N. NATESAM PILLAI

V.

SPL. TAHSILDAR, LAND ACQUISITION, TIRUCHY (Civil Appeal No. 36 of 2004)

AUGUST 11, 2010

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

Land Acquisition Act, 1894 – ss. 4 (1) and 18 – Land acquisition – Fixation of market value of the acquired land – Reference court awarding compensation at Rs. 17/- per sq. C feet – However, High Court reduced the compensation to Rs. 9/- per sq feet – Justification of – Held: Acquired land has all the potentiality to be used as building sites, even in the immediate future – It is abutting the main road and is surrounded by schools, Panchayat, union office, shops and D residential buildings in all three sides – Even on giving a discount in respect of the acquired land being a large tract as compared to the small portion of land sold under the sale deed, rate of Rs. 11/- is adequate and fair – Thus, land owner entitled to compensation at Rs. 11/- per sq. ft. for the acquired E land with additional compensation and solatium on the amount enhanced and fixed, including payment of interest.

The State Government acquired certain land for providing house sites. The Land Acquisition Officer awarded compensation at the rate of Rs. 1.72 per sq. ft. to the land owners, for the acquired land. At the instance of the appellant-land owner, reference was made u/s. 18 of Land Acquisition Act, 1894 before the reference court. He adduced evidence in the form of Sale Deeds-Exs. A1 to A4. The reference court fixed the market value of the acquired land at Rs. 17/- per sq. feet. However, the High Court reduced the amount of compensation to Rs. 9/- per sq. feet. Therefore, the appellant-original owner filed the instant appeal.

A Partly allowing the appeal, the Court

HELD: 1.1 The first clause of Section 23 of the Land Acquisition Act, 1894 clearly provides that the amount of compensation awarded for the land acquired is required to be determined on the basis of market value of the land at the time of publication of the Notification under Section 4 of the Act. Therefore, it is the duty of both, the Land Acquisition Officer as also of the court, to determine the actual compensation payable for the land acquired by referring to evidence regarding fair and just compensation near about the proximate date or on the date itself of the publication of the notification under section 4 of the Act. At times, in order to prove the actual, fair and just compensation for the land acquired, sale deeds of the adjacent land or nearabout adjacent land are produced to indicate the trend of the value of the land within the near vicinity of the acquired land. Such sale deeds are taken notice of generally when they are prior in point of time to the date of Notification, and any sale deed which is dated post Notification is generally ignored, unless evidence is led to show that there was no increase in price despite such acquisition. As a result of such acquisition, the market value of the adjacent land would generally, and in most cases, go up and, therefore, such post notification transaction may not be a sound F criterion to determine and assess the value of the acquired land. [Paras 12 and 14] [8-F-H; 10-C]

1.2 In the instant case, the appellant has not adduced any evidence to show that the market value of adjacent land has not increased in the interregnum. Ex. A1 and Ex. A4 are sale deeds executed subsequent to the date of notification under Section 4(1) and for this reason, the High Court held these to be irrelevant for the purpose of determining compensation. The reference court and the High Court were justified in rejecting these sale deeds

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from consideration. Therefore, the said sale deeds must A not be considered while assessing and determining the just and fair compensation for the acquired land. Ex. A2 is also a sale deed but the same also is not a safe guide as the price for the land covered therein was later on increased to make it in parity with the government B prescribed rate. [Para 14] [10-C-E]

Administrator General of W.B. v. Collector, Varanasi (1988) 2 SCC 150, referred to.

- 2.1. The small area of land measuring 1710 sq. ft. was sold for Rs. 20,000/- as per Ex. A3 dated 15.7.92 which works out to a value of Rs. 11/- per sq. ft. A comparison of the two plots, namely, land in Ex. A3 and the acquired land shows that they are not identical. While the land in Ex. A3 may not be an excellent guide it is still a better guide than any other document exhibited on record. The same could be used as a relevant yardstick to assess the just and reasonable compensation in the instant case. [Para 18] [12-B-C]
- 2.2 It is found from the counter affidavit filed by the respondent-State that the land covered by Ex. A3 is located out of the Municipal Corporation limit, whereas the acquired land is located within the Municipal Corporation limit. Consequently, it cannot be disputed that the acquired land, being in the heart of the city and having excellent prospects of being used as residential site, definitely has an edge regarding the potential value over the land covered by Ex. A3. This building potentiality of acquired land must also be taken into consideration while determining compensation. [Paras 19 and 20] [12-C-E]
- 2.3 The potentiality of the acquired land, in so far as it relates to the use to which it is reasonably capable of being put in the immediate or near future, must be given

A due consideration. In the instant case, the acquired land has all the potentiality to be used as building sites, even in the immediate future, as it is located at a place in and around which building activity has already started. The evidence on record also clearly indicated that the acquired land is abutting the main road. The acquired land is also surrounded by schools, Panchayat union office, shops and residential buildings in all three sides. The High Court also found, as a matter of fact, that the area where the acquired land is situated is fit for construction of houses. On an overall consideration and appreciation of the records, the deduction due to the small size of the exemplar land can easily be set off with the corresponding increase in price of the acquired land when compared with the land in Ex. A3 from the point of view of potential value. [Para 22] [14-E-H]

- 2.4 Although it is true that the land covered by Ex. A3 is a small tract of land and, therefore, cannot be compared in size with the large area of land acquired under the present notification, it is to be concluded that the land in question would definitely fetch a higher price than what is fixed by the High Court. A prospective purchaser would only be too willing to pay for the acquired land having immediate potentiality of being used as a residential site in a prime locale at almost the same, if not higher, price than the land covered by Ex. A3 which is located outside the Municipality area. [Para 23] [15-A-B]
 - 2.5 The conclusion of the High Court that the acquisition of a large tract of land merits a discount in compensation is accepted. However, the compensation granted by the High Court did not match the potentiality of the land, even after the discount was taken into consideration. Even on giving a discount in respect of the acquired land being a large tract as compared to the small portion of land sold under Ex. A3, the rate of Rs. 11/-

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would be adequate and just compensation for the same. A By scaling down the rate of compensation to Rs. 9/- from Rs. 11/- per sq. ft., the High Court denied just and reasonable compensation to the appellant, thereby resulting in a miscarriage of justice. Therefore, the appellant would be entitled to compensation at Rs. 11/- per sq. ft. for the acquired land which is considered to be just and fair. The State would be liable to pay additional compensation and solatium on the amount enhanced and fixed in terms of this order including payment of interest in terms of the rate of interest awarded by the reference court. [Paras 24, 25 and 26] [15-C-G]

P. Ram Reddy v. Land Acquisition Officer, Hyderabad Urban Development Authority (1995) 2 SCC 305; Hasanali Khanbhai and Sons v. State of Gujarat (1995) 5 SCC 422, relied on.

Rishi Pal Singh and Ors. vs. Meerut Development Authority and Anr. (2006) 3 SCC 205; Administrator General of W.B. v. Collector, Varanasi (1988) 2 SCC 150, referred to.

Case Law Reference:

(1988) 2 SCC 150	Referred to.	Paras 13, 17	
(2006) 3 SCC 205	Referred to.	Para 16	
(1995) 2 SCC 305	Relied on.	Para 20	F
(1995) 5 SCC 422	Relied on.	Para 21	

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 36 of 2004.

From the Judgment & Order dated 27.11.2002 of the High Court of Judicature at Madras in A.S. No. 116 of 2002.

K.K. Mani, Ankit Swarup, K. Lakshminarayan for the Appellant.

A Promila, T.S. Kumaran, V.G. Pragasam for the Respondent.

The Judgment of the Court was delivered by

- **DR. MUKUNDAKAM SHARMA, J.** 1. This appeal is directed against the judgment and order dated 27.11.2002 passed by the Madras High Court whereby the High Court reversed the order passed by the Reference Court by reducing the amount of compensation granted by the Reference Court to the appellant from Rs. 17/- per sq. feet to Rs. 9/- per sq. feet.
- 2. Before we deal with the contentions raised before us, brief facts leading to the filing of the present appeal are required to be stated. For providing house sites at Adi Dravidas, land measuring an extent of 3.90 acres comprised in Survey No. 118/Ain Palangudi Village was acquired by the Government of Tamil Nadu by issuing a notification under Section 4(1) of the Land Acquisition Act which was published on 23.9.1992. The Land Acquisition Officer awarded a sum of Rs. 1.72 per sq. ft. for the acquired land. At the instance of the aggrieved land owner, i.e. the appellant, reference was made under Section 18 of the Land Acquisition Act before the Additional Sub Court, Trichy.
- 3. Before the Reference Court, the appellant adduced documentary evidence in the form of Sale Deeds Exs. A1 to A4 and examined two witnesses. The Revenue also produced documents exhibited as Exs. B1 and B2, but no witness was examined from the side of the Revenue. The Reference Court after consideration and appreciation of the evidence adduced fixed the market value of the acquired land at Rs. 17/- per sq. feet.
- 4. Being aggrieved by the said order, the State preferred an appeal before the High Court. The question for consideration before the High Court was whether the amount of compensation for the acquired land fixed by the Reference Court i.e. Rs. 17/per sq. feet is correct or not and whether the appeal filed by the State for reducing the amount of compensation be allowed.

- N. NATESAM PILLAI v. SPL. TAHSILDAR, LAND ACQUISITION, TIRUCHY [DR. MUKUNDAKAM SHARMA, J.]
- 5. The High Court after consideration of the records came to the conclusion that the amount of compensation i.e. Rs. 17/per sq. feet is on the higher side, and that the appropriate amount of compensation would be Rs. 9/- per sq. feet and accordingly reversed the order passed by the Reference Court with the aforesaid modification of the rate of compensation fixing the same at Rs. 9/- per sq. ft.
- 6. The appellant, original owner of the land, has filed this appeal praying for setting aside the order passed by the High Court and has prayed for enhancement of the amount of compensation taking into consideration the potential value of the land.
- 7. The learned counsel appearing for the appellant contended that the High Court took notice of the market value of the acquired land only with reference to the actual use. According to the appellant, the Court failed to take notice of its value with reference to the better use to which it is reasonably capable of being put to in the immediate or near future and thereby failed to take into consideration future potentiality of the land and instead based itself only on the realized possibility and thus committed an error.
- 8. The learned counsel appearing for the respondent, on the other hand, contended that the amount of compensation granted by the High Court is appropriate, and does not deserve to be interfered with.
- 9. The Reference Court granted compensation at Rs. 17/per sq. feet after holding that the acquired land is a potential house site being located in a very important locality and that the amount of compensation granted by the Land Acquisition Officer, i.e., 1.72 per sq. ft. was totally an unjust and inadequate amount.
- 10. The High Court, on the other hand, fixed the market value of the acquired land at Rs. 9/- per sq. ft. by setting aside the order passed by the Reference Court. The High Court while coming

- A to the aforesaid conclusion held that Ex. A3 is a comparable sale transaction. Under Ex. A3, 1710 sq. ft. land was sold for Rs. 20,000/- which would work out to Rs. 11/- per sq. ft. Nonetheless, the High Court also pointed out the fact that the acquired land has got higher potential value, as the acquired land is abutting the main road and when compared with the land covered under Ex. A3, the acquired land is surrounded by Schools, Shops, Panchayat Union Office etc. However, considering the fact that the acquired land is a large tract of land wherein while making development there would be loss of land due to both internal and external development like roads, etc., and that when compared with the land of Ex. A3 which is a very small area of land, there has to be deduction in value of the acquired land and so calculating the rate of compensation was scaled down to Rs. 9/ - per sq. ft.
 - 11. Therefore, it falls upon us to determine whether the High Court was correct and justified in scaling down the compensation to be given to the appellant. To this effect, we must give due consideration to the Sale Deeds Exs. A1 to A4 placed by the appellant, in order to determine the appropriate and just compensation that must be given in pursuance of the instant land acquisition.
- 12. It is important to note that Ex. A1 and Ex. A4 are sale deeds executed subsequent to the date of notification under Section 4(1) and for this reason, the High Court held these to be irrelevant for the purpose of determining compensation. The first clause of Section 23 of the Act clearly provides that the amount of compensation awarded for the land acquired is required to be determined on the basis of market value of the land at the time of publication of the notification under Section 4 of the Act. Therefore, it is the duty of both of the Land Acquisition Officer as also of the Court to determine the actual compensation payable for the land acquired by referring to evidence regarding fair and just compensation near about the proximate date or on the date itself of the publication of the notification under Section Н

4. At times, in order to prove the actual, fair and just compensation for the land acquired, sale deeds of the adjacent land or nearabout adjacent land are produced to indicate the trend of the value of the land within the near vicinity of the acquired land. Such sale deeds are taken notice of generally when they are prior in point of time to the date of notification, and any sale deed which is post notification dated is generally ignored, unless evidence is led to show that there was no increase in price despite such acquisition.

13. This Court in *Administrator General of W.B. v. Collector, Varanasi,* reported at (1988) 2 SCC 150, has held:

"Such subsequent transactions which are not proximate in point of time to the acquisition can be taken into account for purposes of determining whether as on the date of acquisition there was an upward trend in the prices of land in the area. Further under certain circumstances where it is shown that the market was stable and there were no fluctuations in the prices between the date of the preliminary notification and the date of such subsequent transaction, the transaction could also be relied upon to ascertain the market value. This Court in State of U.P. v. Jitendra Kumar, reported at (1982) 2 SCC 382 observed: (SCC p. 383, para 3)

"It is true that the sale deed Ex. 21 upon which the High Court has relied is of a date three years later than the notification under Section 4 but no material was produced before the court to suggest that there was any fluctuation in the market rate at Meerut from 1948 onwards till 1951 and if so to what extent. In the absence of any material showing any fluctuation in the market rate the High Court thought it fit to rely upon Ex. 21 under which the Housing Society itself had purchased land in the neighbourhood of the land in dispute. On the whole we are not satisfied that any error was committed by the High Court in relying

A upon the sale deed Ex. 21."

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But this principle could be appealed to only where there is evidence to the effect that there was no upward surge in the prices in the interregnum. The burden of establishing this would be squarely on the party relying on such subsequent transaction."

14. As a result of such acquisition, the market value of the adjacent land would generally, and in most cases, go up and therefore, such post notification transaction may not be a sound
 C criterion to determine and assess the value of the acquired land. In the present case, the appellant has also not adduced any evidence to show that the market value of adjacent land has not increased in the interregnum. The Reference Court and the High Court were justified in rejecting these sale deeds from consideration. We must, therefore, keep the aforesaid two sale deeds outside our consideration while assessing and determining the just and fair compensation for the acquired land. Ex. A2 is also a sale deed but the same also is not a safe guide as the price for the land covered therein was later on increased to make it in parity with the government prescribed rate.

15. Consequently, it is to be seen if Ex. A3 may be relied upon in determining the claim of the appellant. The High Court, while noting that Ex. A3 does indeed represent a comparable sales transaction also held that since the same concerns a very small area of land, it could be applicable to the acquisition of a large tract of land as the one in question, once deduction as necessary and required is given.

16. In Rishi Pal Singh and Others vs. Meerut Development Authority and Anr. reported in (2006) 3 SCC 205 this Court while dealing with the issue relating to a large tract of land held as follows:-

"5......With respect to the first reason, that is, exemplars of small plots have been taken into consideration by the

Reference Court, in the first instance our attention was invited to some judgments of this Court to urge that there is no absolute bar to exemplars of small plots being considered provided adequate discount is given in this behalf. Thus there is no bar in law to exemplars of small plots being considered. In an appropriate case, specially when other relevant or material evidence is not available, such exemplars can be considered after making adequate discount. This is a case in which appropriate exemplars are not available. The Reference Court has made adequate discount for taking the exemplars of small plots into consideration.........."

17. Furthermore, in *Administrator General of W.B. v. Collector, Varanasi* (cited hereinabove), this Court has held:

"It is trite proposition that prices fetched for small plots cannot form safe bases for valuation of large tracts of land as the two are not comparable properties. The principle that evidence of market value of sales of small, developed plots is not a safe guide in valuing large extents of land has to be understood in its proper perspective. The principle requires that prices fetched for small developed plots cannot directly be adopted in valuing large extents. However, if it is shown that the large extent to be valued does not admit of and is ripe for use for building purposes; that building lots that could be laid out on the land would be good selling propositions and that valuation on the basis of the method of hypothetical lay out could with justification be adopted, then in valuing such small, laid out sites the valuation indicated by sale of comparable small sites in the area at or about the time of the notification would be relevant. In such a case, necessary deductions for the extent of land required for the formation of roads and other civil amenities; expenses of development of the sites by laying out roads, drains, sewers, water and electricity lines, and the interest on the outlays for the period of deferment of the realisation of the price; the profits on the

A venture etc. are to be made."

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18. The small area of land measuring 1710 sq. ft. was sold for Rs. 20,000/- as per Ex. A3 dated 15.7.92 which works out to a value of Rs. 11/- per sq. ft. A comparison of the two plots, namely, land in Ex. A3 and the acquired land shows that they are not identical. While the land in Ex. A3 may not be an excellent guide it is still a better guide than any other document exhibited on record. The same could be used as a relevant yardstick to assess the just and reasonable compensation in the present case.

19. We find from the counter affidavit filed by the respondent-State that the said land covered by the Ex. A3 is located out of the Municipal Corporation limit of Trichy, whereas the acquired land is located within the Municipal Corporation limit of Trichy. Consequently, it cannot be disputed that the acquired land, being in the heart of the city and having excellent prospects of being used as residential site, definitely has an edge regarding the potential value over the land covered by Ex. A3.

20. This building potentiality of acquired land must also be taken into consideration while determining compensation. In *P. Ram Reddy v. Land Acquisition Officer, Hyderabad Urban Development Authority* reported at (1995) 2 SCC 305, this Court held as follows: -

"8. Building potentiality of acquired land.— Market value of land acquired under the LA Act is the main component of the amount of compensation awardable for such land under Section 23(1) of the LA Act. The market value of such land must relate to the last of the dates of publication of notification or giving of public notice of substance of such notification according to Section 4(1) of the LA Act. Such market value of the acquired land cannot only be its value with reference to the actual use to which it was put on the relevant date envisaged under Section 4(1) of the LA Act, but ought to be its value with reference to the better use to

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which it is reasonably capable of being put in the immediate or near future. Possibility of the acquired land put to certain use on the date envisaged under Section 4(1) of the LA Act, of becoming available for better use in the immediate or near future, is regarded as its potentiality. It is for this reason that the market value of the acquired land when has to be determined with reference to the date envisaged under Section 4(1) of the LA Act, the same has to be done not merely with reference to the use to which it was put on such date, but also on the possibility of it becoming available in the immediate or near future for better use, i.e., on its potentiality. When the acquired land has the potentiality of being used for building purposes in the immediate or near future it is such potentiality which is regarded as building potentiality of the acquired land. Therefore, if the acquired land has the building potentiality, its value, like the value of any other potentiality of the land should necessarily be taken into account for determining the market value of such land. Therefore, when a land with building potentiality is acquired, the price which its willing seller could reasonably expect to obtain from its willing purchaser with reference to the date envisaged under Section 4(1) of the LA Act, ought to necessarily include that portion of the price of the land attributable to its building potentiality. Such price of the acquired land then becomes its market value envisaged under Section 23(1) of the LA Act. If that be the market value of the acquired land with building potentiality, which acquired land could be regarded to have a building potentiality and how the market value of such acquired land with such building potentiality requires to be measured or determined are matters which remain for our consideration now."

21. This Court in *Hasanali Khanbhai & Sons v. State of Gujarat* reported in (1995) 5 SCC 422 also held that:-

"3.But it is settled law by series of judgments of this

Court that the court is not like an umpire but is required to Α determine the correct market value after taking all the relevant circumstances, evinces active participation in adduction of evidence; calls to his aid his judicial experience; evaluate the relevant facts from the evidence on record applying correct principles of law which would be В just and proper for the land under acquisition. It is its constitutional, statutory and social duty. The court should eschew aside feats of imagination but occupy the armchair of a prudent, willing but not too anxious, purchaser and always ask the question as to what are the prevailing С conditions and whether a willing purchaser would as a prudent man in the normal market conditions offer to purchase the acquired land at the rates mentioned in the sale deeds. After due evaluation taking all relevant and germane facts into consideration, the Court must answer D as to what would be the just and fair market value..... "

22. Therefore, it is clear from the aforementioned decisions of this Court that the potentiality of the acquired land, in so far as it relates to the use to which it is reasonably capable of being put in the immediate or near future, must be given due consideration. The present acquired land has all the potentiality to be used as building sites, even in the immediate future, as it is located at a place in and around which building activity has already started. The evidence on record also clearly indicates that acquired land is abutting the main road. The acquired land is also surrounded by schools, Panchayat union office, shops and residential building in all three sides. The High Court also found, as a matter of fact, that the area where the acquired land is situated is fit for construction of houses. On an overall consideration and appreciation of the records, we feel that the deduction due to the small size of the exemplar land can easily be set off with the corresponding increase in price of the acquired land when compared with the land in Ex. A3 from the point of view of potential value.

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23. Although it is true that the land covered by Ex. A3 is a A small tract of land and therefore cannot be compared in size with the large area of land acquired under the present notification, it is to be concluded that the land in question would definitely fetch a higher price than what is fixed by the High Court. A prospective purchaser would only be too willing to pay for the acquired land having immediate potentiality of being used as a residential site in a prime locale at almost the same, if not, higher price than the land covered by Ex. A3 which is located outside the Municipality area.

24. We are in agreement with the conc lusion of the High Court that the acquisition of a large tract of land merits a discount in compensation. However, in the present circumstance, it is significant to note that the compensation granted by the High Court does not match the potentiality of the land, even after the discount has been taken into consideration. Even on giving a discount in respect of the acquired land being a large tract as compared to the small portion of land sold under Ex. A3, according to us, the rate of Rs. 11/- would be adequate and just compensation for the same.

25. In our considered opinion, by scaling down the rate of compensation to Rs. 9/- from Rs. 11/- per sq. ft., the High Court denied just and reasonable compensation to appellant, thereby resulting in a miscarriage of justice.

26. We, therefore, hold that the appellant shall be entitled to compensation at Rs. 11/- per sq. ft. for the acquired land which we consider to be just and fair. Needless to say that the State shall also be liable to pay additional compensation and solatium on the amount enhanced and fixed in terms of this order including payment of interest in terms of the rate of interest awarded by the Reference Court. The appeal stands allowed to the aforesaid extent without any costs.

N.J.

KISHAN SINGH (D) THROUGH L.RS. Α

> GURPAL SINGH & ORS. (Criminal Appeal No. 1500 of 2010)

> > AUGUST 12, 2010

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

CODE OF CRIMINAL PROCEDURE. 1973:

s.482 - Order of High Court guashing criminal C proceedings, relying upon the finding of civil court on the same issue as involved in the criminal proceedings, in respect of the same subject matter – HELD: Is not sustainable – The findings of fact recorded by civil court do not have any bearing so far as the criminal case is concerned and vice-versa – However. in the instant case, the complainant having approached the civil court and failed, filing of the complaint by him, pending his civil appeal, with inordinate delay without any plausible explanation and with the sole intention of harassing the other party amounted to an abuse of the process of law and, therefore, the order of High Court, though not sustainable in law, is not interfered with - Penal Code, 1860 - ss.420/323/467/468/471/ 120-B - Practice and Procedure - Simultaneous civil and criminal proceedings – Administration of justice – Abuse of the process of law - Delay/Laches.

An agreement to sell the suit land was executed on 4.1.1988 by the owner, namely, 'KL' in favour of respondents 1 to 4, to whom the land had already been mortgaged. Since the sale deed was not executed by the stipulated date i.e. 10.6.1989, the respondents filed a suit for specific performance and pursuant to the decree dated 8.5.1996, passed in the said suit, the sale deed was executed in favour of respondents 1 to 4 on 17.5.1996. Meanwhile, the father of the appellants also filed on 6.2.1996 a suit for specific performance against the said

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'KL' stating that he had executed on 22.10.1988 an agreement to sell in his favour stipulating that the sale deed would be executed and registered by 15.6.1989. He filed another suit seeking cancellation/setting aside the decree dated 8.5.1996, which was dismissed on 10.6.2002, and consequently he filed a regular first appeal. Thereafter, he filed an FIR on 22.7.2002 against the respondents

In the instant appeal the question for consideration before the Court was: "whether criminal proceedings can be quashed by the High Court relying upon a finding of civil court on an issue involved in criminal proceedings in respect of the same subject matter."

alleging commission of offences punishable u/ss 420/423/

467/468/120-B IPC. On the petition filed by the respondents.

the High Court guashed the FIR and the consequent

Disposing of the appeal, the Court

criminal proceedings.

HELD: 1.1. The findings of fact recorded by the civil court do not have any bearing so far as the criminal case is concerned and vice-versa. Standard of proof is different in civil and criminal cases. In civil cases it is preponderance of probabilities while in criminal cases it is proof beyond reasonable doubt. There is neither any statutory nor any legal principle that findings recorded by the court either in civil or criminal proceedings shall be binding between the same parties while dealing with the same subject matter; and both the cases have to be decided on the basis of the evidence adduced therein. However, there may be cases where the provisions of ss. 41 to 43 of the Evidence Act, 1872, dealing with the relevance of previous judgments in subsequent cases may be taken into consideration. [para 19] [26-F-H; 27-A]

M.S. Sherrif Vs. The State of Madras & Ors., 1954 SCR 1229 = AIR 1954 SC 397; K.G. Premshankar Vs. Inspector of Police & Anr., 2002 (2) Suppl. SCR 350 = AIR 2002 SC 3372; Iqbal Singh Marwah & Anr. Vs. Meenakshi

A Marwah & Anr., 2005 (2) SCR 708 = (2005) 4 SCC 370; P. Swaroopa Rani Vs. M. Hari Narayana alias Hari Babu, 2008 (3) SCR 900 = AIR 2008 SC 1884; Syed Aksari Hadi Ali Augustine Imam & Anr. Vs. State (Delhi Admn) & Anr., 2009 (3) SCR 1017 = (2009) 5 SCC 528; and Vishnu Dutt Sharma B Vs. Daya Prasad, 2009 (7) SCR 977 = (2009) 13 SCC 729, relied on.

M/s Karamchand Ganga Pershad & Anr. Vs. Union of India & Ors., AIR 1971 SC 1244, stood overruled

V.M. Shah Vs. State of Maharashtra & Anr., 1995 (3) Suppl. SCR 79 = (1995) 5 SCC 767 - disapproved.

Emperor Vs. Khwaja Nazair Ahmad, AIR 1945 PC 18, referred to.

1.2. In cases where there is a delay in lodging an FIR,
 the court should carefully examine the facts before it for the reason that a frustrated litigant who failed to succeed before the civil court may initiate criminal proceedings just to harass the other side with mala fide intentions or the ulterior motive of wreaking vengeance on the other party.
 Chagrined and frustrated litigants should not be permitted to give vent to their frustrations by cheaply invoking the jurisdiction of the criminal court. The court proceedings ought not to be permitted to degenerate into a weapon of harassment and persecution. [para 22] [28-A-D]

Chandrapal Singh & Ors. Vs. Maharaj Singh & Anr., AIR
 1982 SC 1238; State of Haryana & Ors. Vs. Ch. Bhajan Lal & Ors., 1990 (3) Suppl. SCR 259 = AIR 1992 SC 604; G. Sagar Suri & Anr. Vs. State of U.P. & Ors., 2000 (1) SCR 417 = AIR
 2000 SC 754; and Gorige Pentaiah Vs. State of A.P. & Ors.,
 2008 (12) SCR 623 = (2008) 12 SCC 531 - relied on.

1.3. In the instant case, the judgment and order of the High Court dated 13.02.2009 quashing the criminal proceedings against the respondents, though not sustainable in the eyes of law, is not interfered with in view of the facts and circumstances of the case. The agreement

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to sell in favour of the appellants' father is dated 22.10.1988 and sale deed was to be executed and registered by 15.06.1989. Respondent Nos. 1 to 4 filed the suit in 1989. It is difficult to believe that the appellants' father was not aware of the pendency of that suit. No explanation has been furnished as to why after expiry of the date of execution of the sale deed in favour of appellant's father, i.e. 15.06.1989, he did not file the suit for specific performance which was subsequently filed on 6.2.1996. Even if it is presumed that he was not aware of pendency of the suit filed by respondent Nos. 1 to 4, no explanation could be furnished that while he filed another suit in 1996 for setting aside the decree dated 8.5.1996 in the suit of the respondents, why did he wait till the decision of that suit for lodging the FIR, as the civil and criminal proceedings could have proceeded simultaneously. The FIR was filed only on 23.07.2002 i.e. after filing the appeal before the High Court on 15.07.2002. Therefore, there is an inordinate delay on the part of the complainant in filing the FIR and there is no explanation whatsoever for the same. [para 20] [27-B-E1

Sahib Singh Vs. State of Haryana, 1997 (3) Suppl. SCR 95 = AIR 1997 SC 3247, relied on.

1.4. The allegations made in the FIR were substantially similar to the allegations made by the appellants in the civil suit, which had been decided against them. The FIR was lodged only after loosing in the civil court. Thus, it is evident that the FIR was lodged with the sole intention of harassing the respondents and enmeshing them in long and arduous criminal proceedings. Such an action on the part of the appellants' father would not be bona fide, and the criminal proceedings initiated by him against the respondents amount to an abuse of the process of law. [para 24] [29-B-D]

Case Law Referene:

AIR 1971 SC 1244 stood overruled para 12 H

Α	1954 SCR 1229	relied on	para 13
	1995 (3) Suppl. SCR 79	disapproved	para 14
	2002 (2) Suppl. SCR 350	relied on	para 15
	AIR 1945 PC 18	referred to	para 15
D	2008 (3) SCR 900	relied on	para 16
В	2005 (2) SCR 708	relied on	para 17
	2009 (3) SCR 1017	relied on	para 18
	2009 (7) SCR 977	relied on	para 18
	1997 (3) Suppl. SCR 95	relied on	para 21
С	AIR 1982 SC 1238	relied on	para 22
	1990 (3) Suppl. SCR 259	relied on	para 22
	2000 (1) SCR 417	relied on	para 22
	2008 (12) SCR 623	relied on	para 22

D CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1500 of 2010.

From the Judgment & Order dated 13.2.2009 of the High Court of Punjab & Haryana at Chandigarh in Crl. Misc. M. No. 4136 of 2003.

E K.T.S. Tulsi, Priyanka A., Niraj Gupta for the Appellant.

Abhinav Ramkrishna, Rakesh Dahiya, Kuldip Singh for the Respondents.

F The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Leave granted.

2. This appeal has been preferred against the Judgment and Order dated 13.02.2009 of the Punjab & Haryana High Court at Chandigarh in Criminal Misc. No. 4136 of 2003, wherein the First Information Report (for short, "FIR") dated 23.07.2002 lodged by the appellant under Sections 420/423/467/468/471/120-B of the Indian Penal Code, 1860 (hereinafter called as, "IPC") has been quashed placing reliance on the decree of Civil Court between the same parties in respect of the same subject matter.

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KISHAN SINGH (D) THROUGH L.RS. v. GURPAL SINGH & ORS. [DR. B.S. CHAUHAN, J.]

- 3. The only question for our consideration involved in this appeal is as to whether criminal proceedings can be quashed by the High Court relying upon a finding of Civil Court on an issue involved in criminal proceedings in respect of the same subject matter.
- 4. Facts and circumstances giving rise to this case are that one Kishori Lal executed an Agreement to Sell dated 4.1.1988 in favour of Respondent Nos. 1 to 4 for land measuring 114 Kanals, 2 Marlas situate in the revenue estate of Mauza Jadali, Tehsil Khanna, Punjab, at the rate of Rs. 11000/- per bigha. Kishori Lal had received a sum of Rs. 1 Lakh as Earnest Money from the said respondents. The said land had already been mortgaged with the said respondents for Rs. 52000/-. As per the terms of the said Agreement dated 4.1.1988, the sale deed was to be executed and registered by 10th June, 1989.

Kishori Lal entered an Agreement to Sell dated 22.10.1988 with Kishan Singh, predecessor-in-interest of the appellants, in respect of the same land at the rate of Rs. 15300/- per bigha and received a sum of Rs. 54000/- as earnest money. As per the said agreement, the sale was to be executed and registered by 15.06.1989.

- 5. Respondent Nos. 1 to 4 filed suit No. 60 of 1989 against Kishori Lal in Civil Court, Ludhiana for specific performance and got an interim relief restraining Kishori Lal to alienate the suit land in favour of anyone else by any manner. Sh. Kishan Singh, father of the appellants, filed Civil Suit No. 81 of 1996 against Kishori Lal for specific performance on 6.2.1996, however, the suit filed by the respondent Nos. 1 to 4 against Kishori Lal was decreed in their favour vide Judgment and decree dated 8.5.1996 and in pursuance thereof, the sale has been executed by Kishori Lal in favour of the respondent Nos. 1 to 4 on 17.05.1996.
- 6. Being aggrieved, Kishan Singh, predecessor-in-interest of the appellants, filed suit No. 1075 of 1996 seeking cancellation/setting aside of the decree dated 8.5.1996 passed in favour of respondent Nos. 1 to 4. The said Civil Suit stood dismissed by

A the Civil Court vide Judgment and decree dated 10.06.2002 against which, the appellants have preferred Regular First Appeal (for short, "RFA") No. 2488 of 2002 before the High Court, which is still pending.

- 7. Kishan Singh, predecessor-in-interest of the appellants, filed FIR No.144 dated 23.07.2002 under Sections 420/423/467/468/120-B IPC at Police Station Division No. 8, Ludhiana alleging forging of the signatures of Kishori Lal on the agreement to sell dated 4.1.1988.
- 8. The respondents preferred a Criminal Misc. No. 4136-4 of 2003 before the High Court for quashing of the FIR No. 144 dated 23.07.2002 and proceeding subsequent thereto, on the ground that appellants had lodged it after losing the civil case and with inordinate delay. Findings on factual issues recorded in civil proceedings are binding on criminal proceedings. The High Court, vide its Judgment and order dated 13.02.2009, allowed the said application and quashed the FIR on the ground that the appellants could not succeed before the Civil Court and findings have been recorded by the Civil Court to the effect that the document i.e. agreement to sell was not forged or fabricated. Hence, this appeal.
- 9. Sh. K.T.S. Tulsi, learned senior counsel appearing for the appellants, has submitted that there is no prohibition in law for simultaneously pursuing the civil as well as criminal remedies available in law. Both the proceedings have to take course and to be decided according to the evidence adduced therein. Findings of fact recorded by the Civil Court are not binding on the criminal courts or vice-versa. The High Court committed a grave error in quashing the FIR only on the basis of findings of fact recorded by the Civil Court.
- 10. Per contra, Sh. Abhinav Ramkrishna, learned counsel appearing for the respondents, has vehemently opposed the appeal contending that Kishan Singh filed the FIR at a much belated stage, i.e. after dismissal of the civil suit by the Trial Court on 10.06.2002. In case, the agreement in their favour provided

decision of one court binding on the other, or even relevant,

except for certain limited purposes, such as sentence or

damages. The only relevant consideration here is the

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that sale deed was to be executed by 15th June, 1989, there could be no justification for them to wait and file suit No. 81/1996 for specific performance on 6.2.1996. Thus, FIR has been filed with inordinate delay of about 14 years and even if, it is presumed that they were not aware of pendency of suit No. 60/1989. Kishan Singh had become fully aware of all the relevant facts at the time of filing the suit no. 1075 of 1996. There is no explanation of delay even after 1996. Thus, the Judgment and Order of the High Court does not warrant any interference. The appeal lacks merit and is liable to be dismissed.

11. We have considered the rival submissions made by the learned counsel for the parties and perused the record. The issue as to whether the findings recorded by Civil Court are binding in criminal proceedings between the same parties in respect of the same subject matter, is no more Res Integra.

12. In *M/s Karamchand Ganga Pershad & Anr. Vs. Union of India & Ors.*, AIR 1971 SC 1244, this Court, while dealing with the same issue, held as under:-

"It is well established principle of law that the decisions of the civil courts are binding on the criminal courts. The converse is not true."

13. The said Judgment was delivered by a three-Judge Bench of this Court without taking note of the Constitution Bench Judgment in *M.S. Sherrif Vs. The State of Madras & Ors.,* AIR 1954 SC 397 on the same issue, wherein this Court has held as under:-

"As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard and fast rule can be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the

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likelihood of embarrassment. Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust. This, however, is not a hard and fast rule. Special considerations

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14. In *V.M. Shah Vs. State of Maharashtra & Anr.,* (1995) 5 SCC 767, this Court has held as under :-

course more expedient and just."

obtaining in any particular case might make some other

"As seen that the civil court after full-dressed trial recorded the finding that the appellant had not come into possession through the Company but had independent tenancy rights from the principal landlord and, therefore, the decree for eviction was negatived. Until that finding is duly considered by the appellate court after weighing the evidence afresh and if it so warranted reversed, the findings bind the parties. The findings, recorded by the criminal court, stand superseded by the findings recorded by the civil court. Thereby, the findings of the civil court get precedence over the findings recorded by the trial court, in particular, in summary trial for offences like Section 630. The mere pendency of the appeal does not have the effect of suspending the operation of the decree of the trial Court and neither the finding of the civil court gets disturbed nor the decree becomes inoperative."

15. The correctness of the aforesaid judgment in V.M. Shah

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(supra) was doubted by this Court and the case was referred to A a larger Bench in *K.G. Premshankar Vs. Inspector of Police & Anr.*, AIR 2002 SC 3372. In the said case, the Judgment in *V.M. Shah* (supra) was not approved. While deciding the case, this Court placed reliance upon the Judgment of the Privy Council in *Emperor Vs. Khwaja Nazair Ahmad*, AIR 1945 PC 18 wherein B it has been held as under:-

"It is conceded that the findings in a civil proceeding are not binding in a subsequent prosecution founded upon the same or similar allegations. Moreover, the police investigation was stopped and it cannot be said with C certainty that no more information could be obtained. But even if it were not, it is the duty of a criminal court when a prosecution for a crime takes place before it to form its own view and not to reach its conclusion by reference to any previous decision which is not binding upon it." (Emphasis D added)

16. In *Iqbal SIngh Marwah & Anr. vs. Meenakshi Marwah* & *Anr* (2005) 4 SCC 370, this Court held as under:-

"Coming to the last contention that an effort should be made to avoid conflict of findings between the civil and criminal courts, it is necessary to point out that the standard of proof required in the two proceedings are entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. There is neither any statutory provision nor any legal principle that the findings recorded in one proceeding may be treated as final or binding in the other, as both the cases have to be decided on the basis of the evidence adduced therein."

17. In *Dr. Swaroopa Rani vs. Hari Narayana Alias Hari Babu* AIR 2008 SC 1884, this Court held as under :-

A "t is, however, well settled that in a given case, civil proceedings and criminal proceedings can proceed simultaneously. Whether civil proceedings or criminal proceedings shall be stayed depends upon the fact and circumstances of each case......Filing of an independent criminal proceeding, although initiated in terms of some observations made by the civil court, is not barred under any statute......It goes without saying that the respondent shall be at liberty to take recourse to such a remedy which is available to him in law. We have interfered with the impugned order only because in law simultaneous proceedings of a civil and a criminal case is permissible."

18. In Syed Aksari Hadi Ali Augustine Imam & Anr. Vs. State (Delhi Admn) & Anr., (2009) 5 SCC 528, this Court considered all the earlier Judgments on the issue and held that while deciding the case in Karam Chand (supra), this Court failed to take note of the Constitution Bench Judgment in M.S. Sherrif (supra) and, therefore, it remains per incuriam and does not lay down the correct law.

A similar view has been reiterated by this Court in *Vishnu Dutt Sharma Vs. Daya Prasad,* (2009) 13 SCC 729, wherein it has been held by this Court that the decision in *Karamchand* (supra) stood overruled in *K.G. Premshankar* (supra).

19. Thus, in view of the above, the law on the issue stands crystallized to the effect that the findings of fact recorded by the Civil Court do not have any bearing so far as the criminal case is concerned and vice-versa. Standard of proof is different in civil and criminal cases. In civil cases it is preponderance of probabilities while in criminal cases it is proof beyond reasonable doubt. There is neither any statutory nor any legal principle that findings recorded by the court either in civil or criminal proceedings shall be binding between the same parties while dealing with the same subject matter and both the cases have to be decided on the basis of the evidence adduced therein. However, there may be cases where the provisions of Sections

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41 to 43 of the Indian Evidence Act, 1872, dealing with the A relevance of previous Judgments in subsequent cases may be taken into consideration.

20. In view of the above, the Judgment and order of the High Court dated 13.02.2009 is not sustainable in the eyes of law and is liable to be set aside. However, the facts and circumstances of the case do not warrant so. The agreement to sell in favour of the appellants' father is dated 22.10.1988 and sale deed was to be executed and registered by 15.06.1989. The respondent Nos. 1 to 4 filed Civil suit No. 60/1989 in 1989. It is difficult to believe that the appellants' father was not aware of the pendency C of that suit. No explanation has been furnished as to why after expiry of the date of execution of the sale deed in favour of Kishan Singh, i.e. 15.06.1989, the appellants' father did not file the suit for specific performance which was subsequently filed on 6.2.1996 as Civil Suit No. 81/1996. Even if it is presumed that D Kishan Singh was not aware of pendency of suit filed by the respondent Nos. 1 to 4, no explanation could be furnished that in case, the appellants' father filed another suit No. 1075/1996 for setting aside the decree dated 8.5.1996 in Civil Suit no.60/ 1989, why did he wait till the decision of that suit for lodging FIR, as the civil and criminal proceedings could have proceeded simultaneously. The FIR has been filed only on 23.07.2002 i.e. after filing the RFA No. 2488/2002 before the High Court on 15.07.2002. Therefore, there is an inordinate delay on the part of the appellants' father in filing the FIR and there is no explanation whatsoever for the same.

21. Prompt and early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of its version. In case, there is some delay in filing the FIR, the complainant must give explanation for the same. G Undoubtedly, delay in lodging the FIR does not make the complainant's case improbable when such delay is properly explained. However, deliberate delay in lodging the complaint is always fatal. [vide: Sahib Singh Vs. State of Haryana, AIR 1997 SC 32471.

22. In cases where there is a delay in lodging a FIR, the Court has to look for a plausible explanation for such delay. In absence of such an explanation, the delay may be fatal. The reason for quashing such proceedings may not be merely that the allegations were an after thought or had given a coloured version of events. In such cases the court should carefully examine the facts before it for the reason that a frustrated litigant who failed to succeed before the Civil Court may initiate criminal proceedings just to harass the other side with mala fide intentions or the ulterior motive of wreaking vengeance on the other party. Chagrined and frustrated litigants should not be permitted to give vent to their frustrations by cheaply invoking the jurisdiction of the criminal court. The court proceedings ought not to be permitted to degenerate into a weapon of harassment and persecution. In such a case, where an FIR is lodged clearly with a view to spite the other party because of a private and personal grudge and to enmesh the other party in long and arduous criminal proceedings, the court may take a view that it amounts to an abuse of the process of law in the facts and circumstances of the case. (vide: Chandrapal Singh & Ors. Vs. Maharaj Singh & Anr., AIR 1982 SC 1238; State of Haryana & E Ors. Vs. Ch. Bhajan Lal & Ors., AIR 1992 SC 604; G. Sagar Suri & Anr. Vs. State of U.P. & Ors., AIR 2000 SC 754; and Gorige Pentaiah Vs. State of A.P. & Ors., (2008) 12 SCC 531).

23. The case before us relates to a question of the genuineness of the agreement to sell dated 4.1.1988. The said agreement was between Kishori Lal and respondents and according to the terms of the said agreement, the sale deed was to be executed by 10.6.1989. As the sale deed was not executed within the said time, suit for specific performance was filed by the other party in 1989 which was decreed in 1996. So far as the present appellants are concerned, agreement to sell dated 22.10.1988 was executed in favour of their father and the sale deed was to be executed by 15.6.1989. No action was taken till 1996 for non-execution of the sale deed. The appellants' father approached the court after 7 years by filing Suit No.81/1996 for specific performance. However, by that time, the suit filed by the

present respondents stood decreed. The appellants' father filed A another Suit No.1075/96 for setting aside the judgment and decree passed in favour of the respondents 1 to 4. The said suit was dismissed by the Additional District Judge (Senior Division). Khanna on 10.6.2002. Subsequently, the appellants preferred RFA No. 2488/02 on 15.7.2002 against the aforesaid order, and the said appeal is still pending before the Punjab & Haryana High Court.

24. It is to be noted that the appellants' father Kishan Singh lodged FIR No.144/02 on 23.7.2002 through his attorney Jaswant Singh Mann under Sections 420/323/467/468/471/120-B IPC. against the respondents. The allegations made in the FIR were substantially similar to the allegations made by the appellants in Civil Suit No.1075/96, which had been decided against them. It is evident that the aforesaid FIR was filed with inordinate delay and there has been no plausible explanation for the same. The D appellants lodged the aforesaid FIR only after meeting their Waterloo in the Civil Court. Thus, it is evident that the FIR was lodged with the sole intention of harassing the respondents and enmeshing them in long and arduous criminal proceedings. We are of the view that such an action on the part of the appellants' father would not be bona fide, and the criminal proceedings initiated by him against the respondents amount to an abuse of the process of law.

25. In view of the above, and to do substantial justice, we are not inclined to interfere with the order passed by the High Court quashing the criminal proceedings against the respondents in spite of the fact that the impugned judgment dated 13.02.2009 passed in Criminal Misc. No. 4136 of 2003 is not sustainable in the eyes of law.

26. With these observations, the appeal stands disposed of.

Appeal disposed of. R.P.

Α MADAN MOHAN SINGH AND ORS.

> RAJNI KANT AND ANR. (Civil Appeal No. 6466 of 2004)

> > AUGUST 13, 2010

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

U.P. Consolidation of Holdings Act, 1953 – s.9A(2) – Objections filed by respondents for inclusion of their names C in the disputed khata as the deceased Khatedar's heirs -Appellants filed cross-objections contending that the mother of the respondents, at the most, could be concubine of the deceased Khatedar; and being illegitimate children, the respondents had no right to inherit any share in the disputed D khata - Statutory authorities under the Consolidation Act concurrently held in favour of the respondents and directed recording of their names - Order upheld by High Court - On appeal, held: The live-in-relationship between the deceased Khatedar and the mother of the respondents continued for a long time, and thus there was a presumption of marriage between them which the appellants failed to rebut - Material placed on record by the appellants not enough to disbelieve the claim of the respondents and the findings of facts recorded by the courts below cannot be disturbed on that ground - The documents placed by the appellants, if accepted, would simply lead not only to improbabilities and impossibilities but absurdity also - No special facts and circumstances warranting further re-appreciation of the evidence by the Supreme Court - Constitution of India, 1950 - Article 136.

G Evidence Act, 1872 - ss.32(5) and 35 - Entry in official record - Probative value of - Standard of proof required in such cases.

Evidence Act, 1872 – s.114 – Legitimacy of children born

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to live-in partners – Held: The law presumes in favour of A marriage and against concubinage, when a man and woman have cohabited continuously for a number of years – However, such presumption can be rebutted by leading unimpeachable evidence.

'C', the father of the appellants, was the *Khatedar* of the *Khata* in question. After the death of his wife in 1945, 'C' had live-in-relationship with one 'SH' which continued till his death in 1979. The respondents, who were purportedly born out of this relationship between 'C and 'SH', filed objections under Section 9-A(2) of U.P. Consolidation of Holdings Act, 1953 claiming that their names be included as the heirs of 'C'. The appellants filed cross-objections contending that the respondents had no right or interest in the disputed *Khata*.

The Consolidation Officer i.e. the statutory authority under the Consolidation Act, allowed the objections filed by the respondents and directed that their names be recorded. The order was upheld in appeal before the Settlement Officer as also in revision. The appellants thereafter filed writ petition which was dismissed by the High Court.

Aggrieved, the appellants contended before this Court that there was nothing on record to show that their father had married 'SH' in accordance with law; that 'SH', at the most, could be concubine of 'C'; and that being illegitimate children, the respondents had no right to inherit any share in the disputed *khata*. The appellants contended that the concurrent findings of facts recorded by the courts below were perverse and contrary to documents on record placed by them, and therefore the Supreme Court ought to appreciate the evidence itself.

Dismissing the appeal, the Court

A HELD:1. The statutory authorities under the U.P. Consolidation of Holdings Act, 1953 enjoy the powers of the Civil Court as well as the Revenue Court as all matters pending before the Civil Court stand abated once a notification of initiation of proceedings under the Consolidation Act is issued. The authorities under the Consolidation Act have been conferred powers of the Civil Court to adjudicate upon any matter of title or right to inherit the property etc. In the instant case, three authorities under the Consolidation Act recorded concurrent findings of facts after appreciating the entire evidence on record, which were affirmed by the High Court. [Paras 6, 7] [39-A-D; 40-B-C]

2.1. In the instant case, the documents placed on record by the appellants are School Leaving Certificates, School Registers, Voter Lists and other documents prepared by the authorised persons in exercise of their official duty. There is so much inconsistency that these documents cannot be read together. The said documents, if taken into consideration, would simply lead not only to improbabilities and impossibilities but absurdity also. It is most unfortunate that none of the courts below had analysed these documents in this manner while taking them into consideration and none of the lawyers have thought it proper to bring these most glaring facts to the notice of the courts. [Paras 8, 9 and 12] [40-G-H; 41-E-F; 42-E-F]

2.2. A document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. Even if the entry was made in an official record by the concerned official in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to

whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases. The entries made in the official record, by an official or person authorised in performance of official duties, may be admissible under Section 35 of the Evidence Act, 1872 but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entry in School Register/School Leaving Certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases. For determining the age of a person, the best evidence is of his/her parents, if it is supported by un-impeccable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeccable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, Government Hospital/Nursing Home etc, the entry in the school register is to be discarded. If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time etc. mentioned therein. [Paras 14, 16, 17, 18] [43-D-G; 44-B-C; 44-D-G]

State of Bihar & Ors. v. Radha Krishna Singh & Ors. AIR 1983 SC 684; Ram Prasad Sharma v. State of Bihar AIR 1970 SC 326; Ram Murti v. State of Haryana AIR 1970 SC 1029; Dayaram & Ors. v. Dawalatshah & Anr. AIR 1971 SC 681; Harpal Singh & Anr. v. State of Himachal Pradesh AIR 1981 SC 361; Ravinder Singh Gorkhi v. State of U.P. (2006) 5 SCC 584; Babloo Pasi v. State of Jharkhand & Anr. (2008) 13 SCC 133; Desh Raj v. Bodh Raj AIR 2008 SC 632; Ram

A Suresh Singh v. Prabhat Singh @Chhotu Singh & Anr. (2009) 6 SCC 681; Brij Mohan Singh v. Priya Brat Narain Sinha & Ors. AIR 1965 SC 282; Birad Mal Singhvi v. Anand Purohit AIR 1988 SC 1796; Vishnu v. State of Maharashtra (2006) 1 SCC 283; Satpal Singh v. State of Haryana JT 2010 (7) SC B 500; Updesh Kumar & Ors. v. Prithvi Singh & Ors. (2001) 2 SCC 524 and State of Punjab v. Mohinder Singh AIR 2005 SC 1868, relied on.

Mohd. Ikram Hussain v. The State of U.P. & Ors. AIR 1964 SC 1625; Santenu Mitra v. State of West Bengal AIR 1999 SC 1587, referred to.

- 3.1. The courts have consistently held that the law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for a number of years. However, such presumption can be rebutted by leading unimpeachable evidence. [Para 21] [45-C-D]
- 3.2. In the instant case, the material placed on record by the appellants cannot be termed enough to disbelieve the claim of the respondents and the findings of facts recorded by the courts below cannot be disturbed on that ground. The appellants' case was that the respondents were born prior to 1960 i.e. prior to the year 'C' started living with 'SH'. As per the Electoral Rolls, 'SH' was born near about 1941. If the documents filed by the appellants are taken to be true, one will have to record a finding of fact that 'SH' gave birth to her two daughters when she was only 5-6 years of age and in case, the Certificate of respondent no.1 (Certificate for practicing Unani medicine wherein his date of birth is shown) is taken to be true and is considered in the light of the documents contained in Electoral rolls, it was arithmetically clear that 'SH' had given birth to respondent no.1 even prior to her own birth. If all the documents placed on record by the appellants are accepted, they would simply lead not only to

improbabilities and impossibilities but absurdity also. None of the courts below had analysed documents in correct perspective. In the instant case, the live-in-relationship, if continued for such a long time, could not be termed as "walk in and walk out" relationship and there was a presumption of marriage between them which the appellants failed to rebut. There are no special facts and circumstances which warranted further reappreciation of the evidence as the appeal was based on totally unreliable/contradicting documents. [Paras 22, 23] [45-E-F; 46-A-C]

S.P.S. Balasubramanyam v. Suruttayan @ Andali Padayachi & Ors. AIR 1992 SC 756; Mohabbat Ali Khan v. Mohd. Ibrahim Khan AIR 1929 PC 135; Gokalchand v. Parvin Kumar AIR 1952 SC 231; S.P.S. Balasubramanyam v. Suruttayan (1994) 1 SCC 460; Ranganath Parmeshwar D Panditrao Mali v. Eknath Gajanan Kulkarni (1996) 7 SCC 681 and Sobha Hymavathi Devi v. Setti Gangadhara Swamy & Ors. (2005) 2 SCC 244, relied on.

S. Khushboo v. Kanniammal & Anr. (2010) 5 SCC 600 and Lata Singh v. State of U.P. & Anr. AIR 2006 SC 2522, referred to.

Case Law Reference:

AIR 1983 SC 684	relied on	Para 13	F
AIR 1970 SC 326	relied on	Para 14	
AIR 1970 SC 1029	relied on	Para 14	
AIR 1971 SC 681	relied on	Para 14	G
AIR 1981 SC 361	relied on	Para 14	G
(2006) 5 SCC 584	relied on	Para 14	
(2008) 13 SCC 133	relied on	Para 14	

Α	AIR 2008 SC 632	relied on	Para 14
	(2009) 6 SCC 681	relied on	Para 14
	AIR 1964 SC 1625	referred to	Para 15
В	AIR 1999 SC 1587	referred to	Para 15
	AIR 1965 SC 282	relied on	Para 17
	AIR 1988 SC 1796	relied on	Para 17
_	(2006) 1 SCC 283	relied on	Para 17
С	JT 2010 (7) SC 500	relied on	Para 17
	(2001) 2 SCC 524	relied on	Para 18
	AIR 2005 SC 1868	relied on	Para 18
D	(2010) 5 SCC 600	referred to	Para 19
	AIR 2006 SC 2522	referred to	Para 19
	AIR 1992 SC 756	relied on	Para 20
Е	AIR 1929 PC 135	relied on	Para 21
	AIR 1952 SC 231	relied on	Para 21
	(1994) 1 SCC 460	relied on	Para 21
F	(1996) 7 SCC 681	relied on	Para 21
'	(2005) 2 SCC 244	relied on	Para 21
	CIVII ADDELLATE ILIE	DISDICTION - Civil /	Annoal Na

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6466 of 2004.

G From the Judgment & Order dated 14.8.2003 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 19334 of 2003.

Mahabir Singh, V.K. Singh, T.N. Singh for the Appellants.

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Abhay Kumar for the Respondents.

The Judgment of the Court was delivered by

- **DR. B.S. CHAUHAN, J.** 1. This appeal has been preferred against the judgment and order dated 14.8.2003 in Civil Misc. Writ Petition No.19334 of 2003 passed by the High Court of Judicature at Allahabad by which the High Court dismissed the writ petition of the appellants in view of the concurrent findings recorded by the three statutory authorities under the Statute.
- 2. Facts and circumstances giving rise to this case are that C one Chandra Deo Singh was recorded as the khatedar of Khata Nos.485, 620, 146 and 66 of Village Bhojapur and Khata No.21 of Village Kanshari. The respondents in appeal, Rajni Kant and Anjani Kumar claimed themselves to be the sons of said Chandra Deo Singh and filed objections under Section 9- D A(2) of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as 'Consolidation Act') and they asked for inclusion of their names as his heirs. Another objection was filed by the appellants in the disputed khata submitting that the said respondents had no right or interest in the suit land, not being the sons of late Chandra Deo Singh and the appellants were his only legal heirs. The Consolidation Officer having framed large number of issues and having provided full opportunity of hearing to both the parties to lead evidence and make submissions, passed an order dated 8.11.2000, allowing the objections filed by the respondents and further directing to record their names. Being aggrieved, the appellants preferred the appeal before the Settlement Officer which had been dismissed vide judgment and order dated 16.2.2001. Being aggrieved, the appellants preferred Revision No.958 under Section 48 of the Consolidation Act which also stood dismissed vide judgment and order dated 15.3.2003.
- 3. The appellants further agitated the issue, challenging the said judgments and orders by filing Writ Petition No.19334/

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A 2003 which has also been dismissed vide judgment and order dated 14.8.2003. Hence, this appeal.

- 4. Shri Mahabir Singh, Ld. Senior counsel, appearing for the appellants, has submitted that mother of the appellants, Smt. Sonbarsa died in 1945. Chandra Deo Singh, father of the appellants remained in Jail as a Freedom Fighter from 1945-47. There is nothing on record to show that appellants' father got married with the mother of the respondents Smt. Shakuntala in accordance with law. At the most she could be concubine of Chandra Deo Singh and being illegitimate children, the respondents have no right to inherit any share in the suit land. More so, the respondents were born prior to having started livein-relationship between Chandra Deo Singh and said Smt. Shakuntala as is evident from the School Register and School leaving certificate produced by the appellants before the statutory authorities as well as before the High Court and this Court. The said documents had not been properly appreciated by any of the authorities. The findings of facts recorded by the statutory authorities are perverse being contrary to evidence on record produced by the appellants. The High Court did not make any attempt to appreciate the evidence at all. Findings so recorded, are perverse, being contrary to the evidence on record. The appeal has merit and thus, deserves to be allowed.
- For the respondents has submitted that three statutory authorities under the Consolidation Act have recorded the concurrent finding of fact that Chandra Deo Singh and Smt. Shakuntala were living together for a long time. Their relationship as husband and wife had been accepted by the Society as well as the family members. In many official documents, name of Chandra Deo Singh has been shown as the father of the respondents. In the beginning, Chandra Deo Singh did not disclose the relationship with Smt. Shakuntala because of social conditions that the Society may not accept their relationship even after the death of his wife Smt. Sonbarsa.

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Both the respondents were born out of their relationship. Appeal A lacks merits and is liable to be dismissed.

6. We have considered the rival submissions made by learned counsel for the parties and perused the record.

In fact, statutory authorities under the Consolidation Act enjoys the powers of the Civil Court as well as the Revenue Court as all matters pending before the Civil Court stand abated once a notification of initiation of proceedings under the Consolidation Act is issued. Authorities under the Consolidation Act have been conferred powers of the Civil Court to adjudicate upon any matter of title or right to inherit the property etc.

