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— Section 10F, Section 169, Section 171 Section 186, Section 189 Section 283(1)(i), Section 295, Section 299, Section 300, Section 397, Section 398, Section 402 and Section 403; Code of Civil Procedure (CPC), 1908—Rule 1, Rule 2 and Section 151. What is the scope of interference by Court in Appeal under Section 10F of the Companies Act, 1956? Held: The scope of interference by the Court in an appeal under Section 10F of the Act is limited to examining substantial questions of law that arise from the order of the CLB. Further, the only other basis on which the appellate Court would interfere under Section 10F was if such conclusion was (a) against law or (b) arose from consideration of irrelevant material or (c) omission to consider relevant materials. Whether the impugned order of the CLB overlooks the mandatory requirement of law under Section 169 and 186 of the Companies Act, 1956? Held-There is nothing to indicate that while exercising the powers under Sections 402 or 403 of the Act, the CLB has to necessarily account for the mandatory requirements or other provisions like Sections 169 or 186 of the Act. The language in fact appears to indicate to the contrary. It permits the CLB to pass orders as long as it is in the interests of the proper conduct of the affairs of the company and it is "just and equitable" to pass such order. Thus, it is untenable that the requirement of a group of shareholders desiring the convening of an EGM having to first make a requisition to the BOD is mandatory and in circumstance can be dispensed with, even by the CLB while making an order under Section 403 of the Act. Appeal dismissed.

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— Section 391 & Section 394: Both petitions have been filed as second motion petitions seeking sanction to the Scheme of Arrangement involving amalgamation of BSMCL ('Transferor company') with PSPL ('Transferee company') with effect from 1st April 2010. Held: Apart from the objections of a

minority share-holder, whose objections have been found to be without merit, there is no other objection to the sanctioning of the Scheme. Consequently Scheme sanctioned and upon the sanctioning of the Scheme, all the properties, rights and powers of BSMCL will be transferred to and will vest in PSPL without any further act or deed. BSMCL will be taken to be dissolved without winding up and without any formal petition being filed for that purposes.

Phenil Sugars Private Ltd. v. *Basti Sugar Mills Company Ltd.* *1134*

CONSTITUTION OF INDIA, 1950—Article 227—Indian Navy, Medical Board—Whether the Petitioner is right in stating that the Respondents failed to conduct the re-survey Medical Board of the Petitioner even though he was granted disability pension for 2 years at the time of invalidation on 28th February, 1972 from the Indian Navy on medical ground? Held—That the Base Hospital, Delhi will conduct the re-survey Medical Board and date and time of the same should be communicated to the Petitioner for his medical examination at the address tendered by him. Further, result of medical examination shall be forthwith communicated to him and he is entitled to service element and pension benefit. Petition allowed.

Ex. Sailor Ishwar Singh v. *UOI and Ors.* *795*

— Article 227—Code of Criminal Procedure, 1973—Section 482—Prevention of Corruption Act, 1988—Section 19 (3) (c)—Special Judge framed charges against petitioner—Writ Petition filed praying for quashing of charges—Stay of proceedings before Trial Court also prayed—Plea taken, in several cases which were relied upon by petitioner, proceedings in cases under PC Act were stayed by SC—Per contra plea taken, *Arun Kumar Sharma* is not applicable to facts of instant case as it is not borne out from said case if same was under PC Act—In rest of cases cited by counsel for petitioner, provisions of PC Act which specifically bar Court from staying proceedings before Trial Court were not considered—Held—In *Satya Narayan Sharma* contention raised before SC that bar under Section 19(3) (c) of Act would not exclude inherent power of HC to stay proceedings under PC

ILR (2013) II DELHI 795
W.P. (C)

EX. SAILOR ISHWAR SINGH ....PETITIONER

VERSUS

UOI AND ORS. ....RESPONDENTS

(GITA MITTAL & J.R. MIDHA, JJ.)

W.P. (C) NO. : 8615/2011 DATE OF DECISION: 19.12.2012

Service Law—Constitution of India, 1950—Article 227—Indian Navy, Medical Board—Whether the Petitioner is right in stating that the Respondents failed to conduct the re-survey Medical Board of the Petitioner even though he was granted disability pension for 2 years at the time of invalidation on 28th February, 1972 from the Indian Navy on medical ground? Held—That the Base Hospital, Delhi will conduct the re-survey Medical Board and date and time of the same should be communicated to the Petitioner for his medical examination at the address tendered by him. Further, result of medical examination shall be forthwith communicated to him and he is entitled to service element and pension benefit. Petition allowed.

