, in the facts and circumstances appearing from the records, this Court is not satisfied that Patna High Court CR. APP (DB) No.1078 of 2012 dt.26-11-2013 the appellant, who happens to be the cousin father-in-law of the deceased, has suffered any „loss or „injury as a result of the crime complained of, so as to qualify as a „victim to maintain this appeal.

51. This appeal is accordingly dismissed as not maintainable.

(Jayanandan Singh, J) (Aditya Kumar Trivedi, J) Pradeep/ A.F.R.