Undoubtedly, there are concurrent findings of facts recorded by three authorities under the Consolidation Act after appreciating the entire evidence on record. The authorities have recorded following findings of facts:-

- (I) Chandra Deo Singh was having relationship with Smt. Shakuntala for long time;
- (II) After the death of his wife Sonbarsa in 1945, Chandra Deo Singh had live-in-relationship with Smt. Shakuntala and started living as husband and wife:
- (III) Chandra Deo Singh started living with Smt. Shakuntala in a different village namely, Murdah in 1960-1961.
- (IV) Their relationship continued till the death of Chandra Deo Singh on 31.12.1979 and therefore, they lived together as husband and wife for a long period;
- (V) The respondents and other four daughters were born out of this relationship between Chandra Deo Singh and Smt. Shakuntala; and

A (VI) Their relationship as husband and wife had been accepted not only by the Society but also by the family members.

7. The aforesaid concurrent findings of facts recorded by the authorities under the Consolidation Act have been affirmed by the High Court though without having full-fledged appreciation of evidence. The High Court reached the conclusion that findings of facts recorded by three courts below did not require re-appreciation of evidence and further that no interference was required with same in exercise of writ jurisdiction.

8. Shri Mahabir Singh, learned Senior counsel appearing for the appellants persuaded us to have recourse to the unusual procedure submitting that in spite of concurrent findings of facts
D by courts below, this Court must appreciate the evidence itself for the reason that findings of facts so recorded are perverse. He has placed a very heavy reliance on the documents the appellants have submitted and contended that the said documents are admissible under Section 35 of the Indian Evidence Act, 1872 (hereinafter called the 'Evidence Act') and mere reading of those documents would not leave any doubt that the findings recorded by the courts- below are contrary to the evidence on record. In order to substantiate his submission, he has placed reliance on large number of judgments of this Court.

However, before entering into any law, we would like to examine the documents which are so heavily relied by learned Senior counsel. The documents so placed on record are basically School Leaving Certificates, School Registers, Voter Lists and other documents prepared by the authorised persons in exercise of their official duty. Annexure P-1(Colly) is the copy of Electoral Rolls for Legislative Assembly of the three consecutive elections. The particulars of Smt. Shakuntala had been shown therein as under:-

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MADAN MOHAN SINGH AND ORS. v. RAJNI KANT 41 AND ANR. [DR. B.S. CHAUHAN, J.]

Electoral Rolls for year o		S.No.	Α
House No. Mother's	Name & Father/	Husband/	
Name	Male/Female	Age	
1975	128	20 S m t .	В
Shakuntala-Saraswati	Female	34	
1979	138	20 S m t .	
Shakuntala-Saraswati	Female	36	
1980	157	20 S m t .	С
Shakuntala-Saraswati	Female	41	

9. These entries are very relevant to determine the controversy regarding the date of birth of the respondents and other family members. As per the first document in Annex.P-1 D (Colly), Smt. Shakuntala should have been born in 1941 as she was 34 years of age in 1975. As per the 2nd list she should have been born in 1943 as she was 36 years of age in 1979. Immediately, after one year in 1980 she became 41 years of age and according to this document she should have been born E in 1939.

There is so much inconsistency that these documents cannot be read together for the reason that in 1979 if Smt. Shakuntala was 36 years of age, in 1980 she had been shown 41 years of age. So, after expiry of one year, her age had gone up by 5 years.

10. Annexure P-3 has been filed as the copy of the report prepared by the Tahsildar in view of the order passed by the competent court dated 31.7.1984. According to that Asha Devi, Gaughter of Smt. Shakuntala and sister of respondents was born on 7.7.1951. Therefore, if Smt. Shakuntala as per the first document was born in 1941, question of giving birth to Asha could not arise at the age of 10 years. If we go by the second document of 1979, Smt. Shakuntala was born in 1943 and she

A could not have given birth to Asha in 1951 at the age of 8 years. According to the third document, Smt. Shakuntala was 41 years of age in 1980. So, at the time of birth of Asha, Smt. Shakuntala was 12 years of age. Same is the position in respect of Savitri, another daughter of Smt. Shakuntala. As per Annexure P-4, School Leaving Certificate, her date of birth has been recorded as 1.9.1949. If this document is taken to be true and age of Smt. Shankutala is taken from Annex.P-1 (Colly), we will have to record a finding of fact that Smt. Shakuntala gave birth to Savitri at the age of 6 years.

11. Now we come to the most material evidence (Annex. P-8) submitted by the appellants in respect of age of Rajni Kant, respondent No.1. The said document is a Certificate for practicing Unani medicine and therein his date of birth has been shown as 15.7.1940. If this document is taken to be true and compared with the document contained in Annexure P-1 (Colly) wherein Smt. Shakuntala had been shown 34 years of age in 1975 and 36 years of age in 1979, it becomes arithmetically clear that Smt. Shakuntala had given birth to him even prior to her own birth.

12. The aforesaid documents placed on record by the appellants and so heavily relied upon by them, if taken into consideration, they would simply lead not only to improbabilities and impossibilities but absurdity also. It is most unfortunate that none of the courts below had analysed these documents in this manner while taking them into consideration and none of the lawyers have thought it proper to bring these most glaring facts to the notice of and of the courts.

13. In State of Bihar & Ors. Vs. Radha Krishna Singh & Ors. AIR 1983 SC 684, this Court dealt with a similar contention and held as under:—

"Admissibility of a document is one thing and its probative value quite another - these two aspects cannot be combined. A document may be admissible and yet may

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not carry any conviction and weight of its probative value A may be nil....

Where a report is given by a responsible officer, which is based on evidence of witnesses and documents and has "a statutory flavour in that it is given not merely by an administrative officer but under the authority of a Statute, its probative value would indeed be very high so as to be entitled to great weight.

The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little."

14. Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in Ram Prasad Sharma Vs. State of Bihar AIR 1970 SC 326; Ram Murti Vs. State of Haryana AIR 1970 SC 1029; Dayaram & Ors. Vs. Dawalatshah & Anr. AIR 1971 SC 681; Harpal Singh & Anr. Vs. State of Himachal Pradesh AIR 1981 SC 361; Ravinder Singh Gorkhi Vs. State of U.P. (2006) 5 SCC 584; Babloo Pasi Vs. State of Jharkhand & Anr. (2008) 13 SCC 133; Desh Raj Vs. Bodh Raj AIR 2008 SC 632; and Ram Suresh Singh Vs. Prabhat Singh @Chhotu Singh & Anr. (2009) 6 SCC 681. In these cases, it has been held that even if the entry was made in an official record by the concerned official in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases.

15. Such entries may be in any public document, i.e. school register, voter list or family register prepared under the Rules and Regulations etc. in force, and may be admissible under H

A Section 35 of the Evidence Act as held in *Mohd. Ikram Hussain* Vs. The State of U.P. & Ors. AIR 1964 SC 1625; and Santenu Mitra Vs. State of West Bengal AIR 1999 SC 1587.

16. So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entry in School Register/ School Leaving Certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.

17. For determining the age of a person, the best evidence is of his/her parents, if it is supported by unimpeccable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeccable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, Government Hospital/Nursing Home etc, the entry in the school register is to be discarded. (Vide: *Brij Mohan Singh Vs. Priya Brat Narain Sinha & Ors.* AIR 1965 SC 282; *Birad Mal Singhvi Vs. Anand Purohit* AIR 1988 SC 1796; *Vishnu Vs. State of Maharashtra* (2006) 1 SCC 283; and *Satpal Singh Vs. State of Haryana* JT 2010 (7) SC 500).

18. If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) or Sections 50,51,59,60 and 61, etc. of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time etc. mentioned therein. (Vide: *Updesh Kumar & Ors. Vs. Prithvi Singh & Ors.,* (2001) 2 SCC 524; and *State of Punjab Vs. Mohinder Singh,* AIR 2005 SC 1868).

19. In S. Khushboo Vs. Kanniammal & Anr. (2010) 5 SCC

600, this Court, placing reliance upon its earlier decision in *Lata Singh Vs. State of U.P. & Anr.* AIR 2006 SC 2522, held that live-in-relationship is permissible only in unmarried major persons of heterogeneous sex.

- 20. In S.P.S. Balasubramanyam Vs. Suruttayan @ Andali Padayachi & Ors. AIR 1992 SC 756, this Court held that if man and woman are living under the same roof and cohabiting for a number of years, there will be a presumption under Section 114 of the Evidence Act, that they live as husband and wife and the children born to them will not be illegitimate.
- 21. The courts have consistently held that the law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for a number of years. However, such presumption can be rebutted by leading unimpeachable evidence. (Vide: Mohabbat Ali Khan Vs. Mohd. Ibrahim Khan, AIR 1929 PC 135; Gokalchand Vs.. Parvin Kumar, AIR 1952 SC 231; S.P.S. Balasubramanyam Vs. Suruttayan, (1994) 1 SCC 460; Ranganath Parmeshwar Panditrao Mali Vs. Eknath Gajanan Kulkarni, (1996) 7 SCC 681; and Sobha Hymavathi Devi Vs. Setti Gangadhara Swamy & Ors., (2005) 2 SCC 244).
- 22. In view of the above, the kind of material placed by the appellants on record cannot be termed enough to disbelieve the claim of the respondents. The findings of facts recorded by the courts below cannot be disturbed on this material. The appellants' case has been that the respondents were born prior to 1960 i.e. prior to the year Chandra Deo Singh started living with Smt. Shakuntala. As per the Annexure P1 (Colly), Smt. Shakuntala was born near about 1941. If the documents filed by the appellants are taken to be true, we will have to record a finding of fact that Smt. Shakuntala gave birth to her two daughters, namely, Asha and Savitri, when she was only 5-6 years of age and in case, the Certificate of Rajni Kantrespondent no.1, contained in Annexure P8 is taken to be true

A and is considered in the light of the documents contained in Annexure P1 (Colly), it could be arithmetically clear that Smt. Shakuntala had given birth to Rajni Kant, respondent No. 1 on 15.7.1940, i.e., even prior to her own birth in 1941. If all the said documents are accepted, they would simply lead not only to improbabilities and impossibilities but absurdity also. It is most unfortunate that none of the courts below had analysed documents in correct perspective. The live-in-relationship if continued for such a long time, cannot be termed in as "walk in and walk out" relationship and there is a presumption of marriage between them which the appellants failed to rebut.

23. In view of the above, the appeal does not present special facts and circumstances which may warrant further reappreciation of the evidence as the appeal is based on totally unreliable/contradicting documents and not worth placing any reliance. It is accordingly dismissed. No cost.

B.B.B.

Appeal dismissed.

MEGHMALA & ORS.

V.

G. NARASIMHA REDDY & ORS. (Civil Appeal Nos.6656-57 of 2010)

AUGUST 16, 2010

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

Andhra Pradesh Land Grabbing (Prohibition) Act, 1982:

Suit land purchased by appellant/applicant by way of a registered sale deed – Challenge not made by anyone as to the validity of the sale deed – In earlier proceedings, respondents claiming right over suit land – However, not producing any document to show their right, interest or title in the suit land – Order attaining finality to the effect that there was no misrepresentation or fraud or suppression of material fact on the part of the appellant in respect of his claim over suit land – Fresh proceedings by respondents raising issue of fraud – Held: Would be tantamount to malicious prosecution as the issue had earlier been adjudicated upon – Finding of facts was recorded in earlier proceedings that the appellant was in actual possession of land and was illegally dispossessed by the respondents – Land grabbing.

s.10 – Allegation of land grabbing – Burden to prove innocence – Held: Is on the accused – It is not like any other F criminal case where accused is presumed to be innocent unless the guilt is proved – Criminal law – Burden of proof.

Review: Review application – Maintainability of – Held: In case a review application is filed before filing the special leave petition and the review application remains pending till the dismissal of the special leave petition, then the review application deserves to be considered – However, if a review application is filed subsequent to dismissal of the special

A leave petition, the process of filing review application would amount to abuse of process of the court and such an application is not maintainable – Administration of justice – Abuse of process of law.

Judgment/order: Obtained by playing fraud on court – Validity of – Held: An act of fraud on court is always viewed seriously – Order obtained by making misrepresentation or playing fraud upon the competent authority not valid in the eyes of law – Fraud is an anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata – Equity – Fraud on court.

The suit land was purchased by the appellant/ applicant by way of registered sale deed dated 21.5.1980. D The appellant filed a complaint under the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 against the respondents stating that they grabbed his land and raised construction thereon. The plea raised by the respondents was that in respect of the suit land, there was an agreement to sell dated 23.01.1976, in favour of a Society which had allotted the land in their favour. therefore, the vendors of the appellant had no right to transfer the land in favour of the appellant. The Special Court by order dated 4.11.1997 held that the appellant was the owner of the suit land and that the respondents were land grabbers. The respondents filed a writ petition before the High Court which was dismissed. Thereafter the respondents filed special leave petition before this Court which was dismissed as withdrawn giving liberty to the respondents to file review petition before the High Court. The respondents filed a review petition before the High Court which was dismissed. Thereafter, in pursuance of the order in execution proceedings passed on 7.11.2002, the appellant was put into possession of

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the suit land on 16.12.2002. The respondents filed writ A petitions challenging the order dated 7.11.2002 which were dismissed by the High Court by order dated 17.12.2002. The review petitions filed thereagainst before the High Court, were also dismissed.

In 2005, the respondents filed a review application before the Special Court seeking review of the order dated 4.11.1997. The respondents subsequently filed the applications before the Special Court for fresh declaration that they were the owners. The Special Court dismissed the said applications. The High Court allowed the writ petitions filed by the respondents and directed the Special Court to decide the applications afresh on merits, as in the opinion of the High Court, the applications required certain inquiry on factual matters and the claim of the respondents could not have been rejected merely on the determination and attaining finality of orders in earlier proceedings. The instant appeals were filed challenging the order of the High Court.

Allowing the appeals, the Court

HELD: 1.1. In case a litigant files a review application before filing the special leave petition before this Court and it remains pending till the special leave petition stands dismissed, the review application deserves to be considered. However, if a review application is filed subsequent to dismissal of the special leave petition, the process of filing review application amounts to abuse of process of the court. Filing of such a review application by the respondents at a belated stage amounts to abuse of process of the court and such an application is not maintainable. Thus, the High Court ought not to have entertained the writ petition against the order of dismissal of the review application by the Special Court and the order of the High Court to that extent is liable to be set aside. [Para 17-18] [66-D-G]

M/s. Kabari Pvt. Ltd. v. Shivnath Shroff & Ors. AIR 1996 SC 742; State of Maharashtra & Anr. v. Prabhakar Bhikaji Ingle AIR 1996 SC 3069; Raj Kumar Sharma v. Union of India (1995) 2 Scale 23; Sree Narayana Dharmasanghom Trust v. Swami Prakasananda & Ors. AIR 1997 SC 3277; K. Ajit Babu & Ors. v. Union of India & Ors. (1997) 6 SCC 473; Gopabandhu Biswal v. Krishna Chandra Mohanty & Ors. AIR 1998 SC 1872; Abbai Maligai Partnership Firm & Anr. v. K. Santhakumaran & Ors. AIR 1999 SC 1486; Kunhayammed & Ors. v. State of Kerala & Anr. AIR 2000 SC 2587; National Housing Coop. Society Ltd. v. State of Rajasthan & Ors. (2005) 12 SCC 149; K. Rajamouli v. A.V.K.N. Swamy AIR 2001 SC 2316; M/s. Green View Tea & Industries v. Collector, Golaghat, Assam & Anr. AIR 2004 SC 1738; Kumaran Silk Trade (P) Ltd. v. Devendra AIR 2007 SC 1185, relied on.

D 2.1. The applications filed by the respondents before the Special Court for fresh declaration that they were the owners, were based on the grounds that the earlier judgment and order were obtained by the appellant/ applicant suppressing the material facts and the suit land E was not identified properly. However, the respondents had never been able to show as to under what circumstances they were interested in the suit land because before the Special Court in the first round, they failed to show any document that land had ever been transferred by the tenure-holders/owners in favour of the Society or the Society had made any allotment in their favour or they were members of the said Society or they obtained any sanction from statutory authority to raise the construction. [Paras 19, 30] [66-G-H; 70-B-C]

2.2. It is settled proposition of law that where an applicant gets an order/office by making at misrepresentation or playing fraud upon the competent authority, such order cannot be sustained in the eyes of

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law. Fraud is an act of deliberate deception with a design A to secure something, which is otherwise not due. The expression "fraud" involves two elements, deceit and injury to the person deceived. It is a way of cheating intended to get an advantage. An act of fraud on court is always viewed seriously. A collusion or conspiracy with B a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case deception may not amount to fraud, fraud is an anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. Even in judicial proceedings, once a fraud is proved, all advantages gained by playing fraud can be taken away. In such an eventuality, the questions of nonexecuting of the statutory remedies or statutory bars like doctrine of res judicata are not attracted. Suppression of any material fact/document amounts to a fraud on the court. Every court has an inherent power to recall its own order obtained by fraud, as the order so obtained is non est. [Paras 20, 25, 26, 27, 28] [67-B; 68-D-E; G-H; 69-A-F]

S.P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. & Ors. AIR 1994 SC 853; Lazarus Estate Ltd. v. Besalay 1956 AII. E.R. 349; Andhra Pradesh State Financial Corporation v. M/s. GAR Re-Rolling Mills & Anr. F AIR 1994 SC 2151; State of Maharashtra & Ors. v. Prabhu (1994) 2 SCC 481; Smt. Shrisht Dhawan v. M/s. Shaw Brothers AIR 1992 SC 1555; United India Insurance Co. Ltd. v. Rajendra Singh & Ors. AIR 2000 SC 1165; District Collector & Chairman, Vizianagaram Social Welfare GResidential School Society, Vizianagaram & Anr. v. M. Tripura Sundari Devi (1990) 3 SCC 655; Union of India & Ors. v. M. Bhaskaran (1995) Suppl. 4 SCC 100; Vice Chairman, Kendriya Vidyalaya Sangathan & Anr. v. Girdharilal Yadav (2004) 6 SCC 325; State of Maharashtra v. Ravi Prakash

A Babulalsing Parmar (2007) 1 SCC 80; Himadri Chemicals Industries Ltd. v. Coal Tar Refining Company AIR 2007 SC 2798; Mohammed Ibrahim & Ors. v. State of Bihar & Anr. (2009) 8 SCC 751: Dr. Vimla v. Delhi Administration AIR 1963 SC 1572; Indian Bank v. Satyam Fibres (India) Pvt. Ltd. (1996) 5 SCC 550: State of Andhra Pradesh v. T. Suryachandra Rao AIR 2005 SC 3110; K.D. Sharma v Steel Authority of India Ltd. & Ors. (2008) 12 SCC 481; Regional Manager, Central Bank of India v Madhulika Guruprasad Dahir & Ors. (2008) 13 SCC 170; Gowrishankar & Anr. v. Joshi Amba Shankar Family Trust & Ors. AIR 1996 SC 2202; Ram Chandra Singh v. Savitri Devi & Ors. (2003) 8 SCC 319; Roshan Deen v. Preeti Lal AIR 2002 SC 33: Ram Preeti Yadav v. U.P. Board of High School & Intermediate Education AIR 2003 SC 4628; Ashok Leyland Ltd. v. State of Tamil Nadu & Anr. AIR 2004 SC 2836; Kinch v. Walcott (1929) AC 482 28 - relied on.

2.3. There was a registered sale deed dated 21.5.1980 in favour of the appellant/applicant. Nobody had ever filed any application before the competent court to declare E said sale deed as null and void. The issue of misrepresentation/fraud, suppression of material fact and identification of land was in issue in earlier review petitions before the Special Court and in the writ petitions before the High Court. In this regard, the Special Court in execution proceedings was fully satisfied regarding the identity of land on the basis of revenue record and came to the conclusion that there was no misrepresentation or fraud on the part of the appellant/ applicant. The Society claimed to have an agreement to sell in its favour which did not confer any title in favour of the Society. A finding of fact had been recorded in earlier proceedings that the appellant/applicant was in actual physical possession of the land and he was illegally/forcibly dispossessed by the respondents. [Paras 31, 33] [72-B-C; 70-E-G]

3. A person in illegal occupation of the land has to be evicted following the procedure prescribed under the law. Even a trespasser cannot be evicted forcibly. The State authorities cannot become the law unto themselves. Even they cannot dispossess a person by an executive order. Government can resume possession only in a manner known to or recognised by law and not otherwise. The forcible eviction of the appellant/applicant by the respondents was unwarranted and unlawful. The proceedings were initiated under the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982. It is a special Act to prevent illegal activities of land grabbing. The Legislature, in its wisdom, constituted a Special Court presided over by a person who is or is eligible to be the Judge of the High Court, and consisting of Members who are or are eligible to become a District Judge and District Collector. Therefore, persons having enough experience and who have acquired a higher status have been given responsibility to adjudicate upon the disputes under the Act. That Special Court has been conferred with the powers of civil or criminal courts. As per the provisions of Section 10 of the Act, the burden of proof is on the accused to prove that he is not guilty. Thus, it is not like any other criminal case where accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right, however, it is subject to the statutory exceptions, and the said principle forms the basis of criminal jurisprudence. For this purpose, the nature of offence, its seriousness and gravity thereof has to be taken into consideration. Statutes like Negotiable Instruments Act, 1881; Prevention of Corruption Act, 1988; and Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. Thus, the Legislature has adopted a deviating

A course from ordinary criminal law shifting the burden on the accused to prove that he was not guilty. The High Court while deciding these cases has not considered the issue of the locus standi of the respondents to maintain the application for eviction of the appellant/applicant. Chagrined and frustrated litigants should not be permitted to give vent to their frustrations by cheaply invoking the jurisdiction of the court. The court proceedings ought not to be permitted to degenerate into a weapon of harassment and persecution. [Paras 34, 36, 37] [72-D-H; 73-B-H; 74-A-B]

Midnapur Zamindary Co. Ltd. v. Naresh Narayan Roy
AIR 1924 PC 124; Lallu Yeshwant Singh v. Rao Jagdish
Singh & Ors. AIR 1968 SC 620; Ram Ratan v. State of U.P.
AIR 1977 SC 619; Express Newspapers Pvt. Ltd. & Ors. v.
Union of India & Ors. AIR 1986 SC 872; Krishna Ram Mahale
v. Mrs. Shobha Vankat Rao AIR 1989 SC 2097; Nagar
Palika, Jind v. Jagat Singh AIR 1995 SC 1377; Bishan Das
v. State of Punjab AIR 1961 SC 1570; State of U.P. & Ors. v.
Maharaja Dharmander Prasad Singh & Ors. AIR 1989 SC
997; State of West Bengal & Ors. v. Vishnunarayan &
Associates (P) Ltd. & Anr. (2002) 4 SCC 134, relied on.

Case Law Reference:

_	AIR 1996 SC 742	relied on	Para 9
F	AIR 1996 SC 3069	relied on	Para 10
	(1995) 2 Scale 23	relied on	Para 11
	AIR 1997 SC 3277	relied on	Para 11
G	(1997) 6 SCC 473	relied on	Para 11
	AIR 1998 SC 1872	relied on	Para 11
	AIR 1999 SC 1486	relied on	Para 12

(2003) 8 SCC 319

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AIR 2000 SC 2587	relied on	Para 13	Α	Α	AIR 2002 SC 3
(2005) 12 SCC 149	relied on	Para 14			AIR 2003 SC 4
AIR 2001 SC 2316	relied on	Para 15			AIR 2004 SC 2
AIR 2004 SC 1738	relied on	Para 15	В	В	(1929) AC 482
AIR 2007 SC 1185	relied on	Para 16			AIR 1924 PC 1
AIR 1994 SC 853	relied on	Para 20			AIR 1968 SC 6
1956 All. E.R. 349	relied on	Para 20	0	0	AIR 1977 SC 6
AIR 1994 SC 2151	relied on	Para 21	С	С	AIR 1986 SC 8
(1994) 2 SCC 481	relied on	Para 21			AIR 1989 SC 2
AIR 1992 SC 1555	relied on	Para 22			AIR 1995 SC 1
AIR 2000 SC 1165	relied on	Para 23	D	D	AIR 1961 SC 1
(1990) 3 SCC 655	relied on	Para 24			AIR 1989 SC 9
(1995) Suppl. 4 SCC 100	relied on	Para 24			(2002) 4 SCC
(2004) 6 SCC 325	relied on	Para 24	E	Е	CIVIL APPE
(2007) 1 SCC 80	relied on	Para 24			6656-6657 of 20
AIR 2007 SC 2798	relied on	Para 24			From the Judicatu
(2009) 8 SCC 751	relied on	Para 24	F	F	Petition Nos. : 19
AIR 1963 SC 1572	relied on	Para 25		-	P. Vishwanat
(1996) 5 SCC 550	relied on	Para 25			for the Appellants
AIR 2005 SC 3110	relied on	Para 25	0	0	M.V. Durga Suyodhan, Amar
(2008) 12 SCC 481	relied on	Para 25	G	G	Krishna Reddy, S
(2008) 13 SCC 170	relied on	Para 25			The Judgme
AIR 1996 SC 2202	relied on	Para 26			DR. B.S. CH

Para 26

relied on

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Α	AIR 2002 SC 33	relied on	Para 26
	AIR 2003 SC 4628	relied on	Para 26
	AIR 2004 SC 2836	relied on	Para 26
В	(1929) AC 482	relied on	Para 27
	AIR 1924 PC 124	relied on	Para 34
	AIR 1968 SC 620	relied on	Para 34
0	AIR 1977 SC 619	relied on	Para 34
С	AIR 1986 SC 872	relied on	Para 34
	AIR 1989 SC 2097	relied on	Para 34
	AIR 1995 SC 1377	relied on	Para 35
D	AIR 1961 SC 1570	relied on	Para 36
	AIR 1989 SC 997	relied on	Para 36
	(2002) 4 SCC 134	relied on	Para 36

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 6656-6657 of 2010.

From the Judgment & Order dated 26.04.2007 of the High Court of Judicature of Andhra Pradesh at Hyderabad in Writ Petition Nos.: 19963 and 19962 of 2006.

- P. Vishwanatha Shetty, G. Seshagiri Rao, Sridhar Potaraju for the Appellants.
- M.V. Durga Prasad, G. Ramakrishna Prasad, B. Suyodhan, Amar Pal, Bharat J. Joshi, T. Anamika, D. Rama Krishna Reddy, Sanjai Kumar Pathak for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Leave granted.

- 2. Judicial pronouncements unlike sand dunes are known for their stability/finality. However, in this case, in spite of the completion of several rounds of litigation upto the High Court, and one round of litigation before this Court, the respondents claim a right to abuse the process of the Court with the perception that whatever may be the orders of the High Court or this Court, inter-se parties the dispute shall be protracted and will never come to an end.
- 3. These appeals have been preferred against the Judgment and Order dated 26.04.2007 of the High Court of Andhra Pradesh, at Hyderabad, passed in Writ Petition Nos. 19962-19963 of 2006, by which the High Court has allowed the said petitions against the Judgment and order of the Special Court under the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 (hereinafter called, "Act 1982"), dismissing the review application No. 397/2005 in LGC No. 76/1996 and in LGCSR 357/2005.
- 4. Facts and circumstances giving rise to the present cases are as under:-
- (A) V. Ram Chandra Reddy and his brother (vendors) had a huge chunk of land and a part of it could have been the subject matter of the provisions of Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter called the Act 1976). The said vendors entered into an agreement to sell dated 23.01.1976 for selling a part of the land (hereinafter called 'suit land') to a cooperative society namely, Gruha Lakshmi Cooperative Housing Society Ltd. (hereinafter called, "the Society"). The vendors, V. Ram Chandra Reddy and his brother executed a sale deed in favour of A. Sambashiva Rao (hereinafter called the appellant/applicant) which was registered on 21.05.1980 vide document No. 4758/80 and the appellants were put in possession of the suit land.
- (B) The appellant/applicant- vendee filed LGC No. 76/1996 against the respondents under the provisions of the Act, 1982

- A alleging that he had been working in Andhra Pradesh State Road Transport Corporation and was mostly out of station, and the respondents had forcibly grabbed his land and raised construction thereon. Thus, he sought the relief of their dispossession and action against them under the provisions of the Act, 1982.
- (C) After complying with the requirements of the statutory provisions i.e. taking the sanction etc., the respondents were issued a show cause notice. The respondents filed their reply submitting that in respect of the suit land, there was an agreement to sell, dated 23.01.1976, in favour of the society and once such an agreement to sell had been executed, vendors had no right to transfer the land in favour of the appellant/applicant. The society had allotted the suit land in their favour, therefore, the application was liable to be rejected.
 - (D) The Special Court after appreciating the evidence, vide Judgment and order dated 4.11.1997 came to the conclusion that the appellant/applicant was the owner of the suit land and that the respondents had no right, title or claim over the suit land. They had forcibly occupied the land and they were land grabbers, thus, they were liable to be evicted and orders for that purpose were passed.
- (E) Being aggrieved by the order of the Special Court dated 4.11.1997, the respondents preferred writ petition No. 33572/1997 before the High Court of Andhra Pradesh, which was dismissed vide Judgment and Order dated 3.07.2001.
- (F) Being aggrieved by the order of the High Court, the respondents preferred Special Leave Petition (c) No. 18218/
 G 2001 before this Court, which was dismissed as withdrawn vide order dated 2.11.2001 giving liberty to the respondents to file review petition before the High Court.
 - (G) The respondents filed review petition No. 31506/2002

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before the High Court. However, the said review petition was A dismissed by the High Court vide order dated 16.12.2002.

- (H) In the intervening period, when the review petition was pending before the High Court, the appellant/applicant filed execution proceedings by moving IA No. 518/2002. The Respondents also moved an application to summon the record of the Revenue Divisional Officer, Secundrabad, pertaining to the survey of the suit land along with an application for the stay of Execution proceedings. The Special Court vide order dated 7.11.2002 allowed the Execution Application filed by the appellant/applicant but dismissed the application filed by respondents directing the Revenue Divisional Officer to implement the order dated 4.11.1997.
- (I) The respondents being aggrieved by the common order dated 7.11.2002, filed writ petition nos. 22953 and 23105 of D 2002, which were, dismissed by the High Court vide order dated 17.12.2002.
- (J) In pursuance of the order in Execution Proceedings dated 7.11.2002, the appellants were put into possession of the suit land on 16.12.2002.
- (K) The respondents being aggrieved by the order of the High Court dated 17.12.2002, preferred review petitions before the High Court, which were dismissed by the Court vide order dated 17.11.2003.
- (L) The respondents filed Review Application no. 397/2005 in LGC No. 76 after an inordinate delay, seeking review of the order dated 4.11.1997. The respondents subsequently filed an application in LGCSR No. 357/2005 before the Special Court for fresh declaration that they were the owners and that the appellants, who had succeeded throughout the litigation, were the land grabbers. The respondents in the said application impleaded persons other than the appellant/applicant also, i.e. the vendors of the appellant/applicant and govt. officials etc.,

- A who are the other appellants in these cases. The Special Court dismissed the said applications vide orders dated 6.7.2006 and 11.7.2006.
- (M) The respondents, being aggrieved by both the orders, filed Writ Petition Nos. 19962 and 19963 of 2006, which have been allowed by the High Court vide impugned Judgment and order dated 26.04.2007, directing the Special Court to decide both the applications afresh on merit, as in the opinion of the High Court, the applications required certain inquiry on factual matters and the claim of the respondents could not have been rejected merely on the determination and attaining finality of orders in earlier proceedings. Hence, these appeals.
- 5. Sh. P. Vishwanatha Shetty, learned senior counsel appearing for the appellants, has submitted that even if there D was an agreement to sell by the vendor of the appellants in favour of the society, such an agreement did not confer any title in the suit land in their favour. The respondents had not been the members of the said Society, nor had any allotment ever been made by the Society in their favour. The earlier proceedings came to an end after having several rounds of litigation upto the High Court and one round upto this Court. The orders passed therein attained finality and in pursuance of the same, the appellant/applicant came into possession of the suit land. Issues of fraud and identification of land had been in issue in some of the earlier proceedings. Once the respondents had approached this Court, the question of entertaining the review petition after an inordinate delay of 7-8 years does not arise. The respondents have no locus standi to ask the Special Court to determine under what circumstances the appellant/applicant had obtained the suit land. An application to call for certain records in respect of the suit land from 1972 to 2002, the survey reports etc. cannot be made by them. The High Court has gravely erred in interfering with the orders of the Special Court rejecting both the applications. Thus, the appeals deserve to be allowed. Н

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6. Per contra, Sh. M.V. Durga Prasad, learned counsel A appearing for the respondents submitted that the transfer of land in favour of the appellant/applicant vide registered sale deed dated 21.05.1980 was itself a fraudulent transaction and material in this regard was suppressed from the Special Court while obtaining the orders in their favour. Fraud vitiates everything. The respondents have raised the issue of the identification of the suit land. Thus, the applications filed by the respondents were maintainable and the High Court has rightly reversed the orders passed by the Special Court. The appeals lack merit and no interference is warranted by this Court.

7. We have considered the rival submissions made by the learned counsel for the parties and perused the record.

Admittedly, there is a registered sale deed in favour of the appellant/applicant dated 21.05.1980 and there may be an agreement to sell in favour of the society dated 23.01.1976. It is settled legal proposition that an agreement to sell does not create any right, or title in favour of the intending buyer. The Society did not file suit for specific performance against the vendors prior to the execution of sale deed in favour of the appellant/applicant on 21.05.1980. The Special Court, after appreciating the entire evidence on record, came to the conclusion that the appellant/applicant was the owner and was in actual physical possession of the land and that the respondents had grabbed the said land. The Special Court has observed as under:-

"In the cross-examination, RW1 (respondent No.1 herein) had to admit that they have not filed any document to show that the said plot was allotted in their favour by the society and that they have not filed any document to show that they are the members of the said society. He also admitted that without any municipal sanction or permission, they raised the construction in the scheduled land."

The Special Court further held that the respondents were

A land grabbers within the meaning of the Act, 1982 and thus, they were directed to restore the premises to the appellant/applicant. These findings of fact had been affirmed upto the High Court.

8. The record of the case reveals that respondents have filed review petitions before the Special Court as well as before the High Court. However, all the applications had been dismissed by the Courts concerned. The respondents again filed an application seeking review of the order dated 4.11.1997. Section 17-A of the Act, 1982 provides that in order to prevent the miscarriage of justice, a review application can be entertained on the grounds that the order has been passed under a mistake of fact, ignorance of any material fact or an error apparent on the face of law. Limitation for filing the review application before the Special Court has been prescribed under Rule 18 of the Andhra Pradesh Land Grabbing (Prohibition) Rules, 1988, as 30 days from the date of the order of which the review is sought. The respondents had earlier challenged the said order dated 4.11.1997 before the High Court, as well as before this Court. Review petitions had been filed before the Special Court, as well as before the High Court. Thus, question does arise as to whether it is permissible for a litigant to file a review application after approaching the superior forum/court.

Review – After approaching the Higher Forum:-

9. In *M/s. Kabari Pvt. Ltd. Vs. Shivnath Shroff & Ors.* AIR 1996 SC 742, this Court had taken a view that the court cannot entertain an application for review if before making the review application, the superior court had been moved for getting the self-same relief, for the reason that for the self-same relief two parallel proceedings before the two forums cannot be taken.

10. In State of Maharashtra & Anr. Vs. Prabhakar Bhikaji Ingle AIR 1996 SC 3069, this Court held that when a special leave petition from the order of the Tribunal was dismissed by

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a non-speaking order, the main order was confirmed by the A Court. Thereafter, the power of review cannot be exercised by the Tribunal as it would be "deleterious to the judicial discipline".

11. Same view has been reiterated by this Court in *Raj Kumar Sharma Vs. Union of India* (1995) 2 Scale 23; *Sree Narayana Dharmasanghom Trust Vs. Swami Prakasananda* & Ors. AIR 1997 SC 3277; *K. Ajit Babu & Ors. Vs. Union of India & Ors.* (1997) 6 SCC 473; and *Gopabandhu Biswal Vs. Krishna Chandra Mohanty & Ors.* AIR 1998 SC 1872.

12. In *Abbai Maligai Partnership Firm & Anr. Vs. K. Santhakumaran & Ors.* AIR 1999 SC 1486, a three Judge Bench of this Court considered the issue afresh and held that filing of the review petition after dismissal of the special leave petition by it against the self-same order amounted to an abuse of process of the court and the entertainment of such a review D application was in affront to its order and it was subversive of judicial discipline.

13. In Kunhayammed & Ors. Vs. State of Kerala & Anr. AIR 2000 SC 2587, a three Judge Bench of this Court reconsidered the issue and all above referred judgments and came to the conclusion that dismissal of special leave petition in limine by a non-speaking order may not be a bar for entertaining a review petition by the court below for the reason that this Court may not be inclined to exercise its discretion under Article 136 of the Constitution. The declaration of law will be governed by Article 141 where the matter has been decided on merit by a speaking judgment. In that case doctrine of merger would come into place and lay down the following principles:-

(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision

A by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.

C (iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The D superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction Ε disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the

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Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

14. The Court came to the conclusion that where the matter has been decided by a non-speaking order in limine the party may approach the High Court by filing a review petition.

Similar view has been reiterated in *National Housing Coop. Society Ltd. Vs. State of Rajasthan & Ors.* (2005) 12 SCC 149.

15. In *K. Rajamouli Vs. A.V.K.N. Swamy* AIR 2001 SC 2316, this Court considered the ratio of the judgment in *Kunhayammed* (supra); and *Abbai Maligai Partnership Firm* (supra) and held that if a review application has been filed before the High Court prior to filing the special leave petition before this Court and review petition is decided/rejected, special leave petition against that order of review would be maintainable. In case the review application has been filed subsequent to dismissal of the special leave petition it would amount to abuse of process of the court and shall be governed by the ratio of the judgment in *Abbai Maligai Partnership Firm* (supra). The said judgment has been approved and followed by this Court in *M/s. Green View Tea & Industries Vs. Collector, Golaghat, Assam & Anr.* AIR 2004 SC 1738.

16. In Kumaran Silk Trade (P) Ltd. Vs. Devendra AIR

A 2007 SC 1185, this Court held as under :-

"As a matter of fact at the earlier stage this Court did not consider the question whether one of the appeals against the order dismissing the Review Petition on merits was maintainable. At best the order of remand and the decision in *Kunhayammed & Ors. v. State of Kerala & Anr.* (2000) 6 SCC 359 would enable the petitioner to get over the ratio of the three Judge Bench decision in *Abbai Maligai Partnership Firm & Anr. v. K. Santhakumaran & Ors.* (1998) 7 SCC 386 that the seeking of a review after the petition for special leave to appeal was dismissed without reserving any liberty in the petitioner was an abuse of process."

17. Thus, the law on the issue stands crystallized to the D effect that in case a litigant files a review petition before filing the Special Leave Petition before this Court and it remains pending till the Special Leave Petition stands dismissed, the review petition deserves to be considered. In case it is filed subsequent to dismissal of the Special Leave Petition, the Process of filing review application amounts to abuse of process of the court.

18. In view of the above, we are of the considered opinion that filing of such a review application by the respondents at a belated stage amounts to abuse of process of the Court and such an application is not maintainable. Thus, the High Court ought not to have entertained the writ petition against the order of dismissal of the review application by the Special Court and the order of the High Court to that extent is liable to be set aside.

19. So far as the other application filed by the respondents before the Special Court is concerned, it is based on the grounds that earlier judgment and order had been obtained by the appellant/applicant suppressing material facts and the suit land had not been identified properly, and therefore, the

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judgment of the Special Court duly affirmed by the High Court A stood vitiated.

Fraud/Misrepresentation: -

- 20. It is settled proposition of law that where an applicant gets an order/office by making misrepresentation or playing fraud upon the competent Authority, such order cannot be sustained in the eyes of law. "Fraud avoids all judicial acts ecclesiastical or temporal." (Vide S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. & Ors. AIR 1994 SC 853). In Lazarus Estate Ltd. Vs. Besalay 1956 All. E.R. 349), the Court observed without equivocation that "no judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for fraud unravels everything."
- 21. In Andhra Pradesh State Financial Corporation Vs. M/s. GAR Re-Rolling Mills & Anr. AIR 1994 SC 2151; and State of Maharashtra & Ors. Vs. Prabhu (1994) 2 SCC 481, this Court observed that a writ Court, while exercising its equitable jurisdiction, should not act as to prevent perpetration of a legal fraud as the courts are obliged to do justice by promotion of good faith. "Equity is, also, known to prevent the law from the crafty evasions and sub-letties invented to evade law."
- 22. In *Smt. Shrisht Dhawan Vs. M/s. Shaw Brothers.* AIR 1992 SC 1555, it has been held as under:—

"Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It is a concept descriptive of human conduct."

23. In *United India Insurance Co. Ltd. Vs. Rajendra Singh & Ors.* AIR 2000 SC 1165, this Court observed that "Fraud and justice never dwell together" (*fraus et jus nunquam cohabitant*) and it is a pristine maxim which has never lost its temper over all these centuries.

A 24. The ratio laid down by this Court in various cases is that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and in such circumstances the Court should not perpetuate the fraud. (See District Collector & Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram & Anr. Vs. M. Tripura Sundari Devi (1990) 3 SCC 655; Union of India & Ors. Vs. M. Bhaskaran (1995) Suppl. 4 SCC 100; Vice Chairman, Kendriya Vidyalaya Sangathan & Anr. Vs. Girdharilal Yadav (2004) 6 SCC 325; State of Maharashtra v. Ravi Prakash Babulalsing Parmar (2007) 1 SCC 80; Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company AIR 2007 SC 2798; and Mohammed Ibrahim & Ors. Vs. State of Bihar & Anr. (2009) 8 SCC 751).

25. Fraud is an intrinsic, collateral act, and fraud of an egregious nature would vitiate the most solemn proceedings of courts of justice. Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. The expression "fraud" involves two elements, deceit and injury to the person deceived. It is a cheating intended to get an advantage. (Vide *Dr. Vimla Vs. Delhi Administration* AIR 1963 SC 1572; *Indian Bank Vs. Satyam Fibres (India) Pvt. Ltd.* (1996) 5 SCC 550; *State of Andhra Pradesh Vs. T. Suryachandra Rao* AIR 2005 SC 3110; *K.D. Sharma Vs. Steel Authority of India Ltd. & Ors.* (2008) 12 SCC 481; and F Regional Manager, Central Bank of India Vs. Madhulika Guruprasad Dahir & Ors. (2008) 13 SCC 170).

26. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void *ab initio*. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including *res judicata*. Fraud is proved when

it is shown that a false representation has been made (i) A knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false. Suppression of a material document would also amount to a fraud on the court. (Vide S.P. Changalvaraya Naidu (supra); Gowrishankar & Anr. Vs. Joshi Amba Shankar Family Trust & Ors. AIR 1996 SC 2202; Ram B Chandra Singh Vs. Savitri Devi & Ors. (2003) 8 SCC 319; Roshan Deen Vs. Preeti Lal AIR 2002 SC 33; Ram Preeti Yadav Vs. U.P. Board of High School & Intermediate Education AIR 2003 SC 4628; and Ashok Leyland Ltd. Vs. State of Tamil Nadu & Anr. AIR 2004 SC 2836).

27. In *kinch Vs. Walcott* (1929) AC 482, it has been held that "....mere constructive fraud is not, at all events after long delay, sufficient but such a judgment will not be set aside upon mere proof that the judgment was obtained y perjury."

Thus, detection/discovery of constructive fraud at a much belated stage may not be sufficient to set aside the judgment procured by perjury.

- 28. From the above, it is evident that even in judicial proceedings, once a fraud is proved, all advantages gained by playing fraud can be taken away. In such an eventuality the questions of non-executing of the statutory remedies or statutory bars like doctrine of *res judicata* are not attracted. Suppression of any material fact/document amounts to a fraud on the court. Every court has an inherent power to recall its own order obtained by fraud as the order so obtained is *non est*.
- 29. The instant case required to be examined in the light of the aforesaid settled legal propositions.

The case of the respondents has been that transfer by the vendor in favour of the appellant was not genuine. Material information had been suppressed from the Special Court. More so, there was no proper identification of the suit land in the

A earlier litigation. The reports submitted in this regard were not correct.

30. Respondents have never been able to show as under what circumstances they are interested in the suit land because before the Special Court in the first round they failed to show any document that land had ever been transferred by the tenure holders/owners in favour of the Society or the Society had made any allotment in their favour or they were member of the said Society or they obtained any sanction from statutory authority to raise the construction.

Shri M.V. Durga Prasad, Ld. Counsel appearing for the said respondents was repeatedly asked by us to show any document on record linking the said respondents with the suit land. Though, he argued for a long time, raised large number of issues but could not point out a single document which may reflect that respondents could have any claim on the suit land. Therefore, we are of the considered opinion that the application at their behest was not maintainable.

al. The issue of mis-representation/fraud, suppression of material fact and identification of land had been in issue in earlier review petitions before the Special Court and in the Writ Petitions before the High Court. In this regard, the Special Court in execution proceedings was fully satisfied regarding the identity of land on the basis of revenue record and came to the conclusion that there was no mis-representation or fraud on the part of the appellant/applicant. The order of the Special Court dated 11th July, 2006 made it clear that all these issues had been agitated in earlier proceedings. The Special Court has held as under:

"The applicants herein as contended in this L.G.C. have filed IA No.869/2002 for stay of proceedings and IA No. 861/2002 for summoning the record in File No.B/9815/97 from the office of the Revenue Divisional Officer on the ground of alleged fraud played by the Mandal Revenue

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Officer and the Mandal Surveyor. Those petitions were heard at length and were dismissed holding that the alleged fraud as contended by the applicants herein was not made out and the property which is the subject matter of L.G.C. No.76/96 should be delivered to the respondents herein by evicting the applicants. As mentioned already, in execution of the said order, applicants herein were evicted and possession was delivered to the respondents.

Admittedly, the common order passed in IA Nos. 518/2002, 861/2002 and 869/2002, by this Court was questioned by the applicants herein by filing Writ Petitions before the Hon'ble High Court of A.P. and the same was also dismissed holding that the *applicants herein are trying to protract the litigation* and to delay the delivery of possession of the property in question to the respondents."(emphasis added)

32. In another case decided by the Special Court vide order dated 6th July, 2006 the Court had taken note of the pleadings in respect of identification of land and misrepresentation/fraud/collusion in the earlier proceedings and the observations made by the Writ Court in its order dated 17th December, 2002 that the said respondents were interested in protracting the litigation and obstructing the implementation of the order of the Special Court dated 4.11.1997. The said order had been passed in Application No. 51 of 2002 where one of the main grounds had been that the appellant/applicant had played fraud in obtaining the said order as is taken note of in paragraph 13 of the said order by the Special Court. The Special Court also took note of earlier direction to the Revenue Divisional Officer to identify the land and possession of the same was delivered to the decree holder. The said order was under challenge before the High Court in Writ Petition Nos. 22953/2002 and 23105/2002 wherein pleading of the alleged fraud and mis-identification of suit land were taken. The Special Court came to the conclusion that there was no suppression A of any fact by the revenue authorities or the court was misled at the time of obtaining such orders.

33. There is a registered sale deed dated 21.5.1980 in favour of the appellant/applicant. Nobody has ever filed any application before the competent court to declare said sale deed as null and void. Respondents have no right or interest in the suit property. The Society claimed to have an agreement to sell in its favour which did not confer any title in favour of the Society. A finding of fact had been recorded in earlier proceedings that the appellant/applicant was in actual physical possession of the land and he was illegally/forcibly dispossessed by the respondents.

Forcible dispossession:-

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34. Even a trespasser cannot be evicted forcibly. Thus, a person in illegal occupation of the land has to be evicted following the procedure prescribed under the law. (Vide Midnapur Zamindary Co. Ltd. Vs. Naresh Narayan Roy AIR 1924 PC 124; Lallu Yeshwant Singh Vs. Rao Jagdish Singh & Ors. AIR 1968 SC 620; Ram Ratan Vs. State of U.P. AIR 1977 SC 619; Express Newspapers Pvt. Ltd. & Ors. Vs. Union of India & Ors. AIR 1986 SC 872; and Krishna Ram Mahale Vs. Mrs. Shobha Vankat Rao AIR 1989 SC 2097).

35. In Nagar Palika, Jind Vs. Jagat Singh AIR 1995 SC F 1377, this Court observed that Section 6 of the Specific Relief Act 1963 is based on the principle that even a trespasser is entitled to protect his possession except against the true owner and purports to protect a person in possession from being dispossessed except in due process of law.

36. Even the State authorities cannot dispossess a person by an executive order. The authorities cannot become the law unto themselves. It would be in violation of the rule of law. Government can resume possession only in a manner known to or recognised by law and not otherwise. (Vide *Bishan Das*

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Vs. State of Punjab AIR 1961 SC 1570; Express Newspapers Pvt. Ltd. (supra); State of U.P. & Ors. Vs. Maharaja Dharmander Prasad Singh & Ors. AIR 1989 SC 997; and State of West Bengal & Ors. Vs. Vishnunarayan & Associates (P) Ltd. & Anr. (2002) 4 SCC 134).

37. The forcible eviction of the appellant/applicant by the respondents was unwarranted and unlawful. Proceedings had been initiated under the Act, 1982. It is a special Act to prevent illegal activities of land grabbing. The Legislature, in its wisdom, constituted a Special Court presided over by a person who is or eligible to be the Judge of the High Court, and consisting of the Members who are or eligible to become District Judge and District Collector. Therefore, persons having enough experience and who have acquired a higher status have been given responsibility to adjudicate upon the disputes under the Act 1982. That Special Court has been conferred with the powers of Civil or Criminal Courts.

As per the provisions of Section 10 of the Act 1982, the burden of proof is on the accused to prove that he is not guilty. Thus, it is not like any other criminal case where accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right, however, subject to the statutory exceptions, the said principle forms the basis of Criminal Jurisprudence. For this purpose, the nature of offence, its seriousness and gravity thereof has to be taken into consideration. Statutes like Negotiable Instruments Act, 1881; Prevention of Corruption Act, 1988; and Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those Statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. Thus, the Legislature has adopted a deviating course from ordinary criminal law shifting the burden on the accused to prove that he was not guilty. The High Court while deciding these cases has not considered the issue of the locus standi of the respondents to maintain the application for eviction of A the appellant/applicant. Chagrined and frustrated litigants should not be permitted to give vent to their frustrations by cheaply invoking the jurisdiction of the court. The court proceedings ought not to be permitted to degenerate into a weapon of harassment and persecution.

- 38. In view of the above factual position, we reach the following conclusions:
- (i) There has been a registered sale deed in favour of the appellant/applicant by the vendors which was registered on 21.5.1980 and he was put in possession.
 - (ii) Prior to the execution of the said sale deed there has been an agreement to sell dated 23.1.1976 in favour of the Society.
 - (iii) In respect of the said agreement to sell the litigation remained pending before the Civil Court but there is nothing on record to show as to what had been its outcome.
- (iv) An agreement to sell did not confer any right on the
 E Society, though the appellant acquired the title over the suit land
 by execution and registration of the sale deed dated
 21.5.1980.
 - (v) The respondents had not been the members of the Society nor Society made any allotment in their favour.
 - (vi) Before the Special Court, the respondents could not show as under what circumstances they could stake their claim on the suit land and no document worth the name could be shown which may link them to the suit land.
 - (vii) Respondents grabbed the suit land forcibly and raised a construction without any authorisation.
 - (viii) In spite of our repeated queries, learned counsel for the respondents could not point out a single document on

MEGHMALA & ORS. v. G. NARASIMHA REDDY & 75 ORS. [DR. B.S. CHAUHAN, J.]

record to show that they could have any right, interest or title in A the suit land.

- (ix) The litigation completed several rounds before the High Court and this is the second round of litigation before this Court.
- (x) All the courts proceedings reveal that after proper adjudication the declaration had been made that suit land belonged to the appellant/applicant and respondents were merely land grabbers.
- (xi) In earlier review petitions filed by the respondents C before the Special Court and further taking the matter to the High Court in Writ Petitions and Review Applications before the High Court the issue of mis-representation/fraud/collusion and mis-identification of the suit land had been raised but they could not succeed.
- (xii) In execution proceedings, the appellant/applicant succeeded and came in possession of the suit land in 2002.
- (xiii) Respondents filed frivolous application raising the issue of fraud and mis-identification of the suit land which had earlier been adjudicated upon. The review application was filed at much belated stage.
- (xiv) The review application was certainly not maintainable as the respondents had approached the higher forum and it merely amounted to abuse of process of the court.
- (xv) The respondents had been interested only to protract the litigation by one way or the other.
- (xvi) Fresh proceedings taken by the respondents before G the Special Court in fact, is tantamount to malicious prosecution.
- 39. The High Court failed to take all aforesaid factors into consideration before passing impugned judgment and order.

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40. In view of the above, we are of the considered opinion Α that judgment and order of the High Court impugned herein, is not sustainable in the eyes of law. The appeals are allowed. The judgment of the High Court dated 26.4.2007 is set aside and the judgments and orders dated 6.7.2006 and 11.7.2006 passed by the Special Court are restored. No costs.

D.G. Appeals allowed.

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CHAKALI MADDILETY & ORS.

V.

STATE OF ANDHRA PRADESH (Criminal Appeal No. 25 of 2007)

AUGUST 16, 2010

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

Penal Code 1860 – ss. 302 and 148 – Murder and rioting armed with deadly weapons – Conviction and sentence under, by courts below – Interference with – Held: Not called for – C FIR was lodged most promptly and all accused persons were named – Consistent evidence of eye witnesses that accused were armed with daggers and knives and they encircled the deceased and caused him injuries – Said version corroborated by medical evidence –Depositions of close D relative relevant – It cannot be discarded merely because they are relatives – Also prosecution case cannot be discarded on the ground of non-examination of independent witnesses of the locality –Acquittal of two persons since there was no evidence of deceased being hit by stone or stick – Evidence – Witnesses – Constitution of India, 1950 – Article 136.

According to the prosecution case, 'HN' and the accused were on inimical terms. On the fateful day, A1, A3, A5, A6 and A7 armed with daggers and A2 armed with stick surrounded 'HN' and his son 'HR'. A1 stabbed 'HN' with the dagger causing injuries. Thereafter, they took the deceased in the injured condition near the mosque and caused him serious injuries. PW-3, PW-4 and PW-5 reached the place of occurrence after hearing the cries of PW-1, the son, and PW-2, the wife, of the victim. The accused then fled away. 'HN' later succumbed to his injuries. The trial court convicted A1, A3, A5, A6 and A7

A of offence punishable u/s 302 IPC and sentenced them to life imprisonment and a fine of Rs.1,000/- each. They were also convicted u/s. 148 IPC and sentenced to one year RI and fine of Rs.500/- each. Both the sentences were directed to run concurrently. A2 and A4 were acquitted of all the charges. The High Court upheld the order. Hence, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 The FIR was lodged promptly within a C period of 2 ½ hours, though, the distance between the place of occurrence and the police station was about 15 kms. All the appellants had been named in the FIR. As per the post mortem report, 13 ante-mortem injuries were found on the body of the deceased. As per the medical evidence, the cause of death was shock and hemorrhage due to multiple injuries. [Para 8] [83-C; 84-E]

1.2 An earlier incident had occurred on 4.11.1998 between the deceased and A1 and A5, thus the deceased was inimical to them. PW-3, PW-4 and PW5 came to the spot after hearing the hue and cry made by PW-1 and PW-2 thus, they could not be eye-witnesses of the actual incident. Therefore, the trial court brushed aside their depositions. PW-6 and PW-7 who were the witnesses of inquest on the dead body, were declared hostile and, therefore, they did not support the case of the prosecution. The trial court came to the conclusion that in spite of the fact that PW-1 and PW-2 were family members of the deceased and a dispute had arisen on 4.11.1998, few days before the incident, between the deceased and A1 and A5 though there may be a possibility to enrope some persons falsely, the question of leaving the real culprits for causing the death of the deceased out of the FIR could not arise. All the persons involved in the case were from the same village. There H was no contradiction in the version in the FIR and the

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statement u/s. 161 Cr.P.C. 1973, of PW-1 and PW-2 and A the case also stood corroborated by the medical evidence. However, the trial court rightly acquitted A2 and A4 in view of the fact that there was no evidence of the deceased being hit by stone and stick. [Para 9] [84-F-H; 85-A-C]

- 1.3 The depositions of close relatives cannot be discarded merely because they are relatives, but their evidence has to be considered with due care and caution. In a case like this, independent witnesses may not come forward to depose, as out of fear, people prefer to run away from the place of occurrence and avoid witnessing the crime, but that does not mean that the case can be discarded only on the ground of non-examination of independent witnesses of the locality. [Para 9] [85-D-E]
- 1.4 The evidence of PW-1 and PW-2 had been consistent that the accused were armed with daggers and knives. They encircled the deceased and PW-1 and caused injuries to the deceased. Their version stands fully corroborated by the medical evidence. Thus, the case to the extent that the appellants stabbed the deceased with dagger and knife stood proved. There is no cogent reason to interfere with the concurrent findings of fact on this issue. The case does not warrant any review of the judgments and orders of the courts below. [Paras 12 and 13] [87-D-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 25 of 2007.

From the Judgment & Order dated 09.03.2004 of the High G Court of Judicature Andhra Pradesh at Hyderabad in Criminal Appeal No. 289 of 2002.

R. Sundaravaradan, S.J. Aristottle, Prabhu Ramasubrmanian, V. G. Pragasam for the Appellants.

A Anoop G. Choudhari, Narada Das (for C.K. Sucharita) for the Respondent.

The Judgment of the Court was delivered by

- DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the judgment and order of the High Court of Andhra Pradesh at Hyderabad, dated 9.3.2004, by which it has dismissed Criminal Appeal No. 289 of 2002, affirming the judgment and order dated 12.2.2002 passed by the Sessions Court, Kurnool in Sessions Case No. 830/1999, convicting the appellants under Sections 302 and 148 of the Indian Penal Code, 1860 (hereinafter called as "IPC") and sentencing them to undergo life imprisonment and one year R.I. respectively.
- 2. Facts and circumstances giving rise to this appeal are that accused (A1 to A7) and Harijana Ayyanna (hereinafter called as "deceased") were residents of village G. Singavaram. On 8.2.1999 at about 7.30 PM, the deceased along with his wife Harijana Ayyamma (PW.2) and son, Harijana Ramakrishna (PW.1) went to the clinic of Dr. Ramana for treatment of Harijana Ayyamma (PW.2) and while they were coming back and reached near the house of Anjaneya Goud at about 8.00 p.m., accused (A1 to A7) suddenly appeared on the spot. A1, A3, A5, A6 and A7 were armed with daggers and A2 was armed with a stick. They surrounded the deceased and his son Harijana Ramakrishna (PW.1). A1 abused the deceased and stabbed on his back with a dagger causing injuries and then A2 to A7 carried the deceased towards the mosque and threw him on the road near it. A1, A3, A5, A6 and A7 stabbed the deceased on his chest, stomach and back with daggers. A2 beat the deceased with a stick and A4 caused injury on his head with a stone. Harijana Ramakrishna (PW.1) and Harijana Ayyamma (PW.2) made hue and cry as a result of which Harijana Sekhar (PW.3), P. Muniswamy (PW.4) and A. Samuel (PW.5) reached the place of occurrence and all the accused fled away from there. PWs. 1 to 5 took the deceased in a vehicle to the Government Hospital, Kurnool, however, he

succumbed to the injuries at about 9.30 p.m. Harijana Ramakrishna (PW.1), son of the deceased filed the F.I.R. (Ext. P-1) in Kurnool Taluk Police station and Crime No.16 of 1999 was registered. T.Naganna (PW.9), the Investigating Officer drew up the panchanama of the scene of offence and held an inquest on the dead body at the hospital in presence of witnesses Molakapogu Daveedu (PW.6) and Molakapogu Harijana Pakkiranna (PW.7) and the dead body was sent for post mortem. In the post mortem report, Dr. L.C. Obulesu (PW.10) found 13 ante-mortem injuries on the body of the deceased. After completing the investigation, T. Naganna (PW.9) filed the charge sheet against the accused persons and they were put to trial.