Important Issue Involved: "Grant of service element to those invalidated out prior to 1973 with less than minimum qualifying service for pension as prescribed from time to time, has been considered."

[As Ma]

APPEARANCES:

FOR THE PETITIONER : Co. (Retd.) S.R. Kalkal, Advocate.

FOR THE RESPONDENTS : Mr. Satya Saharawat, Advocate for Mr. Ankur Chhibber, Advocate.

CASE REFERRED TO:

1. *Union of India & Ors.* vs. *Sinchetty Satyanarayan* SLP (C) No. 20868/2009.

RESULT: Petition allowed.

GITA MITTAL, J.

1. This writ petition has been filed by the petitioner complaining inter alia on the failure of the respondents to conduct the re-survey Medical Board of the applicant even though he was granted disability pension for two years at the time of invalidation on 28th February, 1972 from the Indian Navy on Medical grounds.

2. The Petitioner has contended that on account of his medical condition, he overlooked the requirement of the re-survey Medical Board which was required to be conducted before the pension could be continued to the petitioner. It is also submitted that he did not receive the information with regard to his re-survey Medical Board which the respondents claim to have sent in this case.

3. On the hearing of this case on 13th December, 2012, the following submissions made by learned counsel for the respondents were noticed in the order of the appeal:-

> "Mr. Ankur Chhibber, learned counsel appearing for the respondents has handed over a copy of the communication dated 12th December, 2012 received by him from the respondents whereby the respondents have informed that they are willing to conduct a resurvey medical board. However, given the stand of the respondents that the petitioner had not appeared before the medical board despite reminders sent to him, the respondents have sought the correct particulars and contact details of the petitioner for future correspondence and conduct of the resurvey medical board. An adjournment slip has been moved by learned counsel for the petitioner, who is not represented before us today.
>
> In view of the above, we defer orders today.

List on 19th December, 2012 to enable the petitioner to furnish the complete contact details."

4. It is pointed out by Colonel (Retd.) S.R. Kalkal, learned counsel appearing for the petitioner that communication was not received by the petitioner for the reason that instead of giving full name, the respondents had mentioned only the abbreviation which could not be recognized by the postal authority in the village. He submits that the address of the petitioner given in the memo of parties is correct.

5. The learned counsel for the petitioner places reliance on the order dated 23rd February, 2012 passed in SLP(C)No.20868/2009 and connected matters titled **Union of India & Ors. vs. Sinchetty Satyanarayan** wherein the Government decision dated 22nd February, 2012 granting the benefit of service element to all similarly placed persons with effect from 1st January, 1973 was noticed and directed to be placed before the Supreme Court in a pending Special Leave Petition reads as follows:-

"MINISTRY OF DEFENCE
Department of Ex-Servicemen Welfare

Subject: SLP No. 20868/2009 titled UOI vs. Ex Gnr Sinchetty Satyanarayan & 42 Others

The issue regarding grant of service element to those invalidated out prior to 1973 with less than minimum qualifying service for pension as prescribed from time to time, has been considered in the Ministry and with the approval of Hon'ble RM it has been decided to grant the benefit of service element to all pre 1973 cases w.e.f. 1.1.1973.

2. OIC Legal Cell (Supreme Court) may take appropriate action to file the reply affidavit in the matter in the Hon'ble Supreme Court.

Sd/-
(Ajay Saxena)
Under Secretary/D (Pen/Legal)
Tele : 23015021"

6. The Supreme Court of India on 23rd February, 2012 had recorded the submission of learned counsel for the Union of India that the

Government of India had recorded that the Government has taken a decision that the respondents and other similarly placed persons would be entitled to the benefit of service element of pension with effect from 1.1.1973.

7. It is urged that following the said order dated 23rd February, 2012, noticing the decision of the Ministry of Defence, Government of India noticed above, the petitioner is entitled to the service element and the pension benefit with effect from 1st January, 1973. The respondents shall compute the service element.

8. The learned counsel appearing for the respondents has handed over a letter dated 14th December, 2012 from the record office of the Navy to the petitioner to the effect that the re-survey Medical Board would be conducted at the Base Hospital, Delhi which shall communicate him the date and time of the same.

In view of the above, this writ petition is disposed of with the following direction:-

(i) The Base Hospital, Delhi shall inform the petitioner of the date and time of the re-survey Medical Board at the following address, at least one week before the scheduled date, to enable the petitioner to make himself available for the medical examination:

"Ex. Sailor Ishwar Singh
No.59086
S/o Late Shri Ram Phal
R/o Village & P.O. Ismaila,
District Rohtak,
(Haryana)"

(ii) The result of the medical examination shall be forthwith communicated to the petitioner.