- 3. The learned Sessions Judge, Kurnool, after conclusion of the trial, found A1, A3, A5, A6 and A7 guilty of offences punishable under Sections 148 and 302 IPC. They were sentenced to life imprisonment and a fine of Rs.1,000/- each for an offence punishable under Section 302 IPC and one year RI and fine of Rs.500/- each for an offence punishable under Section 148 IPC. However, both the sentences were directed to run concurrently. The Court acquitted A2 and A4 of all the charges.
- 4. Being aggrieved, the appellants preferred Criminal Appeal No.289 of 2002 before the High Court, which has been dismissed vide impugned judgment and order dated 9.3.2004. Hence, this appeal.
- 5. Shri R. Sundaravaradan, learned senior counsel appearing for the appellants, has submitted that in view of the evidence of alleged eye-witnesses, namely, Harijana Ramakrishna (PW.1) and Harijana Ayyamma (PW.2), two accused namely, Chakali Krishna (A2) and Chakali Sreenivasulu (A4) had been acquitted by the Trial Court. Harijana Sekhar (PW.3) and Muniswamy (PW.4) and A. Samuel (PW.5) had been disbelieved by the Trial Court. Molakapogu Daveedu (PW.6) and Molakapogu Harijana

A Pakkiranna (PW.7) turned hostile and did not support the prosecution. In fact, A2 and A4 had caused fatal injury No.1 on the head. In such a fact-situation there was no occasion for the courts below to convict the appellants. More so, it is nobody's case that all the accused persons came with deadly weapons. Therefore, the question of application of the provisions of Section 148 IPC could not arise. The entire incident occurred in two parts. First, the deceased was hit near the house of Anjaneya Goud and a second time, when as alleged, the appellants caused serious injuries after taking the deceased in injured condition near the mosque. In case there is no evidence that all the appellants were armed with weapons at the time of the first part of the incident, in absence of any evidence that they had been supplied the arms by somebody else in between, question of causing serious injuries in the second part stands falsified. Had the incident been as alleged by the prosecution, at least, Harijana Ramakrishna (PW.1), son of the deceased, as he was 24 years of age, could have intervened and made attempt to protect his father. The incident occurred in a residential area, no independent witness was examined. All these factors have not been considered by the courts below in correct perspective. Therefore, the appeal deserves to be allowed.

6. On the contrary, Shri Anoop G. Choudhari, learned senior counsel appearing for the State, has submitted that two courts have recorded concurrent findings of fact. The Trial Court had an opportunity to examine the demeanour of the witnesses and assess their credibility. The Trial Court, after assessing the evidence on record, reached the conclusion that A2 and A4 had falsely been enroped in the crime. Therefore, they had been acquitted. However, on the basis of the depositions of Harijana Ramakrishna (PW.1) and Harijana Ayyamma (PW.2) the appellants have been convicted and the High Court has affirmed their conviction. The findings of fact as recorded by the courts below cannot be held to be so perverse as to warrant interference by this Court. Had Harijana Ramakrishna (PW.1),

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the son of the deceased tried to intervene and protect the A deceased, there was a possibility of receiving grievous injuries or he could have also faced death at the hands of the appellants. The FIR has been lodged promptly. Appellants were known to the complainant. They had been named in the FIR. In such a fact-situation, appeal lacks merit and is liable to be dismissed.

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- 7. We have considered the rival submissions made by learned counsel for the parties and perused the record.
- 8. Admittedly, FIR was lodged promptly within a period of C. 2 ½ hours, though, the distance between the place of occurrence and the police station was about 15 kms. All the appellants had been named therein. As per the post mortem report, following 13 ante-mortem injuries were found on the dead body of the deceased:-
 - "1. Lacerated wound on right side head, back part of parietal area. Obliquely placed 7 x 1 ½ cms x scalp layer deep with a fracture of left parietal bone 13 cms in width, contusion of brain with fracture of base of skull in mid cranial fossa 12 cms in length.
 - 2. Incised wound on right eye-brow 4 x 1 cms x bone deep.
 - 3. Stab wound on front of right side chest right nipple. Oblique, 4 ½ x 1 ½ cms x chest cavity deep cutting the 4th rib.
 - 4. Stab wound on left side chest below left nipple obliquely 4 ½ x 1 ½ cms x chest cavity depth cutting ribs 4th and 5th.
 - 5. Stab wound on front of right upper abdomen outer part 4 x 1 ½ cms x abdomen deep, cutting the intestines.
 - 6. Stab wound on front of left side abdomen, near the midline, oblique, 4 ½ x 1 ½ cms x abdomen cavity deep, cutting the liver.

- Incised wound on back of left upper are near the Α shoulder 4 x 1 ½ cms x 3 cms muscle deep.
 - Abrasion with contusion on the back of left elbow and fore-arm 6 x 4 cms red in colour.
- Incised would on outer part of left leg near the knee B 4 x 1 ½ cms x bone deep.
 - 10. A stab wound on upper part of right buttock 4 ½ x 1 ½ x 5 cms muscle deep.
- C 11. A stab wound on the back of chest upper part, near the spine upper thoracic 4 ½ x 1 ½ cms x vertebra deep.
 - 12. Stab injuries 4 in number on the back of middle of chest 2 on right side of thoracic spine, 2 on left side measuring 4 x 1½ cms, 4 ½ x 1 cms, 4 ½ x 1 ½ cms, 4 ½ x 1 cms chest cavity deep.\
 - 13. Stab wound on back left side chest lower and outer part obliquely 4 ½ x 1 ½ cms x chest cavity the ribs and injured the left side lung tissues.
- Ε As per the medical evidence the cause of death was shock and hemorrhage due to multiple injuries.
- 9. The Trial Court, after appreciating the evidence on record, came to the conclusion that the FIR had been lodged most promptly and all the appellants were named therein. An earlier incident had occurred on 4.11.1998 between the deceased and A1 & A5, thus the deceased was inimical to them. Harijana Sekhar (PW.3), Muniswamy (PW.4) and A.Samuel (PW.5) came to the spot after hearing the hue and cry made by Harijana Ramakrishna (PW.1) and Harijana Ayyamma (PW.2), thus they could not be eye-witnesses of the actual incident. Therefore, the Trial Court brushed aside their depositions. Molakapogu Daveedu (PW.6) and Molakapogu Harijana Pakkiranna (PW.7), who were the witnesses of inquest on the dead body, were declared hostile and, therefore, they

CHAKALI MADDILETY & ORS. v. STATE OF ANDHRA 85 PRADESH [DR. B.S. CHAUHAN, J.]

did not support the case of the prosecution. The Trial Court A came to the conclusion that in spite of the fact that Harijana Ramakrishna (PW.1) and Harijana Ayyamma (PW.2) were family members of the deceased and a dispute had arisen on 4.11.1998, few days before the incident, between the deceased and Chakali Maddilety (A1) and Chakali Lakshmanna (A5), though there may be a possibility to enrope some persons falsely, the question of leaving the real culprits for causing the death of the deceased out of the FIR could not arise. All the persons involved in the case were from the same village. There was no contradiction in the version in the FIR and the statement under Section 161 of Code of Criminal Procedure, 1973, of PW.1 and PW.2 and the case also stood corroborated by the medical evidence. Therefore, the Trial Court acquitted Chakali Krishna (A2) and Chakali Sreenivasulu (A4) in view of the fact that there was no evidence of the deceased being hit by stone and stick. The depositions of close relatives cannot be discarded merely because they are relatives, but their evidence has to be considered with due care and caution. In a case like this, independent witnesses may not come forward to depose. as out of fear, people prefer to run away from the place of occurrence and avoid witnessing the crime, but that does not mean that the case can be discarded only on the ground of nonexamination of independent witnesses of the locality.

10. The Trial Court considered the application of Section148 IPC elaborately and held:

"With regard to participation of A1, A3, A5 to A7, PW1, PW2 who are the eye witness who actually witnessed the incident specifically stated that A1 and A3, A5 to A7, formed into an unlawful assembly to commit rioting and A1 stabbed Ayyanna on his back with a dagger at first place of occurrence itself. The medical evidence of PW10 who conducted P.M. examination over the dead body of deceased also shows that he found an incised wound on the back of left upper arm near the shoulder 4 x 1 ½ cms muscle deep in size under injury No. 1. So, the injury No.

7 mentioned in Ex. P14 P.M.report is the injury said to Α have caused on the back of deceased by A1 with dagger. Therefore, the medical evidence is totally corroborating the ocular testimony PW1, PW2 with regard to stab injury caused on the back of deceased by A1 in front of the house of Ediga Anihanevulu Goud. In Ex.P1 complaint also. PW1/ В complainant specifically mentioned, that A1 stabbed the deceased on back with a dagger pushing him aside and his mother (PW2) aside. Therefore, basing on the consistent evidence of PW1, PW2 coupled with medical evidence of PW10 and Ex. P14 it can safely be held that C A1, A3, A5 to A7 formed into an unlawful assembly to commit rioting against Ayyanna, in prosecution of common object, A1 stabbed Ayyanna (deceased) thereby A1, A3,

Regarding 2nd incident of murderous assault against Ayyanna (deceased) PW1, PW2 specifically deposed that all the accused stabbed Ayyanna (deceased) indiscriminately. In such case, it is very difficult to attribute any specific overt acts against any of the accused. The overt acts theory cannot be applied, when more number of persons stabbed a single individual indiscriminately. The medical evidence under Ex.P14 and oral evidence of PW10 also lending support to the ocular testimony of PW1, PW2. The P.M. Doctor PW10 found as many as 13 injuries, out of the said injuries, injury No. 2 to 7 and 9 to 13 are stab and incised wound with similar measurements. Therefore, all the above injuries 2 to 7 and 9 to 13 could have been caused with same type of weapon and said fact was spoken by PW10 in his evidence."

A5 to A7 committed the offence punishable under Sec. 148 of IPC. Accordingly, they are liable to be convicted.

Thus, the case to the extent that the appellants stabbed the deceased with dagger and knife stood proved.

11. The High Court considered the issue of application of Section 148 IPC and observed:

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"The first issue that arises for consideration is whether the offence under Section 148 IPC is made out against the accused. The evidence of PWs. 1 and 2 clearly establishes that the accused, who were in inimical terms with the deceased and PW.1, were all at the scene on the night of the incident and they have virtually encircled them duly armed with daggers and stick. It is also the evidence of PWs 1 and 2 in categorical terms that the accused even gave blow with the daggers on the back of the deceased and thereafter they lifted the deceased bodily and took him near the mosque by which time on account of the cries of PWs. 1 and 2, PWs. 3 to 5 came at the scene. Under those circumstances the finding of the learned Ist Additional District and Sessions Judge, Kurnool that the offence under Section 148 IPC established, cannot be found fault with."

12. We have been taken through the evidence of Harijana Ramakrishna (PW.1) and Harijana Ayyamma (PW.2) and they had been consistent that the accused were armed with daggers and knives. They encircled the deceased and Harijana Ramakrishna (PW.1) and caused injuries to the deceased. Their version stands fully corroborated by the medical evidence. Thus, we do not find any cogent reason to interfere with the concurrent findings of fact on this issue. The Submission made by Shri Sundaravaradan, learned senior counsel, has no merit and thus not worth acceptance.

On other issues both the courts below have considered the submissions made by the defence and rejected them. We are in full agreement with the said findings of fact.

13. In view of the above, we are of the considered opinion that the present case does not warrant any review of the G judgments and orders of the courts below. The appeal lacks merit and is accordingly dismissed.

N.J. Appeal dismissed.

A VIRENDER PRASAD SINGH

v.

RAJESH BHARDWAJ & ORS.

(Criminal Appeal No. 1526 of 2010)

AUGUST 16, 2010

[V.S. SIRPURKAR AND CYRIAC JOSEPH, JJ.]

Code of Criminal Procedure, 1973 - s. 482 - Accused charge sheeted for offences punishable u/s. 302, 201 and C 120-B IPC - Petition u/s. 482 seeking re-investigation of matter by another agency - Direction by High Court for reexamination of the completed investigation by officer of the rank of Director General of Police - On appeal, held: The Court has to decide the question of fairness of investigation D - Charge sheet was already filed and nothing was shown suggesting that there was a necessity of any further investigation, additional investigation or investigation by some other agency - Merely because there appeared to be no supervision of DIG level or IG level officer, High Court could not have simply called for the opinion of DGP without recording any finding on any justification - Lack of bona fides on the part of accused should have put High Court on guard - Order of High Court set aside - Penal Code, 1860 - ss. 302, 201 and 120-B.

Respondent no. 1 was facing charges for commission of offences punishable u/ss. 302, 201 and 120-B IPC. He filed a petition u/s. 482 Cr.P.C. seeking reinvestigation of the matter by another agency. Meanwhile, the chargesheet was filed. The High Court directed reexamination of the completed investigation by an officer of the rank of Director General of Police and stayed the trial of the criminal case. Therefore, the appellant-complainant filed the instant appeal.

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Allowing the appeal, the Court

HELD: 1.1 The High Court took a very strange and extremely unusual course, whereby the counsel for the respondent No. 1-accused, who had filed the petition under section 482 Cr.P.C. before the High Court, was asked to give a proposal of three names of the police officers of the DGP rank for examining the records of the completed investigation, wherein even the charge sheet was already filed. Similar choice seems to have been given even to the counsel for the appellant-informant to suggest some names. The appellant-informant (respondent before the High Court) did not choose to give any name, with the result that the High Court went on to select one IPS for assistance in the matter. [Paras 2] [93-B-D]

1.2 Firstly, there was no basis for the parties to have suggested the names of the police officers of the DGP rank. Secondly, the opinion expressed by any such officer would not have been relevant in the decision as to whether the investigation was proper or not. The High Court went only on the consideration that there was no supervision report at the instance of the DIG of Police or Inspector General, Railway or DGP. Merely, because there appeared to be no supervision of the DIG level or IG level officer, the High Court could not have simply called for the opinion of DGP without recording any finding on any justification. No justification is seen whatsoever nor anything was shown. The stance of the High Court in issuing direction not to take any further step in the proceedings arising out of the case till 21.6.2010 is wholly unwarranted. [Paras 13, 14, and 18] [101-G-H; 102-F; 105-C-D1

1.3 The charge sheet had already been filed. It was not necessary for the High Court to seek opinion of the

A DGP unless the High Court had examined the charge sheet, and recorded its findings that the investigation was not properly conducted or it required further investigation under section 173 (8) Cr.P.C. The High Court did not even look into the charge sheet nor did it examine the same.
 B Nothing was shown before this Court or before the High Court suggesting that there was a necessity of any further investigation, additional investigation or investigation by some other agency. [Paras 15 and 18] [103-G-H; 105-B]

1.4 The High Court did not even consider the question of its own jurisdiction in the matter by conveniently observing that it is a matter which is to be considered at the stage of final hearing of the case. Therefore, it is clear that the High Court did not apply its mind also and pushed the matter upto 21.6.2010 for receiving the opinion from the DGP. The same was neither permissible nor warranted. [Para 17] [104-D-E]

1.5 It is also extremely surprising that respondent no. 1 moved the High Court firstly through his mother and secondly himself u/s. 482 Cr.P.C. instead of moving the Sessions Judge before whom the matter was pending. After all cognizance was taken by the Magistrate on the basis of the charge sheet. Thereafter, he also proceeded to commit the matter for trial by the Sessions Judge and the matter was pending before the Sessions Judge. The High Court should have seen through the incessant efforts on the part of respondent no. 1 to stall the proceedings one way or the other and to avoid arrest. It was way back in 2008 that the anticipatory bail application was rejected by this Court and yet the accused remained outside without being arrested. Again the investigation against him is complete, the charge sheet was filed for offence committed by him, and still he managed to remain out. The lack of bona fides on the part

of the accused should have put the High Court on guard. A The application under section 482 on the plea that the investigation is not proper, at the instance of the accused who does not choose even to appear before the Sessions Judge before whom the matter is pending, should have immediately put the High Court on guard B before entertaining the petition which has no bona fides whatsoever. [Paras 16 and 18] [104-B-C; 104-E-H]

1.6 The plea raised by the accused was not for further investigation under section 173 (8) Cr.P.C. but for re-investigation by some other agency. In the circumstances of the case, the accused had not justified his plea at all for re-investigation or investigation a fresh by another agency. On its own, the High Court did not go into that exercise to decide as to whether the investigation was required to be done by any other agency. It required help of DGP level officer and his opinion to decide whether the earlier investigation was done properly or not. To decide so was the task of the court alone and no opinion could have been sought for. particularly, in the circumstances of the case. Nothing seems to have been established which would justify calling for such opinion. Once the charge sheet was filed, ordinarily it could only be the power of the court to decide upon its correctness or otherwise. [Para 22] [106-G-H: 107-A-B1

1.7 The application filed u/s. 482 Cr.P.C. firstly by the mother of respondent no. 1 and then by respondent no. 1 himself, is not at all impressive. There is no reason why the High Court should have entertained such an application at all, particularly, in view of the complete lack of bona fides on the part of respondent no. 1. Therefore, the application was liable to be dismissed straightaway. Since technically the matter is still pending before the

A High Court, a direction is issued to the High Court to dismiss the same. The impugned order of the High Court is set aside. The Sessions Judge before whom the matter is pending would proceed with it in accordance with law. [Para 23] [107-C-E]

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Rubabbuddin Sheikh v. State of Gujarat and Ors. 2010 (2) SCC 200 - distinguished.

Mithabhai Pashabhai Patel and Anr. v. State of Gujarat 2009 (6) SCC 332; Ramachandran v. R. Udhayakumar 2008 (5) SCC 413, referred to.

Case Law Reference:

	2010 (2) SCC 200	Distinguished.	Para 19
D	2009 (6) SCC 332	Referred to.	Para 20
	2008 (5) SCC 413	Referred to.	Para 21

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1526 of 2010.

From the Judgment & Order dated 04.05.2010 of the High Court of Judicature at Patna in Cr. WJC. No. 394 of 2009.

U.U. Lalit, P.S. Mishra, A. Sharan, M. Khairati, Tulika Prakash (for Irshad Ahmad), Upendra Mishra, D.K. Pandey, T.H. Vardhan (for S. Chandra Shekhar), Manish Kumar (for Gopal Singh) for the appearing parties.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. Leave granted.

2. An extremely unusual order passed by the High Court has fallen for consideration in this appeal which has been filed on behalf of the appellant/complainant Virender Prasad Singh. The said order was passed on the basis of a petition filed by the respondent No. 1/accused Rajesh Bhardwaj who is facing

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the charges of very serious offences like provided under A Sections 302, 201 and 120 B of the Indian Penal Code (hereinafter referred to as "IPC" for short). By the impugned order, the learned Judge of the High Court has issued certain directions, whereby he has directed the re-examination of the completed investigation by an officer of the rank of Director General of Police (DGP). An extremely unusual course has been taken, whereby the counsel for the respondent No. 1/ accused, who had filed the petition under Section 482 before the High Court, was asked to give a proposal of three names of the police officers of the DGP rank for examining the records of the completed investigation, wherein even the charge sheet was already filed. Similar choice seems to have been given even to the counsel for the appellant/informant to suggest some names. The appellant/informant (respondent before the High Court) did not choose to give any name, with the result that the High Court went on to select one Mr. Manoj Nath, an IPS of 1973 Batch for assistance in the matter. The High Court observed:-

"This Court requests Mr. Manoj Nath to examine all the records of the case in detail and submit his report to this Court preferably within a period of one month with his clear opinion as to (i) whether investigation of the case is complete from all angles and case is fit to be tried on the basis of materials and report placed on record by the Investigating Officer only or (ii) whether there are some loopholes and lacunae in the investigation which necessitates further or fresh investigation of the case and if necessary by a more experienced and specialized agency, and/or (iii) what further steps, if any, are required to be taken in the case in the ends of justice, so that the guilty may not escape and the innocent may not suffer due to laches on the part of officers of the State. For consideration of Mr. Nath, parties are directed to make available the documents and materials which they have placed on record in the form of a properly indexed paper

book within two weeks. This Court expects from Mr. Nath Α that he will not get swayed away by any opinion of any officer or agency which may be available on record and shall completely ignore the pleadings of the parties. He will examine the documents and evidence of the witnesses available on record and form his independent opinion in В the matter. If necessary, under the authority of this Court, he may requisition any other documents and material connected with the case, in original or in the form of its carbon copy, from any other source or authority and upon his requisition, the same shall be made available to him C by all concerned, default of which shall be treated as contempt of this Court."

In the last paragraph of its order, the High Court held:-

D "Till 21st June, 2010, the Court concerned shall not take any further steps in the proceeding arising out of Arrah Rail GRP Case No. 73 of 2007."

The concerned criminal case was initiated by a First Information Report registered on 6.12.2007. It is an admitted position that the investigation had been completed and the police was going to submit the charge sheet dated 18.6.2009, but before that, the mother of the respondent No. 1/accused filed Crl. WJC No. 394 of 2009 before the High Court. In this petition, the prayer was for re-investigation of the matter by another agency. Eventually, the mother of the respondent No. 1/accused died and the respondent No. 1/accused was substituted for her, and it is only on that basis that the order has been passed.

G 3. The First Information Report refers to the incident which took place on 30.11.2007, according to which at 10 p.m. on that day, the accused went to the house of the deceased Sonu, the daughter of the appellant/complainant and left with the deceased on his motorcycle in presence of the witnesses.

H Since the deceased did not return home, the family members

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started searching for both. It has come on record that A subsequently at about 12.30 a.m., the deceased Sonu had talked to her mother's sister Dr. Anita and informed her that she was with the accused and would come back after getting married with him. On the very next day i.e. on 1.12.2007, at 7.15 a.m., the family members of the deceased were informed by the Railway Police that the dead body of the girl is lying on the side of the Railway track at Karisath Railway Station and her Mobile set bearing No. 9304915589 was also lying there. The complainant's brother Dr. Sanjeev reached the Railway Station and identified the body of the deceased. The deceased had injuries on her head and a portion of her leg was cut. Inquest Panchnama was executed by the Railway Police and the dead body was sent for postmortem. At this time, the complainant/ father of the deceased was out of station. After he returned home, he was informed about the deceased having been taken by the respondent No. 1/accused at night on 30.11.2007. On 6.12.2007, a written complaint was filed. It was disclosed in the said complaint that the deceased was in love with Rajesh Bhardwai, (respondent No. 1/accused) and wanted to get married with him and was persuading him for the last six months for marriage; However, the accused wanted to get rid of her, as he was having an affair with some other girl and it was due to this reason that the accused committed the murder of the deceased and threw her dead body near the Railway track at Karisath Railway Station, with the intention to create a false impression that the deceased had died in an accident. The Railway Police registered the case as GRP Case No. 73 of 2007 for offences punishable under Sections 364, 302, 201 and 120B IPC. An application for orders under Section 438 of the Criminal Procedure Code (Cr.P.C.) was moved by the respondent No. 1/accused before the Sessions Court, Arrah, which was dismissed by the Court vide order dated 18.3.2008. Needless to mention that the respondent No. 1/accused was not in the custody of the police till then. He has not been arrested even till date. Be that as it may, on finding that the accused was absconding, a proclamation under Section 82 Cr.P.C. was

A issued on 20.3.2008 by the Judicial Magistrate. It was also pasted on the residence of the respondent No. 1/accused on 27.3.2008. The respondent No. 1/accused, after about four months i.e. on 1.7.2008, moved a petition before the High Court for the same relief under Section 438, which was registered as Criminal Misc. No. 33158 of 2008. That was dismissed by the High Court vide order dated 1.7.2008. The respondent No. 1/accused did not stop there and moved to this Court by way of a Special Leave Petition (Crl.) No. 5140 of 2008. It came before this Court on 28.7.2008 and this Court dismissed the same. However, it was observed that:-

"If the petitioner surrender before the concerned Court and move for bail, the Court would do well to dispose of the application on the day it is presented."

Needless to mention that the respondent No. 1/accused never surrendered. On 6.4.2009, one more petition came to be filed before the High Court being Cr. WJC No. 352 of 2008, wherein the High Court was pleased to direct the Magistrate to dispose of the objection petition filed by the complainant after hearing both the parties and it was directed that till then the issuance of process of attachment under Section 83 Cr.P.C. would remain stayed. Very strangely, in this order, the High Court observed:-

"the parents of the accused, would endeavour and do all within their prowess to prevail upon and persuade, their son Rajesh Bhardwaj to surrender before the court of law as his anticipatory bail has been rejected up to the Hon'ble Apex Court."

G 4. On 15.5.2009, another petition being Crl. WJC No. 394 of 2009 came to be filed before the High Court by the mother of the accused. On that date, the investigation was in progress, but the final report had not been submitted by the police. It was expressed in this petition that the investigation was being influenced from the complainant's side and there was a prayer

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for direction to the State Government to get the case investigated by an independent investigating agency such as Central Bureau of Investigation. On 18.6.2009, police came to the conclusion that the offences alleged against the accused were committed by him and, therefore, the charge sheet came to be filed for the offences punishable under Sections 302, 201 and 120 B IPC.

5. Needless to mention that the respondent No. 1/accused was still not arrested nor did he ever bother to appear before the Magistrate.

6. On 25.6.2009, after the charge sheet was filed, the father of the accused moved an application before the learned Judicial Magistrate, Arrah, saying that he did not have faith in the said Court and wanted to move a petition for transfer of this case before the District Judge, Arrah, and, therefore, the proceedings of the case be stayed. All this was probably done as the Magistrate had already initiated the proceedings under Sections 82 and 83 Cr.P.C., finding that the accused was absconding. The Magistrate took the view that the father of the accused had no locus standi to file the said application and also came to the conclusion that there appeared to be good reasons for proceeding against the accused. The Magistrate, therefore, took cognizance of the offences. Then again, for some inexplicable reasons, nothing happened for five months and again on 10.11.2009, an application was moved before the Sessions Judge, Bhojpur, Arrah for an order under Section 438 Cr.P.C. for anticipatory bail. The learned Sessions Judge noticed that the respondent No. 1/accused was already asked by this Court to surrender before the court below and move the bail application. It was also noted that the respondent No. 1/ accused thereafter never bothered to appear though more than one year's time had elapsed. On that reasoning, the application was dismissed. Undaunted by this dismissal, the respondent No. 1/accused moved another application being Crl. Misc. Application No. 41823 of 2009 before the High Court on A 21.12.2009, i.e. after more than one month of the dismissal of the earlier bail application. It was contended before the High Court that the charge sheet was filed only for the offences punishable under Section 306 IPC and not under Sections 302. 201 and 120 B IPC. A very novel statement was made that his father's kidney had failed and that the accused was going to donate the kidney and he should be granted provisional anticipatory bail. What flabbergasts us is that on this broad plea, the High Court granted eight months' provisional anticipatory bail to the respondent No. 1/accused. Very strangely, all this was on the backdrop of the rejection of all the applications made by the accused under Section 438 Cr.P.C. before all the Courts including this Court. Again, to say that we are surprised by this order, would be an under-statement. We also did not understand as to why eight months' time was required by the accused and granted by the High Court for donating the kidney. The respondent No. 1/accused again moved an application on 13.1.2010, stating that there was a typing error in the order dated 21.12.2009 passed by the High Court where he was wrongly described as Rakesh Bhardwai instead of Rajesh Bhardwaj. It was also submitted that the charge sheet was filed under Sections 302, 201 and 120 B IPC and not under Section 306 IPC as was represented to the High Court. The matter then pended for another four months and came for hearing only on 4.5.2010. However, by that time, Dr. Vijay Laxmi, the mother of the respondent No. 1/accused had already expired. After her death, the respondent No. 1/accused was substituted in her place. It was during the course of arguments on Misc. Application No. 41823 of 2009 that the subject of the investigation not being properly done, cropped up, and it was urged that the matter should be re-investigated, G though it was informed to the Court that the charge sheet was already filed about eight months prior to this date and the matter was also committed to the Court of Sessions for trial. The High Court ultimately passed the impugned order. The case was then fixed for hearing before the High Court on 21.6.2010 as H the first case in the list. However, the trial has been staved and

the High Court has gone to the extent of selecting a new A investigating officer.

7. Shri U.U. Lalit, learned Senior Counsel appearing on behalf of the appellant/complainant pointed out that this case is nothing, but travesty of criminal justice and it amounts to total abuse of the process of law. The learned Senior Counsel pointed out that though an offence punishable under Section 302 was registered as back as on 6.12.2007, still even after two and half years, the respondent No. 1/accused has not been arrested. The learned Senior Counsel pointed out that even now, the period of eight months which would ordinarily have ended in August, is extended by the High Court by one month. The learned Senior Counsel pointed out that there was no justification, whatsoever, to find out any fault in the investigation and indeed the order of the High Court is wholly silent on the aspect of necessity of transferring the investigation or to do a de novo investigation. According to the learned Senior Counsel, the reasons, if any given in the order of the High Court, are wholly irrelevant. The learned Senior Counsel suggested that very unusual and disturbing orders have been passed by the High Court in this case, such as granting the provisional bail for eight months on the spacious ground that the accused had to donate his kidney to his father. According to the learned Senior Counsel, the sole objective on the part of the accused has been to hoodwink the process of law to avoid his arrest.

8. As against this, Shri P.S. Mishra and Shri A. Sharan, learned Senior Counsel appearing on behalf of the respondents supported the order of the High Court and contended that the whole investigation was bad and tainted in this case, since the investigating officers were influenced by the informant who was a senior officer in Railways, as also by order of a Minister in the Cabinet of Bihar Government. The learned Senior Counsel appearing on behalf of the respondents stated that there was nothing wrong in ordering the investigation by other agency even after the charge sheet was filed and for this

A proposition, the learned Senior Counsel heavily relied on the decision in *Rubabbuddin Sheikh v. State of Gujarat & Ors.* [2010 (2) SCC 200].

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9. It is on the backdrop of these rival contentions that it has to be seen that whether the impugned order is justified or not.

10. The basic contention of Shri Lalit, learned Senior Counsel appearing on behalf of the appellant is that there is a total absence of reasons in the impugned order of the High Court whereby the High Court has directed the change of investigating agency. The learned Senior Counsel pointed out that nothing has been shown either from the charge sheet which is already filed against the accused or from any other circumstance which justified the change of the investigating agency.

D 11. A glance at the impugned order suggests that the criticism is guite justified. The Learned Single Judge referred to the report of the Superintendent of Police dated 27.3.2008 wherein it was allegedly found that the investigation was not properly done and it required to be further investigated by the investigating officer from the angles reported in the supervision report. A letter dated 29.4.2008 by the IG of Police to the Additional DG is also referred to wherein it was suggested that the father of the deceased had raised objections to the supervision report of the SP, Railways. Lastly, the Learned Judge has referred to the supervision report of the Dy. SP,CID dated 04.06.2008 wherein it was allegedly mentioned that the investigation was lacking on some counts and this was probably on account of the fact that the investigation was influenced by the father-in-law of the informant. The Learned Judge has also referred to the further argument that there could have been no motive on the part of the accused to murder the girl who was in love with him. The circumstance is also referred to that father of the accused who was a Senior Advocate practicing in the same Court had also consented to the said marriage between H the accused and the deceased. The Learned Judge has also

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taken stock of the argument that the girl herself had written a A letter expressing that she apprehended danger from her family members, meaning the family members of the informant. We must, however, express that the Learned Judge has not given any findings on these arguments. The Learned Judge has not referred to the arguments on behalf of the informant and has a expressed that there was a counter affidavit on behalf of the informant.

12. A very strange course thereafter seems to have been taken by the Court (in view of the voluminous documents produced on record by both the parties). The Court observed:-

"this Court considers it appropriate to take assistance by getting the matter examined by a senior police official of the rank of DGP to put the controversy, as to whether proper investigation has been done in the case or not, at D rest. Therefore, this Court suggested to each of the Learned Counsel for the parties to propose three names of DGP rank officers of the State for this Court to extend request to anyone of them to assist this Court by examining all the documents and records connected with the case and submit his view to this Court for consideration."

13. We are extremely surprised by this course undertaken. Firstly, we don't know on what basis would the parties have suggested the names of the police officers of the DGP rank. Secondly, we also don't understand as to in what manner would the opinion expressed by any such officer have been relevant in the decision as to whether the investigation was proper or not. It was the task of the Court and it was the Court who would have decided the question of the fairness of the investigation. The High Court proceeded, though this course was not acceptable to the complainant's party, and considered the arguments on behalf of the complainant. Unfortunately, we don't see any findings recorded or any active consideration of the questions raised by the informant/ complainant. It was suggested by the appellant/complainant that there was another

A supervision report of the SP dated 30.4.2009 which supported the filing of the charge sheet and it was in pursuance of that report that the charge sheet came to be filed. The complainant had also urged that the so-called earlier supervision report dated 27.3.2008 was a concocted document. The learned Senior Counsel appearing on behalf of the appellant/complainant challenged the genuineness of the document and contended that it was fabricated. The complainant went to the extent of saying that the father of the accused who was a Senior Advocate of the Court was trying to influence the investigation and in fact even the report of the Forensic Science Laboratory regarding the handwriting and the genuineness of the letter of the deceased was not genuine. Ultimately, it was urged before the High Court that at the stage, particularly, after the charge sheet was already filed, the High Court would not be justified in interfering under Section 482, Cr.P.C. The only reason that we find for the unusual course that the High Court has taken is that there was no supervision report at the instance of the DIG of Police or Inspector General, Railway or DGP. The High Court has recorded a finding:-

E "thus, it is clear that the case has been supervised till now only by the officers up to the rank of SP and none else. Even the said report of the CID is also by an officer below the rank of SP (CID)."

14. Thus, the High Court went only on the consideration that there was no supervision report of a particular level of DIG, IG or DGP of Police.

15. It is only on the basis of that reason that the High Court wanted to get the assistance of DGP level police officer to advise it on the correctness or otherwise of the investigation. The High Court went on to record:-

"however, at this stage, in view of the submissions advanced by Mr. Madhup on behalf of the informant, this Court is all the more convinced that, to put the controversy В

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at rest once for all, matter should be examined by any officer of the rank of DGP so that this Court may get assistance from an experienced senior police officer of the highest rank to come to some conclusion with regard to merits of this application, if at all it is required to be done at the final stage of hearing."

It is then that the High Court went on to select one Manoj Nath and gave him the task of forming his opinion in respect of:-

- "(i) whether investigation of the case is complete from all angles and the case is to be tried on the basis of materials and report placed on record by the investigating officer only or;
- (ii) whether there are some loopholes and lacunae in the investigation which necessitates further or fresh investigation of the case and if necessary by a more experienced and specialized agency, and/or;
- (iii) what further steps, if any, are required to be taken in the case in the ends of justice, so that the guilty may not escape and the innocent may not suffer due to laches on the part of the officers of the State."

We really fail to understand as to under what provision the High Court acted, more particularly, when the charge sheet has already been filed. We are not on the question of the High Court seeking opinion of the DGP. In our opinion, such a course was not necessary unless the High Court had examined the charge sheet which was filed and recorded its findings that the investigation was not properly conducted or it required further investigation under Section 173 (8), Cr.P.C. The High Court has not even looked into the charge sheet nor has it examined the same.

16. It is also extremely surprising that the respondent No. 1/accused should have moved the High Court instead of moving the Sessions Judge before whom the matter was pending after all cognizance was taken by the Magistrate on the basis of the charge sheet. Thereafter he also proceeded to commit the matter for trial by the Sessions Judge and the matter was pending before the Sessions Judge. Under such circumstance, we completely fail to understand the propriety of the accused moving the High Court, firstly through his mother and secondly himself, more particularly, under Section 482, Cr.P.C. instead of going before Sessions Judge where the prosecution was pending and claiming further investigation under Section 173(8) Cr.P.C.

17. The High Court has not even considered the question of its own jurisdiction in the matter by conveniently observing that it is a matter which is to be considered at the stage of final hearing of the case. Therefore, it is clear that the High Court has not applied its mind also and had pushed the matter up to 21.6.2010 for receiving the opinion from the DGP. In our opinion, all this was not permissible nor was it warranted.

Ε 18. The High Court should have seen through the incessant efforts on the part of the respondent No. 1/accused to stall the proceedings one way or the other and to avoid arrest. It was way back in 2008 that the anticipatory bail application was rejected by this Court and yet the accused has remained outside without being arrested. Again the investigation against him is complete, the charge sheet has been filed for offence committed by him, and still he has managed to remain out. In fact, the lack of bona fides on the part of the accused should have put the High Court on guard. A Section 482 application on the plea that the investigation is not proper at the instance of the accused who does not choose to even appear before the Sessions Judge before whom the matter is pending, should immediately have put the High Court on guard before entertaining the petition which has no bona fides whatsoever.

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Be that as it may, we desist from saying anything about the

quality of investigation, necessity of further investigation or the necessity of the further investigation at the hands of some other agency, particularly, in view of the fact that the charge sheet has already been filed in this matter and at least nothing was shown before us or before the High Court suggesting that there was a necessity of any further investigation, additional investigation or investigation by some other agency. Merely, because there appeared to be no supervision of the DIG level or IG level officer, the High court could not have simply called for the opinion of DGP without recording any finding on any justification. We do not see any justification whatsoever nor was anything shown to us. We will, therefore, not go into that question, but the stance of the High Court in issuing direction not to take any further step in the proceedings arising out of Arrah Rail G.R.P. Case No. 73/2007 till 21.6.2010 is wholly unwarranted.

19. Heavy reliance was placed on Rubabbuddin Sheikh v. State of Gujarat & Ors. [2010 (2) SCC 200]. However, we do not find any factual similarity. That was a case where the extreme step was taken by this Court, particularly, in view of the fact that the police officers who were investigating officers, themselves came under the cloud because of the allegations against them. Such is not the position here. This is apart from the fact that factually we do not see any reason why the extreme step is required to be taken in this case even after the charge sheet has been filed.

20. This Court had taken that unusual course in Rubabbuddin Sheikh's case (cited supra), in the words of the Court:-

"in the facts and circumstances of the present case and to do complete justice in the matter and to instill confidence in the public mind."

Before this course was undertaken, the Court had found

A out factual discrepancies apparent on the face in the eight Action Taken Reports and the charge sheet. It was also noted that the crime was committed by the police personnel themselves while investigation conducted was not at all satisfactory. We do not find any such circumstance in the present case. We may also refer to the observations made in another ruling reported as Mithabhai Pashabhai Patel & Anr. V. State of Gujarat [2009 (6) SCC 332]. In paragraph 13 of the said decision, this Court has observed:-

"it is beyond any cavil that 'further investigation' and C 'reinvestigation' stand on different footing. It may be that in a given situation a superior Court in exercise of its Constitutional power, namely, under Articles 226 and 32 of the Constitution of India could direct a "State" to get an offence investigated and/or further investigated by a D different agency. Direction of a reinvestigation, however, being forbidden in law, no superior Court would ordinarily issue such a direction."

21. The Court further referred a decision in Ramachandran v. R. Udhayakumar [2008 (5) SCC 413] and observed therein:-

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"at this juncture it would be necessary to take note of Section 173 of the Code. From a plain reading of the above section it is evident that even after completion of investigation under sub-section (2) of Section 173 of the Code, the police has right to further investigate under subsection (8), but not fresh investigation or re-investigation."

22. The plea raised by the accused herein was not for G further investigation under Section 173 (8) but for reinvestigation by some other agency. In the circumstances of this case, the accused had not justified his plea at all for reinvestigation or fresh investigation by another agency. On its own, the High Court did not go into that exercise to decide as to whether the investigation was required to be done by any

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other agency. It required help of DGP level officer and his opinion to decide whether the earlier investigation was done properly or not. We are afraid that was not the task. To decide so was the task of the Court alone and no opinion could have been sought for, particularly, in the circumstances of this case. Nothing seems to have been established which would justify calling for such opinion. However, we are not going into that question as we have already stated earlier. Once the charge sheet was filed, ordinarily it could only be the power of the Court to decide upon its correctness or otherwise.

23. We are not at all impressed by the Section 482 application firstly filed by the mother of the respondent No. 1/ accused and then by the respondent No. 1/accused himself. We do not see any reason why the High Court should have entertained such application at all, particularly, in view of the complete lack of *bona fides* on the part of the respondent No. 1/accused. That application was, therefore, liable to be dismissed straightaway. Since technically the matter is still pending before the High Court, we only issue a direction to the High Court to dismiss the same. The impugned order of the High Court is set aside and, therefore, this appeal succeeds. The Sessions Judge before whom the matter is pending shall proceed with it in accordance with law.

N.J. Appeal allowed.

[2010] 10 S.C.R. 108

STATE OF WEST BENGAL

V.

SUBHAS KUMAR CHATTERJEE & ORS. (Civil Appeal No. 5538 of 2008)

AUGUST 17, 2010

[B. SUDERSHAN REDDY AND SURINDER SINGH NIJJAR, JJ.]

Administrative Tribunals Act, 1985:

C s. 19 – Application before tribunal by certain employees of West Bengal, seeking revision of scale of pay and fixation of benefits - Tribunal directing the Chief Engineer to decide the application - Chief Engineer revising the scale of pay -Order of tribunal accepting claim of employees accordingly - Upheld by High Court - On appeal, held: In the State of West Bengal pay scales are fixed under statutory Rules -Administrative tribunals by their orders cannot create/ constitute any quasi-judicial authorities and entrust matters for their decision which otherwise are not within their jurisdiction - Order of tribunal directing Chief Engineer to decide the dispute with regard to pay scales is void ab initio and cannot be given effect to - Administrative decisions by executive authorities do not bind the courts, much less operate as res judciata - No court can issue Mandamus directing the authorities to act in contravention of the Rules - Decision of Chief Engineer being contrary to ROPA Rules, 1998, cannot be enforced even if such a decision was taken under the directions of the tribunal – Orders of High Court as well tribunal set aside - Constitution of India, 1950 - Article 226 - Service law – West Bengal Services (Revision of Pay and Allowances) Rules, 1998 – Res judciata.

s. 19 - Jurisdiction of tribunal - Tribunal directing

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application to be decided by executive authority – Held: Power A conferred upon the Administrative Tribunals under the provisions of the Act flows from Article 323-A of the Constitution – Such power can never be delegated except under a valid law made by Parliament – Tribunals in the country henceforth should not repeat such practice of sending B the original applications filed before them to the Executive Authorities for their disposal – Constitution of India, 1950 – Article 323-A.

The post of Senior Laboratory Assistant, in the Roads and Buildings Research Institute and various other divisions under the Public Works (Roads) Department, is the feeder post to the Research Assistant. Under the Revision of Pay and Allowances Rules, 1981, the pay scale for the post of Research Assistant was fixed at scale no. 9 (Rs. 300-910) and for the post of Senior Laboratory Assistant at scale no. 6 (Rs. 300-685). The Senior Laboratory Assistants filed a writ petition claiming scale no. 11 under the Rules on the allegation that they were performing similar duties as that of Senior Research Assistants. The Single Judge of the High Court granted scale no. 11, however, passed a direction that the said pay scale would be paid w.e.f 1st April, 1981. The 3rd Pay Commission constituted for the State of West Bengal granted only scale no. 6 (revised to Rs. 1040-1920) to the Senior Laboratory Assistants and scale no. 9 (revised to Rs. 1260-2610) for the Research Assistants. The State Government framed West Bengal Services (Revision of Pay and Allowances) Rules, 1990 allowing scale nos. 6 and 9 respectively to the Senior Laboratory Assistants and Research Assistants. The 4th Pay Commission retained the same pay scales. However, the pay structure was revised. The State Government of West Bengal framed West Bengal Services (Revision of Pay and Allowances) Rules, 1998.

A Thereafter, the respondents-Research Assistants filed an application before the tribunal seeking revision of scale of pay and fixation of benefits w.e.f 1st April, 1981 in scale no. 14. The tribunal directed the Chief Engineer, Public Works (Roads) Directorate to dispose of the application by a reasoned order. The Chief Engineer extended the scale no. 11 to the respondents. Thereafter, the tribunal directed the State to revise the pay scale in terms of the orders of the Chief Engineer. The appellant-State filed a writ petition. The High Court dismissed the writ petition and upheld the order passed by the tribunal. Therefore, the appellant-State filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 The tribunals cannot travel beyond the power conferred on them and delegate their essential function and duty to decide service related disputes. Such delegation is ab initio void. No judicial tribunal can delegate its responsibilities except where it is authorized to do so expressly. The power conferred upon the Administrative Tribunals under the provisions of the Administrative Tribunals Act, 1985 flows from Article 323-A of the Constitution of India, 1950. Such power can never be delegated except under a valid law made by Parliament. The tribunals by their own act cannot delegate the power to decide any dispute which in law is required to be decided exclusively by such tribunals. Such is the extent of awesome powers and jurisdiction conferred upon the tribunals. It is their bounden duty to adjudicate the matters coming before them but not delegate its jurisdiction to extra-constitutional authorities. Such practice is fraught with undesirable consequences destroying the very purpose and scheme under which they are created and constituted to adjudicate disputes

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in specified areas. The tribunals in the country henceforth A should not repeat such practice of sending the original applications filed before them to the Executive Authorities for their disposal. The order of the Administrative Tribunal

directing the Chief Engineer, Public Works (Roads)
Directorate to decide the dispute raised by the B
respondents with regard to their pay scales is void ab
initio and cannot be given effect to. [Paras 19 and 24]
[120-F-H; 121-A-D; 122-E]

1.2 The Chief Engineer while acting under the directions of the tribunal passed the order declaring that the respondents are entitled to the relief as prayed for by them and accordingly granted scale no. 11 to the respondents. In the State of West Bengal pay scales are fixed under the statutory Rules. The Chief Engineer completely ignored the statutory rules under which the respondents are entitled to only scale no. 9. The Government did not implement the same. The respondents once again approached the tribunal seeking appropriate directions for implementation of the order passed by the Chief Engineer. The tribunal having allowed the application of the respondents held that they are entitled to fixation of pay as recommended by the Chief Engineer and the State must give effect to the same. It cannot be appreciated as to how the Administrative Tribunal could have directed the State to implement the recommendations of the Chief Engineer which run counter not only to the recommendations of the Pav Commission but also the West Bengal Services (Revision of Pay and Allowances) Rules, 1981. [Paras 15 and 16] G [119-C-F]

1.3 The High Court while rejecting the writ petition held that the Chief Engineer has discharged "a solemn duty undertaking the task of quasi-judicial duty has now reached its finality. Now, it is a question of

A implementation of the same". The High Court went to the extent of holding that the decision rendered by the Chief Engineer pursuant to the order of the tribunal operates as res judicata if not issue estoppel. The High Court advanced such an unstatable proposition. The Chief Engineer did not undertake any task of discharging of any quasi-judicial duty. The Administrative Tribunals by their orders cannot create and constitute any quasi-judicial authorities and entrust matters for their decision which otherwise are not within their jurisdiction. [Para 22] C [121-G-H; 122-A]

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1.4 The High Court fell into serious error in construing the orders passed by the Chief Engineer as a decision. There was no adjudication as such of any lis between the parties by the Chief Engineer. The Chief Engineer in law was not entitled to decide any dispute and much less with regard to any dispute and complaint with respect to conditions of service of any persons appointed to public posts controlled by the State Government. The Chief Engineer was not acting in any judicial or quasi-judicial capacity. Administrative decisions by the executive authorities do not bind the courts and much less operate as res judciata. In the circumstances, the view taken by the Chief Engineer that the respondents were entitled to scale No.11, cannot operate as res judicata. [Para 25] [122-F-H; 123-A]

1.5 The State Government having accepted the recommendations of the successive Pay Commissions gave effect to those recommendations by framing statutory rules being ROPA Rules and scales of the employees have been accordingly fixed. The respondents did not challenge the vires of the Rules under which they were entitled to only a particular scale of pay. The State Government is under obligation to

follow the statutory Rules and give only such pay scales A as are prescribed under the statutory provisions. Neither the Government can act contrary to the Rules nor the court can direct the Government to act contrary to Rules. No Mandamus lies for issuing directions to a Government to refrain from enforcing a provision of law. No court can B

No Mandamus lies for issuing directions to a Government to refrain from enforcing a provision of law. No court can B issue Mandamus directing the authorities to act in contravention of the Rules as it would amount to compelling the authorities to violate the law. Such directions may result in destruction of rule of law. In the instant case, the impugned order of the High Court C virtually compelled the State to give pay scales contrary to statutory Rules under which pay scales of the employees are fixed. The decision of the Chief Engineer being contrary to West Bengal Services (Revision of Pay and Allowances) Rules, 1998, cannot be enforced even D if such a decision was taken under the directions of the

Administrative Tribunal. The orders of the tribunal as well as of the High Court suffer from incurable infirmities and

are set aside. [Para 26] [123-B-F]

1.7 Courts should avoid giving a declaration granting a particular scale of pay and compel the Government to implement the same. Equation of posts and equation of salaries is a matter which is best left to an expert body. Fixation of pay and determination of parity in duties and responsibilities is a complex matter which is for the executive to discharge. Even the recommendations of the Pay Commissions are subject to acceptance or rejection, the Courts cannot compel the State to accept the recommendations of the Pay Commissions though it is an expert body. The State in its wisdom and in furtherance of its valid policy may or may not accept the recommendations of the Pay Commission. The constitutional courts clothed with power of judicial review

A have jurisdiction and the aggrieved employees have remedy only if they are unjustly treated by arbitrary State action or inaction while fixing the pay scale for a given post. [Para 13] [118-C-F]

B Union of India v. Arun Jyoti Kundu 2007 (7) SCC 472; State of Haryana and Anr. v. Haryana Civil Secretariat Personal Staff Assn. 2002 (6) SCC 72 – relied on.

Case Law Reference:

2007 (7) SCC 472 Relied on. Para 13 2002 (6) SCC 72 Relied on. Para 13

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5538 of 2008.

D From the Judgment & Order dated 19.12.2007 of the High Court of Calcutta in W.P.S.T.No. 33 of 2007.

Bhaskar P. Gupta, Rana Mukherjee, Anchan Chakraborty, Goowill Indeevar for the Appellant.

Dipak Kumar Jena, Minakshi Ghosh Jena Manmohan for the Respondents.

The Judgment of the Court was delivered by

- B. SUDERSHAN REDDY, J. 1. This appeal by special leave is directed against the final judgment and order dated 19th December, 2007 passed by the Division Bench of the High Court of Calcutta in W.P.S.T No. 33 of 2007 whereby and whereunder the High Court dismissed the writ petition preferred by the State of West Bengal, appellant herein and confirmed the judgment and order dated 18th August, 2005 passed by the State Administrative Tribunal, West Bengal.
 - 2. In order to consider the question as to whether the

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judgment suffers from any infirmities requiring our interference, it may be just and necessary to notice the relevant facts.

- 3. The controversy involved in the present matter requiring resolution centers around the issue as to whether the Senior Laboratory Assistants in the Roads and Buildings Research Institute and various other divisions under the Public Works (Roads) Department, Government of West Bengal are entitled to the same pay scale at par with the Research Assistants in the same department?
- 4. On 4th July, 1972 the Government of West Bengal, in exercise of its power conferred by the proviso to Article 309 of the Constitution of India made the Rules for regulation of recruitment to the post of Senior Research Assistant, Research Assistant and Senior Laboratory Assistant in the Roads and Buildings Research Institute and various other divisions under the Public Works (Roads) Department. The post of Senior Laboratory Assistant is a feeder to the post of Research Assistant. The pay scale fixed under the Revision of Pay and Allowances Rules, 1981 (for short ROPA Rules) for the post of Research Assistant was scale no. 9 (Rs. 300-910) and for the post of Senior Laboratory Assistant scale no. 6 (Rs. 300-685).
- 5. In the year 1982, three Senior Laboratory Assistants filed a Writ Petition in the Calcutta High Court claiming scale no. 11 under ROPA Rules on the allegation that they were performing similar duties as that of Senior Research Assistants. The said Writ Petition was disposed of by a learned Single Judge of the High Court granting scale no. 11 as claimed by the writ petitioners therein vide judgment dated 25th November, 1987. Be it noted that the said writ petition was disposed of on the doctrine of non-traverse since the State Government was unrepresented and no affidavit filed on its behalf. However, the learned Judge granted relief directing the said pay scale to be paid w.e.f 1st April, 1981 but, directed that the petitioners therein would be entitled to arrears only w.e.f April, 1987. The

A State was also directed to place the matter before the 3rd Pay Commission so that the Commission could consider the case of the Senior Laboratory Assistants for higher scale duly taking into consideration their qualifications and duties.

- 6. On 30th June 1987, 3rd Pay Commission for the State of West Bengal was constituted to consider the revision of pay and emoluments of its employees. The Commission submitted its report in December, 1988, granting only scale 6 (revised to Rs. 1040-1920) to the Senior Laboratory Assistants and scale 9 (revised to Rs. 1260-2610) for the Research Assistants. The State Government having accepted the recommendations framed ROPA Rules, 1990 allowing scale nos. 6 and 9 respectively to the Senior Laboratory Assistants and Research Assistants. The 4th Pay Commission retained the same pay scales. However, the pay structure was revised. The State Government accordingly framed ROPA Rules, 1998.
- 7. The respondents herein who are the Research Assistants approached the Tribunal after a period of more than 12 years claiming revision of scale of pay and fixation of benefits w.e.f 1st April, 1981 in scale no. 14. Their case essentially was based upon the judgment of the High Court in Writ Petition No. 2893W of 1982 granting scale no. 11 to Senior Laboratory Assistant which was the feeder post to the Research Assistant and therefore, the Research Assistants were entitled to the proportionate hike in their scale of pay. The Tribunal disposed of the O.A filed by the respondents herein directing the Chief Engineer, Public Works (Roads) Directorate to treat the application filed before it along with its annexures as a representation and to dispose of the same by a reasoned order. G
 - 8. Be that as it may, by order dated 31st August, 2001 the Chief Engineer extended the scale no. 11 to the respondents which was not acceptable to the State Government. The respondents once again approached the Administrative

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Tribunal in the year 2002 seeking appropriate directions as against the State to revise the pay scale in terms of the orders of the Chief Engineer. The Tribunal while rejecting the objections of the State that the Chief Engineer was not competent to modify or amend ROPA Rules as he did by his order, allowed the claim of the respondents.

- 9. The appellant State challenged the said order of the Tribunal in a writ petition filed before the High Court. The High Court vide impugned order dismissed the writ petition and confirmed the order of the Tribunal. Hence this appeal.
- 10. Shri Bhaskar P. Gupta, learned senior counsel submitted that the impugned order suffers from errors apparent on the face of the record. The High Court completely misdirected itself in deciding the matter in controversy by ignoring the well settled legal principles. It was submitted that Revision of Pay and Allowances Rules (ROPA) are framed by the Government of West Bengal by the directions of the Governor under Article 309 of the Constitution of India and are binding in their nature. The Rules are amended from time to time based upon the recommendations of successive Pay Commissions. The successive Pav Commissions have consistently recommended scale no. 9 for the Research Assistants to which category the respondents belong. The State cannot be compelled to act contrary to statutory rules framed by it in exercise of the powers under proviso to Article 309 of the Constitution. It was also submitted that the Pay Commission fixed pay scales after evaluation of duties of the concerned class of employees, educational qualifications, total pay structure, finances of the Government and various other factors. The State having accepted the recommendations made necessary amendments to the Rules and cannot be compelled to make isolated changes in one of the category inasmuch as such a change may have a cascading effect on the whole pay structure of its employees.
 - 11. The learned counsel for the respondents strongly

- A supported the impugned judgment. It was submitted that the Government having implemented the directions of the learned Single Judge in case of Senior Laboratory Assistants in the feeder category, cannot fix the pay scales of Research Assistants in the lower pay scale than that of the Senior **B** Laboratory Assistants.
 - 12. Now we shall proceed to consider the submissions made by the counsel during the course of the hearing of this appeal.
- 13. This Court time and again cautioned that the court should avoid giving a declaration granting a particular scale of pay and compel the Government to implement the same. Equation of posts and equation of salaries is a matter which is best left to an expert body. Fixation of pay and determination D of parity in duties and responsibilities is a complex matter which is for the executive to discharge. Even the recommendations of the Pay Commissions are subject to acceptance or rejection, the Courts cannot compel the State to accept the recommendations of the Pay Commissions though it is an F expert body. The State in its wisdom and in furtherance of its valid policy may or may not accept the recommendations of the Pay Commission. [See: Union of India V. Arun Jyoti Kundu¹ and State of Haryana & Anr. V. Haryana Civil Secretariat Personal Staff Assn.²]. It is no doubt, the constitutional courts clothed with power of judicial review have jurisdiction and the aggrieved employees have remedy only if they are unjustly treated by arbitrary State action or inaction while fixing the pay scale for a given post.
- 14. In the present case, the 3rd Pay Commission vide its G recommendations made in December, 1988 allowed only scale no. 6, to the Senior Laboratory Assistants and scale no. 9, for the Research Assistants. The Government having accepted the

^{1. (2007) 7} SCC 472.

^{2. (2002) 6} SCC 72

recommendations framed rules allowing scale no. 6 and 9, respectively to the Senior Laboratory Assistants and Research Assistants. The 4th Pay Commission retained same scales though the actual pay structure was revised. It appears from the record that in the State of West of Bengal pay scales are fixed under statutory rules. The constitutional validity of those rules a under which the pay scales are fixed has not been challenged.

- 15. Be that as it may, the Chief Engineer while acting under the directions of the Tribunal passed the order declaring that the respondents are entitled to the relief as prayed for by them and accordingly granted scale no. 11 to the respondents. The Chief Engineer completely ignored the statutory rules under which the respondents are entitled to only scale no. 9. The Government did not implement the same. The respondents once again approached the Tribunal seeking appropriate directions for implementation of the order passed by the Chief Engineer.
- 16. The Tribunal vide its order dated 18th August, 2005 having allowed the OA of the Respondents held that they are entitled to fixation of pay as recommended by the Chief Engineer and State must give effect to the same. We fail to appreciate as to how the Administrative Tribunal could have directed the State to implement the recommendations of the Chief Engineer which run counter not only to the recommendations of the Pay Commission but also the ROPA Rules, 1998.

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17. Being aggrieved by the order of the Tribunal the appellant-State of West Bengal filed a writ petition in the High Court of Calcutta and the same was dismissed by the High Court. The High Court while upholding the validity of the order passed by the Administrative Tribunal adopted a very peculiar reason which in our considered opinion is totally untenable and unsustainable in law. The High Court took the view that "the Tribunal, in exercise of its power under Article 226 read with Section 19 of the Central Administrative Tribunals Act, has

A delegated rather conferred power upon" the Chief Engineer "to decide the issue and has done it with reason and the same remains unchallenged. As such, even if on fact or in law, both the two orders might or might not be correct one, once the same is passed and is not set aside by the appropriate forum and the same is binding between the parties."

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18. According to the High Court the decision of the Chief Engineer is a quasi judicial one in its nature and the same has been passed in exercise of delegation of powers by the Tribunal to decide the dispute between the parties as regards the fixation of pay scales. The High Court also held that the order of the Chief Engineer operates as res-judicata. We shall deal with this aspect of the matter a little later.

19. This court on more than one occasion decried such practices adopted by the tribunals directing applications filed before them to be treated as representations before the executive authorities for their decision on merits. It is for the tribunals that are empowered to examine service disputes on merits. Such delegation of power apart from being illegal and unconstitutional amounts to avoidance of constitutional duties and functions to decide such disputes which are exclusively entrusted to them by law. In pursuance of the power conferred upon it by Clause (1) of Article 323-A of the Constitution, Parliament enacted Administrative Tribunals Act. 1985. The Statement of Objects and Reasons of the Act, indicates that it was being enacted to provide for the adjudication or trial by Administrative Tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other G authority within the territory of India. Chapter III deals with the jurisdiction, powers and authority of the Tribunals. Sections 14, 15 and 16 deal with the jurisdiction, powers and authority of the Central Administrative Tribunals, the State Administrative Tribunals and the Joint Administrative Tribunals respectively. The Tribunals under the Act possess jurisdiction and powers

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of every other court in the country except the jurisdiction of the Supreme Court, in respect of all service related matters. The Administrative Tribunals are conferred with the jurisdiction to hear matters where even the vires of statutory provisions are in question. Their function, however, in this regard is only supplementary inasmuch as such decisions are subject to scrutiny of the High Courts. Such is the extent of awesome powers and jurisdiction conferred upon the Tribunals. It is their bounden duty to adjudicate the matters coming before them but not delegate its jurisdiction to extra constitutional authorities. Such practice is fraught with undesirable consequences destroying the very purpose and scheme under which they are created and constituted to adjudicate disputes in specified areas. We hope and trust that the Tribunals in the country henceforth will not repeat such practice of sending the original applications filed before them to the Executive Authorities for their disposal.

- 20. The origin of this controversy lies and is traceable to the improper exercise of jurisdiction by the Tribunal remitting the original application made to it to the Chief Engineer for his decision. We are at a loss to appreciate as to how the tribunal could have issued such a direction virtually surrendering its jurisdiction to the Chief Engineer.
- 21. Now we shall revert to the question as to whether the High Court was justified in rejecting the writ petition filed by the appellant herein.
- 22. The High Court while rejecting the writ petition held that the Chief Engineer has discharged "a solemn duty undertaking the task of quasi-judicial duty has now reached its finality. Now, it is a question of implementation of the same". The High Court went to the extent of holding that the decision rendered by the Chief Engineer pursuant to the order of the Tribunal operates as res judicata if not issue estoppel. We are bewildered to note that the High Court advanced such an unstatable proposition. The Chief Engineer did not undertake any task of discharging of any quasi-judicial duty. The Administrative Tribunals by their

A orders cannot create and constitute any quasi-judicial authorities and entrust matters for their decision which otherwise are not within their jurisdiction.

- 23. Whether the Administrative Tribunal can delegate its power of judicial review and confer the same upon a Chief Engineer? The Tribunals cannot travel beyond the power conferred on them and delegate their essential function and duty to decide service related disputes. Such delegation is ab initio void. It is too elementary to restate that no judicial tribunal can delegate its responsibilities except where it is authorized to do so expressly. The power conferred upon the Administrative Tribunals under the provisions of the said Act flows from Article 323-A of the Constitution. Such power can never be delegated except under a valid law made by Parliament. The Tribunals by their own act cannot delegate the D power to decide any dispute which in law is required to be decided exclusively by such Tribunals.
 - 24. For the aforesaid reasons, the order of the Administrative Tribunal directing the Chief Engineer, Public Works (Roads) Directorate to decide the dispute raised by the respondents with regard to their pay scales is void ab initio and cannot be given effect to.
 - 25. The next question that arises for our consideration is whether the decision of Chief Engineer operates as resjudicata? The High Court fell into serious error in construing the orders passed by the Chief Engineer as a decision. There was no adjudication as such of any lis between the parties by the Chief Engineer. The Chief Engineer in law was not entitled to decide any dispute and much less with regard to any dispute and complaint with respect to conditions of service of any persons appointed to public posts controlled by the State Government. The Chief Engineer was not acting in any judicial or quasi-judicial capacity. Administrative decisions by the executive authorities do not bind the courts and much less operate as res judciata. In the circumstances, the view taken by the Chief Engineer that the respondents were entitled to

STATE OF WEST BENGAL v. SUBHAS KUMAR 123 CHATTERJEE & ORS. [B. SUDERSHAN REDDY, J.]

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scale No.11, cannot operate as res judicata.

26. Yet another question that arises for our consideration is whether a writ of mandamus lies compelling the State to act contrary to law? The State Government having accepted the recommendations of the successive Pay Commissions gave effect to those recommendations by framing statutory rules being ROPA Rules and scales of the employees have been accordingly fixed. The respondents did not challenge the vires of the said Rules under which they were entitled to only a particular scale of pay. The State Government is under obligation to follow the statutory rules and give only such pay scales as are prescribed under the statutory provisions. Neither the Government can act contrary to the rules nor the Court can direct the Government to act contrary to rules. No Mandamus lies for issuing directions to a Government to refrain from enforcing a provision of law. No court can issue Mandamus directing the authorities to act in contravention of the rules as it would amount to compelling the authorities to violate law. Such directions may result in destruction of rule of law. In the instant case, the impugned order of the High Court virtually compelled the State to give pay scales contrary to statutory rules under which pay scales of the employees are fixed. The decision of the Chief Engineer being contrary to ROPA Rules, 1998, cannot be enforced even if such a decision was taken under the directions of the Administrative Tribunal. The orders of the Tribunal as well as of the High Court suffer from incurable infirmities and are liable to be set aside.

27. For the reasons above, the impugned judgment of the High Court as well as the judgment of the Tribunal is set aside. However, the amounts if any paid to the respondents pursuant to the impugned orders shall not be recovered.

28. The appeal is accordingly allowed without any order as to costs.

COMMON CAUSE (A REGD. SOCIETY)

v.

UNION OF INDIA & ANR. (Writ Petition (C) No. 291 of 1998)

AUGUST 18, 2010

[J. M. PANCHAL AND A.K. PATNAIK, JJ.]

Public Interest Litigation:

Banks - Non-recovery of loans, known as Non-Performing Assets - Writ petition filed before Supreme Court for appropriate writs/directions, as legislative and administrative measures taken stated not to have been effective - HELD: whether legislative and administrative measures taken by the Union Government have been effective or not is not for the Court but for the Union Government and Parliament to consider, because reduction and control of NPAs is not within the domain of judiciary but within the domain of the Executive and Legislature – It is reiterated that in the field of economic activities, there has to be judicial deference to Legislative and Executive judgment, and decisions on complex economic matters are to be based on experimentation or what one may call 'trial and error method' - It is for Parliament to debate and decide on the policy decision and not for courts to sit in judgment whether a particular policy decision of Government is effective or not - An expert body known as Serious Fraud Investigation Office (SFIO) set up by the Union Government is already in existence - In order to make the SFIO effective, a Committee of Experts under the chairmanship of Ex-Deputy Governor of Reserve Bank of India has also been set up, which will suggest effective measures, legislative or administrative, to ensure that bank frauds are prevented in future and the NPAs are kept to the minimum - This Committee will consider the

N.J. Appeal allowed.

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suggestion to make the SFIO (or any similar body) a statutory A authority having sufficient powers and having the required autonomy to be able to effectively deal with the problems of bank frauds and NPAs - A copy of this order will be placed before the Committee of Experts - Constitution of India, 1950 - Article 32 - Banks/Banking.

Villianur Iyarkaai Padukapu Maiyam vs. Union of India and Ors. 2009 (9) SCR 225 = (2009) 7 SCC 561; and State of M.P. vs. Nandlal Jaiswal 1987 (1) SCR 1 = 1986 (4) SCC 566 - relied on.

Vishaka and Ors. Vs. State of Rajasthan and Ors. 1997 (3) Suppl. SCR 404 = 1997 (6) SCC 241; and Vineet Narain & Ors. Vs. U.O.I. 1997 (6) Suppl. SCR 595 = 1998 (1) SCC 226 - distinguished.

Case Law Reference:

1997 (3) Suppl. SCR 404 distinguished para 6 1997 (6) Suppl. SCR 595 distinguished para 6 Ε 1987 (1) SCR 1 relied on para 9 2009 (9) SCR 225 para 9 relied on

CIVIL ORIGINAL JURISDICTION: Writ Petition (C) No. 291 of 1998.

Prashant Bhushan, Rohit Kumar Singh, Poulami Putatunda for the Petitioner.

Gopal Subramanium, S. G., S.N. Terdal, Sunita Sharma, Aman Ahluwalia, Kuldeep S. Parihar, H.S. Parihar, Anil Katiyar, P.P. Singh, Romy Chacko for the Respondents.

The order of the Court was delivered by

ORDER

A.K. PATNAIK, J. 1. The petitioner is a society duly registered under the Societies Registration Act, 1860 and is engaged in taking up various common problems of the people for redressal. Concerned with the increase of the non-recovered loans advanced by the public and private sector banks in India which have come to be known as Non-Performing Assets (for short "NPAs"), the petitioner has filed this Writ Petition under Article 32 of the Constitution as a Public Interest Litigation praying for appropriate writs and directions.

2. The petitioner has stated in the Writ Petition that the aggregate figure of NPAs worked out on the basis of data compiled by the Banking Division of the Ministry of Finance is Rs.43,577/- crores. According to the petitioner, non-recovery D of such huge amount of NPAs has resulted in substantial funds of banks not being available for development of the country's economy and this, in turn, has affected the citizens. The petitioner has alleged that the steps taken by the Union Government to recover the NPAs have not yielded positive results and the Finance Ministry of the Union Government is reported to have admitted that 27 nationalised banks had written off a staggering amount of Rs.4,010/- crores as bad debts during 1994-95 and 1995-96. According to the petitioner, most of the bad debts are on account of defaults made by men of substantial means and influence and if proper checks are introduced to ensure that loans and advances are not given to fraudulent borrowers, the NPAs will get substantially reduced.

3. Mr. Prashant Bhushan, learned senior counsel appearing for the petitioner, submitted that in the Writ Petition, as originally filed, the petitioner has suggested various measures to check the menace of increasing NPAs by evolving a proper mechanism that would reduce the possibility of fresh loans becoming NPAs, but subsequently this Court passed orders on 09.08.2005, 08.12.2005, 09.11.2006 and 30.01.2008 H directing the petitioner to make written suggestions to the Union

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under the existing provisions of the Companies Act but

legislation will be brought to invest the SFIO with adequate

Government and also directing the Union Government to hold meetings with the concerned functionaries to consider those suggestions. He submitted that pursuant to these directions, the petitioner has made various suggestions in its letters dated 02.08.2001, 25.08.2005 and 10.08.2006, but except for one suggestion regarding the definition of "willful defaulter", all the suggestions were rejected by the Union Government. He submitted that the reasons given by the Government for rejecting the suggestions are that if the suggestions are adopted, the public sector banks will become less competitive and will loose its customers to the private sector banks. He explained that the suggestions made by the petitioner mainly emphasized that the loans and advances must not be given without fully checking the creditworthiness and past record of the borrowers and that companies, which have been "willful defaulters" in the past or whose subsidiary companies and promoters have willfully defaulted in the past in repaying the loans and advances, should not be given fresh loans and advances. He also explained that the suggestions of the petitioner also stress on the greater accountability of the bank officials and on the personal liability of the promoters by making personal guarantee of the promoters mandatory in every case. He vehemently argued that the Union Government could not possibly have any objection to these suggestions made by the petitioner and the reasons given in the affidavit of Shri Dharam Paul Bhardwaj, Under Secretary, Ministry of Finance, Department of Economic Affairs (Banking Division) filed on behalf of the Union Government for not accepting the suggestions are frivolous. On behalf of the petitioner, he urged the Court to issue appropriate writs and directions to the respondents to implement the suggestions made by the petitioner.

4. Mr. Gopal Subramanium, learned Solicitor General for the Union of India, however, submitted, relying on the additional affidavit, that a number of steps have already been taken by the Ministry of Finance, Government of India, to address the G

A issue of NPAs and bank frauds and these are: action taken under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (for short "the DRT Act") to recover the NPAs of Banks, the enactment of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the SARFAESI Act") which empowers the banks to realize the securities furnished by the borrowers to the bank and to recover the loans and advances from the defaulted borrowers, the enactment of the Credit Information Companies (Regulation) Act, 2005 which provides for the setting up of Credit Information Companies for collection. sharing and dissemination of credit information, which will help in arresting fresh accretion of NPAs and framing of the rules under the Credit Information Companies (Regulation) Act, 2005, which would ensure that the Credit Information Companies collect, process and collate accurate and complete data relating to the borrowers, so that fresh loans and advances given to the borrowers do not become sticky. He submitted that besides the legislative measures, the Reserve Bank of India has been circulating a list of non-suit filed 'doubtful' and 'loss' borrowal accounts of Rs. 1 crore and above, on 31st March and on 30th September every year to the banks and financial institutions for their confidential use. He submitted that the banks and the Union Government also refer cases of bank frauds to the C.B.I. wherever considered necessary and appropriate and that the Union Government has set up in July, 2003 the "Serious Fraud Investigation Office" (SFIO), which comprises officers specialized in various disciplines, such as Taxation, Customs, Central Excise, Information Technology, Company Law, Capital Market, Banking, Investigation/ Police, Forensic Audit, etc. and this expert and experienced body has already started G functioning since October, 2003 and has been assigned a total of 51 cases of serious frauds up to 30.04.2008 out of which 30 cases have already been investigated and 18 cases are under investigation. He explained that SFIO is presently working

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reach and powers. He submitted that the Central Government has already constituted a Committee of Experts under the Chairmanship of the Ex-Deputy Governor of the Reserve Bank of India to make recommendations regarding the SFIO and the report of this Committee of Experts as and when received will be considered by the Union Government. He argued that since adequate mechanism presently exists to tackle the issue of NPAs and bank frauds and there has in fact been a sharp decrease in the level of NPAs in scheduled commercial banks from 4.4% of their net advances as on 31.03.2003 to 1.0% as on 31.03.2008, this Court should not issue any writs or directions, as prayed for, by the petitioner.

5. In rejoinder, Mr. Prashant Bhushan submitted that the reduction in NPAs, as claimed by the Union Government, has come about by waivers, write-offs, rescheduling of repayments, moratoriums and one-time settlements but all this has actually resulted in loss of substantial amount of public funds. He submitted that as per the report of the Reserve Bank of India on the trend and progress of banking in India for 2004-2005, total NPAs recovered by the banks amounted to Rs.20,568/crore and out of this, an amount of Rs.14,506/- crore was recovered through asset reconstruction companies and these recoveries are nothing but purchase of NPAs from the banks by another set of public companies. He submitted that the report of the Reserve Bank of India would further show that during 2004-2005 an additional Rs.16,000 crore of NPAs have accrued. He submitted that the measures taken by the Union Government to reduce the NPAs, therefore, have not been effective. He finally submitted that without statutory power and without qualified manpower, the SFIO would be teeth-less and incompetent and this Court should direct the Union Government to make the SFIO an independent statutory body consisting of qualified manpower as suggested by Mr. Harish Salve, learned senior Counsel.

6. Mr. Bhushan cited the decision of this Court in Vishaka

A and Others v. State of Rajasthan and Others [(1997) 6 SCC 241] for the proposition that if there is no enacted legislation to provide for the effective enforcement of any fundamental right, this Court can issue guidelines/directions for the effective enforcement of the fundamental right under Article 32 of the Constitution, which would be law under Article 141 of the Constitution, till a suitable legislation is enacted to occupy the field. He also relied on the decision in Vineet Narian & Ors. v. Union of India & Anr. [(1998) 1 SCC 226] in which this Court has observed that the judiciary must step in, in exercise of its constitutional obligations under Article 32 read with Article 142 of the Constitution, to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field. He submitted that in case this Court is not inclined to issue directions or writs in the matter, the Court can at least direct that the suggestions made by the petitioner for checking the NPAs in future be referred to an independent expert committee.

7. In Vishaka and Others v. State of Rajasthan and Others (supra) cited by Mr. Bhushan, this Court held that in the absence E of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at workplaces, some guidelines and norms for due observance at all workplaces or other institutions were required to be laid down by this Court until a legislation is enacted for the purpose and this Court made it clear that this was required to be done in exercise of the power available under Article 32 of the Constitution for enforcement of the Fundamental rights guaranteed under Articles 14, 15, 19(1)(g) and 21 of the G Constitution. Similarly, in Vineet Narain and Others v. Union of India and Another (supra), this Court issued some directions for rigid compliance till such time as the legislature steps in to substitute them by proper legislation and these directions were made under Article 32 read with Article 142 of the Constitution to implement the rule of law wherein the concept of equality

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enshrined in Article 14 is embedded. Hence, in both the cases cited by Mr. Prashant Bhushan, the Court issued writs and directions for enforcement of fundamental rights conferred by Part-III of the Constitution, but in the present case, the petitioner has not made out a case that for enforcement of any right guaranteed under Part-III of the Constitution, writs or directions are required to be issued by this Court under Article 32 of the Constitution.

- 8. Moreover, in *Vishaka and Others* v. *State of Rajasthan and Others* (supra), this Court laid down guidelines and norms for due observance at work places and institutions to prevent sexual harassment of working women, because there was no law to prevent such sexual harassment. In the present case, we find from the additional affidavit filed on behalf of the Union of India that through various legislative measures such as the DRT Act, the SARFAESI Act, 2002, the Credit Information Companies (Regulation) Act, 2005 and through some administrative measures, the respondents are trying to reduce the number and amount of NPAs and to detect and check bank frauds in future.
- 9. According to Mr. Prashant Bhushan, however, these legislative and administrative measures taken by the Union Government have not been effective in reducing and controlling the NPAs. Whether legislative and administrative measures taken by the Union Government have been effective or not is not for the Court but for the Union Government and Parliament to consider because reduction and control of NPAs are not within the domain of judiciary but within the domain of the Executive and Legislature under our Constitution. Moreover, as has been observed by P.N. Bhagwati, J. in *State of M.P. and Others* v. *Nandlal Jaiswal and Others* [(1986) 4 SCC 566] in field of economic activities, there has to be judicial deference to Legislative and Executive judgment and decisions on complex economic matters are to be based on experimentation or what one may call 'trial and error method'. It is therefore not

A for Courts to sit in judgment whether a particular policy decision of the Government is effective or not, but for Parliament to debate and decide on the policy decision. In a recent decision of this Court in *Villianur lyarkkai Padukappu Maiyam* v. *Union of India and Others* [(2009) 7 SCC 561], Panchal, J. writing the judgment on behalf of a three-Judge Bench observed:

"It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. In matters relating to economic issues the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within the limits of the authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts."

10. The Union Government, however, must ensure that SFIO is effective in detecting and preventing bank frauds by influential people. We find that the Central Government has constituted a Committee of Experts under the Chairmanship of Shri Vepa Kamesam, Ex-Deputy Governor of Reserve Bank

of India, with the following terms of reference:

(a) Assessment of the need for and details of a separate stature to govern the constitution and functioning of SFIO;

- G (b) The nature and details of the legislative changes as may be required in existing laws, to enable effective functioning of SFIO including prosecution of offences detected by it;
 - (c) The mechanism for referral of cases to SFIO and coordination of activities of SFIO with other agencies/

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organizations of the Central and State Governments, A including investigating;

- (d) Powers of SFIO and its investigation officers;
- (e) Specification of offences and penalties to enable effective conduct of investigation agencies and the need for Special Courts for trial of corporate fraud cases; and
- (f) Other matters consequential to or in pursuance of the above.

We have no doubt that this Committee of Experts under the Chairmanship of Ex-Deputy Governor of Reserve Bank of India will suggest effective measures, legislative or administrative, to ensure that bank frauds are prevented in future and the NPAs are kept to the minimum. We hope and trust that this Committee under the Chairmanship of Ex-Deputy Governor of Reserve Bank of India will consider the suggestion to make the SFIO (or any similar body) a statutory authority having sufficient powers and having the required autonomy to be able to effectively deal with the problems of bank frauds and NPAs. A copy of this order will be placed by the respondent No.1 before the Committee of Experts.

11. The writ petition and the application for impleadment/intervention stand disposed of. No costs.

R.P. Writ Petition Disposed of.

[2010] 10 S.C.R. 134

A GREATER MOHALI AREA DEVELOPMENT AUTHORITY & ANR.

v. U JAIN & OR

MANJU JAIN & ORS. (Civil Appeal No. 6791 of 2010)

AUGUST 19, 2010

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

Contract – Allotment of house – Failure on the part of allottee in accepting the allotment and depositing money in terms of the allotment within stipulated time – Cancellation of allotment – Challenged – High Court quashed the cancellation order holding that the allotment letter was not served at the correct address – On appeal, held: – Cancellation was justified – Allottee having failed in giving acceptance to allotment and in depositing money in terms of the allotment under the hire-purchase scheme, no concluded contract came into existence between the parties – Plea of failure to serve notice being a new plea before court not acceptable – Housing.

Plea – Raising of new plea – Before a writ court – Permissibility – Held: A new plea on facts or mixed question of fact and law cannot be raised before a writ court – Constitution of India, 1950 – Article 226.

Respondent No. 1 applied to the appellant-Authority for allotment of a flat under the hire- purchase scheme. One flat was allocated to her. Thereafter the Authority issued the letter of allotment to her, seeking her acceptance for the allotment and asking her to deposit certain amount within the stipulated time. Respondent No. 1 did not respond to the letter. After about four years from the date of allotment, when she made a query, she was informed that her allotment had been cancelled on

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her failure to deposit the amount pursuant to the A allotment letter.

Respondent No. 1 made an appeal before the statutory authority challenging the order of cancellation. The appeal was dismissed. The order was affirmed by the revisional authority. Respondent No. 1 challenged the orders passed by the authorities in a writ petition. The same was allowed by the High Court quashing the orders passed by the authorities and holding that the notice of allotment was sent to an incorrect person and to the incorrect address. The instant appeal was filed by the appellant-Authority.

Allowing the appeal, the Court

HELD: 1. The High Court allowed the writ petition, without examining the entire record placed before it only on the ground that the dispatch register did not contain the correct name and address of respondent No.1. The writ petition was allowed without giving any proper opportunity to the appellants to file a reply and produce material to controvert the averments made in the writ petition. The High Court failed to note that the appellants had taken a specific plea that the letter of allotment had been communicated to respondent No. 1 by Registered Post. Therefore, the High Court ought to have examined the issue in the correct perspective, as respondent No. 1 had not controverted the plea taken by the appellants of sending the allotment letter by Registered Post. [Paras 16, 17, 21 and 25] [145-C-E; 147-A]

Harihar Banerjee vs. Ramshashi Roy AIR 1918 PC 102; Mst. L.M.S.Ummu Saleema vs. B.B.Gujral and Anr. AIR 1981 SC 1191; C.C. Alavi Haji vs. Palapetty Muhammed and Anr. (2007) 6 SCC 555; Gujarat Electricity Board and Anr. vs. Atmaram Sungomal Poshani AIR 1989 SC 1433; ChiefCommissioner of Income Tax (Admn.) Bangalore vs. A V.K. Gururaj and Ors.(1996) 7 SCC 275; Poonam Verma and Ors. vs. Delhi Development Authority (2007) 13 SCC 154; Sarav Investment and Financial Consultancy Private Limited and Anr. vs. Llyods Register of Shipping Indian Office StaffProvident Fund and Anr. (2007) 14 SCC 753; Union of India vs. S. P. Singh (2008) 5 SCC 438; Municipal Corporation, Ludhiana vs. Inderjit Singh and Anr. (2008) 13 SCC 506; V.N. Bharat vs. Delhi Development Authority and Anr. AIR 2009 SC 1233 – referred to

2.1 The fact that respondent No. 1 had not received the allotment letter was neither pleaded before the appellate authority nor before the revisional authority. Thus, there was no occasion for either of the said authorities to record a finding on this factual aspect. Respondent No. 1, before the revisional authority, took the plea that due to financial difficulty, she could not arrange the money to be paid within the stipulated time. This impliedly amounts to admission that respondent No. 1 was fully aware of her liability and she could not fulfill the requirement only for non-availability of funds. In the writ petition, a totally new case was built up on a new factual matrix. [Paras 11 and 12] [416-G-H]

2.2 Respondent No.1 raised the plea of non-receipt of the letter of allotment for the first time before the High Court. Even if it is assumed that it is correct, it is not permissible for the High Court to consider a new case on facts or mixed question of fact and law which was not the case of the parties before the Court or Tribunal below. A pure question of law can be raised at any time of the proceedings but a question of fact which requires investigation and inquiry, and for which no factual foundation has been laid by a party before the Court or Tribunal below, cannot be allowed to be agitated in the writ petition. If the writ court for some compelling circumstances desires to entertain a new factual plea, it

must give due opportunity to the opposite party to A controvert the same and adduce the evidence to substantiate its pleadings. [Para 25] [148-D-F]

State of U.P. vs. Dr. Anupam Gupta AIR 1992 SC 932; Ram KumarAgrawal and Anr. vs. Thawar Das (D) through Lrs. (1999) 7 SCC 303; Vasantha Viswanathan and Ors. Vs. V.K. Elayalwar and Ors. (2001) 8 SCC 133; Anup Kumar Kundu vs. Sudip Charan Chakraborty (2006) 6 SC 666; Tirupati Jute Industries (P) Ltd. vs. State of West Bengal (2009) 14 SCC 406; Sanghvi Reconditioners (P) Ltd. vs. Union of India and Ors. (2010) 2 SCC 733 – referred to.

2.3 Though, the allotment should not be cancelled unless the intention or motive on the part of the allottee in not making due payment is evident, but in exceptional circumstances, where the allottee does not make any payment in terms of the allotment, the order of cancellation should be passed. Sympathy or sentiment by itself cannot be a ground for passing an order in favour of allottees by the courts nor can an order be passed in contravention of the statutory provisions. [Para 261 [149-D-F]

Teri Oat Estates (P) Ltd. vs. U.T. Chandigarh and Ors. (2004) 2 SCC 130 – relied on.

2.4 In the instant case, respondent No.1 did not make any response whatsoever after applying for allotment. No explanation could be furnished by respondent No.1 for why she kept quiet for 4½ years after receiving the allocation letter and why she did not make any attempt to find out what had happened to her application. Respondent No.1 did not send her acceptance of the allotment; did not deposit the amount and did not execute the required hire-purchase agreement with the appellant-authority. Thus, it is solely because of her that

A no concluded contract could come into existence between the parties. In such a fact-situation, the respondent No.1 could not be handed over possession of the flat. The forfeiture of the earnest money is in terms of the statutory provisions. [Para 27] [149-G-H; 150-A]

2.5 The High Court while deciding the case, did not give opportunity to the authority to file a reply to the writ petition. The Court proceeded in haste and decided the case relying upon irrelevant materials, which itself amounts to arbitrariness. An appropriate course may be to set aside the judgment and order of the High Court and remit it for consideration afresh. However, as a period of 13 years has already been elapsed, since the proceeding came into existence and this Court has examined the entire record and re-appreciated the evidence, such a course would not serve any purpose. Judgment passed by the High Court is set aside and the orders of the authorities are restored. [Paras 25, 28 and 29] [150-E-F]

E Fuljit Kaur vs. State of Punjab AIR 2010 SC 1237 - referred to.

3.1 Mere draw of lots/allocation letter does not confer any right to allotment. The system of draw of lots is being resorted to with a view to identify the prospective allottee. It is only a mode, a method, a process to identify the allottee i.e. the process of selection. It is not an allotment by itself. Mere identification or selection of the allottee does not clothe the person selected with a legal right to allotment. [Para 22]

Delhi Development Authority vs. Pushpendra Kumar Jain AIR 1995 SC 1 – referred to.

3.2 If an order is passed but not communicated to the

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party concerned, it does not create any legal right which A can be enforced through the court of law, as it does not become effective till it is communicated. In the instant case, an acceptance letter had not been sent by respondent No.1. Thus, the allotment in her favour remained of no significance. [Paras 23 and 24]

Bachhittar Singh vs. State of Punjab and Anr. AIR 1963 SC 395; State of Punjab vs. Amar Singh Harika AIR 1966 SC 1313; Union of India and Ors. vs. Dinanath Shantaram Karekar and Ors. AIR 1998 SC 2722; State of West Bengal vs. M.R. Mondal and Anr. (2002) 8 SCC 443; Laxminarayan R. Bhattad and Ors. vs. State of Maharashtra and Anr. (2003) 5 SCC 413 - relied on.

Case Law Reference:

AIR 1918 PC 102	Referred to.	Para 17	D
AIR 1981 SC 1191	Referred to.	Para 18	
(2007) 6 SCC 555	Referred to.	Para 19	
AIR 1989 SC 1433	Referred to.	Para 20	Е
(1996) 7 SCC 275	Referred to.	Para 20	
(2007) 13 SCC 154	Referred to.	Para 20	
(2007) 14 SCC 753	Referred to.	Para 20	F
(2008) 5 SCC 438	Referred to.	Para 20	
(2008) 13 SCC 506	Referred to.	Para 20	
AIR 2009 SC 1233	Referred to.	Para 20	_
AIR 1995 SC 1	Referred to.	Para 22	G
AIR 1963 SC 395	Referred to.	Para 23	
AIR 1966 SC 1313	Referred to.	Para 23	

Α	AIR 1998 SC 2722	Relied on.	Para 23
	(2002) 8 SCC 443	Relied on.	Para 23
	(2003) 5 SCC 413	Relied on.	Para 23
В	AIR 1992 SC 932	Referred to.	Para 25
	(1999) 7 SCC 303	Referred to.	Para 25
	(2001) 8 SCC 133	Referred to.	Para 25
0	(2006) 6 SCC 666	Referred to.	Para 25
С	(2009) 14 SCC 406	Referred to.	Para 25
	(2010) 2 SCC 733	Referred to.	Para 25
	AIR 2010 SC 1237	Referred to.	Para 25
D	(2004) 2 SCC 130	Relied on.	Para 26

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6791 of 2010.

From the Judgment & Order dated 22.11.2007 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 16621 of 2007.

Satinder Singh Gulati, Kamaldeep Gulati for the Appellants.

Govind Goel, Ambuj Agarwal, Dr. Kailash Chand, Ajay Pal for the Respondents.

The Judgment of the Court was delivered by

G DR. B.S. CHAUHAN, J. 1. Leave granted.

2. This appeal has been preferred against the judgment and order dated 22.11.2007 passed by the High Court of Punjab and Haryana at Chandigarh, in Civil Writ Petition No.

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16621 of 2007, by which the High Court has set aside the judgments and orders of the Revisional Authority dated 31st July, 2007 and the Appellate Authority dated 30th March, 2006 and the order of cancellation of the suit plot dated 20th August, 2003 by the statutory authority.

3. Facts and circumstances giving rise to this case are that the respondent No.1 applied vide application No.026012, dated 27.1.1997, for allotment of a flat under a hire purchase scheme along with application money of Rs.20,000/-. After considering the application of the respondent No.1 along with other applicants, a draw of lots was held on 28.6.1997 and an M.I.G. flat was allocated to the respondent No.1 and she was informed vide letter dated 19.11.1997 about the said allocation. As per the said allocation letter, the allotment was for a tentative cost to the tune of Rs.4,79,200/-. Respondent No.1 would deposit a further 15% of the price of the flat within 30 days of the issuance of the allotment letter and the balance amount was to be deposited in equal monthly installments over a period of 13 years. It was also open for her to make payment of the balance amount in a lump sum within 60 days from the date of issue of the allotment letter. The authority issued the letter of allotment dated 9th March, 1999 in her favour, which made it clear that the price of the house was Rs.5,55,200/- and that she had to send her acceptance of the allotment and deposit 25% of the amount within 60 days of the receipt of the allotment letter. She had to deposit the balance amount in monthly installment over a period of 13 years. The respondent No.1 did not make any response to the said letter nor did she deposit any amount. The appellant-authority on her guery vide letter dated 28th August, 2003, informed the respondent No.1 that the allotment made in her favour stood cancelled, as she did not deposit any amount in pursuance of the allotment letter dated 9th March, 1999.

4. Being aggrieved, respondent No. 1 preferred an appeal before the Estate Officer of the appellants challenging the order

A of cancellation. The said appeal was dismissed vide order dated 30th March, 2006, against which the respondent No.1 preferred a revision which was also dismissed by the Revisional Authority vide order dated 31.7.2007.

5. Being aggrieved, respondent No. 1 preferred Writ Petition No.16621 of 2007 challenging the orders passed by the authorities of the appellants, as well as the State Government. The writ petition has been allowed quashing all the orders passed by the authorities of the appellants and of the State of Punjab. Hence, this appeal.

6. Mr. Satinder S. Gulati, learned counsel appearing for the appellants, has submitted that the respondent No.1 was sent the letters of allocation as well as the allotment by Registered Post. She did not send her acceptance nor did she deposit any D amount whatsoever and she filed an appeal wherein she did not take the ground that she had not received the letter of allotment. Respondent No. 1 had made very vague pleadings stating that she had not heard anything from the appellants after depositing the application fee. She failed to make any deposit at any stage and the High Court has wrongly proceeded as if she did not have any notice of the allocation or allotment. The High Court summoned the officer of the appellant-authority and quashed the order of cancellation and all other consequential orders only on the ground that the allotment letter had not been sent to the correct person at correct address, placing reliance upon the receipt and dispatch register of the authority alone. The appellant-authority was not given a proper opportunity to file a reply to the writ petition. Thus, the order impugned passed by the High Court is liable to be set aside.

7. On the other hand, Shri Govind Goel, learned counsel appearing for the respondents, has submitted that greater injustice has been done to the respondent by the authorities, as in spite of the order of allotment, the allotment had been cancelled without issuing any show cause notice to her or sending any information whatsoever. The High Court has rightly

taken note of the fact that the notice was sent to an incorrect A person and to the incorrect address. Therefore, the order of the High Court does not warrant interference. The appeal lacks merit and is liable to be dismissed.

- 8. We have considered the rival submissions made by learned counsel for the parties and perused the record.
- 9. The Appellate Authority, after considering the pleadings, appreciating the evidence on record and hearing both the parties, came to the conclusion that respondent No. 1 did not deposit the required amount and did not execute the hirepurchase agreement and she failed to give any cogent reason for the same. The appeal was rejected.
- 10. Before the Revisional Authority, no factual foundation had been laid by respondent No. 1 on relevant factual aspects, particularly, on the fact that she had not received the allotment letter. The only relevant ground reads as under:

"That due to some financial difficulties, the applicantpetitioner could not arrange the huge sum of Rs.1,19,800/ - to be paid within the stipulated period. The applicantpetitioner also approached some banks for loan but the Bank Authorities did not agree to grant loan for the purpose. However, now the applicant-petitioner has arranged funds for the purpose and is willing and ready to make the payment at any time."

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The revision was dismissed by the Revisional Authority vide order dated 31.7.2007.

11. This ground impliedly amounts to admission that respondent No. 1 was fully aware of her liability and she could not fulfill the requirement only for non-availability of funds. The fact that she had not received the allotment letter was neither pleaded before the Appellate Authority nor before the Revisional Authority. Thus, there was no occasion for either of the said authorities to record a finding on this factual aspect.

A 12. In the writ petition filed on 25-10-2007 before the High Court, a totally new case was built up on a new factual matrix, i.e. that respondent No. 1 had never received the allotment letter and after waiting for a long time when she made a representation to the authorities, she was informed that allotment made vide letter dated 9.3.1999 has been cancelled vide order dated 28.8.2003.

13. The Writ Petition came for admission before the High Court on 29.10.2007, wherein the following order was passed:-

C "Let concerned records be produced by Greater Mohali Area Development Authority, Mohali on 12.11.2007. Copy of the order be given dasti under the signature of Bench Secretary."

14. When matter came up on 12.11.2007 before the High Court, the appellants herein did not appear, and thus, the Court passed the following order:-

"Accordingly, Special Secretary to Govt. of Punjab,
Department of Housing and Urban Development, Mini
Secretariat, (ii) Chief Administrator, Greater Mohali Area
Development Authority and (iii) Addl. Chief Administrator
of Punjab Urban Planning & Development Authority,
Mohali, are directed to remain present in Court on
22.11.2007 to explain reasons for disobeying order dated
29.10.2007 of this court.

A copy of this order be given to Mr. A.G. Masih, Senior Deputy Advocate General, Punjab for ensuring compliance."

G 15. The officers of the appellants received the order dated 29.10.2007 on 13.11.2007 and that is why, they did not enter appearance and none of their officers could be present in the Court on 12.11.2007. To this effect, an affidavit was filed on 20.11.2007. A specific plea was taken therein that the allotment letter was sent to respondent No. 1 at the correct address under

GREATER MOHALI AREA DEVELOPMENT 145 AUTHORITY v. MANJU JAIN [DR. B.S. CHAUHAN, J.]

registered cover as was recorded at serial no.364 of the Register for dispatch of registered letters and on which the stamp of the Post Officer, SAS Nagar, dated 11.3.1999 had been affixed along with 11 other registered letters dispatched on that date. Photocopies of those allotment letters were appended along with affidavit. It was further submitted that the B letter of cancellation was also sent to the same address where the allocation and allotment letters had been sent.

16. The matter came up before the Court on 22.11.2007 when the writ petition filed by the respondent No. 1 stood allowed without examining the entire record placed before the Court, only on the ground that the dispatch register did not contain the correct name and address of respondent No.1.

The writ petition was finally allowed by the High Court within a period of 26 days of its filing without giving any proper opportunity to the present appellants to file a reply and produce material to controvert the averments made in the writ petition.

- 17. The High Court failed to note that the appellants had taken a specific plea that the letter of allotment had been communicated to respondent No. 1 by Registered Post. The Privy Council in *Harihar Banerjee Vs. Ramshashi Roy* AIR 1918 PC 102, held that there can be a presumption of receipt of a letter sent under postal certificate in view of the provisions of Section 114 III.(f) of the Indian Evidence Act, 1872 (hereinafter the Evidence Act).
- 18. In Mst. L.M.S. Ummu Saleema Vs. B.B.Gujral & Anr. AIR 1981 SC 1191, this Court dealt with the issue of presumption of service of letter sent under postal cover, and observed:-

"The certificate of posting might lead to a presumption that a letter addressed to the Assistant Collector of Customs was posted on 14-8-80 and in due course reached the addressee. But it is only a permissible and G

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A not an inevitable presumption. Neither Section 16 nor Section 114 of the Evidence Act compel the Court to draw a presumption. The presumption may or may not be drawn. On the facts and circumstances of a case, the Court may refuse to draw the presumption. On the other hand, the presumption may be drawn initially but on a consideration of the evidence, the Court may hold the presumption rebutted."

19. In C.C. Alavi Haji Vs. Palapetty Muhammed & Anr. (2007) 6 SCC 555, this court re-iterated a similar view that Section 27 of General Clauses Act, 1897 and Section 114 III.(f) of the Evidence Act, give rise to a presumption that the service of a notice has been effected when it is sent to the correct address by registered post. This Court held as under:-

D "Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post....... Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business."

20. This Court has reiterated a similar view in *Gujarat Electricity Board & Anr. Vs. Atmaram Sungomal Poshani* AIR 1989 SC 1433; Chief Commissioner of Income Tax (Admn.), Bangalore Vs. V.K. Gururaj & Ors. (1996) 7 SCC 275; Poonam Verma & Ors. Vs. Delhi Development Authority (2007) 13 SCC 154; Sarav Investment & Financial Consultancy Private Limited & Anr. Vs. Llyods Register of Shipping Indian Office Staff Provident Fund & Anr. (2007) 14 SCC 753; Union of India Vs. S. P. Singh (2008) 5 SCC 438; Municipal Corporation, Ludhiana Vs. Inderjit Singh & Anr. (2008) 13 SCC 506; and V. N. Bharat Vs. Delhi Development Authority & Anr. AIR 2009 SC 1233.

21. In view of the above, the High Court ought to have

GREATER MOHALI AREA DEVELOPMENT 147 AUTHORITY v. MANJU JAIN [DR. B.S. CHAUHAN, J.]

examined the issue in the correct perspective, as respondent A No. 1 did not controvert the plea taken by the appellants of sending the allotment letter by Registered Post.

- 22. Mere draw of lots/allocation letter does not confer any right to allotment. The system of draw of lots is being resorted to with a view to identify the prospective allottee. It s only a mode, a method, a process to identify the allottee i.e. the process of selection. It is not an allotment by itself. Mere identification or selection of the allottee does not clothe the person selected with a legal right to allotment. (See *Delhi Development Authority Vs. Pushpendra Kumar Jain, AIR* 1995 SC 1).
- 23. Constitution Benches of this Court in *Bachhittar Singh Vs. State of Punjab & Anr.* AIR 1963 SC 395; and *State of Punjab Vs. Amar Singh Harika* AIR 1966 SC 1313, have held D that an order does not become effective unless it is published and communicated to the person concerned. Before the communication, the order can not be regarded as anything more than provisional in character.

A similar view has been reiterated in *Union of India & Ors. Vs. Dinanath Shantaram Karekar & Ors.* AIR 1998 SC 2722; and *State of West Bengal Vs. M.R. Mondal & Anr.* (2002) 8 SCC 443.

In Laxminarayan R. Bhattad & Ors. Vs. State of F Maharashtra & Anr. (2003) 5 SCC 413, this Court held that the order of the authority must be communicated for conferring an enforceable right and in case the order has been passed and not communicated, it does not create any legal right in favour of the party.

Thus, in view of the above, it can be held that if an order is passed but not communicated to the party concerned, it does not create any legal right which can be enforced through the

A court of Law, as it does not become effective till it is communicated.

24. Clause 4 of the allotment letter reads as under:-

"In case you accept this allotment, you should send your acceptance by registered post along with amount of balance of twenty five percent of price within sixty days from the date of receipt of allotment letter." (Emphasis added)

In the instant case, an acceptance letter had not been sent by respondent No.1. Thus, the allotment in her favour remained of no significance.

25. The respondent No.1 raised the plea of non-receipt of the letter of allotment first time before the High Court. Even if it is assumed that it is correct, the question does arise as to whether such a new plea on facts could be agitated before the Writ Court. It is settled legal proposition that pure question of law can be raised at any time of the proceedings but a question of fact which requires investigation and inquiry, and for which no factual foundation has been laid by a party before the Court or Tribunal below, cannot be allowed to be agitated in the Writ Petition. If the Writ court for some compelling circumstances desires to entertain a new factual plea the court must give due opportunity to the opposite party to controvert the same and adduce the evidence to substantiate its pleadings. Thus, it is not permissible for the High Court to consider a new case on facts or mixed question of fact and law which was not the case of the parties before the Court or Tribunal below. (Vide State of U.P. Vs. Dr. Anupam Gupta, AIR 1992 SC 932; Ram G Kumar Agrawal & Anr. Vs. Thawar Das (D) through Lrs., (1999) 7 SCC 303; Vasantha Viswanathan & Ors. Vs. V.K. Elayalwar & Ors. (2001) 8 SCC 133; Anup Kumar Kundu Vs. Sudip Charan Chakraborty, (2006) 6 SC 666; Tirupati Jute Industries (P) Ltd. Vs. State of West Bengal, (2009) 14 SCC 406; and

GREATER MOHALI AREA DEVELOPMENT 149 AUTHORITY v. MANJU JAIN [DR. B.S. CHAUHAN, J.]

Sanghvi Reconditioners (P) Ltd. Vs. Union of India & Ors. A (2010) 2 SCC 733.

In the instant case, as the new plea on fact has been raised first time before the High Court it could not have been entertained, particularly in the manner the High Court has dealt with as no opportunity of controverting the same had been given to the appellants.

More so, The High Court, instead of examining the case in the correct perspective, proceeded in haste, which itself amounts to arbitrariness. (Vide Fuliit Kaur Vs. State of Punjab AIR 2010 SC 1237).

26. In Teri Oat Estates (P) Ltd. Vs. U.T. Chandigarh & Ors. (2004) 2 SCC 130, this Court held that cancellation of an allotment should be a last resort. The allotment should not be cancelled unless the intention or motive on the part of the allottee in not making due payment is evident. The drastic power of resumption and forfeiture should be exercised in exceptional cases but that does not mean that the statutory rights conferring the right on the authority should never be resorted to. In exceptional circumstances, where the allottee does not make any payment in terms of allotment, the order of cancellation should be passed. Sympathy or sentiment by itself cannot be a ground for passing an order in favour of allottees by the courts nor can an order be passed in contravention of the statutory provisions.

27. If the instant case is examined in the light of the aforesaid settled legal propositions, it becomes clear that respondent No.1, did not make any response whatsoever after applying for allotment. No explanation could be furnished by respondent No.1 for why she kept quiet for 41/2 years after receiving the allocation letter and why she did not make any attempt to find out what had happened to her application. Respondent No.1 did not send her acceptance of the allotment; did not deposit the amount which became due in 1999 itself; A and did not execute the required hire-purchase agreement with the appellant-authority. Thus, it is solely because of her that no concluded contract could come into existence between the parties. In such a fact-situation, the respondent No.1 could not be handed over possession of the flat. The forfeiture of the earnest money is in terms of the statutory provisions.

While deciding the writ petition, the High Court did not even consider the well reasoned judgments/orders by the authorities under the Statute. The Court was supposed to examine the correctness of those orders. More so, the relevant record of the authority was not examined.

No reason, leave alone a cogent reason has been given by the High Court for the reversal of these orders.

28. The High Court while deciding the case did not give D opportunity to the authority to file a reply to the writ petition. The Court proceeded in haste and decided the case relying upon irrelevant materials. An appropriate course may be to set aside the Judgment and order of the High Court and remit it for consideration afresh. However, as a period of 13 years has already been elapsed, since the proceeding came into existence and we ourselves have examined the entire record and re-appreciated the evidence, such a course would not serve any purpose.

29. In view of the above, the appeal is allowed. The judgment and order of the High Court is set aside and the orders passed by the authorities under the statute are restored. No order as to costs.

K.K.T.

Appeal allowed.

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KESHAV DUTT

V.

STATE OF HARYANA (Criminal Appeal No. 1560 of 2010)

AUGUST 19, 2010

[ALTAMAS KABIR AND DR. MUKUNDAKAM SHARMA. JJ.1

Prevention of Corruption Act, 1988: s.13(1)(d) -Conviction based on report of handwriting expert - Bribe C amount recovered from the co-accused - Appellant not present on the spot nor did he receive the money - Held: It was only the report of handwriting expert which connected the appellant with the offence on account of the paper which was said to be in his handwriting - The handwriting on the paper D was not formally proved by the prosecution - The expert was not examined - In the absence of examination of expert, his report cannot be relied on - The complicity of appellant was thus not established beyond doubt - Appellant entitled to benefit of doubt - His conviction set aside.

Evidence: Report of handwriting expert - Admissibility of - Held: Report of a handwriting expert cannot be admitted in evidence without examination of the expert - Prevention of Corruption Act, 1988.

The prosecution case was that the appellant-accused alongwith the co-accused employed as meter readers under the Electricity Board went to the house of the complainant for checking the electricity meter. After such checking, they informed the complainant that the load in the meter was excess of the permissible load which was liable to fine. The meter reading was noted on a paper Ex.PR by the appellant. They informed the complainant

A that if he paid bribe money, the matter would be hushed up. After about a week, both the accused again went to the complainant's house and demanded the bribe money and ultimately a sum of Rs.2000 was fixed. The complaint was made and trap was laid. The co-accused as well as B one 'M' went to the complainant's house. The raiding party recovered money from 'M'. All the three accused were charged under Section 7 read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. The appellant and the co-accused were convicted under Section C 13(1)(d) and sentenced to undergo rigorous imprisonment for a period of three years. However, 'M' was acquitted of all the charges. The appellant and the co-accused filed the appeals challenging the conviction and the sentence. State also filed appeal against the order D of acquittal of 'M'. The High Court affirmed the judgment of conviction. It, however, reduced the sentence of imprisonment from three years to one year. The High Court also dismissed the appeal preferred by the State.

In the instant appeal, it was contended for the appellant that without examining the handwriting expert. reliance could not be placed on his report; and that since the appellant was acquitted under Section 7 of the Prevention of Corruption Act, 1988, his conviction under Section 13(1)(d) of the Act was not maintainable.

Allowing the appeal, the Court

HELD: The appellant had neither received the bribe money nor was he present at the spot when the same G was received by the co-accused, who handed over the same to 'M', but the involvement of the appellant did not require his presence at the time of the raid as he was connected with the offence in view of Ex.PR which was the paper on which the meter reading was jotted down

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allegedly by the appellant. Ex.PR was proved by the handwriting expert to be in the handwriting of the appellant. In that context, the question whether the opinion of the handwriting expert could have been relied upon without examining him was relevant. The report of the fingerprint expert who was not examined, indicated that a specimen writing was given by the appellant and on a comparison of the same with the writings in Ex.PR, the fingerprint expert came to the conclusion that they were written by the same person. The trial court skirted the issue by holding that the defence could have examined an expert to rebut the report. The High Court recorded that the report having gone unrebutted could be relied upon without any demur. The views of the trial court as well of the High Court in that regard cannot be accepted. When the trial court chose to rely on the report of the handwriting expert, it ought to have examined the handwriting expert in order to give an opportunity to the appellant and the other accused to cross-examine the said expert. There is nothing on record to show that the appellant and the other accused had admitted the report of the handwriting expert. Both the trial court and the High Court erred in denying the appellant such opportunity and shifting the onus on him to disprove Ex.PR which was not formally proved by the prosecution. It was only the report of the handwriting expert, Ex.PY, which connected the appellant with the offence on account of Ex.PR which was said to be in his handwriting. Since the appellant had neither received the money nor was he present at the spot from where the other accused were apprehended, his case has to be treated on a different footing and since his complicity was not established beyond doubt on the basis of Ex.PR and Ex.PY, he must be given the benefit of doubt. The impugned order is liable to be set aside on this ground

A alone. The judgment of conviction and sentence of the appellant under Section 13(1)(d) of the Prevention of Corruption Act, 1988, is set aside. [Paras 11, 12, 13, 15] [158-E-H; 159-A-E; D-E-G]

B CIRMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1560 of 2010.

From the Judgment & Order dated 08.09.2009 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 427-SB of 2005.

Nitin Sangra, Gaurav Agrawal for the Appellant.

Rajeev Gaur 'Naseem', Nazid K. Hye, Kamal Mohan Gupta for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

- 2. Two short points fall for consideration in this Appeal. One is whether the opinion of a handwriting expert can be admitted in evidence without examination of the handwriting expert and the other is whether a person who is charged of an offence under Section 7 read with Section 13(1)(d) of the Prevention of Corruption Act, 1988, and is subsequently acquitted of the charge under Section 7, can still be convicted under Section 13(1)(d) of the aforesaid Act.
- 3. The Appellant and one Kewal Kumar were convicted by the Special Judge, Yamuna Nagar at Jagadhari, under Section 13(1)(d) of the Prevention of Corruption Act, 1988, and were G sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.2,000/-, in default, to undergo rigorous imprisonment for a further period of six months. The co-accused Mahesh Kumar was, however, acquitted of all the charges.

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4. According to the prosecution, on 23rd April, 2002, one Anil Kumar, son of Kewal Prakash Mehta, made an application to the Superintendent of Police, Vigilance, Ambala, stating that he was running a dairy adjoining his house. On 19th April, 2002, Kewal Kumar and the Appellant herein, who were employed as Assistant Lineman and Meter Reader, respectively, under the Electricity Board, Sadhaura, came to his house for checking the electric meter. After such checking, the said Anil Kumar was made to sign on a paper and was informed that the load in the meter was in excess of the permissible load and the matter would have to be reported to the Board which could entail a fine of at least Rs.14,000-15,000/-. The accused persons then informed him that he would have to pay a sum of Rs.7,000/as bribe if he wanted the case to be hushed up. The further case of the prosecution is that on 25th April, 2002, both the accused came to Anil Kumar's house and, once again, demanded the bribe money and ultimately the said two accused agreed to accept a sum of Rs.2,000/- between 4.00-5.00 p.m. on the next date, failing which the case against him would have to be made ready, but if payment was made, the matter would be hushed up.

5. The matter was endorsed by the Superintendent of Police to the Vigilance Inspector before whom the complainant produced Rs.2,000/- for the purpose of laying a trap. Ultimately, the accused Kewal Kumar as well as Mahesh Kumar came to the complainant's house and went inside and on a signal being given, the members of the raiding party went inside the house and asked Kewal Kumar to hand over the bribe money which he had taken from the complainant. Kewal Kumar indicated that the money had been given to Mahesh Kumar and on demand Mahesh Kumar made over the same to the Inspector. The hands of both Kewal Kumar and Mahesh Kumar were got washed separately in a solution of Sodium Carbonate, the colour of which turned pink. The accused were put under arrest and after police investigation, a charge sheet was filed against them in Court for their trial.

A 6. All the three accused were charged under Section 7 read with Section 13(1)(d) of the above-mentioned Act and were convicted and sentenced as mentioned hereinbefore. The judgment and order of the Trial Court was questioned before the High Court in Criminal Appeal No.427-SB of 2005 filed by Keshav Dutt, the Appellant herein, and Criminal Appeal No.438-SB of 2005 filed by Kewal Kumar. The third Appeal No.1328-SB of 2009 was filed by the State of Haryana against the acquittal of Mahesh Kumar of the charges framed against him. The High Court while affirming the judgment of the Trial Court as far as Kewal Kumar and the Appellant are concerned, reduced the sentence of imprisonment from three years to one year. The High Court also dismissed the Appeal preferred by the State.

7. It is against the said order that the present Special D Leave Petition has been filed.

8. The main contention of Mr. Nitin Sangra, learned Advocate appearing for the Appellant, is whether a charge under Section 120-B IPC could be maintained against the Appellant in respect of an offence committed by his coaccused. Elaborating further, learned counsel also raised the question as to whether the Appellant's conviction under Section 13(1)(d) of the Prevention of Corruption Act, 1988, was maintainable when the accused had been acquitted under Section 7 of the Act and the Appellant neither received the bribe money nor was he present when such bribe amount was said to have been paid to the co-accused and no charge under Section 120-B/34 IPC had been brought against the accused persons.

9. The other question raised was whether without examining the handwriting expert his report could have been admitted into evidence and relied upon although the same formed the main basis of conviction. In this regard, the learned counsel placed reliance on the decision of this Court in *State of Maharashtra Vs. Damu* [2000 (6) SCC 269], wherein while

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considering the case of abducting and triple infanticide, this Court had occasion to consider whether reliance could be placed on the opinion of the Assistant State Examiner of Documents without examining him as a witness in Court. This Court held that from the opinion itself it could not be gathered whether his office would fall within the purview of Section 293 Cr.P.C. Accordingly, the Court observed that without examining him as an expert witness, no reliance could be placed on his opinion. Learned counsel urged that the conviction of the Appellant on the basis of the above could not be sustained.

10. The submissions made on behalf of the Appellant were opposed on behalf of the State of Harvana and it was submitted that the provisions of Sections 7 and 13(1)(d) contemplated separate offences which could stand independently and were not entirely dependent on each other. Learned counsel urged that even if an accused was acquitted of the charge under Section 7, he could still be convicted under Section 13 of the Prevention of Corruption Act, 1988, as has been done in the instant case. It was observed by the High Court that PW.5 had categorically stated that he had not authorized accused Kewal Kumar as also the Appellant to check the meter installed at the residence of the complainant and that it was because of this reason that the Trial Court had excluded this accused from the offence under Section 7 of the Act. The Trial Court, in fact, observed that the complaint Ex.PJ was written by some official of the Vigilance Department or by someone at the instance of the Inspector and even the complainant could not identify the person who had written the complaint. However, as far as the offence under Section 13(1)(d) is concerned, the High Court affirmed the findings of the Trial Court that the bribe money had been demanded and received by the accused persons. The Appeal Court also observed that the bribe money had been initially received by Kewal Kumar who had handed over the same to Mahesh Kumar, who was acquitted by the Trial Court. However, the document Ex.PR which bears the signature of the complainant, coupled with Ex.PY, the report of the Forensic

A Science Laboratory, connected the Appellant herein with the commission of the crime and it was held that he could not be allowed to go free only because he was not present or apprehended at the time of the raid. Learned counsel for the State submitted that the submissions made on behalf of the Appellant did not justify interference of this Court with the impugned judgment of the High Court.

11. We have considered the submissions made on behalf of respective parties and have also taken note of the fact that the Appellant had neither received the bribe money nor was he present at the spot when the same was received by Kewal Kumar, who handed over the same to Mahesh Kumar, but the involvement of the Appellant did not require the presence of the Appellant at the time of the raid as he was connected with the offence in view of Ex.PR which is the paper on which the meter reading was jotted down allegedly by the Appellant, which was proved by the handwriting expert to be in the handwriting of the Appellant. In this context, the plea taken on behalf of the Appellant as to whether the opinion of the handwriting expert could have been relied upon without examining him becomes relevant. The Trial Court has dealt with this question by taking recourse to Section 73 of the Indian Evidence Act, 1872, which enables the Court to compare the signatures, writing or seal with others admitted or proved. In the instant case, the report of the fingerprint expert who had not been examined indicates that a specimen writing had been given by the Appellant and on a comparison of the same with the writings in Ex.PR, the fingerprint expert had come to the conclusion that they had been written by the same person. The Trial Court skirted the issue by holding that the defence counsel could have examined in G their defence to rebut the findings of the Assistant Director, Forensic Science Laboratory, Haryana. The High Court also skirted the issue by observing that the science of handwriting being imperfect and inaccurate, it is very difficult, if not impossible to give the opinion that the writings were in the hand of one and the same persons. The High Court went on to

observe that the Appellant did not have the courage to examine any counter expert in rebuttal of the report. The High Court recorded that the report having gone unrebutted could be relied upon without any demur.

12. We are afraid that we cannot concur with the views either of the Trial Court or of the High Court in the above regard. When the Trial Court chose to rely on the report of the handwriting expert (Ex.PR), it ought to have examined the handwriting expert in order to give an opportunity to the Appellant and the other accused to cross-examine the said expert. There is nothing on record to show that the Appellant and the other respondents had admitted the report of the handwriting expert. In our view, the Trial Court ought to have allowed the Appellant an opportunity to cross-examine the expert and both the Trial Court and the High Court erred in denying him such opportunity and shifting the onus on the accused to disprove Ex.PR which had not been formally proved by the prosecution. The decision cited on behalf of the Appellant regarding reliance on the opinion of an expert who had not been examined as a witness, however, includes an Assistant Director of the State Forensic Science Laboratory in clause (e) of Subsection (4) of Section 293 Cr.P.C. Section 293(1)(4)(e), which is relevant for our purpose is extracted below :-

293. Reports of certain Government scientific experts.

(1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

(2) xxx xxx XXX (3) xxx xxx xxx xxx A (4) This section applies to the following Government scientific experts, namely,

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) xxx xxx xxx

(d) xxx xxx xxx

(e) The Director [Deputy Director or Assistant Director of
 C a Central Forensic Science Laboratory or a State forensic Science Laboratory];

(f) xxx xxx xxx"

13. In the instant case, it is only the report of the handwriting expert, Ex.PY, which connects the Appellant with the offence on account of Ex.PR which is said to be in his handwriting. Since the Appellant had neither received the money nor was he present at the spot from where the other accused were apprehended, his case has to be treated on a different footing and since his complicity has not been established beyond doubt on the basis of Ex.PR and Ex.PY, he must be given the benefit of doubt.

14. Without, therefore, going into other questions which have been raised in this Appeal, we are of the view that the same should be allowed on the aforesaid ground alone.

15. The Appeal, accordingly, succeeds and is allowed and the judgment of conviction and sentence of the Appellant under Section 13(1)(d) of the Prevention of Corruption Act, 1988, is set aside. In the event, the Appellant has since been apprehended and is in custody, he shall be released forthwith, if not wanted in connection with any other case.

D.G. Appeal allowed.

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STATE OF BIHAR & ORS.

MITHILESH KUMAR (SLP (C) No. 2631 of 2009)

AUGUST 19, 2010

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

Service law - Appointment - Applications invited for filling up the posts of Assistant Instructors to impart training to disabled students - Subsequent decision to train the persons with disabilities by professionally established NGOs/ institutions - However, State Public Service Commission recommending the name of the successful candidate in the interview conducted to the Authority - Candidate not appointed – Writ petition – High Court directing the Authority D to appoint the candidate - Interference with - Held: Not called for – Norms or Rules as existing on the date when the process of selection begins will control such selection and any alteration to such norms would not affect the continuing process, unless specifically the same were given retrospective effect - Person may not acquire an indefeasible right to appointment merely on the basis of selection - Claim of the candidate to be appointed by Authority was negated by a change in policy after the selection process had begun -Service jurisprudence— Aministrative Law.

Bihar Public Service Commission advertised the posts for appointment of Instructors and Assistant Instructors to impart training to the persons with disabities. The respondent appeared at the interview and was declared successful. Meanwhile, the Empowered Committee decided to train the students through professionally established NGOs/institutions and requested not to send any further recommendations. A Thereafter, the respondent was selected in the interview and the BPSC recommended his name to the said authority for appointment but the same was rejected. The respondent then filed a writ petition. The High Court allowed the petition and directed the authority to appoint B the respondent to the said post. The Division Bench of the High Court upheld the order. Therefore, the appellant-State filed the instant Special Leave Petition.

Dismissing the Special Leave Petition, the Court

C **HELD: 1.1 It is not correct to say that the Bihar Public** Service Commission ought not to have recommended the name of the respondent for appointment after the Assistant Director, Social Welfare, had requested the Commission not to recommend any further names in D view of the decision taken by the State to have disabled persons trained through professionally established NGOs/institutions in place of Instructors/Assistant Instructors for which advertisements had already been issued by the Commission. Both the Single Judge as also the Division Bench of the High Court rightly held that the change in the norms of recruitment could be applied prospectively and could not affect those who had been selected for being recommended for appointment after following the norms as were in place at the time when the selection process was commenced. The respondent was selected for recommendation to be appointed as Assistant Instructor in accordance with the existing norms. Before he could be appointed or even considered for appointment, the norms of recruitment were altered to the prejudice of the respondent. [Para 14] [169-E-H; 170-A-B1

1.2 The law with regard to the applicability of the Rules which were amended and/or altered during the selection process is that the norms or Rules as existing H on the date when the process of selection begins will В

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control such selection and any alteration to such norms A would not affect the continuing process, unless specifically the same were given retrospective effect. In the instant case, the amendments are introduced to a recruitment process after the same has begun. [Para 15] [170-C-D]

1.3 While a person may not acquire an indefeasible right to appointment merely on the basis of selection, in the instant case, the claim of the respondent to be appointed by the BPSC had been negated by a change in policy regarding recruitment after the selection process had begun. In these circumstances, there is no reason to interfere with the impugned judgment of the Division Bench of the High Court, upholding the judgment of the Single Judge of the High Court. [Paras 16 and 17] [170-H; 171-A-B]

Shankarsan Dash vs. Union of India (1991) 3 SCC 47; Chairman, All India Railway Recruitment Board and Anr. vs. K. Shyam Kumar and Ors. (2010) 6 SCC 614; Y.V. Rangaiah & Ors. vs. J. Sreenivasa Rao and Ors. (1983) 3 SCC 284; N.T. Devin Katti vs. Karnataka Public Service Commission and Ors. (1990) 3 SCC 157; Secretary, A.P. Pubic Service Commission vs. B. Swapna and Ors. (2005) 4 SCC 154; Secretary, State of Karnataka vs. Uma Devi (2006) 4 SCC 1 - referred to.

Latham vs. Richard Johnson & Nephew Ltd. (1911-13) All E.R. 117 – referred to.

Case Law Reference:

(1991) 3 SCC 47	Referred to.	Para 6	G
(2010) 6 SCC 614	Referred to.	Para 7	
(1983) 3 SCC 284	Referred to.	Para 11	
(1990) 3 SCC 157	Referred to.	Para 11	Н

(2005) 4 SCC 154 Referred to. Para 12 Α (2006) 4 SCC 1 Referred to. Para 13 (1911-13) All E.R. 117 Referred to. Para 13

CIVIL APPELLATE JURISDICTION: SLP (C) No. 2631 В of 2009.

From the Judgment & Order dated 18.07.2008 of the High Court of Judicature at Patna In L.P.A. No. 844 of 2007.

Gopal Singh, Naresh Mathur for the Petitioners. C

Devendra Kr. Singh, Prem Sunder Jha for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. In 1998, the Department of D Welfare, Government of Bihar, decided to introduce two new trades (Electronic and Electrical Appliances Repairing) for vocational training in the Kamla Nehru Social Service Institute and Handicapped and Rehabilitation Training Centre, Patna, for training of persons with disabilities. The said proposal was approved by the Empowered Committee constituted under the Bihar Public Service Commission under the Chairmanship of the Development Commissioner and funds were also sanctioned for such training. In the light of the above decision on 12th March, 1999, a requisition was sent by the Welfare Department, Government of Bihar, to the Bihar Public Service Commission, hereinafter referred to as "the B.P.S.C.", for appointment of Instructors and Assistant Instructors, but despite sanction of funds for the year 1998-99, appointments were not made because the Commission failed to make recommendations for the said posts. Subsequently, the Scheme was not extended by the Empowered Committee, but on 30th December, 2001, pursuant to requisition made by the Welfare Department, the B.P.S.C. advertised the posts for making appointments thereto. The Respondent, Mithilesh Kumar, Н

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STATE OF BIHAR & ORS. v. MITHILESH KUMAR 165 [ALTAMAS KABIR, J.]

applied pursuant to the said advertisement and was called for A and appeared at an interview on 9th November, 2002, but immediately, thereafter, on 14th November, 2002, the Empowered Committee took a decision that from thenceforth the services of NGOs/institutions would be used for training persons with disabilities. The Assistant Director, Social Welfare, by his letter dated 14th November, 2002, requested the B.P.S.C. not to send any further recommendations as the Scheme was no longer valid and the said Committee had decided to train students of the two trades through professionally established NGOs/institutions.

- 2. On 5th December, 2002, after the said communication was received from the Assistant Director, Social Welfare, the Respondent was declared successful in the interview which had been held on 9th November, 2002, and despite the request made by the Assistant Director, Social Welfare, the B.P.S.C. recommended the name of the Respondent to the said authority for appointment. The Respondent, in his turn, made a representation seeking appointment pursuant to the results declared by the Commission. Not receiving any response, the Respondent filed Writ Petition No.543 of 2005 before the Patna High Court on 11th July, 2005, for appropriate relief. The High Court disposed of the Writ Petition with a direction to the Director, Social Welfare, Government of Bihar, to dispose of the Respondent's representation. On 15th December, 2005, the Director, Social Welfare, considered the representation of the Respondent and rejected the same.
- 3. Aggrieved by the rejection of his representation, the Respondent filed a fresh Writ Petition, being CWJC No.447 of 2006, before the Patna High Court and the same was duly allowed. The order dated 15th December, 2005, passed by the Director, Social Welfare, was quashed and the Secretary, Social Welfare, Government of Bihar and the Director, Social Welfare, were directed to appoint the Respondent to the post of Assistant Instructor (Electronics) in Kamla Nehru Social

A Service Institute and Handicapped and Rehabilitation Training Centre, Patna, after obtaining a recommendation for validation by the B.P.S.C. A direction was given to issue the appointment letter in favour of the Respondent within two weeks from the date of receipt/ production of a copy of the High Court's order.

- 4. The matter was taken to the Division Bench by the State of Bihar in LPA No.844 of 2007. On 18th July, 2008, the Division Bench of the Patna High Court dismissed the said Appeal relying entirely on the judgment of the learned Single Judge, without giving any reasons of its own.
- 5. The instant Special Leave Petition has been filed against the said judgment of the Division Bench of the Patna High Court.
- 6. Without denying the facts of the case, as narrated hereinabove, learned counsel appearing for the State of Bihar submitted that once a request had been made by the Empowered Committee to derequisition the posts in question, the B.P.S.C. ought not to have recommended the name of the Respondent for appointment as Assistant Instructor (Electronics). Referring to the Constitution Bench decision of this Court in Shankarsan Dash vs. Union of India [(1991) 3 SCC 47], learned counsel submitted that inclusion in the select panel did not vest the Respondent with an indefeasible right to be appointed, even if a vacancy existed.
- 7. Reference was also made to the decision of this Court in Chairman, All India Railway Recruitment Board & Anr. vs. K. Shyam Kumar & Ors. [(2010) 6 SCC 614], wherein while considering the scope of judicial review, this Court had G occasion to consider the aforesaid question also and it was reiterated that even after vacancies were notified for appointment and adequate number of candidates were found successful, they would not acquire any indefeasible right to be appointed against the existing vacancies.

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- 8. On the other hand, learned counsel for the Respondent A reiterated the fact that pursuant to the advertisement published by the Bihar Public Service Commission on 30th December, 2001 for filling up the posts of Instructor/Assistant Instructor, the Respondent had applied and Admit Card was issued to him in October, 2002. Pursuant to the above, the Respondent appeared in the selection process and the results were declared by the Commission on 5th December, 2002 and after declaration of the results a direction was given by the Minister concerned to the Director. Social Welfare, Bihar, Patna, the Petitioner No.3, to appoint the Respondent, Mithilesh Kumar, forthwith. Pursuant thereto, on 24th February, 2004, the Director of Social Welfare asked the Respondent to produce all his certificates before the Assistant Director on 22nd February. 2004, for verification but, thereafter, he was not favoured with an appointment letter. Learned counsel submitted that this compelled the Respondent to file CWJC No.543 of 2005 for issuance of a writ in the nature of mandamus for his appointment to the post in question.
- 9. Learned counsel submitted that on 5th March, 2005, the Director wrote to the Deputy Secretary of the Commission to revalidate the recommendation which had been made by it and had expired during the pendency of the matter. On 3rd May, 2005, the recommendation was revalidated for a period of three months. Thereafter, on 11th July, 2005, a learned Single Judge of the Patna High Court disposed of CWJC No.543 of 2005 with a direction to the Director, Social Welfare, to dispose of the Respondent's representation after seeking appropriate instruction from the State Government and to ensure disposal of the said representation on or before 3rd August, 2005.
- 10. Learned counsel submitted that the Respondent's representation was considered and rejected by the Director, Social Welfare, by his cryptic order dated 15th December, 2005, which was, thereafter, affirmed by the Division Bench in LPA No.844 of 2007 on 18th July, 2008, in an even more cryptic

- A fashion. Learned counsel urged that having been selected for appointment after a regular process of selection, the Respondent's claim for appointment could not have been neutralized simply on the basis of a request subsequently made by the Assistant Director, Social Welfare, to the B.P.S.C. not to send any further recommendations as a decision had been taken in the interregnum to train students in respect of the trades in question through professionally established NGOs/ institutions.
- 11. Learned counsel submitted that the conditions of the advertisement inviting applications for filling up the posts of Assistant Instructor (Electronics) in the Kamla Nehru Social Service Institute and Handicapped and Rehabilitation Training Centre, Patna, could not have been altered to the prejudice of the Respondent on account of a decision taken subsequently to have persons with disabilities trained by professionally established NGOs/institutions. Reliance was placed on the decision of this Court in Y.V. Rangaiah & Ors. vs. J. Sreenivasa Rao & Ors. [(1983) 3 SCC 284], where this Court in similar circumstances had held that when Service Rules are E amended, vacancies which had occurred prior to the amended Rules would be governed by the old Rules and not by the amended Rules. Reference was also made by learned counsel to the decision of this Court in N.T. Devin Katti vs. Karnataka Public Service Commission & Ors. [(1990) 3 SCC 157], wherein it was reiterated that where selection process was initiated by issuing advertisement inviting applications, selection normally should be regulated by the Rules and orders then prevailing. It was also emphasized that service jurisprudence provides that normally amendments effected during the pendency of a selection process operate prospectively, unless indicated to the contrary by express language or by necessary implication.
 - 12. Learned counsel lastly referred to the decision of this Court in Secretary, A.P. Pubic Service Commission vs. B.

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Swapna & Ors. [(2005) 4 SCC 154], wherein while considering the norms for recruitment/selection for filling up vacancies which had been initially advertised, this Court was of the view that such norms of selection cannot be altered after commencement of the selection process and Rules prescribing qualification, which were amended during the continuation of the selection process, have prospective operation unless something to the contrary is indicated expressly or by necessary implication.

13. Replying to the submissions made on behalf of the Respondent, learned counsel for the Petitioner submitted that the Respondent was not also entitled to any relief having regard to the decision of this Court in *Secretary, State of Karnataka vs. Uma Devi* [(2006) 4 SCC 1], where in paragraphs 13 and 35, the Constitution Bench quoted with approval the observations of Farwell, L.J. in *Latham vs. Richard Johnson & Nephew Ltd.* [(1911-13) All E.R. 117] to the effect that the Supreme Court in exercise of its jurisdiction under Article 142 has to be very careful not to allow sympathy to affect its judgment.

14. We have carefully considered the submissions made on behalf of the parties and we are not impressed with the stand taken by the Petitioner, State of Bihar, that the Bihar Public Service Commission ought not to have recommended the name of the Respondent for appointment after the Assistant Director, Social Welfare, had requested the Commission not to recommend any further names in view of the decision taken by the State to have disabled persons trained through professionally established NGOs/institutions in place of Instructors/Assistant Instructors for which advertisements had already been issued by the Commission. Both the learned Single Judge as also the Division Bench rightly held that the change in the norms of recruitment could be applied prospectively and could not affect those who had been selected for being recommended for appointment after following the norms as were in place at the time when the selection process A was commenced. The Respondent had been selected for recommendation to be appointed as Assistant Instructor in accordance with the existing norms. Before he could be appointed or even considered for appointment, the norms of recruitment were altered to the prejudice of the Respondent.

B The question is whether those altered norms will apply to the Respondent.

15. The decisions which have been cited on behalf of the Respondent have clearly explained the law with regard to the applicability of the Rules which are amended and/or altered during the selection process. They all say in one voice that the norms or Rules as existing on the date when the process of selection begins will control such selection and any alteration to such norms would not affect the continuing process, unless specifically the same were given retrospective effect. As far as the decision in Uma Devi's case (supra) is concerned, we share the sentiments as set out in paragraph 35 of the judgment but we are only considering a situation where amendments are introduced to a recruitment process after the same has begun. The question of allowing sympathy to affect our judgment does E not, therefore, arise in this case. Our focus is not on any individual, but on a legal principle which has been settled by this Court in various decisions, as referred to hereinbefore. There is no reason for us to have any disagreement with the decision of this Court in All India Railway Recruitment Board case (supra) regarding the right to appointment even of selected candidates, but this is not a case of the Respondent having acquired any indefeasible right which has to be cancelled on account of certain exigencies. On the other hand, this is a case where although selected for the purpose of appointment by the B.P.S.C., Patna, the case of the Respondent was not even considered as there was a change in policy regarding recruitment in the meantime.

16. While a person may not acquire an indefeasible right to appointment merely on the basis of selection, in the instant

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case the fact situation is different since the claim of the A Respondent to be appointed had been negated by a change in policy after the selection process had begun.

17. In these circumstances, we do not see any reason to interfere with the impugned judgment of the Division Bench of the High Court dated 18th July, 2008, in LPA No.844 of 2007, affirming the judgment of the learned Single Judge dated 31st July, 2007, in CWJC No.447 of 2006. The Special Leave Petition is, therefore, dismissed, without any order as to costs.

N.J. Special Leave Petition Dismissed.

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V.

UNION OF INDIA AND ORS. (Civil Appeal No. 6811 of 2010)

AUGUST 20, 2010

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

Metro Railways (Construction of Works) Act, 1978: s.45 - Acquisition of land for construction works relating to metro C railways in the metropolitan cities - Applicability of Land Acquisition Act – Held: s.45 makes it clear that the authorities are free to apply the Metro Railways Act and acquire any land for such construction work, but at the same time, there is no specific prohibition in the Metro Railways Act from applying the Land Acquisition Act to acquire any land for the said purpose - In view of urgency and in the absence of similar urgency clause in the Metro Railways Act as that of Land Acquisition Act, the Government can issue a fresh notification for acquisition under the Land Acquisition Act – On facts, plea that acquisition of private land was not justified as government land adjoining to the land in question was available - Plea not accepted as the adjoining land belonging to DDA was notified as reserved forests - Land Acquisition Act, 1894.

A notification under Section 4 of the Land Acquisition

Act, 1894 was issued to acquire vast tract of agricultural land including that of appellants for the planned development of Delhi. The appellants challenged the acquisition before the High Court by filing writ petitions. After dismissal of the writ petitions, the appellants filed appeal before the Supreme Court, which directed maintenance of status quo in respect of the possession of the land in question. Thereafter, Delhi Metro Railway Corporation (DMRC) filed applications for impleadment/

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modification of order of status quo on the ground that the land admeasuring 26,187 sq. mtrs. was required urgently for the construction of Chattarpur Metro Station. The Court allowed the application for impleadment and clarified the order to the effect that DMRC was free to proceed with the fresh acquisition in accordance with law. Pursuant to the same, fresh notification dated 04.06.2009 was published by the concerned authority exercising powers under Section 4 read with Section 17(1)(4) of the Metro Railways (Construction of Works) Act, 1978 for the acquisition of the land of the appellants. A writ petition was filed before the High Court challenging the said action and the entire acquisition. The High Court dismissed the petition.

In the instant appeals, the appellants contended that since the acquisition of the land was for DMRC and there was a specific Act, namely, the Metro Railways (Construction of Works) Act, 1978, the authorities were not justified in invoking the urgency provision in the Land Acquisition Act by dispensing with the enquiry under Section 5A of the said Act and that the Government land adjoining to the land in question was available and therefore, the acquisition of a private land belonging to the appellants was not justified.

Dismissing the appeals, the Court

HELD: 1. In the instant case, the acquisition of land was for public purpose. There was urgency in executing the project before the commencement of Common Wealth Games. Section 45 of the Metro Railways (Construction of Works) Act, 1978 makes it clear that if any land is required for the construction works relating to metro railways in the metropolitan cities, the authorities are free to apply the Metro Railways Act and acquire any land. But at the same time, there is no specific prohibition in the

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A Metro Railways Act from applying the Land Acquisition Act to acquire any land for a public purpose, more particularly, for the construction works relating to metro railways in the metropolitan cities. Although special enactment, namely, Metro Railways Act, 1978 was available, in view of urgency and in the absence of similar urgency clause in the Metro Railways Act as that of Land Acquisition Act, the Delhi Government was justified in issuing a fresh notification for acquisition under the Land Acquisition Act. [Paras 6, 8] [178-B-F; 180-D-F]

S.S. Darshan v. State of Karnataka and Others, (1996) 7 SCC 302 – relied on.

2. Land acquisition proceedings can be challenged only by the "person-interested" and none else. On this ground also, the claim of appellants is rejected. The appellants had not specified anywhere in the affidavit, the details regarding their holdings, such as khasra no., extent, ownership details with reference to revenue records. They did not disclose anywhere in the petition as to how they are concerned with the suit land. Very vague pleadings were made that the suit land belonged to their family. As per the revenue record, total area of land owned by their so called family was 12-1-0 bighas only while the land in respect of which the acquisition was under challenge was 28-1-0 bighas. [Para 9] [180-G-H; 181-A-B]

3. By virtue of Notification No. F.10(42)-I/PA/DCF/93/2012-17(1) dated 24.05.1994, the adjoining land owned by DDA was notified as reserved forests. The Conservator of Forests also specifically stated that the said DDA land was a forest land. In addition to the same, DDA had filed an affidavit to the effect that the land of DDA falls in reserved park and reserved forests. The joint survey carried out by the Conservator of Forests and DDA in the Presence of the appellants is a sufficient proof that the

land in question belongs to DDA being the land notified A under the said Notification. In the matter of this nature, courts have to accept the notification duly issued by the concerned authority as sufficient proof. [Para 10] [181-C-H; 182-A-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6811 of 2010.

From the Judgment & Order dated 08.09.2009 of the High Court of Delhi at New Delhi CWP No. 9647 of 2009.

Parag P. Tripathi, P.S. Patwalia, S.S. Reddy, Ajay Singh, Manish Kaushik, Vivek Singh, Arvind Kumar Gupta, Rachna Srivastava, Nikhil Goel, Naveen Goel, Marsook Bafati, A. Venayagam Balan, Kiran Bhardwaj, Sushma Suri, Tarun Johri for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 08.09.2009 passed by the High Court of Delhi at New Delhi in W.P. (C) No. 9647 of 2009 whereby the High Court dismissed the petition filed by the appellants herein.

3. Brief facts:

A notification under Section 4 (1) of the Land Acquisition Act, 1894 (hereinafter referred to as "the Act") was issued on 24.10.1961 to acquire vast chunk of agricultural land for the planned development of Delhi including the lands of the appellants herein situated in Village Mehrauli. A declaration under Section 6 of the Act in respect of the said land was issued on 04.01.1969. Notices were issued by the Collector under Section 9 of the Act on 26.04.1983, after a lapse of almost 22 years from the date of Notification published under Section 4 (1) of the Act. Thereafter, objections and claims were

A filed by the appellants on 23.05.1983. Challenging the validity of the acquisition proceedings, the appellants filed W.P. (C) No. 1129 of 1983 and other members of the family also filed W.P.(C) No. 1131 of 1983 before the High Court. The High Court, vide its order dated 25.05.1983, issued notice and directed to maintain status quo as on that date. However on

directed to maintain status quo as on that date. However on 15.04.2004, the High Court dismissed the writ petitions. Against the dismissal of the writ petition, the appellants filed Review Petition No. 253 of 2004 which was also dismissed by the High Court. Aggrieved by the said order, on 19.11.2004, the appellants filed S.L.P. before this Court. On 24.01.2005.

the appellants filed S.L.P. before this Court. On 24.01.2005, this Court, while issuing notice, granted status quo in respect of possession of the land in question. Thereafter, the abovesaid S.L.P. were numbered as Civil Appeal Nos. 2418-2419 of 2008. On 07.10.2008, Delhi Metro Rail Corporation Limited (hereinafter referred to as "DMRC") filed applications in C.A.

Nos. 2418-2419 of 2008 for impleadment and vacation/ modification of order of status quo on the ground that land admeasuring 26,187 sq. mtr. was required urgently for the construction of Chattarpur Metro Station on Qutub Minar-Gurgaon Corridor of Delhi MRTS. On 17.11.2008, this Court allowed the application for impleadment and clarified that the order of status quo passed by it will not come in the way of

DMRC proceeding with fresh acquisition in accordance with

law. Thereafter, on 19.01.2009, the Land Acquisition Collector along with Delhi Administration preferred I.A. No. 5 of 2009 and on 29.1.2009, DMRC also filed I.A.No.6 of 2009 in C.A. Nos. 2418-2419 of 2008 for modification of this Court's order dated 17.11.2008. This Court, on 23.02.2009, disposed of the said applications for modification reiterating its earlier order dated 17.11.2008. On 06.06.2009, the Government of NCT of Delhi and Land & Building Department, Govt. of Delhi published a

and Land & Building Department, Govt. of Delhi published a notification dated 02.06.2009 under Section 48 of the Act withdrawing its earlier notification for acquisition of land in question and a fresh notification dated 04.06.2009 was published on 07.06.2009 exercising powers under Section 4

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read with Section 17(1)(4) of the Act seeking to acquire land of the appellants. Challenging the said notification, the appellants filed W.P. (C) No. 9647 of 2009 before the High Court. The High Court by the impugned order dated 08.09.2009 dismissed the petition. Aggrieved by the said order, the appellants have preferred this appeal by way of special leave petition before this Court.

4. Heard Mr. P.S. Patwalia, learned senior counsel for the appellants/land owners, Mr. Parag P. Tripathi, Additional Solicitor General for the Union of India and Mr. Nikhil Goel for DDA.

5. Main Contentions:

- i) When the acquisition of the land is for DMRC and when there is a specific Act, namely, the Metro Railways (Construction of Works) Act, 1978 whether the authorities are justified in invoking the urgency provision in the Land Acquisition Act by dispensing enquiry under Section 5A of the said Act.
- ii) When Government land adjoining to the land in question is available, whether acquisition of a private land belonging to the appellants is justifiable.

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6. It is true that initially a vast extent of agricultural lands in Delhi were sought to be acquired under the provisions of the Land Acquisition Act (Central Act) for the planned development of Delhi. The said acquisition was challenged before the High Court of Delhi and after their dismissal, the appellants and others preferred Civil Appeal Nos. 2418-2419 of 2008 before this Court and vide order dated 24.01.2005, this Court directed maintenance of status quo in respect of possession of land in question. Subsequently, at the instance of the DMRC, the limited status quo order was clarified to the effect that DMRC is free to proceed with the fresh acquisition in accordance with law. Pursuant to the same, fresh notification dated 04.06.2009

A was published on 07.06.2009 exercising powers under Section 4 read with Section 17(1)(4) of the Act seeking to acquire the land of the appellants. The said action and the entire acquisition proceeding was challenged before the High Court which ended in dismissal. As raised before the High Court, it was contended before us that in view of the Metro Railways (Construction of Works) Act. 1978, the respondents are not permitted to invoke urgency provision under the Land Acquisition Act which deprived the appellants from participating in the enquiry under Section 5A. The Metro Railways Act (No. 33 of 1978) was enacted by the Parliament to provide for the construction of works relating to metro railways in the metropolitan cities. Chapter III of the said Act deals with 'Acquisition'. It is not in dispute that similar provisions as that of Sections 4, 5A, 6, 9 and 11 of the Land Acquisition Act have been incorporated in the Metro Railways Act. Section 17 makes it clear that when acquisition of land is initiated under Metro Railways Act, the provisions of Land Acquisition Act, 1894 shall not apply. Section 45 also makes it clear that any proceeding initiated under the Land Acquisition Act for the purpose of any metro railway project pending immediately before the commencement of Metro Railways Act is to be continued and be disposed of under that Act (Land Acquisition Act). The above provisions make it clear that if any land is required/needed for the construction works relating to metro railways in the metropolitan cities, the authorities are free to apply the Metro Railways Act and acquire any land. But at the same time, there is no specific prohibition in the Metro Railways Act from applying the Land Acquisition Act to acquire any land for a public purpose, more particularly, for the construction works relating to metro railways in the metropolitan cities. G

7. The respondents have clarified that in view of the status quo order passed by this Court in respect of the first acquisition proceedings and the project has to be executed urgently in view of ensuing Common Wealth Games, they sought for clarification from this Court and this Court clarified that the respondents are

free to initiate fresh proceeding in order to execute the project. In such circumstance, the Government cancelled the earlier notification and issued a fresh notification under the Land Acquisition Act. Since Section 17 of the Act enables the authorities to dispense with enquiry under Section 5A and to complete the acquisition proceedings without any delay, urgency clause under Section 17 of the Land Acquisition Act was invoked. There is no serious challenge as to the invocation of urgency clause under the Land Acquisition Act. It is also not in dispute that there is no provison for acquisition of land on urgent basis in the Metro Railways Act, 1978.

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8. Similar question was considered by this Court in S.S. Darshan vs. State of Karnataka and Others, (1996) 7 SCC 302. Against dismissal of two writ petitions by a common order dated 14.07.1995, passed by a Division Bench of the High Court of Karnataka, the landowners have filed appeal before this Court. The challenge made in the writ petitions before the High Court was to the validity of the notification dated 16.07.1994, issued under Section 4(1) read with Section 17 of the Land Acquisition Act, 1894 and the notification dated 22.08.1994 issued under Section 6 thereof by the State of Karnataka for acquisition of 11 acres 36 gunthas of land in Pattandur Agrahara Village, Whitefield, Bangalore Taluk, Bangalore, belonging to the appellants therein. It was contended that these notifications were invalid apart from the fact that the user of the acquired land by them is beneficial to the society. Several other contentions on which the validity of acquisition was challenged have been rejected by the High Court. It is also seen from the above case that a large tract of land contiguous to the area acquired by the impugned notifications had already been acquired by the Karnataka Industrial Areas Development Board under the Karnataka Industrial Areas Development Act, 1966 which also provides for acquisition of land for the Board. The said area was found to be inadequate for the project on account of which the contiguous disputed area had been acquired under the Land A Acquisition Act, 1894. It was contended that the acquisition of the present area should also be made only under the Karnataka Act of 1966 instead of the Land Acquisition Act since the Karnataka Act gives greater opportunity to the owners of the land to resist the acquisition. It was also contended that the acquisition under the Central Act, which is a more stringent provision, is violative of Article 14 since it deprives the appellants of the right of the more liberal provisions of the Karnataka Act, 1966. This Court rejected all the above contentions and held:

"10. In our opinion, there is no merit in this contention as well. In view of the urgent need for the acquisition of this land, which cannot be met under the Karnataka Act, resort to the provisions of the Central Act which are applicable cannot be faulted...."

It is clear that in spite of the provisions of Karnataka Industrial Areas Development Act, 1966, this Court upheld the action of the Karnataka Government in invoking Land Acquisition Act (Central Act) for acquiring lands for a public purpose of setting up the Information Technology Park and to meet the need of additional land contiguous to the area acquired earlier. This decision is squarely applicable to the case on hand. Even though special enactment, namely, Metro Railways Act, 1978 is available, in view of urgency and in the absence of similar urgency clause in the Metro Railways Act as that of Land Acquisition Act, the Lt. Governor, Delhi issued a fresh notification for acquisition under the Land Acquisition Act. Accordingly, we reject the first contention.

9. With the assistance of maps that were produced before the High Court, Mr. Patwalia, learned senior counsel for the appellants submitted that when the lands adjoining to the railway track belongs to DDA, the Authorities are not justified in acquiring the private land of the appellants. Before considering this issue, it is our duty to point out that nowhere in the affidavit the appellants have specified the details regarding their

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holdings such as khasra No., extent, ownership details with reference to revenue records. The appellants have not disclosed anywhere in the petition as to how they are concerned with the suit land. Very vague pleadings have been made that the suit land belonged to their family. As per the revenue record, total area of land owned by their so called family is 12-1-0 bighas only while land in respect of which the acquisition is under challenge is 28-1-0 bighas. Land acquisition proceedings can be challenged only by the "person-interested" and none else. On this ground also, their claim is liable to be rejected.

10. Coming to the land owned by DDA, report filed by the Department clearly shows the Conservator of Forests who inspected the adjoining land of DDA along with the Director (LMI) of DDA and other officials in the presence of appellants, that the land in question is comprised in Reserved Park as per MPD 2021 and has also been notified as Reserved Forests vide Notification No. F.10(42)-I/PA/DCF/93/2012-17(1) dated 24.05.1994. Further, the Conservator of Forests has specifically stated that the said DDA land is a forest land. In addition to the same, DDA has filed an affidavit which reiterated the above report and also asserted that on inspection it was verified that the land of DDA falls in reserved park and reserved forests, South Central Ridge. The High Court also perused the said notification dated 24.05.1994 and found that the Lt. Governor of Delhi declared those lands mentioned in Schedule A of the notification as Reserved Forests. The notification also shows that the area in South Central Ridge comprises approximately 626 hectares of forest land and waste lands which have been duly declared as reserved forests. Though relying on reply sent to the appellants on their application under RTI Act that these lands cannot be treated as reserved forests and the counsel wanted to rely upon certain communications from the Department, in view of proper notification declaring the area in question as reserved forests, we are not inclined to entertain such argument at this stage. As rightly observed by the High Court, the joint survey carried out by the A Conservator of Forests and DDA, in the presence of the appellants, is a sufficient proof that the land in question belongs to DDA being the land notified under the notification dated 24.05.1994. In a matter of this nature, Courts have to accept the notification duly issued by the authority concerned as sufficient proof. In view of the same, though Mr. Patwalia has heavily relied on certain communications about the nature of land in question and in view of authoritative notification by the department concerned, we are of the opinion that it would not be possible to rely on those details at this stage. Accordingly, we reject the second contention also.

11. Though a feeble request was made that the appellants were ready to forego as much land as was required for Metro tracts and Chhattarpur Metro Station provided the electric substation is shifted to some other land and that part of the appellants land which was sought to be used for electric substation is allowed to be retained by them, in view of the factual findings about the nature and character of the land owned by the DDA being a forest land as per the notification, we have no other option except to reject the same.

12. In the light of the above discussion, we are satisfied that the existence of public purpose and urgency in executing the project before the Common Wealth Games, the adjoining land belonging to DDA being forest land as per the notification and also of the fact that the respondents have fully complied with the mandatory requirements including deposit of 80 per cent of the compensation amount, we are in entire agreement with the stand taken by the respondents as well as the conclusion of the High Court.

G 13. Consequently, the appeal fails and the same is dismissed with no order as to costs.

D.G. Appeals dismissed.

AJMERA HOUSING CORPORATION & ANR. ETC. ETC.

COMMISSIONER OF INCOME TAX (Civil Appeal Nos. 6827-6848 of 2010)

AUGUST 20, 2010

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

Income Tax Act. 1961 - s 245C - Settlement of cases -Pre-requisites for – Held: Section 245C mandates disclosure of 'full and true' particulars of undisclosed income and 'the C manner' in which such income had been derived - Amount of income tax payable on such undisclosed income is to be computed and mentioned in the application - Income Tax Settlement Commission has the jurisdiction to pass any order on the matter covered by the application only when it records its satisfaction on the said aspect - There is no stipulation for revision of application filed u/s. 245C(1) and thus. determination of income by Settlement Commission has necessarily to be with reference to the income disclosed in the application filed u/s. 245C in the prescribed form – On facts. Income Tax Settlement Commission decided to proceed with the application of the assessee u/s. 245C(1), disclosing additional incomes at different stages of proceedings and thereafter, passed final order u/s. 245D(4). determining the total income of assessee for assessment years - Order of High Court setting aside the final order, and remanding the matters back to Settlement Commission for consideration afresh, does not call for interference -Disclosure of Rs.11.41 crores as additional undisclosed income in the revised annexure as against the income of Rs. 1.94 crores, sufficient to establish that the application made by assessee u/s. 245C(1) could not be entertained as it did not contain a 'true and full' disclosure of their undisclosed income and 'the manner' in which such income had been

A derived – Income Tax Settlement Commission (Procedure) Rules, 1987 – r. 6 – Constitution of India, 12950 – Article 136.

Interpretation of statutes – Taxing statute – Construction of – Held: Is to be construed strictly – Relevant provision is to be looked at – There is no presumption as to a tax – Nothing is to be read in and nothing is to be implied – There is no equity about a tax.

The appellant-assessee filed an application u/s. 245C(1) of the Income Tax Act. 1961 for settlement before C the Income Tax Settlement Commission, disclosing an additional income of Rs.1,94,33,580/- for the assessment vears 1989-90 to 1993-94, in addition to the income declared in the returns of income submitted by them earlier. The Commissioner of Income Tax objected to the D entertainment of the application for settlement as not being a full and true disclosure of their income. On 19th September, 1994, the assessee filed a revised settlement application containing "confidential annexure and related papers", declaring an additional income. On 17th November, 1994, the Settlement Commission decided to proceed with the application. During the course of hearing in the case before the Settlement Commission, the assessee made a further disclosure of undisclosed income. On 29th January, 1999, the Settlement Commission passed the final order u/s. 245D(4). determining the total income of the assessee for assessment years 1989-90 to 1993-94 at Rs.42.58 crores. It imposed a 'token' penalty of Rs.50 lakhs as against the minimum leviable penalty of Rs.562.87 lakhs, as per its own assessment and granted immunity to the assessee against prosecution and in respect of other penalties under the Act. The Commissioner filed a writ petition. The High Court allowed the writ petition and set aside the order of the Settlement Commission. It declared order dated 17th November, 1994 as void ab-initio and guashed

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order dated 29th January, 1999. The High Court remitted the proceedings back to the Settlement Commission for decision afresh. Pursuant to and in furtherance of the order passed by this Court, the matter was heard afresh by the High Court. The High Court again set aside Settlement Commission's order dated 29th January, 1999 and remitted the matter back to the Settlement Commission for consideration afresh. Therefore, the appellants filed the instant appeals.

COMMISSIONER OF INCOME TAX

Dismissing the appeals, the Court

HELD: 1.1 The disclosure of 'full and true' particulars of undisclosed income and 'the manner' in which such income had been derived are the pre-requisites for a valid application u/s. 245C (1) of the Income Tax Act, 1961 for settlement. Additionally, the amount of income tax payable on such undisclosed income is to be computed and mentioned in the application. Section 245C(1) of the Act mandates 'full and true' disclosure of the particulars of undisclosed income and 'the manner' in which such income was derived and, therefore, unless the Settlement Commission records its satisfaction on this aspect, it will not have the jurisdiction to pass any order on the matter covered by the application. [Paras 22 and 23] [205-A-C]

1.2 Even when the Settlement Commission decides to proceed with the application, it will not be denuded of its power to examine as to whether the assessee in his application u/s. 245C(1) of the Act, has made a full and true disclosure of his undisclosed income. The report(s) of the Commissioner and other documents coming on record at different stages of the consideration of the case, before or after the Settlement Commission has decided to proceed with the application, would be most germane to determination of the said question. It is plain from the language of sub-section (4) of section 245D of the Act that

A the jurisdiction of the Settlement Commission to pass such orders as it may think fit is confined to the matters covered by the application and it can extend only to such matters which are referred to in the report of the Commissioner under sub-section (1) or sub-section (3) of R the said Section. A 'full and true' disclosure of income. which had not been previously disclosed by the assessee, being a pre-condition for a valid application u/ s. 245C(1) of the Act, the scheme of Chapter XIX-A does not contemplate revision of the income so disclosed in the application against item No. 11 of the form. Moreover, if an assessee is permitted to revise his disclosure, in essence, he would be making a fresh application in relation to the same case by withdrawing the earlier application. Section 245C(3) of the Act which prohibits the withdrawal of an application once made under subsection (1) of the said Section is instructive in as much as it manifests that an assessee cannot be permitted to resile from his stand at any stage during the proceedings. Therefore, by revising the application, the applicant would be achieving something indirectly what he cannot otherwise achieve directly and in the process rendering the provision of sub-section (3) of section 245C of the Act otiose and meaningless. The scheme of said Chapter is clear and admits no ambiguity. [Para 26] [210-B-G]

F 1.3 In the scheme of Chapter XIX-A, there is no stipulation for revision of an application filed u/s. 245C(1) of the Act and thus the natural corollary is that determination of income by the Settlement Commission has necessarily to be with reference to the income disclosed in the application filed under the said section in the prescribed form. [Para 28] [211-D]

1.4 A taxing statute is to be construed strictly. In a taxing Act, one has to look merely at what is said in the

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Nothing is to be read in, nothing is to be implied. There is no room for any intendment. There is no equity about a tax. [Para 27] [210-H; 211-A]

Cape Brandy Syndicate vs. Inland Revenue Commissioners (1921) 1 KB 64; Federation of A.P. Chambers of Commerce and Industry and Ors. vs. State of A.P. and Ors.(2000) 6 SCC 550; Commissioner of Sales Tax, Uttar Pradesh vs. The Modi Sugar Mills Ltd. 1961 (2) SCR 189 – referred to.

1.5 The view of the High Court that it would not be proper to set aside the proceedings before the Settlement Commission even though it was convinced that the assessee had not made full and true disclosure of their income while making application u/s. 245C of the Act, cannot be accepted. The High Court in its earlier order dated 28th July, 2000 while declaring order dated 17th November, 1994, as ab initio void and setting aside order dated 29th January, 1999, remitted the case to the Settlement Commission to decide the entire matter afresh, including the question of maintainability of the application u/s. 245C(1) of the Act. The said order of the High Court was put in issue before this Court and was set aside and the case was remanded back to the High Court for consideration afresh. Nevertheless, all points raised by the parties, including the plea of the revenue that the application filed by the assessee before the Settlement Commission was not maintainable as the assessee had not made a full and true disclosure of their undisclosed income were kept open. The High Court addressed itself on the said issue and found that the assessee had not made a full and true disclosure of their income while making the application u/s. 245C(1), yet did not find it proper to set aside the proceedings on that ground. Having recorded the said adverse finding on the

A very basic requirement of a valid application u/s. 245C(1) of the Act, the High Court's opinion that it would not be proper to set aside the proceedings is clearly erroneous. [Para 30] [211-F-G; 212-A-D]

W T Ramsay Ltd. Vs. Inland Revenue Commissioners 1981 (1) All ER 865; Inland Revenue Commissioners vs. Duke of Westminster (1936) AC 1, (1935) All ER 259 – referred to.

1.6 In the instant case, the disclosure of Rs.11.41 C crores as additional undisclosed income in the revised annexure, filed on 19.09.1994 alone was sufficient to establish that the application made by the assessee on 30.09.1993 u/s. 245C(1) of the Act could not be entertained as it did not contain a 'true and full' disclosure of their Undisclosed income and 'the manner' in which such income had been derived. [Para 31] [213-D-E]

1.7 The submission that the High Court failed to consider, in their correct perspective the two reports submitted by the Commissioner on 30.08.1995 and 20.10.1997, in as much as, in the latter report the Commissioner had himself computed the undisclosed income at Rs.42.52 crores, which was equivalent to the amount finally determined by the Settlement Commission, thus there was no justification for the remand of the case back to the Settlement Commission, does not merit acceptance. [Para 32] [213-G-H; 214-A]

1.8 In the impugned order, on a critical examination of the order passed by the Settlement Commission with G reference to the said two reports, in particular the reconciliation report submitted by the Commissioner on 20.10.1997, estimating the undisclosed income at Rs. 187.20 crores, the High Court found that only that part of the report dated 20.10.1997, which dealt with 'on money'

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was highlighted before this Court, while other incomes. A investments, receipts or payments were not covered in that part of the statement. The High Court also observed that the manner in which expenses were shown, created a serious doubt about the expenditure of Rs.734.02 lakhs. The High Court also noted that the Settlement Commission had not properly dealt with the amount of Rs.911.51 lakhs on account of unexplained expenses, loans and surplus amount of Rs.488.98 lakhs, while assessing the total income and thus, an amount of Rs.14.49 crores was left out while determining the undisclosed income of the assessee. Besides, the High Court also commented that having come to the conclusion that the penalty leviable worked out to be Rs. 562.87 lakhs, the Settlement Commission had no reason for levying a token penalty of Rs. 50 lakhs, which was not even 10% of the minimum leviable penalty. Ultimately, the High Court observed that since the Settlement Commission did not supply annexure filed on 19.09.1994. declaring additional income of Rs.11.41 crores, due opportunity had not been given to the revenue to place its stand properly; that huge amount of unexplained expenses, unexplained loans and unexplained surplus, total of which was more than Rs.14 crores, was not taken into consideration while passing the final order and that the Settlement Commission had imposed token penalty of Rs.50 lakhs while on its own assessment leviable penalty would have been Rs.562.87 lakhs. Further, if the amount which had not been taken into consideration while assessing the total undisclosed income was to be taken into account, the amount of leviable penalty would have been much more. In the light of these facts, the High Court formed the opinion that it would be in the interest of justice to set aside the final order passed by the Settlement Commission and to remand the case back to it for adjudication on assessee's application afresh. It cannot be said that there was no justification for order

A of remand by the High Court and that the order passed by the Settlement Commission should have been affirmed. The High Court was correct in making the order of remand and no good ground is made out for interference in exercise of jurisdiction under Article 136 B of the Constitution. [Para 32] [214-B-H; 215-A-C]

1.9 The submission that the scope of judicial review being limited, the High Court should not have interfered with the order of the Settlement Commission in exercise of its power under Article 226 of the Constitution, cannot be accepted. Having conceded before the High Court that the assessee was not pressing the point of maintainability of the writ petition before the High Court, the assessee cannot be now permitted to resile from its earlier stand and raise the same issue before this Court. Even otherwise, the manner in which assessee's disclosures of additional income at different stages of proceedings were entertained by the Settlement Commission, rubbishing the objection of the Commissioner that the assessee had not made a full and E true disclosure of their income in the application u/s. 245C(1), leaves much to be desired. [Para 33] [215-D-F]

1.10 It is true that details of the 'full and true' disclosure of income and 'the manner' in which such income is derived is to be given in the form of an annexure to the application, which is treated as confidential and is not to be forwarded to Commissioner for the purpose of his report under sub-section (1) of section 245D of the Act and, therefore, prima-facie there seems to be some merit in the apellant's argument that since the Commissioner was not entitled to receive a copy of the annexure to the application before the Settlement Commission had decided to proceed with the application, no prejudice was caused to the Commissioner because of the alleged non-supply of the

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revised annexure at a stage anterior to the making of A order u/s. 245D(1) of the Act. But when it is tested on the anvil of the scheme of Chapter XIX-A, the said argument fails as the revision of the annexure by itself was prejudicial to the interest of the revenue. Besides, revision of the annexure is tantamount to revision of the application, not contemplated in the scheme, withholding of the information regarding filing of revised annexure, disclosing undisclosed income of Rs.11.41 crores as against the income of Rs.1.94 crores, disclosed in the annexure forming part of the application, deprived the Commissioner of his right to object to the maintainability of assessee's application on the ground that the assessee had not made true and full disclosure of their income in the previous application, the foundational requirement of a valid application u/s. 245C(1) of the Act. The Commissioner is entitled to costs quantified at Rs. 50,000/-. [Paras 34, 35] [215-B-F]

Jyotendrasinhji vs. S.I. Tripathi and Ors 1993 Supp (3) SCC 389; M/s R.B. Shreeram Durga Prasad and Fatehchand Nursing Das vs. Settlement Commission (IT & WT) and Anr. 1989 (1) SCC 628; Shriyans Prasad Jain vs. Income Tax Officer and Ors. 1993 Supp (4) 727; Sanghvi Reconditioners Private Limited vs. Union of India and Ors 2010 (2) SCC 733; Commissioner of Income Tax, Jalpaiguri vs. Om Prakash Mittal (2005) 2 SCC 751; Mrs. Margaret Lalita Samuel vs. The Indo Commercial Bank Ltd. (1979) 2 SCC 396 – referred to.

Case Law Reference:

1993 Supp (3) SCC 389	Referred to.	Para 14	G
1989 (1) SCC 628	Referred to.	Para 14	
1993 Supp (4) 727	Referred to.	Para 14	
2010 (2) SCC 733	Referred to.	Para 17	Н

Α	(2005) 2 SCC 751	Referred to.	Para 17
	(1979) 2 SCC 396	Referred to.	Para 19
	(1921) 1 KB 64	Referred to.	Para 27
В	(2000) 6 SCC 550	Referred to.	Para 27
	1961 (2) SCR 189	Referred to.	Para 27
	1981 (1) All ER 865	Referred to.	Para 30
0	(1935) All ER 259	Referred to.	Para 30

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 6827-6848 of 2010.

From the Judgment and order dated 08/07/2009 of the High Court of Judicature at Bombay.in WP No. 57/2000 & WP No. 63/2000 & WP No. 64/2000 & WP No. 65/2000 & WP No. 66/2000 & WP No. 73/2000 & WP No. 92/2000 & WP No. 93/2000 & WP No.161/2000 & WP No.177/2000 & WP No.192/2000 & WP No.193/2000 & WP No.1965/2000 & WP No. 2191/1999 & WP No. 2742/1999 & WP No. 2778/1999 & WP No. 2779/1999 & WP No. 2780/1999 & WP No. 2832/1999 & WP No. 2833/1999 & WP No. 2834/1999 & WP No. 2835/1999.

- Dr. A.M. Singhvi, P.H. Parekh, Sameer Parekh, Carmichael Martin, Pallavi Srivastava, Ashish Vaid, Nitin Thukral, Parekh & Co., for the Appellants.
 - H.P. Raval, Kunal Bahri, T.A. Khan, Amoy Nargolkar, B.V. Balramdass, Varun Sarin for the Respondent.
- G 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 8th July, 2009 delivered by the High

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Court of Judicature at Bombay in a batch of 22 writ petitions. By the impugned common judgment, the High Court has set aside order dated 29th January, 1999 passed by the Income Tax Settlement Commission (for short "the Settlement Commission") under Section 245D(4) of the Income Tax Act, 1961 (for short "the Act"), and has remanded all the proceedings back to the Settlement Commission for a fresh consideration in the light of the observations made in the impugned judgment.

3. Since the case has had a chequered history and, in fact, the present appeal is the second round of litigation between the parties before this Court, in order to appreciate the questions raised, it would be necessary to take notice of the foundational facts in greater detail. The Ajmera Group of firms, consisting of mainly 4 firms and their partners are engaged in the business of land development and building/construction. For the sake of convenience, facts relating to the main firm viz. M/ s. Ajmera Housing Corporation, Bombay (hereinafter referred to as "the assessee"), in which other firms and partners have stakes, are being noticed. These are:

In January, 1989 and again in December, 1992, searches were conducted at the premises of the Group under Section 132(1) of the Act and voluminous books of account, loose papers and other documents were seized during the second search. Files, loose papers and a computer together with its hard disk were seized from the residence of one B.L. Vora. Accountant of Ajmera Group. In his statement B.L. Vora admitted that he was managing secret books and documents in code words as per the instructions given to him by one Chhotalal Ajmera, who was controlling the whole Ajmera Group.

On the basis of the seized documents, assessment for the assessment year 1989-90 was completed, determining the total income at Rs.18.93 crores as against the returned income of Rs.70 lakhs. Similarly, assessment for the assessment year

A 1990-91 was completed at Rs.4.01 crores as against the returned income of Rs.4 lakhs. An addition of Rs.90 lakhs was also made to the returned income for the assessment year 1991-92. Prior to the completion of assessment for the said assessment years, an order under Section 132(5) of the Act B was passed determining the concealed income of the group at Rs.200.60 crores for the assessment year 1993-94

4. On 30th September, 1993 the assessee filed an application under Section 245C(1) of the Act before the Settlement Commission, disclosing an additional income of Rs.1,94,33,580/- for the assessment years 1989-90 to 1993-94, in addition to the income declared in the returns of income submitted by them earlier. The Settlement Commission called for a report from the Commissioner of Income Tax, (for short "the Commissioner") in terms of Section 245D(1) of the Act read with Rule 6 of the Income Tax Settlement Commission (Procedure) Rules, 1987 (for short "the 1987 Rules"), On 27th January, 1994, the Commissioner, while objecting to the entertainment of the application for settlement submitted by the assessee, as not being a full and true disclosure of their E income, suggested that, at any rate, the income of the group should not be settled at less than Rs. 223.55 crores.

5. Arguments on the question of whether or not the Settlement Commission should proceed with the application were concluded on 12th September, 1994 and orders were reserved. However, on 19th September, 1994, the assessee filed a revised settlement application containing "confidential annexure and related papers", declaring therein an additional income of Rs.11.41 crores. On 17th November, 1994, the Settlement Commission passed an order under Section 245D(1) of the Act deciding to proceed with the application. Accordingly, the Settlement Commission asked the Commissioner to submit a further report, as required under Rule 8 of the 1987 Rules. The Commissioner in his elaborate report dated 30th August, 1995, while observing that the

COMMISSIONER OF INCOME TAX [D.K. JAIN, J.]

income disclosed by the assessee should not be treated as true and correct, reported that the total unaccounted income of the assessee was to the tune of Rs.187.09 crores. A yearwise summary of unaccounted receipts and investments made by the assessee, compiled on the basis of the seized books of account and documents, was submitted with the report. It appears that on 20th October, 1997, the Commissioner sent to the Settlement Commission a general note on reconciliation of various annexures to the earlier report, submitted on 30th August, 1995.

- 6. Hearing in the case commenced before the Settlement Commission on 6th October, 1998 and various hearings took place thereafter, but some time in the year 1999 the assessee made a further disclosure of undisclosed income of Rs.2.76 crores, apparently during the course of hearing, as no application/letter to that effect is on record. Hearings concluded on 14th October, 1998.
- 7. Vide his letter dated 6th January, 1999, the departmental representative furnished to the Settlement Commission some clarifications regarding the taxability of advance booking amounts received by the assessee. In the said letter, the Commissioner requested the Settlement Commission to examine the question of identifying the "so called" persons who had booked the flats because this information would be necessary in order to locate them. Instead of responding to the said issue raised by the Commissioner, the assessee, by their letter dated 25th January, 1999, revised their statement of facts and offered an "ad-hoc income of Rs.1 crore for the assessment year 1992-93 and Rs.6 crores for the assessment year 1993-94 to cover up any discrepancies and/ or any unforeseen contingencies". On 29th January, 1999, the Settlement Commission passed the final order under Section 245D(4), determining the total income of the assessee for assessment years 1989-90 to 1993-94 at Rs.42.58 crores. Observing that the assessee had co-operated during the

proceedings before it, the Settlement Commission imposed a "token" penalty of Rs.50 lakhs as against the minimum leviable penalty of Rs.562.87 lakhs, as per its own assessment. The Settlement Commission also granted immunity to the assessee against prosecution and in respect of other penalties under the Act. В

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8. Dis-satisfied with the order by the Settlement Commission, the Commissioner challenged it by preferring a writ petition in the High Court of Bombay. Holding that the Settlement Commission had not given any finding as to whether there was full and true disclosure of the income by the assessee, by a strongly worded order, dated 28th July, 2000. the High Court allowed the writ petition and set aside the order. It would be useful to extract the relevant observations in the judgment:

"In the instant case, if we look at the facts in the light of the legal canvass, in our opinion, the Commission at the very inception ought to have addressed itself on the question as to whether the application was in compliance with the first and foremost requirement of Section 245-C(1). The Commission ought to have noticed that in the application made under Section 245-C(1) disclosure was to the extent of Rs. 1.94 crores. The report of the Commissioner as envisaged under Section 245-D(1) was called for and submitted and thereafter just before the order could be passed under Section 245-D(1) the assessee respondent No. 2 declared additional income of Rs. 11.41 crores. At this stage itself, it was obligatory on the part of the Settlement Commission to apply his mind to the issue as to whether full and true disclosure of the income and the manner in which it was derived, has been made or not. We find no material in the order dated 17.11.1994 in this behalf. Had the Settlement Commission applied its mind to the said facts and had addressed itself on this aspect of the matter regarding subsequent disclosure of Rs. 11.41

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crores and had it dealt with the question of maintainability of application under Section 245C(1), then it would not have been open for this Court to sit in appeal over the finding recorded by the Settlement Commission in this behalf.

On the fact of the record, we find fault with decision taken by the Settlement Commission to allow the application to be proceeded with without determining the basic facts on which further jurisdiction of the Tribunal depended. We, therefore, find that the said order of the Settlement Commission suffers from non-application of mind of the facts available on record."

Dealing with the grievance of the Commissioner that he was not apprised of the revised settlement application filed by the assessee on 19th September, 1994, i.e. after the hearing on the question of whether or not the assessee's application is to be proceeded with in terms of Section 245D(1) of the Act had concluded, disclosing additional income of Rs. 11.41 crores, the High Court observed that order dated 17th November, 1994 was bad, illegal and ab-initio void being in breach of principles of natural justice. Accordingly, the High Court held that all subsequent proceedings and orders passed therein would be of no consequence and they had to be set aside because the subsequent order under Section 245D(4) of the Act could survive only subject to the validity of the order required to be passed under Section 245D(1) of the Act. Even on the merits of the quantification of the total undisclosed income of the assessee, the High Court held that the final order was clearly perverse and could not stand the scrutiny of law. Finally declaring order dated 17th November, 1994 as ab-initio void and quashing order dated 29th January, 1999, the High Court remitted the proceedings back to the Settlement Commission, A keeping all the questions open, with a direction to decide the application afresh in accordance with law.

9. Aggrieved by the decision of the High Court, the assessee challenged the same before this Court. By order dated 11th July, 2006, this Court set aside the order of the High Court solely on the ground that the second report submitted by the Commissioner on 20th October, 1997, estimating the undisclosed income at Rs. 42.5 crores, which approximately coincided with the figures arrived at by the Settlement Commission, and accepted by the assessee, had not been taken into consideration by the High Court, which fact was also conceded by learned counsel appearing for the revenue. The special leave petition was disposed of in the following terms:

"Without expressing any opinion on the merits of the dispute, the findings recorded on the first report or the effect of not recording a finding on the second report, we set aside the impugned order and remit the case back to the High Court for a fresh decision, leaving the parties to raise all points including the point raised before us on behalf of the assessee that the High Court should not have entertained the revenue's writ petitions in exercise of its discretionary jurisdiction under Article 226 of the Constitution of India, and the stand taken by the revenue that the application filed by the assessee for settlement before the Settlement Commission was not entertainable as the assessee had not made, inter alia, true and complete disclosure of its undisclosed income, as provided under the law. All contentions of the parties are left open to be agitated before the High Court."

G (Emphasis supplied by us)

10. Pursuant to and in furtherance of the order passed by this Court, the matter was heard afresh by the High Court. By the impugned judgment and order, the High Court has again set aside Settlement Commission's order dated 29th January,

1999 and has remitted the matter back to it for fresh A adjudication, observing thus:

"In view of the facts and the legal position noted above. even though we find that the respondents had not made full and true disclosure of their income while making applications under Section 245C, it would not be proper to set aside the proceeding. However, at the same time, the Commission appears to have misdirected itself on several important aspects while passing the final order. The Settlement Commission had not supplied the annexure dated 19.9.1994 declaring additional income of Rs.11.41 crore and thus, due opportunity was not given to the Revenue to place (sic) its stand properly. Huge amount of unexplained expenses, unexplained loans and unexplained surplus, total of which is more than Rs.14 crore, was not taken into consideration while passing the final order. Thirdly, the Settlement Commission has imposed token penalty of Rs.50 lakh while in its own assessment leviable penalty would be 562.87 (sic Rs.562.87). In fact the amounts, which were not taken into consideration while assessing the total undisclosed income, are also taken into consideration, the amount of leviable penalty may be much more. Taking into consideration the multiple disclosures and the fact that the respondents had failed to make true and full disclosure initially as well as at the time of second disclosure, we do not find any justifiable reasons to reduce or waive the amount of penalty so drastically. Taking into consideration all these circumstances, in our considered opinion, it will be in the interest of justice to set aside the final order passed by the Settlement Commission and to remand the matter back to the Settlement Commission for hearing parties afresh and to pass orders as per law. Facts and circumstances noted in respect of writ petition no. 2191 of 1999 are also relevant for the remaining writ petitions and, therefore, it will be necessary that the final A orders passed in all these proceedings should be set aside."

(Emphasis added)

Thus, the remand of the case by the High Court to the Settlement Commission was confined only to the question of determination of total income, penalty etc. and the Settlement Commission was not required to go into the question of maintainability of application under Section 245C(1) of the Act.

- 11. Still being dissatisfied, all the applicants before the Settlement Commission are before us in these appeals.
- 12. We have heard Dr. A.M. Singhvi, learned senior counsel appearing for the assessee and Shri H.P. Raval, learned Additional Solicitor General, on behalf of the Commissioner.
- 13. Dr. Singhvi strenuously urged that the impugned order is clearly fallacious as the High Court has again failed to consider the two reports submitted by the Commissioner on E 30th August, 1995 and 20th October, 1997 in their proper perspective, despite specific direction by this Court vide order dated 11th July, 2006. Refuting the stand of the Commissioner that undisclosed income determined in her report was Rs.187.20 crores and not Rs.42.58 crores, learned counsel referred us to several documents, forming part of the revised confidential annexure, in particular to the last page of Commissioner's report dated 30th August, 1995 wherein, according to the learned counsel, while referring to Annexure-VII of the revised annexure, the Commissioner has determined undisclosed income at Rs.42.58 crores. It was thus, asserted that the High Court has gone wrong in equating "unaccounted income" with "unaccounted receipts" and payments of Rs.187.20 crores. On the basis of the very same annexure. learned counsel also attempted to demonstrate that the revised annexure, disclosing undeclared income of Rs.11.41 crores

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was, in fact, in the knowledge of the Commissioner before she had submitted her report, whereafter the Settlement Commission had decided to proceed with the assessee's application. It was pleaded that the finding of the High Court that the Commissioner had not been supplied with the annexure filed on 19th September, 1994 declaring additional income of Rs.11.41 crores and thus, due opportunity was not given to the revenue to put forth its stand properly, was erroneous and, therefore, the impugned order deserves to be set aside on this ground alone.

14. Next, it was urged by learned senior counsel for the assessee that the High Court erred in entertaining the writ petition filed by the Commissioner under Article 226 of the Constitution against the order passed by the Settlement Commission because: (i) in terms of Section 245D(1) of the Act, the order made by the Settlement Commission under subsection (4) of the said Section is conclusive as to the matters stated therein and no matter covered by such order can be reopened in any proceedings under the Act or under any other law for the time being in force and (ii) in the absence of any illegality in the procedure followed by the Settlement Commission, the power of judicial review could not be exercised by the High Court to interfere with the findings of fact recorded by the Settlement Commission. To buttress his proposition that judicial review is concerned only with the decision making process and not with the final decision, learned counsel referred us to the decisions of this Court in Jyotendrasinhji Vs. S.I. Tripathi & Ors.1, M/s R.B. Shreeram Durga Prasad & Fatehchand Nursing Das Vs. Settlement Commission (IT & WT) & Anr.2 and Shriyans Prasad Jain Vs. Income Tax Officer & Ors.3.

15. It was also argued by the learned counsel that since

A by operation of Section 245D(1) of the Act read with Rule 6 of the 1987 Rules, annexure, statements and other documents accompanying such annexure were not to be supplied to the Commissioner before the Settlement Commission had decided to proceed with assessee's application, no prejudice was caused to the Commissioner by the filing of revised annexure by the assessee on 19th September, 1994.

16. Shri Raval, on the other hand, supporting the impugned judgment, submitted that the scheme of Chapter XIX-A does not envisage revision of the application filed by the assessee under Section 245C(1) of the Act and, therefore, the Settlement Commission committed serious procedural irregularity in permitting the assessee to file revised annexure, declaring higher undisclosed income. Additionally, the learned counsel argued that acceptance of such annexure, after the conclusion of hearing on 12th September, 1994, behind the back of the departmental representative and after the Settlement Commission had reserved its order under Section 245D(1), was improper and clearly in breach of principles of natural justice and, therefore, the order passed by the Settlement Commission on 17th November, 1994, deciding to proceed with the application deserves to be set aside.

17. Learned counsel contended that revision of undisclosed income from Rs.1.94 crores to Rs.11.41 crores, as projected in the revised annexure and thereafter the two voluntary disclosures during the course of hearing and finally acceptance of Settlement Commission's order determining total income at Rs.42.58 crores without demur shows that the disclosure made by the assessee in their application under Section 245C of the Act was neither full nor true and, therefore, the Settlement Commission ought to have rejected the application for settlement. It was pleaded that the piecemeal disclosures, in particular the revision of the statement of facts vide assessee's letter dated 25th January, 1999, offering an ad hoc income of Rs.1 crore for the assessment year 1992-

^{1. 1993} Supp (3) SCC 389.

^{2. (1989) 1} SCC 628.

^{3. 1993} Supp (4) SCC 727.

93 and Rs.6 crores for the assessment year 1993-94 to cover A up "any discrepancies and/or any unforeseen contingencies" is not contemplated in the scheme of Chapter XIX-A and, therefore, the final order passed by the Settlement Commission on the basis of revised statement of facts and annexures is void ab initio. In support of the submission that a full and true disclosure of income in the application is a sine qua non for an application under Section 245C(1) of the Act, learned counsel placed reliance on the decisions of this Court in Sanghvi Reconditioners Private Limited Vs. Union of India & Ors.4 and Commissioner of Income Tax, Jalpaiguri Vs. Om Prakash Mittal⁵.

- 18. Responding to the contention urged on behalf of the assessee regarding entertainment of writ petition by the High Court, learned counsel submitted that having conceded before the High Court that the assessee was not pressing the point of tenability of the writ petition, the assessee is estopped from raising the said issue before this Court.
- 19. Lastly, relying on the decision of this Court in Mrs. Margaret Lalita Samuel Vs. The Indo Commercial Bank Ltd.6, learned counsel for the Commissioner pleaded that since the High Court has merely remanded the case back to the Settlement Commission for fresh determination of income and penalty etc., this Court may not like to exercise its discretionary power under Article 136 of the Constitution.
- 20. Before embarking upon the rival contentions, it would be instructive to refer to the scheme of Chapter XIX-A of the Act. The Chapter was inserted in the Act by the Taxation Laws (Amendment) Act, 1975, pursuant to the recommendations of the Justice Wanchoo Committee Report. The recommendation, contained in Chapter 2 of the report under the caption "Black
- (2010) 2 SCC 733.
- (2005) 2 SCC 751.
- (1979) 2 SCC 396.

A Money and Tax Evasion", was for setting up of a statutory settlement machinery, whereby a tax evader could make a clean breast of his past illegitimate affairs, discharge his tax liability as determined by the body so established and thus, buy quittance for himself and in the process accelerate recovery of taxes by the State, although less than what may have been recovered after protracted litigation and recovery proceedings. The said Chapter, with some amendments, envisages settlement of complex tax disputes and grant of immunity from criminal proceedings by a Settlement Commission constituted in this regard. The Chapter sets out in detail the mechanics of application, investigation, consideration, hearing and disposal of the application.

21. Proceedings under the said Chapter commence on the filing of an application by an assessee under Section 245C(1) of the Act, which reads as follows:-

"245-C. Application for settlement of cases.—(1) An assessee may, at any stage of a case relating to him, make an application in such form and in such manner as may be prescribed, and containing a full and true disclosure of his income which has not been disclosed before the Assessing Officer, the manner in which such income has been derived, the additional amount of income-tax payable on such income and such other particulars as may be prescribed, to the Settlement Commission to have the case settled and any such application shall be disposed of in the manner hereinafter provided:

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G A bare reading of the provision would reveal that besides such other particulars, as may be prescribed, in an application for settlement, the assessee is required to disclose: (i) a full and true disclosure of the income which has not been disclosed before the assessing officer; (ii) the manner in which such income has been derived and (iii) the additional amount of

AJMERA HOUSING CORPORATION v. COMMISSIONER OF INCOME TAX [D.K. JAIN, J.]

income tax payable on such income.

22. It is clear that disclosure of "full and true" particulars of undisclosed income and "the manner" in which such income had been derived are the pre-requisites for a valid application under Section 245C(1) of the Act. Additionally, the amount of income tax payable on such undisclosed income is to be computed and mentioned in the application. It needs little emphasis that Section 245C(1) of the Act mandates "full and true" disclosure of the particulars of undisclosed income and "the manner" in which such income was derived and, therefore, unless the Settlement Commission records its satisfaction on this aspect, it will not have the jurisdiction to pass any order on the matter covered by the application.

23. Section 245D(1) lays down the procedure to be followed after the receipt of the application under Section D 245C(1) of the Act. It reads thus:

"Procedure on receipt of an application under section 245C. 245D. (1) On receipt of an application under section 245C, the Settlement Commission shall call for a report from the Commissioner and on the basis of the materials contained in such report and having regard to the nature and circumstances of the case or the complexity of the investigation involved therein, the Settlement Commission may, by order, allow the application to be proceeded with or reject the application:

Provided that an application shall not be rejected under this sub-section unless an opportunity has been given to the applicant of being heard:

(3) Where an application is allowed to be proceeded with under sub-section (1), the Settlement Commission may Α

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call for the relevant records from the Commissioner and after examination of such records, if the Settlement Commission is of the opinion that any further enquiry or investigation in the matter is necessary, it may direct the Commissioner to make or cause to be made such further enquiry or investigation and furnish a report on the matters covered by the application and any other matter relating to the case.

(4) After examination of the records and the report of the Commissioner, received under sub-section (1), and the report, if any, of the Commissioner received under subsection (3), and after giving an opportunity to the applicant and to the Commissioner to be heard, either in person or through a representative duly authorised in this behalf, and after examining such further evidence as may be placed before it or obtained by it, the Settlement Commission may, in accordance with the provisions of this Act, pass such order as it thinks fit on the matters covered by the application and any other matter relating to the case not covered by the application but referred to in the report of the Commissioner under sub-section (1) or sub-section (3)."

24. Since Rules 6 and 8 of the 1987 Rules have some bearing on the issues involved, for the sake of ready reference, these are extracted below:

"6. Commissioner's report etc., under section 245D (1).—On receipt of a settlement application, a copy of the said application (other than the Annexure and the statements and other documents accompanying such Annexure) shall be forwarded by the Commission to the Commissioner with the direction to furnish his report under sub-section (1) of section 245D within thirty days of the receipt of the said copy of the application by him or within such further period as the Commission may specify."

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208 SUPREME COURT REPORTS [2010] 10 S.C.R.		207	AJMERA HOUSING CORPORATION <i>v.</i> 207 MISSIONER OF INCOME TAX [D.K. JAIN, J.]	
income-tax payable on such income [See Notes 9 and 10]	А) of be said	Commissioner's further report.—Where an order is seed by the Commission under sub-section (1) of ction 245D allowing the settlement application to be acceded with, copy of the Annexure to the said plication, together with a copy of each of the statements	passed by section 245 proceeded
Signed (Applicant) Notes:	В	shall B by of oner ceipt	d other documents accompanying such annexure, shall forwarded to the Commissioner along with a copy of said order with the direction that the Commissioner all furnish a further report within ninety days of the receipt the said Annexure (including the statements and other	and other do be forwarded the said ord shall furnish
7. Full details of issues for which application for settlement is made, the nature and circumstances of the case and complexities of the investigation involved must	С		cuments accompanying it or within such further period the Commission may specify."	documents a
be indicated against item 10. Where the application relates to more than one assessment year, these details should be furnished for each assessment year.	D		It will also be useful to extract the relevant portions of No.34B), prescribed for making an application under 245C(1) of the Act:	Form (No.34B),
	5	_	"[FORM NO. 34B]	
9. The additional amount of income-tax payable on the income referred to in item 11 should be calculated in the manner laid down in sub-sections (1A) to (1D) of section 245C.	E	r E	[See rules 44C and 44CA] Form of application fo r settlement of cases under section 245C(1) of the Income-tax Act, 1961	
10. The details referred to in item 11 shall be given in the Annexure to this application."				
[Emphasis supplied by us]	F	F		
26. The procedure laid down in Section 245D of the Act, contemplates that on receipt of the application under Section 245C(1) of the Act, the Settlement Commission is required to forward a copy of the application filed in the prescribed form (No. 34B), containing full details of issues for which application	G	and	 Particulars of the issues to be settled, nature and circumstances of the case and complexities of the investigation involved [See Note 7] 	10.
for settlement is made, the nature and circumstances of the case and complexities of the investigation involved, save and except the annexures, referred to in item No. 11 of the form and to call for report from the Commissioner. The Commissioner	Ц	sing has	11. Full and true disclosure of income which has not been disclosed before the Assessing Officer, the manner in which such income has been derived and the additional amount of	11.

is obliged to furnish such report within a period of 45 days from A the date of communication by the Settlement Commission. Thereafter, the Settlement Commission, on the basis of the material contained in the said report and having regard to the facts and circumstances of the case and/or complexity of the investigation involved therein may by an order, allow the application to be proceeded with or reject the application. After an order under Section 245D(1) is made, by the Settlement Commission, Rule 8 of the 1987 Rules mandates that a copy of the annexure to the application, together with a copy of each of the statements and other documents accompanying such annexure shall be forwarded to the Commissioner and further report shall be called from the Commissioner. The Settlement Commission can also direct the Commissioner to make further enquiry and investigations in the matter and furnish his report. Thereafter, after examining the record, Commissioner's report and such further evidence that may be laid before it or obtained by it, the Settlement Commission is required to pass an order as it thinks fit on the matter covered by the application and in every matter relating to the case not covered by the application and referred to in the report of the Commissioner under subsection (1) or sub-section (3) of the said Section. It bears repetition that as per the scheme of the Chapter, in the first instance, the report of the Commissioner is based on the bare information furnished by the assessee against item No. 10 of the prescribed form, and the material gathered by the revenue by way of its own investigation. It is evident from the language of Section 245C(1) of the Act that the report of the Commissioner is primarily on the nature of the case and the complexities of the investigation, as the annexure filed in support of the disclosure of undisclosed income against item No. 11 of the form and the manner in which such income had been derived are treated as confidential and are not supplied to the Commissioner. It is only after the Settlement Commission has decided to proceed with the application that a copy of the annexure to the said application and other statements and documents accompanying such annexure, containing the

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A aforesaid information are required to be furnished to the Commissioner. In our opinion even when the Settlement Commission decides to proceed with the application, it will not be denuded of its power to examine as to whether in his application under Section 245C(1) of the Act, the assessee has made a full and true disclosure of his undisclosed income. We feel that the report(s) of the Commissioner and other documents coming on record at different stages of the consideration of the case, before or after the Settlement Commission has decided to proceed with the application would be most germane to determination of the said question. It is plain from the language of sub-section (4) of Section 245D of the Act that the jurisdiction of the Settlement Commission to pass such orders as it may think fit is confined to the matters covered by the application and it can extend only to such matters which are referred to in the report of the Commissioner under sub-section (1) or subsection (3) of the said Section. A "full and true" disclosure of income, which had not been previously disclosed by the assessee, being a pre-condition for a valid application under Section 245C(1) of the Act, the scheme of Chapter XIX-A does not contemplate revision of the income so disclosed in the application against item No. 11 of the form. Moreover, if an assessee is permitted to revise his disclosure, in essence, he would be making a fresh application in relation to the same case by withdrawing the earlier application. In this regard, Section 245C(3) of the Act which prohibits the withdrawal of an application once made under sub-section (1) of the said Section is instructive in as much as it manifests that an assessee cannot be permitted to resile from his stand at any stage during the proceedings. Therefore, by revising the application, the applicant would be achieving something G indirectly what he cannot otherwise achieve directly and in the process rendering the provision of sub-section (3) of Section 245C of the Act otiose and meaningless. In our opinion, the scheme of said Chapter is clear and admits no ambiguity.

27. It is trite law that a taxing statute is to be construed

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28. As afore-stated, in the scheme of Chapter XIX-A, there is no stipulation for revision of an application filed under Section 245C(1) of the Act and thus the natural corollary is that determination of income by the Settlement Commission has necessarily to be with reference to the income disclosed in the application filed under the said Section in the prescribed form.

29. Having noticed the scheme of Chapter XIX-A of the Act, we shall now advert to the facts at hand and evaluate the rival submissions.

30. Before addressing the other issues, at the outset, we record our disapproval with the view of the High Court that it would not be proper to set aside the proceedings before the Settlement Commission even though it was convinced that the assessee had not made full and true disclosure of their income while making application under Section 245C of the Act. As stated above, in its earlier order dated 28th July, 2000 while declaring order dated 17th November, 1994, as *ab initio void* and setting aside order dated 29th January, 1999, the High Court had remitted the case to the Settlement Commission to

A decide the entire matter afresh, including the question of maintainability of the application under Section 245C(1) of the Act. The said order of the High Court was put in issue before this Court and was set aside vide order dated 11th July, 2006 and the case was remanded back to the High Court for fresh consideration. Nevertheless, all points raised by the parties, including the plea of the revenue that the application filed by the assessee before the Settlement Commission was not

maintainable as the assessee had not made a full and true disclosure of their undisclosed income were kept open. The High Court addressed itself on the said issue and found that the assessee had not made a full and true disclosure of their income while making the application under Section 245C(1) of

the Act, yet did not find it proper to set aside the proceedings

on that ground. Having recorded the said adverse finding on the very basic requirement of a valid application under Section 245C(1) of the Act, the High Court's opinion that it would not be proper to set aside the proceedings is clearly erroneous. The High Court appears to have not appreciated the object and scope of the scheme of settlement under Chapter XIX-A of the

Act. At this juncture, it would be appropriate to notice a few illuminating observations in *W T Ramsay Ltd. Vs. Inland Revenue Commissioners*¹⁰, which was considered to be a turning point in the interpretation of tax laws in England and was a significant departure from *Inland Revenue Commissioners Vs. Duke of Westminster*¹¹ dictum, noted in the passage

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"Given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance. This is the well-known principle of *Inland Revenue Comrs* v *Duke of Westminster* [1936] AC 1, [1935] All ER Rep 259, 19 Tax Cas 490. This is a cardinal principle but it must not be overstated or over-extended. While obliging the court to accept documents or

^{7. (1921) 1} KB 64.

^{8. (2000) 6} SCC 550.

^{9. 1961 (2)} SCR 189

^{10. (1981) 1} All ER 865.

H 11. [1936] AC 1, [1935] All ER Rep 259.

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transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction B intended as a whole, there is nothing in the doctrine to prevent it being so regarded; to do so is not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transactions to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded."

31. We are convinced that, in the instant case, the disclosure of Rs.11.41 crores as additional undisclosed income in the revised annexure, filed on 19th September, 1994 alone was sufficient to establish that the application made by the assessee on 30th September, 1993 under Section 245C(1) of the Act could not be entertained as it did not contain a "true and full" disclosure of their undisclosed income and "the manner" in which such income had been derived. However, we say nothing more on this aspect of the matter as the Commissioner, for reasons best known to him, has chosen not to challenge this part of the impugned order.

32. We shall now deal with the principal argument of learned counsel for the assessee that the High Court had failed to consider, in their correct perspective the two reports submitted by the Commissioner on 30th August, 1995 and 20th October, 1997, in as much as, in the latter report the Commissioner had himself computed the undisclosed income at Rs. 42.52 crores, which was equivalent to the amount finally determined by the Settlement Commission. Therefore, according to the learned counsel, there was no justification for the remand of the case back to the Settlement Commission.

A At the first blush, the argument appears to be attractive but on a deeper scrutiny, it does not merit acceptance. In the impugned order, on a critical examination of the order passed by the Settlement Commission with reference to the said two reports. in particular the reconciliation report submitted by the Commissioner on 20th October, 1997, estimating the undisclosed income at Rs. 187.20 crores, the High Court had found that only that part of the report dated 20th October, 1997, which dealt with "on money" was highlighted before this Court, while other incomes, investments, receipts or payments were not covered in that part of the statement. The High Court also observed that the manner in which expenses had been shown, created a serious doubt about the expenditure of Rs.734.02 lakhs. The High Court has also noted that the Settlement Commission had not properly dealt with the amount of Rs.911.51 lakhs on account of unexplained expenses, loans and surplus amount of Rs.488.98 lakhs, while assessing the total income and thus an amount of Rs.14.49 crores had been left out while determining the undisclosed income of the assessee. Besides, the High Court has also commented that having come to the conclusion that the penalty leviable worked out to be Rs. 562.87 lakhs, the Settlement Commission had no reason for levying a token penalty of Rs. 50 lakhs, which was not even 10% of the minimum leviable penalty. Ultimately the High Court observed that : (i) since the Settlement Commission had not supplied annexure filed on 19th September, 1994, declaring additional income of Rs.11.41 crores, due opportunity had not been given to the revenue to place its stand properly; (ii) huge amount of unexplained expenses, unexplained loans and unexplained surplus, total of which was more than Rs.14 crores, was not taken into consideration while passing the final order and (iii) the Settlement Commission had imposed token penalty of Rs.50 lakhs while on its own assessment leviable penalty would have been Rs.562.87 lakhs. Further, if the amount which had not been taken into consideration while assessing the total undisclosed income was to be taken into account, the amount of leviable penalty would have been much more. In light of these facts, the High Court formed the opinion that it would be in the interest of justice to set aside the final order passed by the Settlement Commission and to remand the case back to it for fresh adjudication on assessee's application. Bearing in mind the afore-stated factual position, as emanating from the material on record, we find it difficult to persuade ourselves to agree with learned counsel for the assessee that there was no justification for order of remand by the High Court and that the order passed by the Settlement Commission should have been affirmed. We are satisfied that under the given scenario, the High Court was correct in making the order of remand and no good ground is made out for interference in exercise of our jurisdiction under Article 136 of the Constitution.

33. As regards the argument of learned counsel for the assessee that the scope of judicial review being limited, the High Court should not have interfered with the order of the Settlement Commission in exercise of its power under Article 226 of the Constitution, in our opinion, the argument is stated to be rejected. Having conceded before the High Court that the assessee was not pressing the point of maintainability of the writ petition before the High Court, the assessee cannot be now permitted to resile from its earlier stand and raise the same issue before us. Even otherwise, as stated above, we have no hesitation in observing that the manner in which assessee's disclosures of additional income at different stages of proceedings were entertained by the Settlement Commission, rubbishing the objection of the Commissioner that the assessee had not made a full and true disclosure of their income in the application under Section 245C(1) of the Act, leaves much to be desired.

34. We may now evaluate the submission of learned counsel for the assessee that since the Commissioner was not entitled to receive a copy of the annexure to the application before the Settlement Commission had decided to proceed A with the application, no prejudice was caused to the Commissioner because of the alleged non-supply of the revised annexure at a stage anterior to the making of order under Section 245D(1) of the Act. It is true that details of the "full and true" disclosure of income and "the manner" in which such income is derived is to be given in the form of an annexure to the application, which is treated as confidential and is not to be forwarded to Commissioner for the purpose of his report under sub-section (1) of Section 245D of the Act and therefore, apparently there is substance in the contention. But when the argument is tested on the anvil of the scheme of Chapter XIX-A, the revision of the annexure by itself was prejudicial to the interest of the revenue. Apart from the fact, as explained above. revision of the annexure is tantamount to revision of the application, not contemplated in the scheme, withholding of the information regarding filing of revised annexure, disclosing undisclosed income of Rs.11.41 crores as against the income of Rs.1.94 crores, disclosed in the annexure forming part of the application, deprived the Commissioner of his right to object to the maintainability of assessee's application on the ground that the assessee had not made true and full disclosure of their income in the previous application, the foundational requirement of a valid application under Section 245C(1) of the Act. Accordingly, we have no hesitation in rejecting the argument.

35. For all the reasons aforesaid, we do not find any merit in these appeals, which are dismissed accordingly. The Commissioner will be entitled to costs, quantified at Rs.50,000/

G N.J.

Appeals dismissed.

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HARYANA STATE ELECTRICITY BOARD

v.

M/S. HANUMAN RICE MILLS AND ORS.

(Civil Appeal No. 6817 of 2010)

AUGUST 20, 2010

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

Electricity: Non-payment of electricity bill by previous owner/occupier of the premises in regard to the supply of electricity to the premises — Liability of subsequent purchaser of the premises to pay such arrears — Held: Electricity arrears do not constitute a charge over the property — Therefore, a transferee of a premises cannot be made liable for the dues of the previous owner/occupier — However, the electricity supplier can demand arrears from subsequent purchaser if the statutory rules or the terms and conditions of supply which are statutory in character, authorize it to make such demand.

Res judicata: First suit filed for permanent injunction for restraining the electricity Board from enforcing the demand notice, dismissed – Second suit filed for declaration that the demand and the disconnection were invalid – Held: The second suit was not barred by the principle of res judicata since the matter that was directly and substantially in issue in the second suit was completely different from the matter that was directly and substantially in issue in the first suit and the reliefs claimed were also different – Doctrine/Principle.

The first respondent purchased a rice mill in an auction. When the mill was purchased, the electricity supplied to it was already disconnected due to non-payment of electricity bill. After taking the possession of the mill, the first respondent applied for and obtained the electricity connection in its own name in the year 1991. Four years later, the appellant-Electricity Board served

A upon the first respondent a demand notice dated 16.1.1995 towards electricity arrears due from the previous owner.

The first respondent filed a suit for permanent injunction for restraining the appellant-Board from enforcing the demand notice. The suit was dismissed. The appellate court upheld the order of dismissal. Thereafter, the appellant served a notice dated 2.3.1998 informing the first respondent that the electricity supply would be disconnected if the arrears due from the previous owner were not paid. Thereafter the electricity supplied was disconnected on 9.3.1998.

The first respondent filed a suit challenging the demand and disconnection of electricity supplied. The D said suit was dismissed by the trial court holding that the claim of the appellant was barred by limitation. Both the first respondent and the appellant filed appeals. The first appellate court while dismissing the appeal filed by the appellant and allowing the appeal filed by the first respondent held that the first respondent could not be made liable for the dues of the previous owner, as there was no provision in the terms and conditions of sale that the electricity dues of the previous owner should be paid by the first respondent as auction purchaser. The appellant filed an appeal before the High Court. The High Court dismissed the appeal holding that in view of the decision in Isha Marbles case, the liability of a consumer to pay charges for consumption of electricity cannot be fastened on a subsequent auction purchaser of the property.

In appeal to this Court, appellant contended that the dismissal of the first suit filed by the first respondent for permanent injunction having attained finality, the second

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suit filed by the first respondent for a declaration that A demand and disconnection were invalid, was barred by the principles of *res judicata*, and that the decision in **Isha Marbles* relied on by the High Court was inapplicable to the facts of the case.

Dismissing the appeal, the Court

HELD: 1. The first suit by the first respondent was for a permanent injunction to restrain the appellant Board from enforcing the demand notice dated 16.1.1995 in respect of the electricity consumption charges incurred by the previous owner. By the second suit, the first respondent sought a declaration that the notice dated 9.3.1998 threatening disconnection of electricity supply for non-payment of the arrears of the previous owner and the consequential disconnection dated 2.3.1998, were invalid and for consequential relief. The matter that was directly and substantially in issue in the second suit was completely different from the matter that was directly and substantially in issue in the first suit. The reliefs claimed were also different, as the first suit was for a permanent injunction and the second suit was for a declaration and consequential relief. Therefore the second suit was not barred by res judicata. [Para 5] [223-A-D]

2. Electricity arrears do not constitute a charge over the property. Therefore, in general law, a transferee of a premises cannot be made liable for the dues of the previous owner/occupier. Where the statutory rules or the terms and conditions of supply which are statutory in character, authorize the supplier of electricity, to demand from the purchaser of a property claiming re-connection or fresh connection of electricity, the arrears due by the previous owner/occupier in regard to supply of electricity to such premises, the supplier can recover the arrears from a purchaser. The appellant did not plead in its

A defence that any statutory rule or terms and conditions of supply, authorized it to demand the dues of previous owner, from the first respondent. The decision in **Paramount Polymers shows that such an enabling term was introduced in the terms and conditions of electricity B supply in Haryana, only in the year 2001. The appellant did not demand the alleged arrears, when the first respondent approached the appellant for electricity connection in its own name for the same premises and obtained it in the year 1991. More than three years thereafter, a demand was made by the appellant for the first time on 16.1.1995 alleging that there were electricity dues by the previous owner. In these circumstances, the claim relating to the previous owner could not be enforced against the first respondent. On facts, the decision of the High Court does not call for interference. [Paras 9 10, 11] [227-F-H; 228-A-E]

Paschimanchal Vidyut Vitran Nigam Ltd. v. DVS Steels & Alloys Pvt.Ltd. 2009 (1) SCC 210 - relied on.

*Isha Marbles v. Bihar State Electricity Board (1995) 2 SCC 648; **Dakshin Haryana Bijli Vitran Nigam Ltd. v. Paramount Polymers (P) Ltd. (2006) 13 SCC 101; Dakshin Haryana Bijli Vitran Nigam Ltd. v. Excel Buildcon Pvt.Ltd. 2008 (10) SCC 720 – referred to.

F Case Law Reference:

	(1995) 2 SCC 648	referred to	Para 3
	(2006) 13 SCC 101	referred to	Para 4
G	2008 (10) SCC 720	referred to	Para 7
	2009 (1) SCC 210	relied on	Para 8

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6817 of 2010.

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From the Judgment & Order dated 08.08.2005 of the High Court of Punjab & Haryana at Chandigarh in R.S.A. No. 412 of 2004.

Pardeep Dahiya, T.V. George for the Appellant.

Amarjit Singh Bedi, Gurbir Singh R. for the Respondents.

The Judgment of the Court was delivered by

R. V. RAVEENDRAN, J. 1. Leave granted. Heard.

- 2. The second respondent Haryana Financial Corporation auctioned the rice mill premises of one of its borrowers Durga Rice Mills, to recover its dues. The first respondent purchased the said premises at the auction on 14.12.1990 for a consideration of Rs. 15,25,000/- and paid the entire sale consideration to the second respondent. When the first respondent purchased the mill premises, electricity supply to the premises had been disconnected. After taking possession of the premises, the first respondent applied for and obtained electricity connection in its own name in the year 1991. Four years later, the appellant served upon the first respondent, a notice dated 16.1.1995 demanding payment of Rs.2,39,251/-towards arrears of electricity charges due by the previous owner Durga Rice Mills.
- 3. The first respondent filed a civil suit for permanent injunction and the said suit ended in dismissal on 5.12.1996 which was affirmed by the appellate court on 27.2.1998. Thereafter the appellant served a notice dated 2.3.1998 informing the first respondent that the electricity supply will be disconnected if the said arrears due by Durga Rice Mills were not paid. This was followed by disconnection of electricity supply on 9.3.1998. First respondent filed a suit challenging the said demand and disconnection of electricity supply. The said suit was dismissed by the trial court. While dismissing the suit, the trial court held that the claim of the appellant was barred by limitation. Feeling aggrieved by the dismissal, the first

A respondent filed an appeal; and feeling aggrieved by the finding that appellant's claim was barred by limitation, the appellant filed an appeal. The first appellate court decided the appeals by a common judgment dated 30.10.2003. It dismissed the appeal filed by the appellant and allowed the appeal filed by the first respondent. It held that first respondent could not be made liable for the dues of the previous owner, as there was no provision in the terms and conditions of sale that the electricity dues of the previous owner should be paid by the first respondent as auction purchaser. The judgment of the first appellate court was challenged by the appellant by filing a second appeal. The Punjab & Haryana High Court by its judgment dated 8.8.2005 dismissed the said appeal holding that the liability of a consumer to pay charges for consumption of electricity, cannot be fastened on a subsequent auction purchaser of the property, in view of the decision of this court in Isha Marbles vs. Bihar State Electricity Board - (1995) 2 SCC 648.

4. Feeling aggrieved the appellant filed this appeal raising two contentions:

(i) The dismissal of the first suit filed by the first respondent for permanent injunction having attained finality, the second suit filed by the first respondent for a declaration that demand and disconnection were invalid, was barred by the principles of res judicata.

(ii) The decision in *Isha Marbles* relied on by the High Court was inapplicable to the facts of the case. The decision of this court in *Dakshin Haryana Bijli Vitran Nigam Ltd. v. Paramount Polymers (P) Ltd. – (*2006) 13 SCC 101, entitles the appellant to claim and receive the electricity dues of the previous owner from the new owner/ auction purchaser.

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Re: Point No. (i)

5. The first suit by the first respondent was for a permanent injunction to restrain the appellant Board from enforcing the demand notice dated 16.1.1995 in respect of the electricity consumption charges incurred by the previous owner. By the second suit, the first respondent sought a declaration that the notice dated 9.3.1998 threatening disconnection of electricity supply for non-payment of the arrears of the previous owner and the consequential disconnection dated 9.3.1998, were invalid and for consequential relief. The matter that was directly and substantially in issue in the second suit was completely different from the matter that was directly and substantially in issue in the first suit. The reliefs claimed were also different, as the first suit was for a permanent injunction and the second suit was for a declaration and consequential relief. Therefore the second suit was not barred by res judicata.

Re: Point No. (ii)

6. The High Court held that the demand was untenable in view of the decision in Isha Marbles. In Isha Marbles this court held that in the absence of a charge over the property in respect of the previous electricity dues, and in the absence of any statutory rules authorizing a demand for the dues of the previous occupant, an auction purchaser seeking supply of electrical energy by way of a fresh connection, cannot be called upon to clear the pre-sale arrears, as a condition precedent for granting fresh connection. This court further held that an Electricity Board could not seek the enforcement of the contractual liability of the previous owner/occupier against a purchaser, who was a third party in so far as the contract between the Electricity Board and the previous occupant and that an auction purchaser who purchases the property after disconnection of the electricity supply, could not be considered as a 'consumer' within the meaning of the Electricity Act, 1910 or Electricity (Supply) Act, 1948, even though he seeks A reconnection in respect of the same premises. This court observed:

"Electricity is public property. Law, in its majesty, benignly protects public property and behoves everyone to respect public property. Hence, the courts must be zealous in this В regard. But, the law, as it stands, is inadequate to enforce the liability of the previous contracting party against the auction purchaser who is a third party and is in no way connected with the previous owner/occupier. It may not be correct to state, if we hold as we have done above, it would C permit dishonest consumers transferring their units from one hand to another, from time to time, infinitum without the payment of the dues to the extent of lakhs and lakhs of rupees and each one of them can easily say that he is not liable for the liability of the predecessor in interest. No D doubt, dishonest consumers cannot be allowed to play truant with the public property but inadequacy of the law can hardly be a substitute for overzealousness."

(emphasis supplied)

The appellant relies on the subsequent decision of this court in *Paramount Polymers* (supra) to distinguish the decision in *Isha Marbles*. In *Paramount Polymers* (supra), the terms and conditions of supply contained a provision (clause 21A) providing that reconnection or new connection shall not be given to any premises where there are arrears on any account, unless the arrears are cleared. In view of the said express provision, this Court distinguished *Isha Marbles* on the following reasoning:

"This Court in *Hyderabad Vanaspati Ltd. v. A.P. SEB* [1998] 2 SCR 620 has held that the Terms and Conditions for Supply of Electricity notified by the Electricity Board under Section 49 of the Electricity (Supply) Act are statutory and the fact that an individual agreement is entered into by the Board with each consumer does not make the

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terms and conditions for supply contractual. This Court has A also held that though the Electricity Board is not a commercial entity, it is entitled to regulate its tariff in such a way that a reasonable profit is left with it so as to enable it to undertake the activities necessary. If in that process in respect of recovery of dues in respect of a premises to which supply had been made, a condition is inserted for its recovery from a transferee of the undertaking, it cannot ex facie be said to be unauthorized or unreasonable. Of course, still a court may be able to strike it down as being violative of the fundamental rights enshrined in the Constitution of India. But that is a different matter. In this case, the High Court has not undertaken that exercise.

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The position obtaining in Isha Marbles (supra) was akin to the position that was available in the case on hand in view of the Haryana Government Electrical Undertakings (Dues Recovery) Act, 1970. There was no insertion of a clause like Clause 21A as in the present case, in the Terms and Conditions of Supply involved in that case. The decision proceeded on the basis that the contract for supply was only with the previous consumer and the obligation or liability was enforceable only against that consumer and since there was no contractual relationship with the subsequent purchaser and he was not a consumer within the meaning of the Electricity Act, the dues of the previous consumer could not be recovered from the purchaser. This Court had no occasion to consider the effect of clause like Clause 21A in the Terms and Conditions of Supply. We are therefore of the view that the decision in Isha Marbles (supra) cannot be applied to strike down the condition imposed and the first respondent has to make out a case independent on the ratio of Isha Marbles (supra), though it can rely on its ratio if it is helpful, for attacking the insertion of such a condition for supply of electrical energy. This Court was essentially dealing with the construction of Section 24 of the Electricity Act in

arriving at its conclusion. The question of correctness or Α otherwise of the decision in Isha Marbles (supra) therefore does not arise in this case especially in view of the fact that the High Court has not considered the guestion whether Clause 21A of the terms and conditions incorporated is invalid for any reason." В

The decision in Paramount Polymers was followed in Dakshin Haryana Bijli Vitran Nigam Ltd. v. Excel Buildcon Pvt.Ltd. [2008 (10) SCC 720].

8. In Paschimanchal Vidyut Vitran Nigam Ltd. v. DVS Steels & Alloys Pvt.Ltd. [2009 (1) SCC 210] this court held, while reiterating the principle that the electricity dues did not constitute a charge on the premises, that where the applicable rules requires such payment, the same will be binding on the D purchaser. This court held:

> "A transferee of the premises or a subsequent occupant of a premises with whom the supplier has no privity of contract cannot obviously be asked to pay the dues of his predecessor in title or possession, as the amount payable towards supply of electricity does not constitute a 'charge' on the premises. A purchaser of a premises, cannot be foisted with the electricity dues of any previous occupant, merely because he happens to be the current owner of the premises.

> When the purchaser of a premises approaches the distributor seeking a fresh electricity connection to its premises for supply of electricity, the distributor can stipulate the terms subject to which it would supply electricity. It can stipulate as one of the conditions for supply, that the arrears due in regard to the supply of electricity made to the premises when it was in the occupation of the previous owner/occupant, should be cleared before the electricity supply is restored to the premises or a fresh connection is provided to the

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premises. If any statutory rules govern the conditions relating to sanction of a connection or supply of electricity. the distributor can insist upon fulfillment of the requirements of such rules and regulations. If the rules are silent, it can stipulate such terms and conditions as it deems fit and proper, to regulate its transactions and dealings. So long as such rules and regulations or the terms and conditions are not arbitrary and unreasonable, courts will not interfere with them.

A stipulation by the distributor that the dues in regard to the electricity supplied to the premises should be cleared before electricity supply is restored or a new connection is given to a premises, cannot be termed as unreasonable or arbitrary. In the absence of such a stipulation, an unscrupulous consumer may commit defaults with impunity, and when the electricity supply is disconnected for non-payment, may sell away the property and move on to another property, thereby making it difficult, if not impossible for the distributor to recover the dues. Provisions similar to Clause 4.3(g) and (h) of Electricity Supply Code are necessary to safeguard the interests of the distributor."

- 9. The position therefore can may be summarized thus:
- Electricity arrears do not constitute a charge over the property. Therefore in general law, a transferee of a premises cannot be made liable for the dues of the previous owner/occupier.
- Where the statutory rules or terms and conditions of supply which are statutory in character, authorize the supplier of electricity, to demand from the purchaser of a property claiming re-connection or fresh connection of electricity, the arrears due by the previous owner/occupier in regard to supply of electricity to such premises, the supplier can recover the arrears from a purchaser.

Position in this case

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10. The appellant did not plead in its defence that any statutory rule or terms and conditions of supply, authorized it to demand the dues of previous owner, from the first respondent. Though the appellant contended in the written statement that the dues of Durga Rice Mills were transferred to the account of the first respondent, the appellant did not specify the statutory provision which enabled it to make such a claim. The decision in Paramount Polymers shows that such an enabling term was introduced in the terms and conditions of electricity supply in Haryana, only in the year 2001. The appellant did not demand the alleged arrears, when first respondent approached the appellant for electricity connection in its own name for the same premises and obtained it in the year 1991. More than three years thereafter, a demand was made by the appellant for the first time on 16.1.1995 alleging that there were electricity dues by the previous owner. In these circumstances the claim relating to the previous owner could not be enforced against the first respondent.

11. On facts, it has to be held that the decision of the High Court does not call for interference. The appeal is therefore dismissed. Parties to bear their respective costs.

D.G. Appeal dismissed.

JYOTI MISHRA

V.

DHANANJAYA MISHRA (Transfer Petition (Criminal) Nos. 94-95 of 2010)

AUGUST 27, 2010

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

Code of Criminal Procedure, 1973:

Transfer petition – Estranged wife seeking transfer of C. criminal case filed by her against her husband and his relatives - HELD: Transfer petition is liable to be dismissed on the ground that only the husband is impleaded as respondent and the other accused in the criminal case have not been made parties in the petition.

Transfer petition – Seeking transfer of criminal case filed by petitioner-complainant against her husband and his relatives - HELD: In criminal proceedings, the right of accused to a fair trial and a proper opportunity to defend himself cannot be ignored for the convenience of the complainant simply because she happens to be the estranged wife -Court is not inclined to transfer a criminal case from one State to another solely on the ground that it would be more convenient for the complainant (wife) to prosecute the matter there - It is true that in cases of dissolution of marriage, restitution of conjugal rights or maintenance, much indulgence is shown to the wife and, ordinarily, the case is transferred to a place where it would be more convenient for the wife to prosecute the proceedings - But, a criminal case is on a somewhat different footing - Accused may not be able to attend the proceedings before the court suggested by complainant for many reasons, one of which may be financial constraints, but the consequences of non-appearance of the

A accused before such court would be quite drastic - Having regard to the consequences of non-appearance of the accused in a criminal trial, the Court is loath to entertain the prayer for transfer.

Transfer Petition: B

> Transfer of a criminal case or a matrimonial dispute -Factors to be considered - Explained - Code of Criminal Procedure, 1973 - Practice and Procedure.

CRIMINAL ORIGINAL JURISDICTION: Transfer Petition (Crl.) Nos. 94-95 of 2010.

Anjani Kr. Mishra, Rajeev Kumar Bansal, Akshay K. Ghai, Sanjeev Bansal for the Petitioner.

D The following order of the Court was delivered

ORDER

- 1. We have heard counsel for the petitioner.
- Ε 2. No one appears for the respondent despite service of notice.
 - 3. The petitioner is the estranged wife of the respondent. While still living with him at Hyderabad, she had filed a written report before the Station House Officer, P.S. Alwal, Secunderabad, that led to the institution of FIR No. 470/2009 dated September 09, 2009 under Section 498-A of the Penal Code citing her husband Dhananjaya Mishra (the sole respondent) and five others as accused. The Police, after investigation, submitted charge sheet and the proceedings against the accused are now pending before the VIth Metropolitan Magistrate, Cyberabad in CC No. 804/2009.
- 4. In the meanwhile, the petitioner left her husband at Hyderabad and came to live with her parents at Indore. She H has filed this petition for transferring the criminal case pending

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before the VIth Metropolitan Magistrate, Cyberabad to a court A of competent jurisdiction at Indore, Madhya Pradesh.

- 5. The first thing that needs to be noticed is that in the Transfer Petitions only the husband Dhananjaya Mishra is impleaded as respondent. The other accused in the criminal case are not made parties to these Transfer Petitions. The Transfer Petitions are, therefore, liable to be dismissed on that score alone.
- 6. Otherwise also, we are not inclined to transfer a criminal case from one State to another solely on the ground that it would be more convenient for the complainant (wife) to prosecute the matter there. It is true that in cases of dissolution of marriage, restitution of conjugal rights or maintenance, this Court shows much indulgence to the wife and ordinarily transfers the case to a place where it would be more convenient D for the wife to prosecute the proceedings.
- 7. But a criminal case is on a somewhat different footing. The accused may not be able to attend the court proceedings at Indore for many reasons, one of which may be financial constraints, but the consequences of non-appearance of the accused before the Indore Court would be quite drastic. Having regard to the consequences of non-appearance of the accused in a criminal trial, we are loath to entertain the petitioner's prayer for transfer. In a criminal proceeding, the right of the accused to a fair trial and a proper opportunity to defend himself cannot be ignored for the convenience of the complainant simply because she happens to be the estranged wife.
- 8. For all these reasons, we are not inclined to accept the prayer for transfer in these cases.
 - 9. The Transfer Petitions are dismissed.

R.D. Transfer Petitions dismissed.

A DR. M.S. PATIL v.

GULBARGA UNIVERSITY AND ORS. (Civil Appeal No. 1483 of 2005)

AUGUST 27, 2010.

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

Service law - Appointment - Post of Reader -Appointment of appellant-general category candidate -C Challenged to - Case of respondent-reserved category candidate that the post was reserved for 'Group B' candidate and appointment of appellant was the result of favouritism -Appointment set aside by High Court - However, appellant directed to continue on ad-hoc basis until appointment of new D incumbent to the post - On appeal, held: Appellant was wrongly appointed to a post reserved for 'Group B' category - His selection to the post was tainted - In service law, concepts of adverse possession or holding over are not there - For 17 years, appellant occupied the post which lawfully belonged to someone else - Equitable considerations are against him - Appellant continued in that post on basis of the direction of Supreme Court to maintain status quo, thus no need to continue ad-hoc arrangement any further - University directed to issue fresh Notification to fill up the post.

The respondent-University advertised posts of Reader. In the remarks column of the Notification, the said post was reserved for 'Group B' category. The appellant-general category candidate, was selected. Respondent no.2, a 'Group B' candidate, challenged the appointment of the appellant on the ground that the post was reserved for 'Group B' candidate; and that the appointment of the appellant was the result of favouritism. The Single Judge of the High Court set aside the selection and appointment of the appellant as Reader. It directed

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the University to fill up the post of reader calling for fresh applications and to complete the selection within the stipulated period. However, the appellant was allowed to continue on the post till the fresh selection process was completed. The Division Bench of the High Court upheld the order passed by the Single Judge of the High Court. B Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 The facts of the case lead to only one conclusion that the appellant was wrongly appointed to a post that was reserved for 'Group B' category. The High Court also found that the appellant's selection for appointment to the post was tainted by the participation of the Head of the Department of Kannada, who was related to him, in the selection process. [Para 11] [239-C-D]

1.2 In service law, there is no place for the concepts of adverse possession or holding over. Helped by some University authorities and the gratuitous circumstances of the interim orders passed by the Court and the delay in final disposal of the matter, the appellant has been occupying the post, for all these years that lawfully belonged to someone else. Thus, the equitable considerations are actually against him rather than in his favour. It is noted as to how the appellant was able to secure the appointment and how he managed to continue on the post. By notification dated August 13, 2004, the appellant was discharged from the service of the University on the post of Reader in Kannada but was asked to continue on ad-hoc basis until the appointment of the new incumbent to the post, on the basis of the order of status quo passed by this Court. Thus, his position is only ad- hoc till the appointment of the new incumbent and in that position he is continuing on the basis of the direction of this Court to maintain status quo. A There is no reason to continue this ad-hoc arrangement any further and stand any longer in the way of the post being filled up on a regular basis. [Paras 13] [239-F-H; 240-A-C]

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1.3 Since the matter has become very old, it would not be reasonable for the University to fill up the post on the basis of the notification issued in the year 1993. Therefore, the University could issue a fresh notification to fill up the post. [Para 14] [240-C-D]

C CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1483 of 2005.

From the Judgment & Order dated 02.06.2004 of the High Court of Karnataka at Bangalore in W.A. No. 1303 of 2000.

D Basava Prabhu S. Patil, Ajay Kumar M. (for A.S. Bhasme) for the Appellant.

S.N. Bhat, Lakshmi Raman Singh for the Respondents.

The Judgment of the Court was delivered by

F AFTAB ALAM,J. 1. This case sadly illustrates how interim orders passed by the court coupled with judicial delays enure to the great advantage of the wrong doer and in the end make him bold in the false belief that with the passage of time the equity was now firmly on his side. The appellant in this case was wrongly appointed to the post of Reader in the Department of Kannada in Gulbarga University. On the basis of the interim orders passed by the Court and evidently helped by the concerned authorities in the University he has been able to hold on to the post now for over seventeen and a half years.

2. The manner in which the case has progressed to reach the present stage may be stated thus. On March 30, 1992 the Gulbarga University, Gulbarga invited applications for appointment to different posts. One of the advertised posts was of Reader in Kannada. In the remarks column of the notification,

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it was clearly shown as reserved for 'Group B' category. It A needs to be stated here that a plain copy of the notification is enclosed with the paper book as part of Annexure PI. In the remarks column of the enclosed copy, the letters "GM" are shown against the post in question, indicating that it was open to the general merit category. In order to show that it was incorrect Mr. L. R. Singh, counsel for respondent No. 2 produced before us a Xerox copy of the notification from which it clearly appears that the post was reserved for a candidate of 'Group B' category. Thus, confronted the lame plea on behalf of the appellant was that the mistake in the copy (Annexure P1) was due to a typing error. We do not wish to proceed any further in the matter except to say that a typing error materially affecting the facts of the case to the benefit of the party committing the mistake has to be viewed with a good deal of suspicion.

- 3. In response to the notification, 11 applications were made for the post in question. Only 3 applicants were from 'Group B' category and the rest were from different other categories; the appellant is from the general merit category. According to the appellant, the Board of Appointment did not find any of the 'Group B' candidates eligible or suitable and on the basis of the interview held on June 5, 1992 he was selected for appointment. His selection was approved by the Syndicate on February 1, 1993 and a notification for his appointment was issued on February 4, 1993 in pursuance of which he joined the post.
- 4. On June 27, 1993 respondent No.2 filed a writ petition [W.P. No.22047/1993] in the Karnataka High Court challenging the appellant's appointment on the ground that the post was reserved for 'Group B' candidate. He also alleged that in a certain way the appellant (respondent No. 2 in the Writ Petition) was closely related to the Head of the Kannada Department of the University (respondent No.3 in the WP) and his appointment was the result of favouritism. Before the High Court, the writ petition was resisted both by the appellant and

A the University. On behalf of the University, it was stated that the Writ Petitioner (respondent No.2 in this appeal) did not satisfy the requirements as per the government order to consider him as coming under 'Group B' category and, therefore, the Board of Appointment interviewed all the candidates and selected respondent No.2 (appellant herein, who belonged to the General category) on the basis of his qualification, experience and performance in the interview. The appellant and the Head of the Department (who was made a party to the writ petition and was served with notice) on their part denied any relationship between them.

5. A learned single judge of the High Court upheld the contention of the Writ Petitioner (respondent no.2 herein) on both counts. He held that the selection and appointment of the appellant, belonging to the General Merit category, to the post reserved for 'Group B' category was illegal. The learned judge further held that the appellant (respondent No.2) was closely related to the Head of the Department (respondent No.3 in the writ petition) and, therefore, he ought not to have participated in the selection to the post of Reader in Kannada. On behalf of E the present appellant, it was also pleaded before the learned single judge that since he had been working for several years after his appointment to the post he should not be disturbed. The learned judge did not accept the plea. He allowed the writ petition and by judgment and order dated December 6, 1999 set aside the selection and appointment of the appellant as Reader in Kannada on the basis of the notification dated March 30, 1992. The single judge directed the University to fill up the post of Reader in Kannada calling for fresh applications and to complete the selection within 6 months from the date of the judgment. He, however, allowed the appellant to continue on the post till the selection process was completed.

6. Against the judgment and order passed by the single Judge, the appellant preferred an intra court appeal (W.A. No.1303/2000). A division bench of the High Court, dismissed

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the appeal by judgment and order dated June 2, 2004. The division bench noted that the single judge had come to the conclusion that the appellant was related to the Head of the Department and, therefore, the Head of the Department ought not to have participated in the selection proceedings in which a person related to him was one of the candidates. As regards the appointment of the appellant who belonged to the general merit category to a post reserved for 'Group B' category the division bench made the following observations:

"We may observe that there is not material to support this contention to come to the conclusion that the selection committee did not consider the claim of the persons belonging to Group B category on that ground. If any of the candidates belonging to Group B category did not satisfy the qualifications prescribed, it can be taken note of by the selection committee and reasons can be recorded for considering General Merit candidate for such post. But we do not find material on record to accept that plea and to interfere in the order of the learned Single Judge which has been passed after taking into consideration the reservation policy and the qualifications required and also the posts notified in the notification."

7. By the time the appeal was heard by the division bench, ten years had gone by and the appellant was continuing on the post. On that basis it was strongly urged that it would be very unfair to him if he is forced to go back to the college from where he had resigned to join the post of Reader in Gulbarga University. The division bench was, however, unmoved. It maintained the order passed by the learned single judge and directed the University to fill up the post of Reader in Kannada pursuant to the notification dated March 30, 1992 giving opportunity to all the eligible candidates who had submitted their applications in response to the notification and complete the selection process within three months from the date of receipt of a copy of the order.

8. Against the order of the division bench, the appellant came to this Court in appeal. In the SLP, notice was issued on September 13, 2004 and a direction was given to maintain a status quo as obtaining on that date. Finally, the leave to appeal was granted on February 28, 2005.

В 9. In the meanwhile, there were some intervening developments that have a bearing on the matter. In compliance with the order passed by the division bench of the High Court. the University issued an order on August 13, 2004 by which the appellant was discharged from the service of the University on the post of Reader in Kannada but was asked, as directed by the High Court, to continue as Reader in Kannada on ad-hoc basis until the completion of the appointment of the new incumbent to the post. Later, on the basis of the interview, held on August 20, 2004 the Board of appointment selected and recommended for appointment one Dr. (Smt.) Mallamma Ganti. The recommendation of the Board of Appointment was placed before the Syndicate. After much discussion, the Syndicate approved the recommendation of the Board of Appointment to appoint Smt. Mallamma Ganti as Reader in Kannada. But the E approval was not without qualification. It was stated that the syndicate "felt that since disciplinary proceedings are now pending against her [Dr. (Smt.) Mallamma Ganti], this fact may also be brought to the notice of the Honorable High Court before the orders are issued." There is nothing to show that anything was brought to the notice of the High Court, but this much is evident that no order was ever issued for appointment of Dr. (Smt.) Mallamma Ganti to the post in question.

10. In the counter affidavit filed by respondent no.2, in this appeal, it is stated as follows:

"It is also relevant to state that from the information derived from the University under the Right to Information Act, no disciplinary proceedings against Dr. Mallamma Ganti was pending as on the date of her selection and yet she was not allowed to join the said post merely to show undue favor to the appellant herein as the University due to malafide A reasons was determined to show undue favour to the appellant herein."

The above statement is not controverted either by the appellant or on behalf of the University. Thus, the appellant was allowed to continue on the post with some little help from the University authorities and on the basis of the order of status quo passed by this Court.

- 11. Once the facts of the case are narrated, there remains hardly anything to adjudicate upon. The facts of the case lead to only one conclusion that the appellant was wrongly appointed to a post that was reserved for 'Group B' category. The High Court has also found that the appellant's selection for appointment to the post was tainted by the participation of the Head of the Department of Kannada, who was related to him, in the selection process. In those facts and circumstances, all that is needed is to dismiss the appeal without further ado.
- 12. But at this stage once again a strong appeal is made to let the appellant continue on the post where he has already worked for over 17 years. Mr. Patil, learned senior counsel, appearing for the appellant, submitted that throwing him out after more than 17 years would be very hard and unfair to him since now he cannot even go back to the college where he worked as lecturer and from where he had resigned to join to this post.
- 13. We are unimpressed. In service law there is no place for the concepts of adverse possession or holding over. Helped by some University authorities and the gratuitous circumstances of the interim orders passed by the Court and the delay in final disposal of the mater, the appellant has been occupying the post, for all these years that lawfully belonged to someone else. The equitable considerations are, thus, actually against him rather than in his favour. The matter can also be looked at from a slightly different angle. It is noted above how the appellant was able to secure the appointment and how he managed to

A continue on the post. By notification dated August 13, 2004, the appellant was discharged from the service of the University on the post of Reader in Kannada but was asked to continue on ad-hoc basis until the appointment of the new incumbent to the post. His position is, thus, only ad-hoc till the appointment of the new incumbent and in that position he is continuing on the basis of the direction of this court to maintain status quo. We see no reason to continue this ad-hoc arrangement any further and we do not wish to stand any longer in the way of the post being filled up on a regular basis.

14. Since the matter has become very old, it would not be reasonable for the University to fill up the post on the basis of the notification issued in the year 1993. The University may, therefore, issue a fresh notification to fill up the post. The process of selection and appointment on the basis of the fresh notification should be completed within six months from today.

15. In the result, the appeal is dismissed with costs, quantified at Rs.50.000.00 (rupees fifty thousand only).

N.J. Appeal dismissed.

PRATHAP & ANR.

V.

STATE OF KERALA (Criminal Appeal Nos. 1198-1199 of 2005)

AUGUST 27, 2010

[B. SUDERSHAN REDDY AND SURINDER SINGH NIJJAR, JJ.]

Penal Code, 1860 - ss. 302 and 149 - Murder -Deceased and one more attacking accused persons and coaccused - In retaliation, accused and co-accused armed with deadly weapons inflicting fatal injuries to deceased - High Court upholding conviction of accused u/s. 302/149 but setting aside the conviction u/s. 120-B - As regard coaccused, High Court upholding acquittal of four co-accused and also acquitting the other four co-accused convicted by trial court - On appeal, held: Facts and circumstances clearly prove the existence of common object of accused to eliminate the deceased - Accused had a clear motive -Evidence of eye-witnesses is reliable – Medical evidence leads to the conclusion that death resulted from injuries caused by accused - Prosecution witnesses not only identified accused as assailants with swords but also indicated injuries inflicted by them on deceased - Accused don't deserve to be acquitted on the principle of parity – Thus, order of High Court does not call for interference - Evidence -Criminal law - Common object - Principle of parity -Constitution of India 1950 – Article 136.

According to the prosecution case, 'K'-deceased and 'M'-CW 11 attacked the appellants. To seek revenge, the appellants and the other accused inflicted various injuries to 'K' resulting in his death. The appellants and the other accused were tried by the Court of Session for the offences punishable u/ss. 114, 143, 147, 148, 120-B

A and 302/149 IPC. The High Court upheld the conviction and sentence of the appellants u/s. 302/149 IPC, however, it set aside the conviction u/s.120 B IPC. The High Court upheld the acquittal of A3 and A8 to A10 and also acquitted accused no. 4, 5, 6 and 7. Therefore, the

B appellants filed the instant appeal.

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Dismissing the appeals, the Court

HELD: 1.1 The trial court as well as the High Court correctly relied upon the unflinching, coherent and consistent evidence given by PW 1 which leaves no manner of doubt about the entire sequence of events. The evidence given by PW1 was corroborated by PW 2 in every material particular. The submission with regard to the scene of crime not being well lit is without any substance. Similarly, the criticism with regard to the identification parade not having been held is of no consequence. PW 1 and PW 2 clearly stated that the appellants were previously known to them. PW1 certainly even knew about the previous enmity between the deceased and the appellants. [Paras 14 and 15] [255-F; 257-C-E]

1.2 There is no reason at all to disbelieve the evidence of the eye-witnesses. The weapons used by the appellants and the injuries caused have been specifically mentioned by PW1 and PW2. Recoveries of the swords used by them were made at the instance of the appellants. Recoveries of other weapons, clothes worn by the accused on the day of the assault were also made at the instance of the other accused. Medical evidence also leads to the conclusion that the death resulted from the injuries caused by the appellants and the other accused with their respective weapons. In view of the proven facts, it becomes evident that the appellants had acted with a common object to eliminate the deceased.

H [Para 16] [257-F-H]

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Bhagwan Singh vs. State of M.P. (2002) 4 SCC 85; A Chanda vs. Stateof U.P. (2004) 5 SCC 141 – referred to.

1.3 It cannot be said that the appellants were perhaps unaware that the murderous assault, intended to be committed by them, would, in all probability, cause the death of 'K'. Both the trial court as well as the High Court considered the specific injuries caused by the appellants with swords. There were 20 ante-mortem injuries on the deceased. According to the opinion of the doctor, the death was due to injuries caused on the chest and on the left palm. The death could also have resulted from the cumulative effect of all other injuries. Therefore, there is no manner of doubt that 'K' died as a result of injures caused by the appellants along with the other accused. [Para 17] [259-G-H; 260-A-B]

1.4 It is always open to a court to differentiate the accused who had been acquitted from those who had been convicted. Both the courts below applied the said principle in distinguishing the case of the appellants from those who have been acquitted. The appellants were known to be associates of the deceased. They had previous social interaction. For some time they had differences of opinion. This led to an assault by the deceased and his companion CW 11, on the appellants, A1 and A2. Consequently, the appellants wanted to settle the score with the deceased. They had a clear motive. This apart, PW 1 and PW 2 not only identified the appellants as assailants with swords but also indicated the injuries inflicted by them on the deceased. On the other hand, the accused persons who had been acquitted were not known to PW 1 and PW 2. In fact, PW 1 in the evidence categorically admitted that the other accused were not from the locality but were sometimes seen there. The courts below rightly declined to acquit the appellants on the principle of parity. [Paras 18 and 19] [260-C-G]

A Gangadhar Behera vs. State of Orissa (2002) 8 SCC 381 – referred to.

1.5 The trial court as well as the High Court rightly convicted the appellants, as the facts and circumstances of the case unequivocally proved the existence of the common object of the appellants. They had come looking for 'K' armed with deadly weapons with the intention of causing grievous bodily injuries. There was a pre-planned attack. They located him and caused serious injuries with swords, choppers and other weapons, which led to his death. Thus, they were rightly convicted and sentenced u/s. 302/149 IPC. The concurrent views taken by the trial court as also the High Court cannot be said to be either clearly illegal or manifestly erroneous and does not call for any interference under Article 136 of the Constitution of India. [Paras 20 and 21] [261-D-F]

Siri Kishan and Others Vs. State of Haryana (2009) 12 SCC 757; Mummidi Hemadri and Others Vs. State of Andhra Pradesh (2007) 13 SCC 496; Chanda and Others Vs. State of U.P. and Another (2004) 5 SCC 141 – referred to.

Case Law Reference:

	(2009) 12 SCC 757	Referred to.	Para 5
F	(2007) 13 SCC 496	Referred to.	Para 5
•	(2004) 5 SCC 141	Referred to.	Para 5
	(2002) 4 SCC 85	Referred to.	Para 16
_	(2004) 5 SCC 141	Referred to.	Para 16
G	(2002) 8 SCC 381	Referred to.	Para 19

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1198-1199 of 2005.

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From the Judgment & Order dated 28.06.2004 of the High Court of Kerala at Ernakulam in Crl. Appeal No. 432 of 2003 (B) and Crl. Appeal No. 873 of 2003.

C.N. Sreekumar, T.G.N. Nair, V.K. Sidharthan for the Appellants.

R. Sathish, S. Geetha for the Appellant.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. These two appeals have been filed against the common judgment of the High Court of Kerala at Ernakulam dated 28.6.2004 in Criminal Appeal No. 432 of 2003 and Criminal Appeal No. 873 of 2003 whereby the High Court dismissed the appeal filed by the appellants herein by confirming the judgment of the trial court convicting and sentencing them under Section 302 and 149 of the Indian Penal Code. By the same judgment, their conviction under Section 120 (B) was set aside.

2. The appellants along with eight other persons were tried by the Sessions Court, Kollam, in Sessions case no. 564/1999 for the offences punishable under Section 114, 143, 147, 148, 120(B) & 302 read with Section 149 of Indian Penal Code. It was the case of the prosecution that the deceased Kochukuttan and Murali (CW-11) had assaulted the appellants on 19.5.1997 "at 9.00 p.m. at a place at Chaithram Restaurant" run by the appellant Devakumar @ Jayakumar. Seeking revenge, the two appellants, Rajeev (A3) and Venu (A4) assembled at Chaithram Restaurant at Veliyam junction on 20.6.1997 at 7.45 p.m. and hatched a conspiracy to murder Kochukuttan. On 24.6.1997, all the ten accused in furtherance of a common object, armed with deadly weapons such as swords, iron rods, chopper, knife and stick etc. came to Chaithram Restaurant in a jeep KL-2B/9938. The jeep, which belonged to CW-16, was driven by Venu (A4). All the accused came out of the jeep at a place in front of the restaurant. Accused Prathap (hereinafter

A referred to as A1) and Rajeev (hereinafter referred to as A3) were in the front whereas Padmachandran (A5) to Deepu (A10) followed behind them. They came to a place in front of Harishree Bakers on the Eastern side of Kottarakkara Ovoor Public Road at Veliyam junction at about 7.45 p.m. At that time, the deceased was talking to PW-1 Hareendranathan. A3, Rajeev, called Kochukuttan by saying "Kochukuttan Come here". Thereafter, appellant no. 1 Prathap (A1) assaulted the deceased with his sword and caused an injury on his head. At the same time, appellant no. 2 (A2) shouted "cut this man". He was also armed with a sword and made a cut with the same on the side of the chest of the deceased. As a result of the injuries. Kochukuttan fell down on the road on the side of the verandah of Harishree Bakers. Thereafter, Padmachandran (hereinafter referred to as A5), Arjunan (hereinafter referred to as A6), Siddikishan (hereinafter referred to as A7), Saji @ Sajith(hereinafter referred to as A8), Rajesh(hereinafter referred to as A9) and Deepu(hereinafter referred to as A10) are alleged to have inflicted various injuries with their weapons such as iron rods, chopper, sword, knife and stick. After causing mortal injuries to Kochukuttan, the assailants left the place in the same jeep in which they had arrived. The deceased was moved to the hospital initially in a car driven by CW-14. However, the lights of the car developed some problem and the deceased was transferred to the jeep driven by CW-15. Kochukuttan succumbed to the injuries at 8.10 p.m. on 24.6.1997. Upon completion of the investigation, the ten accused were put on trial. The prosecution cited PW-1, PW-2. PW-4 and PW-5 to PW-10 as eye-witnesses. It is noticed by the High Court that PW-6 to PW-10 were declared hostile as they did not fully support the prosecution story. PW-3 was examined mainly to prove the criminal conspiracy which had been hatched at the hotel of Chaithram owned by A2, appellant in Criminal Appeal No. 873 of 2003 in the High Court. The trial court convicted A1, A2, A5, A6 and A7 under Section 302 of

IPC and sentenced them to imprisonment for life and fine of

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Rs. 20,000/- each, in default to undergo R.I. for a period of 6 months. A1, A2, A5, A6 and A7 were also convicted under Section 149 and sentenced to R.I. for 1 year each. A1, A2 and A4 were also convicted of the offence under Section 120B IPC and sentenced to R.I. for 5 years each. Accused A3 and A8 to A10 were acquitted.

3. The two appellants herein challenged the aforesaid judgment by filing Criminal Appeal No. 873 of 2003 and 432 of 2003 before the High Court. The other accused persons filed Criminal Appeal No. 319/2003, 400/2004, 422/2003, 479/ 2003. State of Kerala preferred Criminal Appeal No. 901/2003 against the acquittal of 5 accused persons. All the appeals were heard together by the High Court and decided by a common judgment dated 28.6.2004. The appeals filed by the two appellants herein against the conviction and sentence under Section 302 IPC read with Section 149 of the IPC were dismissed. However, the conviction of these two appellants under Section 120(B) was set aside. The appeals filed by the State against the acquittal of A3 and A8 to A10 were also dismissed. At the same time, the appeals filed by accused no. 4, 5, 6 and 7 were allowed and their conviction as well as the sentence was set aside. These two appeals have been filed by the two appellants against the judgment of the High Court rendered in Criminal Appeal No. 873 and 432 of 2003.

4. We have heard the learned counsel for the parties.

5. The submissions made by the learned counsel for the appellants before the High Court have been reiterated before this Court. Learned counsel appearing for the appellants, Mr. C.N. Sreekumar, has submitted that the presence of the eyewitnesses is doubtful. Even if the alleged eye-witnesses were present, their evidence cannot be relied upon as it would have been impossible to identify the assailants as the scene of occurrence was not a well lit place. Assault which led to the death of Kochukuttan is alleged to have taken place at about 7.45 P.M. At the relevant time, there was load shedding of

A electricity in Kerala. On the date of the incident, the load shedding commenced at about 7.30. P.M. Therefore, it would not have been possible to identify the appellants. It would also not have been possible for the eve-witnesses to notice the weapons which were allegedly used by all members of the unlawful assembly. Learned counsel further submitted that the eye-witnesses have failed to state categorically as to which injury was caused by which appellant and with which weapon. The learned counsel submitted that the eye-witnesses account is highly suspicious. Attacking the evidence of PW1, the learned counsel has submitted that the witness is the brotherin-law of the deceased. He has been deliberately introduced by the prosecution. If he was an actual witness to the incident. he would have tried to save his brother-in-law and would have certainly received some injuries. Apart from this, when the deceased was being moved to the hospital, this witness did not accompany the deceased in the same car. According to the learned counsel, the evidence of PW2, suffers from the same infirmities. Learned counsel further submitted that the High Court having acquitted all the accused from the charge of criminal conspiracy, there was hardly any evidence of unlawful assembly or common object. Therefore, a conviction under Section 302 IPC cannot be recorded on the basis of such evidence. At best, the appellants could have been convicted under Section 304 IPC. In support of the submissions, learned counsel has relied on three judgments of this Court, viz.,

(1) Siri Kishan and Others Vs. State of Haryana, (2009) 12 SCC 757

(2) Mummidi Hemadri and Others Vs. State of Andhra Pradesh, (2007) 13 SCC 496

(3) Chanda and Others Vs. State of U.P. and Another, (2004) 5 SCC 141

6. Learned counsel further submitted that in any event, the evidence of the eye-witnesses cannot be believed as there was

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no identification parade held by the investigating officer to identify the accused persons, who have actually committed the offence. It is further submitted by the learned counsel that the identification of the appellants in the Court is of no consequence as the appellants along with the other co-accused had been shown to the witnesses in the police station. Their weapons were also shown to the witnesses. As a result of these infirmities, the co-accused of the appellants have been acquitted. Therefore, on the principle of parity, the appellants also deserved the benefit of doubt. According to the learned counsel, apart from the unsatisfactory identification of the appellants, the case of the prosecution has not been supported by PW6 to PW10, who were having shops in the neighbourhood at the junction where the assault had taken place. Therefore, it was submitted that the very genesis of the assault has not been proved.

7. On the other hand, Mr. R. Sathish, learned counsel appearing for the State of Kerala submitted that the trial court as well as the High Court has given concurrent findings. The evidence having been appreciated twice, by the trial court as also the High Court, does not leave any iota of doubt as to the involvement of the appellants in the murder of the deceased. He has submitted that the first information report was registered on the basis of the first information statement given by the brother-in-law of the deceased, PW1 very soon after the incident. The consistent story given by PW1 was fully corroborated by the eye-witnesses account of the PW2. The conspiracy has been duly proved by the evidence of PW3. He has further submitted that the submission of the learned counsel with regard to the place of assault being not properly lit is factually incorrect because the Veliyam junction where the murder took place is a very busy place and well lit throughout the night. Learned counsel further submitted that the injuries which caused the death of Kochukuttan have been specifically pointed out by the medical evidence in the inquest report as also in the postmortem report. Coming to the evidence with A regard to the identification of the appellants, learned counsel submitted that any infirmities in not holding the identification parade would be totally irrelevant in case of the appellants as they were previously well known to PW1 and PW2. The evidence of PW1 and PW2 has been duly corroborated by the evidence of other eve-witnesses PW4 and PW5. So far as the submissions with regard to the non-identification of the weapons and the non-attribution of the particular injuries to the appellants, learned counsel submitted that their participation is such that they would not be entitled to the benefit of the very limited exception which is permissible to a by-stander in a charge under Section 149 IPC. Learned counsel further submitted that this is a clear case of enmity as the deceased and CW-11 had attacked appellants on the night before the murder. With regard to the load shedding, learned counsel has submitted that the entire assault incident took place within a span of 3 to 4 minutes. It is alleged to have commenced at 7.25 P.M. and would have been over by 7.28. P.M. The load shedding if any does not commence till after 7.30 p.m. Even otherwise, it is submitted that on the fateful night of 24.6.1997. it was a moonlight night, therefore, it would not be a case of complete darkness at night.

8. We have given due consideration to the rival submissions made by the learned counsel. The High Court in the impugned judgment has clearly observed that the identity of the deceased and the place of occurrence etc. are not disputed in this case. Postmortem of the dead body of Kochukuttan was conducted by PW-18 at 11.40 a.m. on 25.6.1997. Ex. P17 is the postmortem certificate which shows that there are 20 ante mortem injuries. PW-16 has opined that the death was due to injuries sustained to the chest and left palm, that is, injuries No. 14 to 20 and death can also be due to the cumulative effect of all the injuries. Both the Courts have concluded that the medical evidence is consistent with the eyewitnesses account given by PW-1, PW-2, PW-4 and PW-5. As noticed above, PW-6 to PW-10 although cited as eye-

witnesses were declared hostile and did not support the A prosecution.

- 9. The trial court formulated 5 points for consideration, which are as follows:-
 - (1) Whether the death of Kochukuttan was because of the injuries sustained in the occurrence?

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- (2) Whether the accused persons had inflicted injuries on deceased?
- (3) Whether the accused persons A1 to A4 had conspired together to cause the murder of deceased Kochukuttan?
- (4) What offence, if any, accused persons had committed?
- (5) Regarding sentence?

On point no. 1, the trial court concluded on the basis of the findings in the inquest report as follows:

"The inquest on the dead body of deceased was conducted by PW19, sub inspector on the morning on 25.6.1997 at the District Hospital on the direction given by the Circle Inspector, Kottarakara and Ext.P20 is the inquest report prepared by PW.19. In Ext.P20, PW.19 had noted the injuries found on the dead body. By Ext.P20, the cause of death is due to the injury sustained by beating, stabbing and cutting. In Ext.P20, it is stated that as per the information received, the injuries were inflicted on the deceased by A1, A2 and others due to their animosity against deceased Kochukuttan. Ext.P17 is the postmortem certificate prepared by PW16, doctor who has conducted the postmortem examination on the dead body of the deceased. In Ext.P17, 20 ante mortem injuries

A are noted on the body of the deceased and the cause of death stated in Ext.P17 'due to the injury sustained to the chest and left palm'."

10. In the post mortem report (Ex.P17), the following injuries were noticed on the deceased:-

- (1) Incised wound 4.5x2 cm skin deep oblique reflecting a flap backwards on the left side of face, the upper outer and being 4 cm in front of ear.
- (2) Incised wound 5x1 cm bone deep obliquely placed on the left side of head the lower inner and being 9 cm outer to midline 6 cm. Above eyebrow.
- (3) Abrasion 2x1 cm on the left side of forehead 2 cm outer to midline and 2 cm above eyebrow.
 - (4) Incised wound 3.5 x 0.5 cm bone deep obliquely placed on the left side of back of head the lower inner and being 5 cm outer to midline and 18 cm above root of neck.
 - (5) Incised punctured wound 3 x 1 x 9 cm. Oblique on the right side of root of neck, the lower inner blunt and being 10 cm below right ear. The upper outer and was sharply cut. The wound was directed downwards, forwards and the left through the muscle plane.
- (6) Incised punctured wound 2.5x1x6.5 cm oblique on the right side of root of neck, its lower inner blunt end being 2 cm, above the injury No. 5. The upper outer end was sharply cut. The wound was directed downwards,

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forwards and the left through the muscle plane.	below elbow,	back and outer aspect of left forearm, 9 cm below elbow, underneath the muscles, the radius bone was found cut and separated.	
(7) Abraded contusion 2 c 1.5x05 cm. On the front of right shoulder 2 cm inner to its tip.			(17) Incised wound 9x3.5 cm skin deep at its
(8) Incised wound 1.8x0.5 skin deep obliquely placed on the right side of front of neck, the lower inner and being 5 cm outer to midline 2.5 cm. Above collar bone.	В	В	upper part and 3 cm deep at its lower part oblique with tailing upwards, on front of left side of chest, the lower inner and being 3.5 cm outer to middle and 9.5 cm below the upper end of sternum.
(9) Lenior abrasion 7.5 cm. long oblique on the outer front and cuter aspect of right arm the lower inner and being 9 cm. above elbow.	С	С	(18) Incised wound 11x1.5x0.5 cm oblique on the right side of back of trunk, the lower inner and being 11.5 cm outer to midline 4 cm below root of neck.
(10) Incised wound 7 x 02 x 10 oblique on the outer aspect of right arm the lower inner and being 9 cm above elbow.	D	D	(19) Incised wound 2.5x1 cm skin deep oblique on the back of right side of trunk, the lower
(11) Lacerated wound 0.8x0.8x1.5 cm on the outer aspect of right arm 0 cm above elbow.			inner end being 11.5 cm outer to midline 9 cm below root of neck.
(12) Lacerated wound 1x1 cm bone deep on the outer aspect of right arm 2 cm above elbow. Underneath the humerus was found fractured 4 cm above elbow.	E	Е	(20) Incised penetrating wound 2.5x1 cm obliquely placed on the back of left side of trunk, the lower inner sharply cut end was 5.5 cm outer to midline and 7 cm below root of neck. The outer end of the wound showed
(13) Abrasion 1.5x1 cm. on the outer aspect of right elbow.	F	F	splitting of the skin. The chest cavity was scan penetrated through the Vth intercostal space, after cutting the upper border of the
(14) Incised wound 10x1.5x2 cm obliquely placed on the left palm the lower outer and was in the web space in between the middle and ring finger. Underneath the muscle tendon and vessels were found sharply cut.		G	Vth rib. The upper lobe of the back aspect of the lung was scan punctured 2x05x4 cm. The left chest cavity contained 300 ml. of fluid blood. The track of the wound was directed downwards and forwards to the right. The
(15) Incised wound 2.5x05 cm skin deep on the back of left ring finger 4 cm. below its root.			total minimum depth of the wound was 14 cms."
(16) Incised wound 8x3x3 cm horizontal on the	Н	Н	11. The trial court also noticed that PW-16, the doctor, who

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conducted the postmortem examination, stated "that the death A was due to the injuries sustained to the chest and the left palm. that is, injuries no. 14 to 20". These injuries were caused by sharp cutting weapons such as sword or chopper. Thus, the inquest report (Ex.P20) and the postmortem report (Ex.P17) would clearly show that Kochukuttan died as a result of the injuries sustained in the fatal assault by the appellants and the other co-accused.

- 12. The trial court on the basis of evidence given by the eye-witnesses concluded that the participation in the assault by appellants herein is proved beyond doubt. The conspiracy was held to be proved on the basis of the evidence given by PW3. On the basis of the findings, the trial court convicted the two appellants along with the other co-accused as noticed above.
- 13. The High Court on a re-examination of the entire body of the evidence has also concluded that the ocular evidence of PW1 cannot be discarded simply on the ground that he is the brother-in-law of the deceased. The High Court has also held that there is clear evidence that both the appellants had participated and formed an unlawful assembly with a common object to commit the murder of the deceased. The High Court. therefore, found that there is clear evidence with regard to the appellants having committed the offence under Section 149 IPC.
- 14. A perusal of the evidence of PW1 leaves no manner of doubt about the entire sequence of events. He has graphically recounted the arrival of the assailants in the jeep. He even gave the sequence and the order in which they had advanced towards Kochukuttan. He has stated in categoric terms that he had known the appellants herein for a number of years. He had seen the others in the vicinity and at the Veliyam junction. He has categorically stated about the participation of both the appellants. He has named both the appellants in the first information statement. He has given a graphic account of the injuries caused by both the appellants. He has also narrated

A how the accused went away in the jeep after inflicting mortal injuries on the deceased. He also talks about the load shedding which according to him commenced from 7.30 p.m. He further narrated that the car in which the injured Kochukuttan was being taken had developed electrical problem and that the deceased had to be removed to a jeep. He has categorically stated that by reason of enmity, A1 and A2 together have murdered his brother-in-law. He identified the weapons wielded by the appellants. He could also recognize the apparels worn by the accused with clear distinction. In his examination, he also stated that the incident was clearly seen in the street light and light of the nearby shops. He stated that at that time, 3 bulbs were glowing over the shop where the incident happened. There was also Mercury Street light. The incident could be seen clearly. He also stated that the vicious assault was the result of instigation of A2. This witness was cross-examined at length. In his cross-examination, he has stated that deceased Kochukuttan was a Marxist party worker. He reiterated that he has stated before the police that A1 had taken a sword which was concealed at the back of his waist and had stabbed at the left side of the head of the deceased. He also went on to say that A2 also stabbed Kochukuttan on the left side of his chest pursuant to which the deceased had fallen down to the road from the cement thinna. Such deposition of PW1 also gets strength from the seizure of MOs Nos. 13 and 14, i.e., portion of blood stained cement and portion of removed cement without blood respectively. He also reiterated that he had narrated the acts done by each and every accused. He reiterated that he is able to identify all the accused persons. In the crossexamination, he seems to have further strengthened the case of the prosecution. While answering the numerous questions G posed by the defence counsel, he elaborated that there was previous enmity between the deceased and the accused persons. So there was clear motive for the appellants to assault the deceased. He also stated that the police had not recorded the version as he had narrated. He had definitely told the police

about the signs for identification of the accused. He admitted

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that all the accused were not the residents of the place of occurrence. However, the appellants herein were certainly local residents. He even went on to narrate that the deceased told him about 2 weeks ago that the appellants had attempted to kill him through hired people. He categorically states in the cross-examination that the entire incident of assault took 3 minutes. He also stated that the deceased used to go to the junction quite regularly by about 7.00 p.m. and he would usually go home by 9 p.m.

15. In our opinion, the trial court as well as the High Court correctly relied upon the unflinching, coherent and consistent evidence given by PW1. The evidence given by PW1 has been corroborated by PW2 in every material particular. From the above narration, it becomes apparent that the submission with regard to the scene of crime not being well lit is without any substance. Similarly, the criticism with regard to the identification parade not having been held is of no consequence. PW1 and PW2 have clearly stated that the appellants herein were previously known to them. PW1 certainly even knew about the previous enmity between the deceased and the appellants.

16. We see no reason at all to disbelieve the evidence of the eye-witnesses. The weapons used by the appellants and the injuries caused have been specifically mentioned by PW1 and PW2. There were 20 ante mortem injuries on the deceased. Recoveries of the swords used by them were made at the instance of the appellants. Recoveries of other weapons, clothes worn by the accused on the day of the assault were also made at the instance of the other accused. As stated above, medical evidence also leads to the conclusion that the death has resulted from the injuries caused by the appellants and the other accused with their respective weapons. In view of the proven facts, in this case as noticed by the trial court, the High Court and by us above, it becomes evident that the appellants had acted with a common object to eliminate the deceased.

A This Court delineated the circumstances in which constructive liability can be fastened on the accused, in the case of *Bhagwan Singh Vs. State of M.P.*, (2002) 4 SCC 85, wherein it was observed:

"9. Common object, as contemplated by Section 149 of В the Indian Penal Code, does not require prior concert or meeting of minds before the attack. Generally no direct evidence is available regarding the existence of common object which, in each case, has to be ascertained from the attending facts and circumstances. When a concerted C attack is made on the victim by a large number of persons armed with deadly weapons, it is often difficult to determine the actual part played by each offender and easy to hold that such persons who attacked the victim had the common object for an offence which was known to be likely D to be committed in prosecution of such an object. It is true that a mere innocent person, in an assembly of persons or being a bystander does not make such person a member of an unlawful assembly but where the persons forming the assembly are shown to be having identical Ε interest in pursuance of which some of them come armed, others though not armed would, under the normal circumstances, be deemed to be the members of the unlawful assembly. In this case the accused persons have been proved to be on inimical terms with the complainant party. The enmity between the parties had been aggravated on account of litigation with respect to the dispute over the mango trees. Accused persons who came on the spot are shown to have come armed with deadly weapons. The facts and circumstances of the case unequivocally prove the existence of the common object G of such persons forming the unlawful assembly who had come on the spot and attacked the complainant party in consequence of which three precious lives were lost. The High Court was, therefore, justified in holding that the

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accused persons, involved in the occurrence, had shared A the common object."

(emphasis supplied)

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The aforesaid proposition was further reiterated in the case of *Chanda Vs. State of U.P.*, (2004) 5 SCC 141:

"8. The pivotal question is applicability of Section 149 IPC. The said provision has its foundation on constructive liability which is the sine qua non for its operation. The emphasis is on the common object and not on common intention. Mere presence in an unlawful assembly cannot render a person liable unless there was a common object and he was actuated by that common object and that object is one of those set out in Section 141. Where common object of an unlawful assembly is not proved, the accused persons cannot be convicted with the help of Section 149. The crucial question to determine is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects, as specified in Section 141. It cannot be laid down as a general proposition of law that unless an overt act is proved against a person, who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141."

17. In the present case we are unable to accept the submission that the appellants were perhaps unaware that the murderous assault, intended to be committed by them, would, in all probability, cause the death of Kochukuttan. We have earlier noticed that both the trial court as well as the High Court have considered the specific injuries caused by the appellants with swords. As noticed above, there were 20 ante mortem injuries on the deceased. According to the opinion of the doctor,

A the death was due to injuries caused on the chest and on the left palm. It is further observed that the death could also have resulted from the cumulative effect of all other injuries. Therefore, there is no manner of doubt that Kochukuttan died as a result of injures caused by the appellants along with the other accused.

18. We also do not find any substance in the submission of the Learned Counsel of the appellant that since all the other co-accused have been acquitted; on the ground of parity the appellants herein also deserve to be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who had been convicted. Both the Courts below have applied the aforesaid principle in distinguishing the case of the appellants herein from those who have been acquitted. To remove any doubt we may emphasize that the appellants herein were known to be associates of the deceased. They had previous social interaction. For some time they had been having differences of opinion. This had led to an assault by the deceased and his companion Murali (CW11) on the appellants herein, namely, Prathap (A1) and Devakumar E (A2). Consequently the appellants herein had wanted to settle the score with the deceased. They had a clear motive. This apart, PW1 and PW2 not only identified the appellants herein as assailants with swords but also indicated the injuries inflicted by them on the deceased. On the other hand the accused persons who had been acquitted were not known to PW1 and PW2. In fact PW1 in the evidence had categorically admitted that the other accused were not from the locality but were sometimes seen at the Veliyam Junction.

19. In our opinion the Courts below rightly declined to acquit the appellants on the principle of parity. The power of the Courts to distinguish the cases of one or more of the accused(s) from the other(s) is far too well recognized to need reiteration. Still, we may notice the principle as stated in the

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case of Gangadhar Behera Vs. State of Orissa, (2002) 8 SCC A 381 wherein this Court observed as follows:

"Even if a major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, notwithstanding acquittal of a number of other coaccused persons, his conviction can be maintained. It is the duty of the court to separate the grain from the chaff. Where chaff can be separated from the grain, it would be open to the court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons."

20. In our opinion the trial court as well as the High Court rightly convicted the appellants as the facts and circumstances of the case unequivocally prove the existence of the common object of the appellants. They had come looking for Kuchukuttan armed with deadly weapons with the intention of causing grievous bodily injuries. There was a preplanned attack. They located him and caused serious injuries with swords, choppers and other weapons, which led to his death. Thus they were rightly convicted and sentenced for the offence under Section 302/149 IPC.

21. We are also of the considered opinion that the concurrent views taken by the trial court as also the High Court cannot be said to be either clearly illegal or manifestly erroneous and do not call for any interference under Article 136 of the Constitution of India.

22. In view of the above, both the appeals are dismissed.

N.J. Appeals dismissed. C. MUNIAPPAN & ORS.

STATE OF TAMIL NADU (Criminal Appeal Nos. 127-130 of 2008)

AUGUST 30, 2010

[G. S. SINGHVI AND DR. B.S. CHAUHAN, JJ.]

Penal Code, 1860:

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ss. 302, 302/114, 307 and 307/114 - Three of the members of a group of agitators setting ablaze a University bus full of girl-students - Three girls burnt alive to death and several others received burn injuries - HELD: Courts below rightly convicted and sentenced the three accused to death - Their activities were not only barbaric but inhuman to the highest degree - The manner of the commission of the offence is extremely brutal, diabolical, grotesque and cruel -It is shocking to the collective conscience of society -Sentence/Sentencing - Sentence of death - Aggravating and mitigating circumstances - Explained.

ss. 147/148, 341 IPC and ss. 3 and 4 of TN (PDL) Act, 1982 r/w s.149 - IPC Offences committed by a group of agitators - Conviction and sentence by trial court - Sentence directed to run consecutively - High Court directing F sentences to run concurrently - HELD: The maximum sentence to be served by the accused as per High Court judgment being 2 years and accused having served 14 months of sentence, in the circumstances of the case, sentence reduced to the period already undergone - Tamil G Nadu (Prevention of Dangerous Activities of Boot Laggers, Traffic Offenders, Forest Offenders Activities, Immoral Traffic Offenders and Slum Grabbers and Videopirate) Act, 1982.

Evidence:

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Discrepancies in evidence – HELD: An undue A importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness.

Hostile witness – Evidence of – HELD: cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.

Extra-judicial confessional statement – Exhibiting of – C Explained.

Investigation:

Irregularities in investigation – HELD: In the instant case, irregularities-committed in the investigation by the earlier I.Os. have too little relevance on the merits of the case and the material of earlier investigations has rightly been not relied upon by the subsequent Investigating Officer.

Obligation on trial court in case of defective investigation – HELD: Investigation is not the solitary area for judicial scrutiny in a criminal trial – Where there has been negligence or omissions etc. on the part of the investigating agency, which resulted in defective investigation, there is a legal obligation on the court to examine the prosecution evidence de hors such lapses and examine whether the lapses had affected the prosecution case.

Test identification parade – HELD: Is a part of investigation and provides for an assurance that the investigation is proceeding in the right direction and it enables the witnesses to satisfy themselves that the accused whom they suspect is really one who was seen by them at the time of commission of offence – Holding the test identification

A parade is not substantive piece of evidence, yet it may be used for the purpose of corroboration that a person brought before the court is the real person involved in the commission of the crime – However, the test identification parade, even if held, cannot be considered in all the cases as trustworthy evidence on which the conviction of the accused can be sustained – It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant – Evidence Act, 1872 – s.9 – Test identification parade.

C Code of Criminal Procedure, 1973

s.195 – Cognizance by court, of offence punishable u/s
188 IPC – HELD: The provisions of s.195 are mandatory –
Non-compliance of it would vitiate the prosecution and all
other consequential orders – Law does not permit taking
cognizance of any offence punishable u/s 188 IPC unless
there is a complaint in writing by the competent public servant
– In the absence of such a complaint, the trial and conviction
will be void ab initio being without jurisdiction – However, noncompliance of s.195 would have no bearing on the prosecution
case so far charges for other offences are concerned – Penal
Code, 1860 – s.188.

Criminal Trial:

Clubbing of two Criminal cases into one trial – HELD: In the instant case, second incident was a fall out of the first occurrence – Merely because two separate complaints had been lodged, it would not mean that they could not be clubbed together and one charge-sheet could not be filed – Practice and Procedure.

Criminal Law:

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Crime and society – Crimes occurring in presence of public and police – Social sensitivity – Duty of police and

protectors of law – A University bus full of girl students set A ablaze by some of the agitators – Three young girls charred to death while several others sustained burn injuries – HELD: Even if the common man fails to respond to the call of his conscience, the police should not have remained inactive – The administration did not bother to find out why the police B did not intervene and assist in the rescue, much less reprimand them for failing in their duty.

During the "Rasta Roko Agitation" staged against conviction of a political leader, a mob of 100-150 of her supporters, while the prohibition order u/s 60 of the Indian Police Act, 1861 was in force, damaged a town bus and set ablaze a University bus with 47 girl-students, with the result that 3 students burnt alive and 28 others received burn injuries and several others sustained serious injuries. Two FIRs were lodged as regards the occurrence involving both the buses. In all, 30 accused were convicted u/ss 188, 341 IPC, and ss. 3 and 4 of the TNP (PDL) Act read with s. 149 IPC. They were also convicted u/s 147 IPC except A-24, who was convicted u/s 148 IPC. Besides, A-2 to A-4 were also found guilty of setting the University bus ablaze and burning three girl-students to death and causing burn injuries and other serious injuries to 28 others for which A-2 and A-3 were convicted u/s 302 IPC each for three counts and A-4 u/s 302 read with s. 114 IPC for three counts: A-2 and A-3 were further convicted u/s 307 IPC each for 46 counts and A-4 u/s 307 read with s.114 IPC for 46 counts; A-2 to A-4 were sentenced to death. The sentences imposed on the other accused persons were directed to run consecutively which extended to 7 years odd. The High Court G confirmed the death sentences of A-2 to A-4, but modified the sentences of the other accused to run concurrently.

In the appeals filed by the convicts, it was contended for them that in the absence of any complaint by the A competent officer whose prohibition order was stated to have been violated, the charge u/s 188 IPC could not have been framed; that the Criminal cases registered in respect of two separate FIRs could not have been clubbed into one single trial; that there were contradictions in the statements of alleged eyewitnesses; and, as such, the case did not warrant any trial.

Disposing of the appeals, the Court

C HELD: 1.1 From the record, involvement of A-2 to A-4 in the incident of setting fire to the University bus has been substantiated. From the evidence of PW-99, PW-4, PW-5, PW-1 and PW-2, PW-8, PW-11, PW-12, PW-14, it has been established that A-2 to A-4 came on motorcycle. A-D 1 and A-3 sprinkled petrol inside the bus and set the bus ablaze. PW-99 has spoken about A-2 to A-4. He is an advocate and belongs to the locality. He has deposed that A-2 had set fire to the Route No.7-B town bus. He has also corroborated the evidence of PW-97 that while the bus was in flames, some persons tried to douse the fire but they were prevented by A-23. A-2 remained present in the earlier occurrence as well as the subsequent occurrence. It is significant to note that A-4 had kept the engine of the motor cycle running only to escape from the scene of occurrence along with A-2 and A-3 after the occurrence. The said fact would also indicate the mind of the accused to commit the offence and to flee from the scene of occurrence to avoid the clutches of law. But for PWs 1, 2, 4 and 5 and some other students who became alert immediately after the bus was set on fire, the consequence could have been disastrous and more deaths could have occurred. [para 47, 51-56]

1.2 So far as the issue of damage to the buses and

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the main incident of setting the University bus on fire is A concerned, both the courts have proceeded on the finding, after appreciating the entire evidence on record, that there was no common object between A-2, A-3 and A-4 on the one hand, and the other accused, on the other, regarding murder of the students and burning of the bus. Therefore, all of them had been convicted under different sections. However, the High Court directed the sentence to run concurrently so far as A-1, A-5 to A-14, A-16 to A-21. A-23 to A-26 and A-28 to A-31 are concerned. There has been sufficient material to show their participation in the "Rasto Roko Andolan" and indulging in the incident of damaging the local route bus. Both the courts below have recorded the concurrent findings of fact in this regard and there is no reason to interfere with the same. [para 46] [302-C-E]

1.3 As regards the doubts raised about the arrest of A-4, and his confessional statement, there has been no cross-examination independently on his behalf on this issue. Even in cross-examination on behalf of other accused nothing has been elicited qua irregularity or improbability of the arrest of A-4. Therefore, there is no reason to disbelieve the arrest of A- 4 as shown by the I.O. [para 45] [301-E-H; 302-A-B]

1.4 A large number of injured students were examined in the court. They supported the prosecution case but did not identify any person either in the test identification parade or in the court. Their seating position in the bus had been such that they could not see as who had sprinkled the petrol in the bus. Besides, the photographer (PW-51) photographed and videographed the spot of the agitation. He also photographed the burning bus. He watched the video prepared by him in the court and identified the same. [para 62] [308-F-G]

2.1 If there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth. exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions. contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the statements of witnesses. The omissions and improvements in the evidence of the PWs pointed out in the instant casse are found to be very trivial in nature. [para 70-71] [311-F-G: 312-A-B]

Sohrab & Anr. v. The State of M.P., 1973 (1) SCR 472 = AIR 1972 SC 2020; State of U.P. v. M.K. Anthony, AIR 1985 SC 48; Bharwada Bhogini Bhai Hirji Bhai v. State of E Gujarat, 1983 (3) SCR 280 = AIR 1983 SC 753; State of Raiasthan v. Om Prakash 2007 (7) SCR 1000 = AIR 2007 SC 2257: Prithu @ Prithi Chand & Anr. v. State of Himachal Pradesh, 2009 (2) SCR 765 = (2009) 11 SCC 588; State of U.P. v. Santosh Kumar & Ors., 2009 (14) SCR 106 = F (2009) 9 SCC 626; and State v. Saravanan & Anr., AIR 2009 SC 151 - relied on.

2.2 The evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence. In the instant case, some of the material witnesses i.e. PW-86; and PW-51 turned hostile. Their evidence has been taken into consideration by the courts below strictly in accordance with law. [para 70] [311-D-E1

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Bhagwan Singh v. The State of Haryana, 1976 (2) SCR 921 = AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, 1977 (1) SCR 439 = AIR 1977 SC 170; Syad Akbar v. State of Karnataka, 1980 (1) SCR 95 = AIR 1979 SC 1848; and Khujji @ Surendra Tiwari v. State of Madhya Pradesh, 1991 (3) SCR 1 = AIR 1991 SC 1853; State of B U.P. v. Ramesh Prasad Misra & Anr., 1996 (4) Suppl. SCR 631 = AIR 1996 SC 2766; Balu Sonba Shinde v. State of Maharashtra, 2002 (2) Suppl. SCR 135 = (2002) 7 SCC 543; Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P., 2006 (1) SCR 519 = AIR 2006 SC 951; Sarvesh Naraia Shukla v. Daroga Singh & Ors., 2007 (11) SCR 300 = AIR 2008 SC 320; and Subbu Singh v. State, 2009 (7) SCR 383 = (2009) 6 SCC 462 - relied on

2.3 As regards exhibiting and reading of an extrajudicial confessional statement, only the admissible part of it can be exhibited. The statement as a whole, if exhibited and relied upon by the prosecution, leads to the possibility of the court getting prejudiced against the accused. In the instant case, the confessional statement of A-4 had been exhibited in the court in its full text. It was neither required nor warranted nor was permissible. However, in view of the fact that there had been other sufficient material on record to show his involvement in the crime, the full exhibition of the statement had not prejudiced the case against him. [para 67-68] [310-C-E]

Aloke Nath Dutta & Ors. v. State of West Bengal, 2006 (10) Suppl. SCR 662 = (2007) 12 SCC 230; State of Maharashtra v. Damu Gopinath Shinde & Ors., 2000 (3) SCR 880 = AIR 2000 SC 1691; and Anter Singh v. State of Rajasthan, AIR 2004 SC 2865 - relied on.

Pulukuri Kotayya v. King-Emperor, AIR 1947 PC 67 – referred to

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A 3.1 The investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation. The defect in the investigation by itself cannot be a ground for acquittal. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the court to examine the prosecution evidence de hors such lapses, carefully, to find out whether the evidence is reliable or not and to what extent the lapses affected the object of finding out the truth. It is to be examined as to whether there is any lapse by the I.O. and whether due to such lapse any benefit should be given to the accused. [para 43-44] [310-A-B; 301-F-H]

Chandra Kanth Lakshmi v. State of Maharashtra, AIR
1974 SC 220; Karnel Singh v. State of Madhya Pradesh,
1995 (2) Suppl. SCR 629 = (1995) 5 SCC 518; Ram Bihari
Yadav v. State of Bihar, 1998 (2) SCR 1097 = AIR 1998
SC 1850; Paras Yadav v. State of Bihar, 1999 (1) SCR
55 = AIR 1999 SC 644; State of Karnataka v. K. Yarappa
Reddy, 1999 (3) Suppl. SCR 359 = AIR 2000 SC 185;
Amar Singh v. Balwinder Singh 2003 (1) SCR 754 = AIR
2003 SC 1164; Allarakha K. Mansuri v. State of Gujarat, 2002
(1) SCR 1011 = AIR 2002 SC 1051; and Ram Bali v. State
of U.P., 2004 (1) Suppl. SCR 195 = AIR 2004 SC 2329 relied on.

3.2 In the instant case, the occurrence was so ugly and awful that the I.Os. had conducted the investigation under great anxiety, tension and in a charged atmosphere. Therefore, some irregularities were bound to occur. The State authorities ultimately transferred the investigation to the CBCID. Therefore, the irregularities committed in the investigation by the earlier I.Os. have too little relevance on the merits of the case and the material

of earlier investigation has rightly been not relied upon A by the subsequent Investigating Officer. [para 43-44] [301-A-B: 300-A-H]

- 3.3 The test identification parade is a part of the investigation and is very useful in a case where the accused are not known before hand to the witnesses. It provides for an assurance that the investigation is proceeding in the right direction and it enables the witnesses to satisfy themselves that the accused whom they suspect is really one who was seen by them at the time of commission of offence. The accused should not be shown to any of the witnesses after arrest; and before holding the test identification parade, he is required to be kept "baparda". [para 36] [297-H; 298-A-C]
- 3.4 Holding the test identification parade is not substantive piece of evidence, yet it may be used for the purpose of corroboration that a person brought before the court is the real person involved in the commission of the crime. However, the test identification parade, even if held, cannot be considered in all the cases as trustworthy evidence on which the conviction of the accused can be sustained. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant. [para 32] [296-C-D]

State of H.P. v. Lekh Raj 1999 (4) Suppl. SCR 286 = AIR 1999 SC 3916 - relied on.

Mulla & Anr. v. State of Uttar Pradesh, 2010 (2) SCR 633 = (2010) 3 SCC 508; Matru @ Girish Chandra v. G The State of Uttar Pradesh, 1971 (3) SCR 914 = AIR 1971 SC 1050; and Santokh Singh v. Izhar Hussain & Anr., 1974 (1) SCR 78 = AIR 1973 SC 2190; Lal Singh & Ors v. State of U.P., AIR 2004 SC 299; Suresh Chandra Bahri v. State of Bihar 1994 (1) Suppl. SCR 483 = AIR 1994 SC 2420; H

A Malkhan Singh v. State of M.P., 2003 (1) Suppl. SCR 443 = AIR 2003 SC 2669; Ankush Maruti Shinde & Ors. v. State of Maharashtra, 2009 (7) SCR 182 = (2009) 6 SCC 667; and Jarnail Singh & Ors. v. State of Puniab. 2009 (13) SCR 774 = (2009) 9 SCC 719; Shaikh Umar Ahmed Shaikh & Anr. v. State of Maharashtra, 1998 (2) SCR 1209 = AIR 1998 SC 1922; Lalli @ Jagdeep Singh v. State of Rajasthan, (2003) 12 SCC 666; Dastagir Sab & Anr. v. State of Karnataka, 2004 (1) SCR 952 = (2004) 3 SCC 106; Maya Kaur Baldevsingh Sardar & Anr. v. State of Maharashtra. 2007 (10) SCR 752 = (2007) 12 SCC 654; and Aslam @ Deewan v. State of Rajasthan, 2008 (13) SCR 1010 = (2008) 9 SCC 227: Yuvarai Ambar Mohite v. State of Maharashtra. 2006 (7) **Suppl. SCR 677 = (2006) 12 SCC 512**; *D. Gopalakrishnan* v. Sadanand Naik & Ors., 2004 (5) Suppl. SCR 520 =AIR 2004 SC 4965; Kartar Singh v. State of Punjab 1994 (2) SCR 375 =, (1994) 3 SCC 569; Umar Abdul Sakoor Sorathia v. Intelligence Officer, Narcotic Control Bureau, 1999 (1) Suppl. SCR 113 = AIR 1999 SC 2562 - referred to.

3.5 In the instant case, it is evident that all the accused for whom test identification parades were conducted were identified by some of the witnesses in the jail. They were also identified by some of the eye witnesses/injured witnesses in the court. Both the courts below came to the conclusion that identification of A-2 to A-4 by the witnesses, if examined in conjunction with the evidence of the Judicial Magistrate, PW-89 and his reports, particularly, Exh. P.137 and P.142, leaves no room for doubt regarding the involvement of A-2 to A-4 in the crime. There is no cogent reason to take a contrary view. Not supporting of the prosecution case by PW.86 would not tilt the balance of the case in favour of the appellants. [para 39 and 42] [298-F-G; 299-F-G]

4.1 The provisions of s.195 Cr.PC are mandatory.

Non-compliance of it would vitiate the prosecution and all other consequential orders. The law does not permit taking cognizance of any offence punishable u/s 188 IPC unless there is a complaint by the competent public servant whose lawful order has not been complied with. The complaint must be in writing. The court cannot assume cognizance of the case without such complaint. In the absence of such a complaint, the trial and conviction will be void ab initio being without jurisdiction. In the instant case, no such complaint had ever been filed. Therefore, it was not permissible for the trial Court to frame a charge u/s 188 IPC. [para 25 and 27] [293-C-D; F-G]

M.S. Ahlawat v. State of Haryana & Anr., 1999 (4) Suppl. SCR 160 = AIR 2000 SC 168; Sachida Nand Singh & Anr. v. State of Bihar & Anr. 1998 (1) SCR 492 = (1998) 2 SCC 493; and Daulat Ram v. State of Punjab 1962 Suppl. SCR 812 = AIR 1962 SC 1206 - relied on.

Govind Mehta v. The State of Bihar1971 Suppl. SCR 777 = AIR 1971 SC 1708; Patel Laljibhai Somabhai v. The State of Gujarat 1971 Suppl. SCR 834 = AIR 1971 SC 1935; Surjit Singh & Ors. v. Balbir Singh, 1996 (3) SCR 70 = (1996) 3 SCC 533; State of Punjab v. Raj Singh & Anr. 1998 (1) SCR 223 = (1998) 2 SCC 391; K. Vengadachalam v. K.C. Palanisamy & Ors. (2005) 7 SCC 352; and Iqbal Singh Marwah & Anr. v. Meenakshi Marwah & Anr. 2005 (2) SCR 708 = AIR 2005 SC 2119; Basir-ul-Haq & Ors. v. The State of West Bengal, 1953 SCR 836 = AIR 1953 SC 293; and Durgacharan Naik & Ors v. State of Orissa, 1966 SCR 636 = AIR 1966 SC 1775 - referred to.

4.2 However, it cannot be said that absence of a complaint u/s 195 Cr.PC falsifies the genesis of the prosecution case and is fatal to the entire case. In the instant case, there is ample evidence on record to show that there was a prohibitory order, which had been issued

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A by the competent officer one day before; it had been given due publicity and had been brought to the notice of the public at large; it has been violated as there is no denial even by the accused persons that there was no 'Rasta Roko Andolan'. The agitation which initially started peacefully, turned ugly and violent when the public transport vehicles were subjected to attack and damage. In such an eventuality, in case the charges u/s 188 IPC are quashed, it would by no means have any bearing on the case of the prosecution, so far as the charges for other offences are concerned. [para 27] [293-G-H; 394-A-C]

5. As regards clubbing of two crimes bearing Nos. 188 and 190 of 2000 together, keeping in view the totality of the circumstances and the sequence in which the two incidents occurred and taking into consideration the evidence of drivers and conductors/cleaners of the vehicles involved in the first incident and the evidence PW-87, the second occurrence was nothing but a fall out of the first one. The damage caused to the public transport vehicles and the consequential burning of the University bus remained part of one and the same incident. Merely because two separate complaints had been lodged, did not mean that they could not be clubbed together and one charge sheet could not be filed. [para F 28] [294-D-F]

T.T. Antony v. State of Kerala & Ors. 2001 (3) SCR 942 = (2001) 6 SCC 181 - relied on.

6.1 So far as sentencing is concerned, criminal law requires strict adherence to the rule of proportionality in providing punishment according to the culpability of each kind of criminal conduct keeping in mind the effect of not awarding just punishment on the society. [para 75]

State of Punjab v. Rakesh Kumar, 2008 (12) SCR 929

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= AIR 2009 SC 391; and Sahdev v. Jaibar @ Jai Dev & Ors., A 2009 (3) SCR 722 =(2009) 11 SCC 798; Bantu v. State of U.P., 2008 (11) SCR 184 = (2008) 11 SCC 113, Sevaka Perumal v. State of T.N. 1991 (2) SCR 711 = AIR 1991 SC 1463 - relied on.

6.2 Life imprisonment is the rule and death penalty an exception. The "rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful co- existence of the society. Where an accused does not act on any spur-of-themoment provocation and he indulged himself in a deliberately planned crime and meticulously executed it. the death sentence may be the most appropriate punishment for such a ghastly crime. Therefore, the court must satisfy itself that death penalty would be the only punishment which can be meted out to a convict. It has to be considered whether any other punishment would be completely inadequate and what would be the mitigating and aggravating circumstances in the case. Murder is always foul. However, the degree of brutality, depravity, diabolic nature and the circumstances under which murders take place differ in each case. [para 75-761 [315-E-H: 316-A1

Bachan Singh v. State of Punjab, AIR 1980 SC 898; Machhi Singh & Ors. v. State of Punjab, 1983 (3) SCR 413 = AIR 1983 SC 957; Devender Pal Singh v. State of NCT of Delhi, 2002 (2) SCR 767 = AIR 2002 SC 1661; Atbir v. Govt. of N.C.T. of Delhi, JT 2010 (8) SC 372; Mahesh v. State of M.P., 1987 (2) SCR 710 = AIR 1987 SC 1346 - relied on.

6.3 In the instant case, the girl-students of the University, while on tour had been the victims of a heinous crime. A demonstration by the appellants which had started peacefully, took an ugly turn when the

A appellants started damaging public transport vehicles. Damaging the public transport vehicles did not satisfy them and they became the law unto themselves. Some of the appellants had evil designs to cause damage to a greater extent so that people may learn a "lesson". In order to succeed in their mission, A-2, A-3 and A-4 went to the extent of sprinkling petrol in a bus full of girl students and setting it on fire with the students still inside the bus. They were fully aware that the girls might not be able to escape, when they set the bus on fire. As it happened, some of the girls did not escape the burning bus. No provocation of any kind had been offered by any of the girls or by any person whatsoever. A-2, A-3 and A-4 did not pay any heed to the pleas made by PW1 and PW2, the teachers, to spare the girls. They caused the death of three innocent young girls and burn injuries to another twenty. There can be absolutely no justification for the commission of such a brutal offence. This shows the highest degree of depravity and brutality on the part of A-2, A-3 and A-4. [para 77] [316-C-H; 317-A-B]

F 6.4 The aggravating circumstances in the case of A-2, A-3 and A-4 are that this offence had been committed after previous planning and with extreme brutality. These murders involved exceptional depravity on the part of A-2, A-3 and A-4. These were the murders of helpless, innocent, unarmed, young girl students in a totally unprovoked situation. No mitigating circumstances could be pointed out to impose a lesser sentence on them. Their activities were not only barbaric but inhuman to the highest degree. Thus, the manner of the commission of the offence in the present case is extremely brutal, diabolical, grotesque and cruel. It is shocking to the collective conscience of society. There is no cogent reason to interfere with the punishment of death sentence awarded to A-2, A-3 and A-4 by the courts below and the same is confirmed. [para 77] [317-C-F]

6.5 So far as the other appellants are concerned, the maximum sentence to be served by them as per the judgment of the High Court is two years. Most of these appellants have already served more than 14 months of their sentence and they are on bail. The incident occurred on 2.2.2000, so more than ten and a half years have already elapsed since the incident. These appellants have already suffered a lot. Their sentences are reduced to the period undergone. [para 77] [317-G]

7. The crime occurred right in the middle of a busy city. Innocent girls trapped in a burning bus were shouting for help and only the male students from their University came to their rescue and succeeded in saving some of them. There were large number of people including the shopkeepers, media persons and on-duty police personnel, present at the place of the "Rasta Roko Andolan", which was very close to the place of the occurrence of the crime, and none of them considered it proper to help in the rescue of the victims. Even if the common man fails to respond to the call of his conscience, the police should not have remained inactive. But the police stood there and witnessed such a heinous crime being committed and allowed the burning of the bus and roasting of the innocent children. The administration did not bother to find out why the police did not intervene and assist in the rescue of the girl students, much less reprimand them for failing in their duty. If the common citizens and public officials present at the scene of the crime had done their duty, the death of three innocent young girls could have been prevented. [para 78] [318-A-D]

Case Law Reference:

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1971 Suppl. SCR 777 referred to para 20 1971 Suppl. SCR 834 referred to para 20

Α	1996 (3) SCR 70	referred to	para 20
	1998 (1) SCR 223	referred to	para 20
	2005) 7 SCC 352	referred to	para 20
В	2005 (2) SCR 708	referred to	para 20
	1953 SCR 836	referred to	para 21
	1966 SCR 636	referred to	para 21
0	1999 (4) Suppl. SCR 160	relied on	para 22
С	1998 (1) SCR 492	relied on	para 23
	1962 Suppl. SCR 812	relied on	para 24
	2001 (3) SCR 942	relied on	para 28
D	AIR 2004 SC 299	referred to	para 29
	AIR 1994 SC 2420	referred to	para 30
	2003 (1) Suppl. SCR 443	referred to	para 30
Е	2009 (7) SCR 182	referred to	para 30
	2009 (13) SCR 774	referred to	para 30
	2004 (1) SCR 952	referred to	para 30
F	(2003) 12 SCC 666	referred to	para 30
•	1998 (2) SCR 1209	referred to	para 30
	2007 (10) SCR 752	referred to	para 30
0	2008 (13) SCR 1010	referred to	para 30
G	2006 (7) Suppl. SCR 677	referred to	para 31
	2004 (5) Suppl. SCR 520	referred to	para 31
	1999 (4) Suppl. SCR 286	relied on	para 32
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2002 (2) Suppl. SCR 135 relied on

2010 (2) SCR 633	referred to	para 33	Α	Α	(2006) 13 SCC 516	relied on	para 70
1971 (3) SCR 914	referred to	para 33			2006 (1) SCR 519	relied on	para 70
1974 (1) SCR 78	referred to	para 33			2007 (11) SCR 300	relied on	para 70
1994 (2) SCR 375	referred to	para 34	В	В	2009 (7) SCR 383	relied on	para 70
1994 (1) Suppl. SCR 483	referred to	para 34	_		1973 (1) SCR 472	relied on	para 71
1999 (1) Suppl. SCR 113	referred to	para 35			AIR 1985 SC 48	relied on	para 71
AIR 1974 SC 220	relied on	para 44	С	0	1983 (3) SCR 280	relied on	para 71
1995 (2) Suppl. SCR 629	relied on	para 44		С	2007 (7) SCR 1000	relied on	para 71
1998 (2) SCR 1097	relied on	para 44			(2009) 11 SCC 588	relied on	para 71
1999 (1) SCR 55	relied on	para 44			2009 (14) SCR 106	relied on	para 71
1999 (3) Suppl. SCR 359	relied on	para 44	D	D	2009 (2) SCR 765	relied on	para 71
2003 (1) SCR 754	relied on	para 44			AIR 1980 SC 898	relied on	para 72
2002 (1) SCR 1011	relied on	para 44			1983 (3) SCR 413	relied on	para 73
2004 (1) Suppl. SCR 195	relied on	para 44	E	E	2002 (2) SCR 767	relied on	para 74
2006 (10) Suppl. SCR 662	relied on	para 65			JT 2010 (8) SC 372	relied on	para 74
2000 (3) SCR 880	relied on	para 66			1987 (2) SCR 710	relied on	para 75
AIR 2004 SC 2865	relied on	para 66	F	F	2008 (12) SCR 929	relied on	para 75
AIR 1947 PC 67	referred to	para 66		•	2009 (3) SCR 722	relied on	para 75
1976 (2) SCR 921	relied on	para 69			2008 (11) SCR 184	relied on	para 75
1977 (1) SCR 439	relied on	para 69		•	1991 (2) SCR 711	relied on	para 75
1980 (1) SCR 95 relied on		para 69	G	G	CRIMINAL APPELLATE JURISDICTION : Criminal Appeal		
1991 (3) SCR 1	relied on	para 69		ı	Nos. 127-130 of 2008.		
1996 (4) Suppl. SCR 631	relied on	para 70			From the Judgment & Order	r dated 06.12.2007	7 of the High

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Court of Madras Death Sentence Referred Trial No. 1 of 2007 A with Criminal Appeal Nos. 226, 266, & 267 of 2007.

WITH

Criminal Appeal No. 1632-1634 of 2010.

Sushil Kumar, P.N. Prakash, P.H. Manoj Pandian, Subramonium Prasad, Shyam D. Nandan, Rajat Khattry, Gurukrishnakumar, Aditya Kumar, Anmol Thakral for the Appellants.

Altaf Ahmed, R. Shunmugasundaram, Srinivasan, Promila, S. Thananjayan, R. Nedumaran for the Respondent.

The Judgment of the Court was delivered by

- **DR. B.S. CHAUHAN, J.** 1. Leave granted in Special Leave Petition (Criminal) Nos. 1482-1484 of 2008.
- 2. These appeals have been preferred against the Judgment and Order dated 6.12.2007 of the High Court of Madras in Crl. Appeal Nos. 226, 266 and 267 of 2007, and Death Sentence Reference in Trial No. 1 of 2007.
- 3. Facts and circumstances giving rise to these cases are that on 22.1.2000, the students of the Horticulture College and Research Centre, Periakulam, affiliated to the Tamil Nadu Agricultural University, Coimbatore (hereinafter called the 'University'), left for an educational tour in two buses. One bus was carrying male students and the other bus was carrying 47 female students. After completing the educational tour, the students came to Paiyur, near Dharmapuri, on 1.2.2000, at about 12.00 midnight, and stayed in the Regional Agricultural Research Centre. On the next day, after visiting the research centre, they left for a tour to Hogenakkal from Dharmapuri, which was the last leg of their tour as per their revised tour programme. They visited a nursery garden on 2.2.2000 and reached Dharmapuri at 12.30 p.m. and parked their buses in front of Sarayanabhayan Hotel. The students and the two

A teachers accompanying them went to the Saravanabhavan Hotel to take their meals and to purchase parcels of food. Some of the students remained in the bus itself.

4. In view of naxalite movement and activities around Dharmapuri, the Deputy Superintendent of Police at Dharmapuri had promulgated a prohibitory order under Sections 30-A and 61 of the Indian Police Act, 1861, which expired on 31.1.2000, and thus, a fresh prohibitory order was issued on 31.1.2000, for fifteen days. On 2.2.2000, former Chief Minister of Tamil Nadu, Ms. J. Jayalalitha, along with four others was convicted and sentenced to undergo one year imprisonment in the Pleasant Stay Hotel, Kodailkanal, case. According to the prosecution, when the news of her conviction spread, the AIADMK party members resorted to dharnas and took out processions in Dharmapuri and compelled the shop keepers to close their shops by pelting stones. The news of conviction and sentence of the former Chief Minister of Tamil Nadu was being broadcast on T.V. and radio, thus, the students and teachers also came to know about it.

5. According to the prosecution, a procession of 100 to 150 party workers having flags of AIADMK party, armed with sticks and stones passed on the roads nearby the buses. raising slogans. The girl students witnessed the procession but remained in the bus. Dr. Latha (PW.1), the teacher accompanying the students, contacted the Vice-Chancellor of the University and told the students that the Vice-Chancellor had instructed them to stay at a safe place and return to Coimbatore after the situation becomes normal. On this advice, the drivers of both the buses made an attempt to take the buses to the District Collector's office. However, the buses could not reach G there because of the obstruction of the traffic on the way, as the political workers staging dharna came on the road. Mr. P. Kandasamy (PW.4), driver of bus no. TN-38-C-5550, which was carrying the girl students, moved the bus to some distance and parked it in a vacant place near an old petrol bunk. The H bus carrying the boys was also moved there. The accused,

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along with other political workers formed an unlawful assembly indulging in a 'road roko agitation', under the leadership of D.K. Rajendran (A.1), violating the prohibitory order at Illakkiampatti, near the MGR statue on the Salem-Bangalore National Highway, prevented the free flow of traffic and caused nuisance to general public at large. They damaged the government buses having registration nos. TN-29-N-1094, TN-29-N-0543 and TN-29-N-1011 by breaking their glasses and also set fire to the three seats of one of the buses (being a town bus with Route No. 7-B).

6. As per the Prosecution, Nedu @ Nedunchezhian (A.2), Madhu @ Ravindran (A.3) and C. Muniappan (A.4) having the common object to cause damage to the buses, left the aforesaid place and went to the motor workshop of B. Kamal (PW.86), namely "Majestic Auto Garage", and procured petrol in two plastic cans and came to the place where the bus in which the girl students were travelling was parked. It is alleged that Nedu (A.2) and Madhu (A.3) sprinkled petrol inside the bus through the first two shutters on the left-side and Nedu (A.2) lit a match stick and threw it inside the bus. Nedu (A.2) and Madhu (A.3) went towards the motor bike which was already kept ready for running by C. Muniappan (A.4) and escaped from the scene. The fire lit at the front-side of the bus spread backwards. Dr. Latha (PW.1) and Akila (PW.2) (both teachers) managed to get down from the bus from the front door along with some students. Some girl students stretched their heads and hands through the shutters and the boy students pulled them out. However, three students, namely, Kokilavani, Hemalatha and Gayathri could not escape from the burning bus. They were burnt alive inside the bus. Some of the girl students got burn injuries while getting down from the bus and some were injured while they were being pulled out through the shutters. The injured students were taken to the Government Hospital, Dharmapuri, where they were treated by Dr. K.S. Sampath (PW.30).

7. On the same day, an FIR was lodged at about 1.30 p.m. in the police station regarding the occurrence of the incident

involving the Town Bus with route no.7-B. In respect of the other incident, i.e. the Bus burning, an FIR was lodged at about 3.30 p.m. vide written complaint (Exh. P.120) and a case under Sections 147, 148, 149, 436 and 302 of Indian Penal Code. 1860 (in short the 'IPC') and under Sections 3 and 4 of the Tamil Nadu Property (Prevention of Damage & Loss) Act, 1992 (in short as "TNP (PDL) Act") was registered. In the said FIR, the name of C. Muniappan (A.4) was not mentioned. A general statement was made that "some persons shouting slogans surrounded the bus and broke down the window panes" and Nedu (A.2) and Madhu (A.3) poured the petrol from the front entrance of the bus and set it on fire. As far as the damage caused to the government buses at Illakkiampatti is concerned, on 2.2.2000, Elangovan (PW.60), a Senior Assistant Engineer in the Tamil Nadu Transport Corporation, Dharmapuri, at 8.00 p.m. submitted a written complaint (Exh. P.82) under Sections 147, 148, 341, 436 and 506(ii) IPC and Sections 3 and 4 of the TNP (PDL) Act.

8. On these complaints, investigations were carried out by Ayyasamy, Inspector of Police (PW.81), and he inspected the place of occurrence at about 10.30 p.m. in the presence of witnesses Velayutham (PW.67) and Vetrivel (PW.68) and prepared an Observation Mahazar (Ex. P.107). He also prepared a rough sketch and recovered broken glass and brick pieces from the place under the Seizure Mahazar (Ex. P.109).

The buses were inspected on the next day by Motor Vehicles Inspector and he prepared reports in respect of the same (Exs. P.116 to P.119).

9. Dr. A.C. Natarajan (PW.31) conducted an autopsy on the body of Kokilavani, Dr. N. Govindaraj (PW.35) conducted G an autopsy on the body of Gayathri and Dr. Rajkumar (PW.38) conducted an autopsy on the body of Hemalatha and issued Exs. P.23, P.33 and P.28, Post mortem certificates, respectively.

10. In respect of the second incident, regarding bus no.

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TN-38-C-5550, Crime No. 188 of 2000 was registered on the basis of the complaint given by Village Administrative Officer, C. Ramasundaram (PW.87). Since the officer-in-charge of police station was on court duty, Shanmugaiah, Inspector of Police (PW.116) took up the investigation. However, after two days, i.e. on 4.2.2000, Vilvaranimurugan, Inspector of Police (PW.119) took over the investigation from Shanmugaiah (PW.116). On 6.2.2000, investigation was transferred to the CBCID and R. Samuthirapandi, Additional Superintendent of Police (PW.123), became the Investigating Officer.

11. After completing the investigation, a report under C Section 173 of the Code of Criminal Procedure, 1973 (hereinafter called as "Cr.PC"), was filed on 28.4.2000, arraying 31 persons as accused. The case was committed to the Sessions Court. Krishnagiri, vide Order dated 25.7,2000. The Sessions Court, Krishnagiri, framed 21 charges against D all accused persons vide order dated 8.10.2001 under Sections 147, 148, 149, 341, 342, 307 read with Sections 302, 114 IPC and Sections 3 and 4 TNP (PDL) Act. During the course of trial, 10 out of 11 witnesses, who had been examined, turned hostile, including C. Ramasundaram (PW.87) who had lodged the complaint in respect of second incident. Being dissatisfied and aggrieved. Veerasamy, father of one of the victims, namely, Kokilavani, approached the High Court of Madras by filing Cr. O.P. No. 23520 of 2001 under Section 407 Cr.PC seeking transfer of the trial from Krishnagiri to Coimbatore on various grounds, inter-alia, that all the accused were from the AIADMK party and were holding the party posts; most of the witnesses who had been examined had turned hostile, including the complainant C. Ramasundaram; all the accused and most of the witnesses were from the Coimbatore District and thus, they would be won over by the accused. Therefore, conduct of an impartial trial was not possible at Krishnagiri. The High Court allowed the said Transfer Petition vide order dated 22.8.2003 issuing some directions, including the appointment of the Special Public Prosecutor and to have a de-novo trial. The

A said order of transfer was challenged by D.K. Rajendran (A.1), by filing SLP(Crl.) No. 4678 of 2003. However, the said SLP was dismissed by this Court vide order dated 17.11.2003.

12. The Special Public Prosecutor was appointed after filing of a contempt petition before the High Court for not complying with its order dated 22.8.2003. The State Government initiated Departmental Proceedings against the Village Administrative Officer, C. Ramasundaram (PW.87), the complainant, who had been examined at Krishnagiri Court, for not supporting the case of the prosecution. After a long delay, C vide order dated 14.3.2005, the Sessions Court, Salem, framed 22 charges against the 31 accused, as the trial was being conducted *de-novo*. During the trial, 123 witnesses were examined and after assessing the facts and the legal issues, the Trial Court delivered the judgment and order dated D 16.2.2007.

In total, 31 accused were put to trial. R. Chellakutty (A.22) died during trial. S. Palanisamy (A.15) and A. Madesh @ Madesh Mastheri (A.27) stood acquitted. The remaining 28 accused were convicted under Sections 188, 341 IPC and 3 E & 4 of TNP (PDL) Act r/w 149 IPC. In addition, all of them except accused No. 24, Mani @ Member Mani, were convicted for offence u/s 147 IPC, whereas accused No. 24, Mani @ Member Mani was convicted, for an offence u/s 148 IPC. Apart from that accused No. 2, Nedu @ Nedunchezhian, and accused F No. 3, Madhu @ Ravindran, were convicted for offences u/s 302 IPC (3 counts) and accused No. 4, C. Muniappan, u/s 302 r/w 114 IPC (3 counts) and the accused Nos.2 and 3 were convicted also for offences u/s 307 IPC (46 counts) and C. Muniappan (A4) for offences u/s 307 r/w 114 IPC for 46 counts. G Accused Nos. 2, 3 and 4 were sentenced to death.

The sentences imposed on accused Nos. 1, 5 to 14, 16 to 21, 23 to 26 and 28 to 31 were ordered to run consecutively which extended to 7 years and 3 months and sentence of 7 years and 9 months to accused No. 24.

13. All the 28 convicts filed appeals before the High Court A of Madras. The death sentence references in respect to Nedu (A.2), Madhu (A.3) and C. Muniappan (A.4) were also made. Crl. Revision No. 777 of 2007 was filed by R. Kesava Chandran @ Moorthy, the father of one of the deceased, namely, Hemalatha, for enhancement of punishment imposed on all the accused. As all the appeals, references and Crl. Revision arose out of a common judgment, they were taken up jointly and disposed of by the High Court vide impugned judgment and order dated 6.12.2007.

On hearing the aforesaid Crl. Revision and appeals, the High Court modified the conviction of accused No. 24 under section 148 IPC as being under section 147 IPC. Accused nos. 1, 5 to 14, 16 to 21, 23 to 26 and 28 to 31 were awarded different punishment for different offences, however, maximum punishment remained two years as all the sentences were D directed to run concurrently.

Conviction and sentence of death against accused Nos. 2 to 4 was confirmed by the High Court along with all other sentences under different heads.

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14. Hence, these seven appeals.

15. Shri Sushil Kumar and Shri Udai U. Lalit, learned senior counsel appearing for all these appellants, have submitted that the facts and circumstances of the case did not warrant any trial. The case of the prosecution had been inherently improbable. There had been material contradictions in the statements of witnesses in respect of the involvement of the accused and the nature of offences committed by them. The inquest reports were not consistent with the charge-sheets. Confessional statements made by some of the accused before the police, could not be relied upon nor read as a whole in the court, as it is not permissible in law. The reading of the full text thereof, had materially prejudiced the mind of the court. Two separate FIRs, i.e., in respect of Crime No.188/2000 and 190/2000 could not be clubbed, resulting in one consolidated charge sheet. All the A accused had been charged by the Salem Court even for the offence under Section 188 IPC. In this respect, as no complaint had been filed by the competent officer whose prohibitory order had been violated, the charge could not have been framed. In any case, as it was not permissible for the trial court to frame any charge under Section 188 IPC in absence of any written complaint by the public servant concerned, the genesis of the prosecution case becomes doubtful and the appellants become entitled to the benefit of doubt. Further, cases under Section 188 I.P.C. are triable by the Magistrate. In this case, it has been tried by the Sessions Court. Such a course has caused great prejudice to the appellants. The statements made by the witnesses particularly, by Dr. Latha (PW.1), Akila (PW.2), P. Kandasamy, Driver (PW.4) and N. Jagannathan, Cleaner (PW. 5), were full of contradictions and could not be relied upon. Identification of the accused was on the basis of the photographs taken and published by the media. C. Muniappan (A.4) was arrested on 3rd February, 2009, in respect of some other case and, therefore, his arrest shown on 7th February, 2009, was only an act of jugglery. The Forensic Report did not support the case of the prosecution that kerosene oil or petrol had been put to set the bus ablaze. Some of the most material witnesses of the prosecution, like B. Kamal (PW.86), turned hostile, thus could not be relied upon.

16. Four different versions have been given by the different witnesses disclosing the genesis of the main incident.

First, as revealed by the complaint lodged by C. Ramasundaram (PW.87), the incident occurred at 3.30 p.m. on 2.2.2000. According to the complaint, 20 persons named in the F.I.R. armed with wooden sticks and iron rods, shouted slogans G and caused damage to the bus. They threatened the girl students, who were travelling in the bus, with dire consequences. Nedu (A.2) and Madhu (A.3) brought the petrol and sprinkled the same inside the bus as well as on the platform. D.K. Rajendran (A.1) ordered that no one should be H allowed to get down from the bus and threatened that the bus

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will be set on fire along with the inmates. Immediately, both Nedu (A.2) and Madhu (A.3) set the bus on fire with match sticks. Suddenly, the fire engulfed the entire bus and all the accused ran away from the scene. Some girls were trapped inside the bus and charred to death. C. Muniappan (A.4) was not named in the first version.

The second version is as per the evidence of P. Kandasamy (PW.4), driver of the vehicle and N. Jagannathan (PW.5), Cleaner. According to them, the incident occurred on 2.2.2000, wherein, two persons came on a motor bike and stopped in front of the bus. One of them sprinkled the petrol through left side window and set the bus on fire and went away on the motorbike.

The third version has been as revealed by the Report (Ex.D.14) submitted by P. Kandasamy (PW.4), Driver, dated 7.2.2000, according to which, two persons came on a motor bike and stopped in front of the bus. One of them sprinkled petrol through the left side window and set the bus on fire.

The fourth version is based on the Report (Ex.D.12), dated 6.3.2000, by Dr. Latha (PW.1), according to which, when the bus was parked, at about 2.25 p.m., after two minutes thereof, one person poured the petrol on the front seats and set the bus on fire.

All the aforesaid versions are contradictory to each other. Thus, the case of prosecution is not trustworthy.

Thus, in view of the above, appeals deserve to be allowed.

17. Per contra, Shri Altaf Ahmad, learned senior counsel appearing for the State, has tried to defend the prosecution's case submitting that the contradictions were trivial in nature. He has submitted that framing of charges under Section 188 IPC in absence of written complaint of the public servant concerned, could not be fatal to the prosecution's case. The entire prosecution case cannot be discarded merely on the grounds of improperly framing the charges under Section 188 I.P.C.

A Clubbing the two crimes, i.e., 188/2000 and 190/2000 did not cause any prejudice to any of the accused. Both the crimes were found to be parts of the same incident. The court has to examine the facts in a proper perspective where the said ghastly crime had been committed, where three university girl B students stood roasted and 18 girl students suffered burn injuries. At the initial stage, the investigation was conducted by Shri Shanmugaiah (PW.116), as the Inspector, Shri Vilvaranimurugan (PW.119) was on court duty on 2.2.2000. Thus, PW.119 took over the investigation after being free from the court duty. Considering the gravity of the offences, the investigation was handed over to the CBCID, thus, the change of Investigating Officer was inevitable. The Test Identification Parade was conducted by the experienced Judicial Officer in accordance with law and there was no haste in conducting the same. There is no rule of law that deposition of a hostile witness is to be discarded in toto. The appeals lack merit and are liable to be dismissed.

18. We have considered the rival submissions made by learned counsel for the parties and perused the records.

Charges under Section 188 IPC:

19. Section 195 Cr.PC reads as under:

"195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence – (1) No Court shall take cognizance –

(a)(i) of any offence punishable under Sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

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except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;"

20. Section 195(a)(i) Cr.PC bars the court from taking

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cognizance of any offence punishable under Section 188 IPC or abetment or attempt to commit the same, unless, there is a written complaint by the public servant concerned for contempt of his lawful order. The object of this provision is to provide for a particular procedure in a case of contempt of the lawful authority of the public servant. The court lacks competence to take cognizance in certain types of offences enumerated therein. The legislative intent behind such a provision has been that an individual should not face criminal prosecution instituted upon insufficient grounds by persons actuated by malice, ill-will or frivolity of disposition and to save the time of the criminal courts being wasted by endless prosecutions. This provision has been carved out as an exception to the general rule contained under Section 190 Cr.PC that any person can set the law in motion by making a complaint, as it prohibits the court from taking cognizance of certain offences until and unless a complaint has been made by some particular authority or person. Other provisions in the Cr.PC like sections 196 and 198 do not lay down any rule of procedure, rather, they only create a bar that unless some requirements are complied with. the court shall not take cognizance of an offence described in those Sections. (vide Govind Mehta v. The State of Bihar, AIR 1971 SC 1708; Patel Laljibhai Somabhai v. The State of Gujarat, AIR 1971 SC 1935; Surjit Singh & Ors. v. Balbir Singh, (1996) 3 SCC 533; State of Punjab v. Raj Singh & Anr., (1998) 2 SCC 391; K. Vengadachalam v. K.C. Palanisamy & Ors., (2005) 7 SCC 352; and Igbal Singh Marwah & Anr. v. Meenakshi Marwah & Anr., AIR 2005 SC 2119).

21. The test of whether there is evasion or non-compliance of Section 195 Cr.PC or not, is whether the facts disclose primarily and essentially an offence for which a complaint of the court or of a public servant is required. In *Basir-ul-Haq & Ors. v. The State of West Bengal,* AIR 1953 SC 293; and *Durgacharan Naik & Ors v. State of Orissa,* AIR 1966 SC 1775, this Court held that the provisions of this Section cannot be evaded by describing the offence as one being punishable

A under some other sections of IPC, though in truth and substance, the offence falls in a category mentioned in Section 195 Cr.PC. Thus, cognizance of such an offence cannot be taken by misdescribing it or by putting a wrong label on it.

22. In M.S. Ahlawat v. State of Haryana & Anr., AIR 2000
 SC 168, this Court considered the matter at length and held as under:

"....Provisions of Section 195 CrPC are mandatory and no court has jurisdiction to take cognizance of any of the offences mentioned therein unless there is a complaint in writing as required under that section." (Emphasis added)

23. In Sachida Nand Singh & Anr. v. State of Bihar & Anr., (1998) 2 SCC 493, this Court while dealing with this issue observed as under:

"7. ..Section 190 of the Code empowers "any magistrate of the first class" to take cognizance of "any offence" upon receiving a complaint, or police report or information or upon his own knowledge. Section 195 restricts such general powers of the magistrate, and the general right of a person to move the court with a complaint to that extent curtailed. It is a well-recognised canon of interpretation that provision curbing the general jurisdiction of the court must normally receive strict interpretation unless the statute or the context requires otherwise." (Emphasis supplied)

24. In *Daulat Ram v. State of Punjab*, AIR 1962 SC 1206, this Court considered the nature of the provisions of Section 195 Cr.PC. In the said case, cognizance had been taken on the police report by the Magistrate and the appellant therein had been tried and convicted, though the concerned public servant, the Tahsildar had not filed any complaint. This Court held as under:

"The cognizance of the case was therefore wrongly

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assumed by the court without the complaint in writing of the public servant, namely, the Tahsildar in this case. The trial was thus without jurisdiction ab initio and the conviction cannot be maintained. The appeal is, therefore, allowed and the conviction of the appellant and the sentence passed on him are set aside." (Emphasis B added)

25. Thus, in view of the above, the law can be summarized to the effect that there must be a complaint by the pubic servant whose lawful order has not been complied with. The complaint must be in writing. The provisions of Section 195 Cr.PC are mandatory. Non-compliance of it would vitiate the prosecution and all other consequential orders. The Court cannot assume the cognizance of the case without such complaint. In the absence of such a complaint, the trial and conviction will be void ab initio being without jurisdiction.

26. Learned counsel for the appellants have submitted that no charge could have been framed under Section 188 IPC in the absence of a written complaint by the officer authorised for that purpose, the conviction under Section 188 IPC is not sustainable. More so, it falsifies the very genesis of the case of the prosecution as the prohibitory orders had not been violated, no subsequent incident could occur. Thus, entire prosecution case falls.

27. Undoubtedly, the law does not permit taking cognizance of any offence under Section 188 IPC, unless there is a complaint in writing by the competent Public Servant. In the instant case, no such complaint had ever been filed. In such an eventuality and taking into account the settled legal principles in this regard, we are of the view that it was not permissible for the trial Court to frame a charge under Section 188 IPC. However, we do not agree with the further submission that absence of a complaint under Section 195 Cr.PC falsifies the genesis of the prosecution's case and is fatal to the entire prosecution case. There is ample evidence on record to show

A that there was a prohibitory order; which had been issued by the competent officer one day before; it had been given due publicity and had been brought to the notice of the public at large; it has been violated as there is no denial even by the accused persons that there was no 'Rasta Roko Andolan'.

B Unfortunately, the agitation which initially started peacefully turned ugly and violent when the public transport vehicles were subjected to attack and damage. In such an eventuality, we hold that in case the charges under Section 188 IPC are quashed, it would by no means have any bearing on the case of the prosecution, so far as the charges for other offences are concerned.

28. The submission on behalf of the appellants that two crimes bearing Nos. 188 and 190 of 2000 could not be clubbed together, has also no merit for the simple reason that if the D cases are considered, keeping in view the totality of the circumstances and the sequence in which the two incidents occurred, taking into consideration the evidence of drivers and conductors/cleaners of the vehicles involved in the first incident and the evidence of C. Ramasundaram V.A.O., (PW.87), we reach the inescapable conclusion that the second occurrence was nothing but a fall out of the first occurrence. The damage caused to the public transport vehicles and the consequential burning of the University bus remained part of one and the same incident. Merely because two separate complaints had been lodged, did not mean that they could not be clubbed together and one charge sheet could not be filed (See : T.T. Antony v. State of Kerala & Ors. (2001) 6 SCC 181).

Test Identification Parade:

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29. In Lal Singh & Ors v. State of U.P., AIR 2004 SC 299, this Court held that the court must be conscious of the fact that the witnesses should have sufficient opportunity to see the accused at the time of occurrence of the incident. In case the witness has ample opportunity to see the accused before the identification parade is held, it may adversely affect the trial and

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in that case, the evidence as a whole is to be considered. The prosecution should take precautions and should establish before the Court that right from the day of his arrest, the accused was kept "baparda" so as to rule out the possibility of his face being seen while in police custody.

30. In Suresh Chandra Bahri v. State of Bihar, AIR 1994 SC 2420, this Court held that the object of conducting Test Identification Parade is to enable witnesses to satisfy themselves that the accused whom they suspect is really one who was seen by them in connection with commission of crime and to satisfy investigating authorities that suspect is really the person whom witnesses had seen in connection with said occurrence. It furnishes an assurance that the investigation is proceeding on right lines, in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial. Therefore, the Test Identification Parade is primarily meant for investigation purposes. (vide Malkhan Singh v. State of M.P., AIR 2003 SC 2669; Ankush Maruti Shinde & Ors. v. State of Maharashtra, (2009) 6 SCC 667; and Jarnail Singh & Ors. v. State of Punjab, (2009) 9 SCC 719).

But the position would be entirely different when the accused or culprit who stands trial has been seen a number of times by the witness, as it may do away with the necessity of identification parade. Where the accused has been arrested in presence of the witness or accused has been shown to the witness or even his photograph has been shown by the Investigating Officer prior to Test Identification Parade, holding an identification parade in such facts and circumstances remains inconsequential. (vide Shaikh Umar Ahmed Shaikh & Anr. v. State of Maharashtra, AIR 1998 SC 1922; Lalli @ Jagdeep Singh v. State of Rajasthan, (2003) 12 SCC 666; Dastagir Sab & Anr. v. State of Karnataka, (2004) 3 SCC 106; Maya Kaur Baldevsingh Sardar & Anr. v. State of Maharashtra, (2007) 12 SCC 654; and Aslam @ Deewan v. State of Rajasthan, (2008) 9 SCC 227).

- A 31. In *Yuvaraj Ambar Mohite v. State of Maharashtra,* (2006) 12 SCC 512, this Court placed reliance upon its earlier judgment in *D. Gopalakrishnan v. Sadanand Naik & Ors.,* AIR 2004 SC 4965, and held that if the photograph of the accused has been shown to the witness before the Test Identification Parade, the identification itself looses its purpose. If the suspect is available for identification or for video identification, the photograph should never be shown to the witness.
- 32. Holding the Test Identification Parade is not a substantive piece of evidence, yet it may be used for the Purpose of corroboration; for believing that a person brought before the Court is the real person involved in the commission of the crime. However, the Test Identification Parade, even if held, cannot be considered in all the cases as trustworthy evidence on which the conviction of the accused can be sustained. It is a rule of prudence which is required to be followed in cases where the accused is not known to the witness or the complainant. (Vide State of H.P. v. Lekh Raj AIR 1999 SC 3916).
 - 33. In Mulla & Anr. v. State of Uttar Pradesh, (2010) 3 SCC 508, this Court placed reliance on Matru @ Girish Chandra v. The State of Uttar Pradesh, AIR 1971 SC 1050; and Santokh Singh v. Izhar Hussain & Anr., AIR 1973 SC 2190 and observed as under:-
 - "The evidence of test identification is admissible under Section 9 of the Indian Evidence Act. The Identification parade belongs to the stage of investigation by the police. The question whether a witness has or has not identified the accused during the investigation is not one which is in itself relevant at the trial. The actual evidence regarding identification is that which is given by witnesses in Court. There is no provision in the Cr.P.C. entitling the accused to demand that an identification parade should be held at or before the inquiry of the trial. The fact that a particular witness has been able to identify the accused at an

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identification parade is only a circumstance corroborative A of the identification in Court."

34. In *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569, a Constitution Bench of this Court has *suo moto* examined the validity of Section 22 of Terrorist and Disruptive Activities (Prevention) Act, 1987 and held that:

"If the evidence regarding the identification on the basis of a photograph is to be held to have the same value as the evidence of a test identification parade, we feel that gross injustice to the detriment of the persons suspected may result".

This Court, thus, struck down the provision of Section 22 of the said Act.

35. The said judgment was considered by this Court in Umar Abdul Sakoor Sorathia v. Intelligence Officer, Narcotic Control Bureau, AIR 1999 SC 2562, and the Court observed that in the said case, the evidence of a witness regarding identification of a proclaimed offender involved in a terrorist case was in issue. The courts below had taken a view that evidence by showing photographs must have the same value as evidence of a Test Identification Parade. The Court distinguished the aforesaid case on facts. The Court further held that the court must bear in mind that in a case where the accused is not a proclaimed offender and the person who had taken the photographs was making deposition before the court was being examined by the prosecution as a witness, and he identified the accused in the court, that may be treated as a substantive evidence. However, courts should be conscious of the fact that during investigation, the photograph of the accused was shown to the witness and he identified that person as a one whom he saw at the relevant time.

36. Thus, it is evident from the above, that the Test Identification Parade is a part of the investigation and is very useful in a case where the accused are not known before-hand

A to the witnesses. It is used only to corroborate the evidence recorded in the court. Therefore, it is not substantive evidence. The actual evidence is what is given by the witnesses in the court. The Test Identification Parade provides for an assurance that the investigation is proceeding in the right direction and it enables the witnesses to satisfy themselves that the accused whom they suspect is really one who was seen by them at the time of commission of offence. The accused should not be shown to any of the witnesses after arrest, and before holding the Test Identification Parade, he is required to be kept C "baparda".

37. In the Test Identification Parades held in the Jail, Nedu (A.2) was identified by P. Kandasamy (PW.4); N. Jagannathan (PW.5); G. Gayathiri (PW.11); N. Thilagavathi (PW.13); and S. Anitha (PW.14). Madhu (A.3) was identified by Dr. Latha (PW.1); and Akila (PW.2). C. Muniappan (A.4) was identified by N. Jagannathan (PW.5); S. Anitha (PW.14); and B. Kamal (PW.86).

38. In the court, Nedu (A.2) was identified by P. Kandasamy (PW.4); Jaganathan (PW.5); G. Gayathiri (PW.11); Thilagavathi (PW.13); and Anitha (PW-14). Madhu (A.3) was identified by Dr. Latha (PW.1); Akila (PW.2); Jaganathan (PW.5); G. Gayathiri (PW.11); and Suganthi (PW.12). C. Muniappan (A.4) was identified by Kandasamy (PW.4); Jaganathan (PW.5); and Anitha (PW.14).

39. Thus, it is evident that all the accused for whom Test Identification Parades were conducted were identified by some of the witnesses in the jail. They were also identified by some of the eye witnesses/injured witnesses in the court.

G Shri Sushil Kumar, learned senior counsel appearing for the appellants raised an objection that the entire proceedings of identification on 22.2.2000 had been concluded within a short span of 2 hours and 25 minutes. Eighteen witnesses were there, having three rounds each. Therefore, one round was H completed in three minutes, i.e., the Test Identification Parade

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was conducted in full haste and thus, could not be treated to A be a proper identification.

40. It is evident from the evidence of Shri Kalaimathi, Judicial Magistrate (PW.89), who conducted the Test Identification Parade, that all the witnesses had reached the Central Prison, Salem, before 10.30 a.m. All preparations/arrangements had been made in advance by the Jail authorities as per direction of the said officer. Arrangements of standing of the accused along with other inmates in jail of the same height and complexion had already been made. There had been no haste or hurry on the part of Shri Kalaimathi, Judicial Magistrate (PW.89) to conclude the proceedings. More so, for reasons best known to the defence, no question had been asked to the said Judicial Magistrate (PW.89) in his cross-examination as to how he could conclude the said proceedings within such a short span of time. Thus, the submission is not worth consideration.

- 41. In court, B. Kamal (PW.86) did not support the case of the prosecution as he deposed that during the identification he was forced by the police to identify C. Muniappan (A.4) by showing his photograph only. He was declared hostile.
- 42. The trial Court and the High Court have considered the issue elaborately and discussed the statements made by the prosecution witnesses in the court, along with the fact of identification by the witnesses in the Test Identification Parades. Both the Courts came to the conclusion that identification of A.2 to A.4 by the witnesses, if examined, in conjunction with the evidence of the Judicial Magistrate, R. Kalaimathi, (PW.89) and his reports, particularly, the Exh. P.137 and P.142, leave no room for doubt regarding the involvement of A.2 to A.4 in the crime. We do not find any cogent reason to take a view contrary to the same. Not supporting the prosecution's case by B. Kamal (PW.86) would not tilt the balance of the case in favour of the appellants.
 - 43. Serious issues have been raised by learned senior H

A counsel appearing for the appellants, submitting that inquest report was defective as there has been much irregularity in the inquest itself. Undoubtedly, three Investigating Officers, namely, T. Shanmugaiah, Police Inspector (PW.116); S. Palanimuthu (PW.121); and John Basha (PW.122) had conducted the investigation at the initial stage. The occurrence was so ugly and awful that the I.Os. had conducted the investigation under great anxiety and tension. The seizure memos were also prepared in the same state of affairs. Therefore, when the investigation had been conducted in such a charged atmosphere, some irregularities were bound to occur. There is ample evidence on record to show that after burning of the University bus, when the students came to know that three girls had been charred and large number of girl students had suffered burn injuries, they became so violent that they damaged the ambulance which had been brought to take bodies of the deceased girls for conducting autopsy. The State Authorities, after keeping all these factors in mind and realizing that the investigation had not been conducted in proper manner, had taken a decision to transfer the investigation to the CBCID. Therefore, the irregularities committed in the investigation by the earlier I.Os. has too little relevance on the merits of the case. The evidence collected by the said three I.Os. was not worth placing reliance on and has rightly been not relied upon by the subsequent Investigating Officer.

44. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the I.O. and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there

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is a legal obligation on the part of the court to examine the A prosecution evidence de hors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation. (Vide Chandra Kanth Lakshmi v. State of Maharashtra, AIR 1974 SC 220; Karnel Singh v. State of Madhya Pradesh, (1995) 5 SCC 518; Ram Bihari Yadav v. State of Bihar, AIR 1998 SC 1850; Paras Yadav v. C. State of Bihar, AIR 1999 SC 644; State of Karnataka v. K. Yarappa Reddy, AIR 2000 SC 185; Amar Singh v. Balwinder Singh, AIR 2003 SC 1164; Allarakha K. Mansuri v. State of Gujarat, AIR 2002 SC 1051; and Ram Bali v. State of U.P., AIR 2004 SC 2329).

Arrest of A-4

45. Shri Sushil Kumar, learned senior counsel has raised the issue vehemently that arrest of C. Muniappan (A.4) is totally false. However, the evidence on record reveals that he was arrested at 1.30 a.m. on 3.2.2000, as is evident from the evidence of D. Poongavanam (PW.108), according to which when he was attending patrol duty along with other police officials on the highway from Dharmapuri to Tirupathur, near P. Mottupatti lake bridge, he got information that some one was present beneath the bridge. Thus, the said witness went to the place along with the other officers and he was taken into police custody in Crime No.115/2000 of Mathikonepalayam Police Station under Section 151 Cr.P.C. read with Section 7(1)(A) of C.L. Act, and thus he was sent to jail. He had been released on bail on 9.2.2000 and the I.O. had been searching for him and he was arrested at New Bus Stand, Salem, where the Dharmapuri bus was to be parked, by P. Krishnaraj (PW.109). He tendered a confessional statement which was recorded in presence of Revenue Inspector, Manickam and Village Administrative Officer, C. Ramasundaram (PW.87).

There has been no cross-examination independently on behalf of A.4 on this issue. Even in cross-examination on behalf of other accused nothing has been elicited qua irregularity or improbability of the arrest of A.4. Therefore, we do not see any reason to disbelieve the arrest of C. Muniappan (A.4) as shown by the I.O.

46. So far as the issue of damage to the buses and the main incident of setting the bus on fire are concerned, both the courts have proceeded on the finding, after appreciating the entire evidence on record, that there was no common object between Nedu @ Nedunchezhian (A.2), Madhu @Ravindran (A.3) and C. Muniappan (A.4) and the other accused regarding murder of the students and burning of the bus. Therefore, all of them had been convicted under different sections. However, the High Court directed the sentence to run concurrently so far as D A.1, A.5 to A.14, A.16 to A.21, A.23 to A.26 and A.28 to A.31 are concerned. There has been sufficient material to show participation in the "Rasto Roko Andolan" and indulging in the incident of damaging the local route bus. Both courts have recorded the concurrent findings of fact in this regard. We have also gone through the evidence. Their presence is established on the spot and we do not see any reason to interfere with the concurrent findings of fact recorded in that respect. We do not find any material on record, which may warrant interference with the said findings.

47. So far as A.2 to A.4 (Nedu, Madhu and C. Muniappan respectively) are concerned, the Trial Court recorded the following findings of fact:-

"Accused 2 and 3 had poured petrol into the bus through the front door steps and set fire to it resulting in the death of the abovesaid three students and causing injuries to some of the students. Knowing that students are inside the bus, they had set fire to the bus as stated above, knowing fully well that some of the students or all the inmates of the bus would meet their death inside the bus. Nobody could

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deny this fact. There was clear intention on the part of A2 A and A3 to kill the inmates of the bus and thus A2 and A3 have murdered three girl students with the intention of killing them. Hence A2 and A3 are liable to be punished u/s 302 IPC (3 counts)......Presence of the 4th accused in the occurrence place has been amply proved. Though the fact that he gave matchbox to A2 to set fire to the bus had not been established, yet the fact that he aided A2 and A3 to come to the occurrence place in his motor cycle after the occurrence is over, is clearly proved. because he was the person who drove the motor cycle and thus aided A2 and A3 in the commission of the offence u/ s 4 of the TNP (PDL) Act and 302 IPC and 114 IPC could be invoked in this case since as per Section 107 IPC vide third definition whoever intentionally aids by any act or illegal omission the doing of the thing is an offender as defined in 107 IPC. Hence, A4 Muniappan has committed the offences punishable u/s 4 of TNP (PDL) Act r/w 114 IPC and 302 IPC r/w 114 IPC (3 counts).

Further, the High Court after appreciating the evidence on record found that :-

"The identification of the A2 to A4 by the witnesses coupled with the evidence of the learned Magistrate PW-89 and the reports of PW89 produced in Exs. P-137 and P-142 would go a long way to show that A-2 to A-4 were involved in the crime as spoken to by the prosecution witnesses."

From the record, it is evident that so far as A2 to A4 are concerned, their involvement in the incident has been substantiated by the evidence of PWs.61,62,63,97&99 (Santhamurthy, Madhaiyan, G. Manickam, Udayasuriyan and R. Karunanidhi respectively) as some of those said witnesses had identified D.K. Rajendran, Nedu, Madhu, C. Muniappan, D.K. Murugesan, D.A. Dowlath Basha, (A.1 to A.6 respectively), K. Ravi (A.9), Sampath (A.13), K. Chandran (A.21), R. Chellakutty

A (A.22), K. Mani (A.24), K. Veeramani (A.30) & Udayakumar (A.31). All the witnesses have also deposed that some of the members had been in the demonstration while K. Mani (A.24) damaged the Hosur bus stand. M. Kaveri (A.23) prevented the people from dousing the fire.

48. In view of the fact that Udayasuriyan (PW.97) and R. Karunanidhi (PW.99) had not been dis-believed by the court below and their evidence was found natural and trustworthy as they did not falsely implicate all the accused for causing damages to the bus and they were local and independent witnesses and knowing some of the accused persons; the High Court held as under:

"Though, both the witnesses have spoken about the demonstration and implicated most of the accused, they have spoken only about Nedu (A.2) for having set fire to the Route No.7-B town bus and there is absolutely no material to show as to why both PWs 97 & 99 should falsely implicate Nedu (A.2). Equally, for the same reason, the implication of M. Kaveri (A.23) for having prevented the persons in and around the bus from dousing the fire also cannot be dis-believed. There is ample evidence to show that Nedu (A.2) and M. Kaveri (A.23) were part of the demonstrators as has been stated by some of the witnesses. In fact, PW.62 stated that even when he saw the demonstrators sitting on the road, he also saw the damaged buses parked nearby. None of the witnesses have implicated any of the accused except Nedu (A.2) and M. Kaveri (A.23) for causing damage to the buses. Though, PW.97 implicated K. Mani (A.24) as well for causing damage to the bus, A.24 was not spoken to by PW.99. In the absence of any corroboration, it cannot be held that K. Mani (A.24) also damaged the bus.

49. Therefore, the presence of the accused had also been established by press and media persons who were present at the scene of the occurrence, as well as by the complainant, and

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those persons had not named all the accused for setting the bus on fire and only few of them had been involved. But as the said persons were not having any arm/weapon, the offence of Section 148 IPC was not found sustainable and thus, their conviction under Section 148 IPC has been rightly set aside. Some of the accused had been convicted under Section 147 IPC.

50. It has been submitted that the witnesses PWs. 1, 2 and 4 have not disclosed the identities of the accused at the initial stage of investigation. Therefore, they cannot be relied upon for conviction of A.2 to A.4. However, it has been proved that there was no initial investigation and therefore the question of disclosing identity of the accused to Shri Shanmugaiah (PW.116), who had done the initial investigation, could not arise. More so, as has been mentioned hereinabove, the initial investigation was conducted in a panicked situation, therefore, the government thought it proper to scrap it out and hand over to a higher officer through the CBCID. The presence of A.2 to A.4 with the other accused at the place of agitation stands established.

- 51. R. Karunanidhi (PW.99) had spoken about A.2 to A.4. He is an advocate and belongs to Dharamapuri. He has deposed that Nedu (A.2) had set the fire to the Route No.7-B town bus. He has also corroborated the evidence of Udayasuriyan (PW.97) that while the bus was in flames, some persons tried to douse the fire but they were prevented by M. Kaveri (A.23). Nedu (A.2) remained present in the earlier occurrence as well as the subsequent occurrence.
- 52. We cannot ignore one more fact, namely, that C. Muniappan (A.4) had kept the engine of the motor cycle (M.O.5) running only to escape from the scene of occurrence along with Nedu (A.2) and Madhu (A.3) after the occurrence. The said fact would also indicate the mind of the accused to commit the offence and to flee from the scene of occurrence to avoid the clutches of law. But for PWs 1, 2, 4 & 5 and some other students

A who became alert immediately after the bus was set on fire, the consequence could have been disastrous and more deaths could have occurred.

53. P. Kandasamy, the bus driver (PW.4) has deposed that at the time of incident, a bike coming from the right side of the bus stopped near the left side headlight at a distance of about 12 ft. Three persons were riding on the said motor cycle. Two persons who were sitting on the rear seat of the motor cycle came towards the bus and each of them was carrying a yellow coloured can. One of them came to the left side of the bus and sprinkled liquid contained in the can inside the bus through the first window shutter. The other poured the liquid from the can through the second window. From the smell, he could understand that they had sprinkled petrol. Dr. Latha (PW.1) and Akila (PW.2) begged those persons and pleaded not to do any D harm. At that time there was a shout "set fire on them, then only they will realise". Students started coming out of the bus from the front entrance. The bus was put to fire immediately. The persons who poured the petrol proceeded towards the motor cycle and escaped.

E 54. P. Kandasamy (PW.4) has identified Nedu (A.2) and C. Muniappan (A.4) in the court and pointed out that C. Muniappan (A.4) was the person who was sitting on the motor cycle, keeping engine running at the time of occurrence. He also disclosed that the number of the maroon coloured motor cycle was TN-29-C-2487 and identified the vehicle parked outside the court. In cross-examination again and again he was asked large number of questions, but his deposition remained trustworthy throughout.

55. The deposition of N. Jagannathan, cleaner (PW.5) corroborated the evidence of P. Kandasamy (PW.4). He identified A.2 to A.4. He also identified the motor cycle but could not identify the colour and registration number. He has identified the accused in the Test Identification Parade. He has denied the suggestion that he had ever been shown any

photograph of either of A.2 to A.4. He deposed that A.2 to A.4 were the persons who sprinkled the petrol inside the bus and he had given a version of events explaining how the girl students got burn injuries and some of them died because they could not come out of the vehicle. He denied the suggestion that he could identify A.2 to A.4 as he had been shown their photographs.

56. Dr. Latha (PW.1) had deposed that she had seen the man who was pouring the petrol. She had identified A.3 in the court as the man who sprinkled petrol in the bus. She deposed that it was A.3 who had shouted "set fire to all, then only they will realize" and at that time there was a fire from the front left side.

57. Akila (PW.2) had given same version and corroborated the evidence of Dr. Latha (PW.1), P. Kandasamy (PW.4) and N. Jagannathan (PW.5) and deposed that petrol was sprinkled near the seat which was occupied by PW.5. She identified Madhu (A.3) as the person who sprinkled the petrol and stated that another person lit the match stick and threw it in the bus and the bus was burnt into flames. Three girl students were charred to death.

58. Preetha (PW.8), a B.Sc. 2nd year student, aged 19 years had deposed that she was sitting on the double seat just before the front entrance on the window side. A man sprinkled petrol from a yellow can which he was holding on the seat in front of her seat through the window shutter. At the same time another person came and poured petrol inside the bus through the window shutter which was near the first seat. PWs. 1 and 2 begged them not to harm students. However, in the meantime, the front side of the bus caught fire. She had suffered some burn injuries over her left foot. She had identified Madhu (A.3) in the court as a person who had sprinkled petrol. She denied the suggestion that she was deposing falsely or identified the accused D.K. Rajendran (A.1) and Nedu (A.2) as she had been tutored by the police.

A 59. Gayathri G. (PW.11), another injured witness identified Nedu (A.2) and Madhu (A.3) in the Court. She explained how the petrol was sprinkled by A.2 and A.3 and how PWs. 1 and 2 begged them not to harm the girls. However, at the same time, there was fire at the place where the petrol had been poured. She denied any suggestion made by the defence that she was deposing falsely or she had identified any of the accused by showing their photographs.

60. R. Suganthi (PW.12) another injured witness had given the same version. She had identified Madhu (A.3) in the court as a person who had sprinkled the petrol inside the bus and N. Thilagavathi (PW.12) another injured witness corroborated the genesis of the case as given by the other witnesses. She identified Nedu (A.2) in the court as a person who had sprinkled the petrol and denied all suggestions made by the defence.

61. S. Anitha (PW.14) supported the prosecution version thoroughly and stated that two persons came to the front of the bus and sprinkled the petrol. She had identified A.2 to A.4 in Test Identification Parade denying all suggestions made by the defence.

62. A large number of injured witnesses (students) were examined. They supported the prosecution case but did not identify any person either in the Test Identification Parade or in the Court. M. Kalaivani, M. Krithika, G. Gayathiri and R. Suganthi (PWs.9 to 12), R. Banuchitra, Chitra, C. Susma, S. Thilagam, P.T. Sutha, M. Vasantha Gokilam, R. Abirami, P. Geetha and S. Gayathiri (PWs.15 to 23), K. Sumathi, M. Deivani and N. Anbuselvi (PWs. 26 to 28) got injuries, and were treated in the hospital. They were examined in the court. Their seating position in the bus had been such that they could not see as who had sprinkled the petrol in the bus. They could see the motorcycle or C. Muniappan (A.4) on the scene. They did not depose anything in this regard.

63. R. Maruthu (PW.51), photographer, deposed that he was contacted by Dowlat Basha (A.6) to cover the "Road Roko

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Agitation" at Illakkiampatti in stills and video. He reached there A on a motorcycle. There he found D.K. Rajendran (A.1) engaged in an agitation with four or five persons. They were raising slogans. He photographed and videographed the spot of the agitation. He deposed that along with (A.1), Muthu (A.8), Ravi (A.9), A.P. Murugan (A.11) and Vadivelu (A.12) were also present there. Their photographs and negatives were exhibited in the court. He also photographed the burning bus. He reached the spot when the bus was burning. Students were shouting. The bus was full of black smoke. Some persons were trying to break open the rear side glass panes and some were dragging the girls from the rear side shutters. The fire spread from the front portion and engulfed the whole bus to the rear and he had been taking photographs continuously. These photographs were exhibited as Ex.P.78 and Ex.P.80. He watched the video prepared by him in the court and identified the same. In the cross-examination, he denied knowing the accused persons, particularly, Madhu (A.3), Velayutham (A.7), Sampath (A.13), Selvam (A.26), Selvaraj (A.28) and Veeramani (A.30). However, they were shown in the photographs taken by him. He was declared hostile.

- 64. The shirt (M.O.4), which was worn by Nedu (A.2) at the time of incident, had been identified by most of the eye-witnesses in the court. It is stated that this shirt belonged to A.2.
- 65. In Aloke Nath Dutta & Ors. v. State of West Bengal, (2007) 12 SCC 230, this Court disapproved the exhibiting and reading of confessional statement of the accused before the police as a whole before the court, as it had not been brought on record in a manner contemplated by law. The Court held as under:

"Law does not envisage taking on record the entire confession by making it an exhibit incorporating both the admissible or inadmissible part thereof together. We have to point out that only that part of confession is admissible, which could be leading to the recovery of dead body and/

- A or recovery of articles.....; the confession proceeded to state even the mode and manner in which they allegedly killed. It should not have been done. It may influence the mind of the Court."
 - 66. While deciding the said case, this Court placed reliance on the judgments in *Pulukuri Kotayya v. King-Emperor,* AIR 1947 PC 67; the *State of Maharashtra v. Damu Gopinath Shinde & Ors.*, AIR 2000 SC 1691; and *Anter Singh v. State of Rajasthan*, AIR 2004 SC 2865.
 - 67. Thus, it is evident from the above that only the admissible part of extra-judicial confessional statement can be exhibited. The statement as a whole, if exhibited and relied upon by the prosecution, leads to the possibility of the court getting prejudiced against the accused. Thus, it has to be avoided.
 - 68. In the instant case, as has rightly been pointed out by Shri Sushil Kumar, learned senior counsel that confessional statement of C. Muniappan (A.4) had been exhibited in the court in its full text. It was neither required or warranted nor was permissible. However, in view of the fact that there had been other sufficient material on record to show his involvement in the crime, we are of the opinion that full exhibition of the statement had not prejudiced the case against him.

Hostile Witness:

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69. It is settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (vide *Bhagwan Singh v. The State of Haryana*, AIR 1976 SC 202; *Rabindra Kumar Dey v. State of Orissa*, AIR 1977 SC 170; *Syad Akbar v. State of Karnataka*, AIR 1979 SC 1848; and *Khujji* @ *Surendra*

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Tiwari v. State of Madhya Pradesh, AIR 1991 SC 1853).

70. In State of U.P. v. Ramesh Prasad Misra & Anr., AIR 1996 SC 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543; Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P., AIR 2006 SC 951; Sarvesh Naraian Shukla v. Daroga Singh & Ors., AIR 2008 SC 320; and Subbu Singh v. State, (2009) 6 SCC 462.

Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence.

In the instant case, some of the material witnesses i.e. B. Kamal (PW.86); and R. Maruthu (PW.51) turned hostile. Their evidence has been taken into consideration by the courts below strictly in accordance with law.

Some omissions, improvements in the evidence of the PWs have been pointed out by the learned counsel for the appellants, but we find them to be very trivial in nature.

71. It is settled proposition of law that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be disregarded. After exercising care and caution and sifting through the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version

A of the prosecution's witness. As the mental abilities of a human being cannot be expected to be attuned to absorb all the details of the incident, minor discrepancies are bound to occur in the statements of witnesses. (vide Sohrab & Anr. v. The State of M.P., AIR 1972 SC 2020; State of U.P. v. M.K. Anthony, AIR 1985 SC 48; Bharwada Bhogini Bhai Hirji Bhai v. State of Gujarat, AIR 1983 SC 753; State of Rajasthan v. Om Prakash AIR 2007 SC 2257; Prithu @ Prithi Chand & Anr. v. State of Himachal Pradesh, (2009) 11 SCC 588; State of U.P. v. Santosh Kumar & Ors., (2009) 9 SCC 626; and State v. C.

Death sentence

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- 72. The guidelines laid down by this Court for awarding death sentence in *Bachan Singh v. State of Punjab,* AIR 1980 SC 898, may be culled out as under:
 - (a) The extreme penalty of death may be inflicted in gravest cases of extreme culpability;
 - (b) While imposing death sentence the circumstances of the offender also require to be taken into consideration along with the circumstances of the crime;
 - (c) Death sentence be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime; and
 - (d) Extreme penalty can be imposed after striking the balance between aggravating and mitigating circumstances found in the case.

Aggravating circumstances include:

- (a) If the murder has been committed after previous planning and involves extreme brutality; or
- (b) If the murder involves exceptional depravity.
- H **Mitigating circumstances** include:

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- (a) That the offence was committed under the influence of A extreme mental or emotional disturbance:
- (b) The age of the accused. If the accused is young or old, he shall not be sentenced to death:
- (c) The probability that the accused would not commit B criminal acts of violence as would constitute a continuing threat to society:
- (d) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (c) and (d) above;
- (e) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence;
- (f) That the accused acted under the duress or domination D of another person; and
- (g) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

73. In *Machhi Singh & Ors. v. State of Punjab*, AIR 1983 SC 957, this Court expanded the "rarest of rare" formulation beyond the aggravating factors listed in *Bachan Singh* (supra) to cases where the "collective conscience" of a community is so shocked that it will expect the holders of the judicial powers to inflict the death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, and stated that in these cases such a penalty should be inflicted. But the Bench in this case underlined that full weightage must be accorded to the mitigating circumstances in a case and a just balance had to be struck between aggravating and mitigating circumstances. The Court further held that the relevant factors to be taken into consideration may be motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as:-

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 Murder is in extremely brutal manner so as to arouse intense and extreme indignation of the community.

(ii) Murder of a large number of persons of a particular caste, community, or locality, is committed.

(iii) Murder of an innocent child; a helpless woman, is committed.

74. In *Devender Pal Singh v. State of NCT of Delhi*, AIR C 2002 SC 1661, this Court referred to both these cases and held that death sentence may be warranted when the murder is committed in an extremely brutal manner; or for a motive which evinces total depravity and meanness e.g. murder by hired assassin for money or reward, or cold blooded murder for D gains. Death sentence may also be justified:

- "(i) When the crime is enormous in proportion. For instance, when multiple murders, say of all or almost all the members of a family or a large number of persons or a particular caste, community, or locality are committed.
- (ii) When the victim of murder is an innocent child or a helpless woman or old or infirm person or a person vis-à-vis, whom the murderer is in a dominating position, or a public figure generally loved and respected by the community."

(See also Atbir v. Govt. of N.C.T. of Delhi, JT 2010 (8) SC 372).

G imposing the appropriate punishment observing that it will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. The court held that "To give a lesser punishment to the appellants would be to render the justice system of this

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country suspect. The common man will lose faith in the courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon". (See also *State of Punjab v. Rakesh Kumar, AIR 2009 SC 391*; and *Sahdev v. Jaibar @ Jai Dev & Ors.*, (2009) 11 SCC 798).

In *Bantu v. State of U.P.*, (2008) 11 SCC 113, this Court placing reliance on *Sevaka Perumal v. State of T.N.* AIR 1991 SC 1463, re-iterated the same view observing as under:

"Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc."

Thus, it is evident that Criminal Law requires strict adherence to the rule of proportionality in providing punishment according to the culpability of each kind of criminal conduct keeping in mind the effect of not awarding just punishment on the society.

The "Rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. Where an accused does not act on any spur-of-the-moment provocation and he indulged himself in a deliberately planned crime and meticulously executed it, the death sentence may be the most appropriate punishment for such a ghastly crime.

76. Life imprisonment is the rule and death penalty an exception. Therefore, the Court must satisfy itself that death penalty would be the only punishment which can be meted out to a convict. The Court has to consider whether any other punishment would be completely inadequate and what would be the mitigating and aggravating circumstances in the case. Murder is always foul, however, the degree of brutality,

A depravity and diabolic nature differ in each case. Circumstances under which murders take place also differ from case to case and there cannot be a straitjacket formula for deciding upon circumstances under which death penalty must be awarded. In such matters, it is not only a nature of crime, but the background of criminal, his psychology, his social conditions, his mindset for committing offence and effect of imposing alternative punishment on the society are also relevant factors.

77. In the instant case, the girl students of the University, while on tour had been the victims of a heinous crime at the tail end of their programme. The appellants may have had a grievance and a right of peaceful demonstration, but they cannot claim a right to cause grave inconvenience and humiliation to others, merely because a competent criminal court has handed down a judicial pronouncement that is not to their liking. A demonstration by the appellants which had started peacefully, took an ugly turn when the appellants started damaging public transport vehicles. Damaging the public transport vehicles did not satisfy them and the appellants became the law unto themselves. There had been no provocation of any kind by any person whatsoever. Some of the appellants had evil designs to cause damage to a greater extent so that people may learn a "lesson". In order to succeed in their mission, Nedu @ Nedunchezhian (A.2), Madhu @ Ravindran(A.3) and C. Muniappan (A.4) went to the extent of sprinkling petrol in a bus full of girl students and setting it on fire with the students still inside the bus. They were fully aware that the girls might not be able to escape, when they set the bus on fire. As it happened, some of the girls did not escape the burning bus. No provocation had been offered by any of the girls. Nedu @ Nedunchezhian (A.2), Madhu @ Ravindran (A.3) and C. Muniappan (A.4) did not pay any heed to the pleas made by Dr. Latha (PW1) and Akila (PW2), the teacher, to spare the

girls. As a consequence of the actions of Nedu @

Nedunchezhian (A.2), Madhu @ Ravindran (A.3) and C.

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Muniappan (A.4), three girls stood to death and about 20 girls received burn injuries on several parts of their bodies. There can be absolutely no justification for the commission of such a brutal offence. Causing the death of three innocent young girls and causing burn injuries to another twenty is an act that shows the highest degree of depravity and brutality on the part of Nedu @ Nedunchezhian (A.2), Madhu @ Ravindran (A.3) and C. Muniappan (A.4).

The aggravating circumstances in the case of Nedu @ Nedunchezhian (A.2), Madhu @ Ravindran (A.3) and C. Muniappan (A.4) are that this offence had been committed after previous planning and with extreme brutality. These murders involved exceptional depravity on the part of Nedu @ Nedunchezhian (A.2), Madhu @ Ravindran (A.3) and C. Muniappan (A.4). These were the murders of helpless, innocent, unarmed, young girl students in a totally unprovoked situation. No mitigating circumstances could be pointed to us, which would convince us to impose a lesser sentence on them. Their activities were not only barbaric but inhuman of the highest degree. Thus, the manner of the commission of the offence in the present case is extremely brutal, diabolical, grotesque and cruel. It is shocking to the collective conscience of society. We do not see any cogent reason to interfere with the punishment of death sentence awarded to Nedu @ Nedunchezhian (A.2), Madhu @ Ravindran (A.3) and C. Muniappan (A.4) by the courts below. Their appeals are liable to be dismissed.

So far as the other appellants are concerned, the maximum sentence to be served by them as per the Judgment of the High Court is two years. Most of these appellants have already served more than 14 months of their sentence and they are presently on bail. The incident occurred on 2.2.2000, so more than ten and a half years have already elapsed since the incident. These appellants have already suffered a lot. Thus, their sentences deserve to be reduced.

78. Before parting with this case, we would like to take note

A of the fact that this crime occurred right in the middle of a busy city. Innocent girls trapped in a burning bus were shouting for help and only the male students from their University came to their rescue and succeeded in saving some of them. There were large number of people including the shopkeepers, media persons and on-duty police personnel, present at the place of the "Rasta Roko Andolan", which was very close to the place of the occurrence of the crime, and none of them considered it proper to help in their rescue. Even if the common man fails to respond to the call of his conscience, the police should not have remained inactive. The so-called administration did not bother to find out why the police did not intervene and assist in the rescue of the girl students. It is clear that the so-called protectors of the society stood there and witnessed such a heinous crime being committed and allowed the burning of the bus and roasting of the innocent children without being reprimanded for failing in their duty. If the common citizens and public officials present at the scene of the crime had done their duty, the death of three innocent young girls could have been prevented.

79. In view of the above, all the appeals are dismissed. E So far as Nedu @ Nedunchezhian (A.2), Madhu @ Ravindran (A.3) and C. Muniappan (A.4) are concerned, sentence of death imposed on them is confirmed and the same be executed in accordance with law.

However, in Criminal Appeal Nos 163-34 of 2010 (arising out of SLP (Crl.) Nos. 1482-1484 of 2008), the sentences are reduced as undergone. All of them are on bail, their bail bonds stand discharged. These criminal appeals stand disposed of accordingly.

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Appeals disposed of.