(iii) In case the petitioner is found entitled to any amount, whether as disability pension, the same would be calculated and informed to the petitioner within four weeks of the Medical Board. Such amount shall also be forwarded to the petitioner within a period of four weeks thereafter.

(iv) The petitioner's claim for service element of pension shall be computed and found not paid to the petitioner within a period of four weeks from today.

(v) In case the petitioner is aggrieved by the order which are passed by the respondents with regard to the re-survey Medical Board, disability pension or the service components, the petitioner shall be at liberty to assail the same by way of appropriate proceedings.

This writ petition is allowed in the above terms.

ILR (2013) II DELHI 799
CRL.REV.P.

AAKASH JUVENILE THROUGH HIS FATHER MALKHAN SINGH **.....PETITIONER**

VERSUS

NCT OF DELHI & ANR. **.....RESPONDENTS**

(G.P. MITTAL, J.)

CRL. REV. P. NO. : 510/2012 DATE OF DECISION: 03.01.2013

Juvenile Justice (Care and Protection of Children) Act, 2000 – Section 7A – Juvenile Justice (Care and Protection of Children) Rules, 2007 – Rule 12 – Scope of Application – Conduct of inquiry to determine age – Section 7A obliges the Court to make an inquiry and not an investigation or a trial under the Code of Criminal Procedure – Procedure as laid down under Rule 12 to be followed. HELD: As per Rule 12(3)(a), only three certificates are to be taken into consideration for purpose of determining juvenility – If Matriculation (or equivalent) certificate is not available, only then the date of birth certificate from the school other than the play school first attended is to be seen, and if that too is not available, then the birth certificate given by Corporation or Municipal Authority or a Panchayat is to be seen – Only in cases where these documents or certificates are found to be manipulated or fabricated should the court or the JJB or the Committee need to go for medical report for age determination. Petitioner held to be juvenile by the Juvenile Justice Board – order reserved by the Sessions Court – Held: Petitioner's date of birth certificate issued by the school first attended was an undisputed document – No need for JJB to look into the genuineness of the certificate issued by Municipal Corporation – ASJ committed an error of law in relying on the opinion of Medical Board since, precedence had to be given to the date of birth certificate as per Rule 12(3)(a).

[Lo Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Ravinder Narayan with Mr. Mukul Kumar Gupta, Advocates.

FOR THE RESPONDENTS: Ms. Rajdipa Behura, APP for the State.

CASE REFFERED TO:

1. *Ashwani Kumar Saxena* vs. *State of M.P.,* (2012) 9 SCC 750.

RESULT: Petition allowed.

G.P. MITTAL, J. (ORAL)

1. By way of this Revision Petition, the Petitioner Aakash takes exception to the order dated 24.08.2012 passed by the learned Additional Sessions Judge (ASJ), Dwarka whereby the order dated 31.03.2012 passed by the Juvenile Justice Board (JJB) holding the Petitioner Aakash to be a juvenile was reversed and the Petitioner was held not to be a juvenile.

2. FIR No.63/2011 under Section 363/366/376(2)(f)/308 IPC, Police Station Sagarpur was registered against the Petitioner. The Petitioner was declared to be a juvenile by an order dated 08.04.2011, while the case was at the stage of defence's evidence. The order dated 08.04.2011 was

assailed in an Appeal before the learned ASJ. By an order dated 10.10.2011 the matter was remanded to the JJB with the direction to conduct a fresh inquiry into the age and date of birth of the Petitioner. The JJB conducted a fresh inquiry to determine the question of Petitioner's juvenility and held that his date of birth was to be taken as 05.04.1995. Consequently, on the date of commission of the offence the Petitioner was held to be 15 years 11 months and 4 days and thus, a juvenile under the Juvenile Justice (Care and Protection of Children) Act 2000 (the Act of 2000).

3. The Complainant, that is, the Prosecutrix through her natural guardian successfully assailed the order dated 09.04.2012 passed by the JJB. While reversing the order dated 31.03.2012, the learned ASJ was swayed by the fact that the date of birth, that is, 05.04.1995 mentioned in the MCD Primary School, Dabri at the time of the admission was only by approximation on the basis of the Affidavit Ex.CW-1/1 sworn in by the Petitioner's father Malkhan Singh. Thus, the learned ASJ preferred the ossification test according to which the Petitioner was more than 22 years on the date of commission of the offence. Paras 9 to 12 of the impugned order are extracted hereunder:-

> "9. In the instant case, it is not disputed that the respondent No.2 had sought admission for the first time, in MCD Primary School, Dabri, in the records of which his date of birth has been mentioned as 05.04.1995 vide Ex. CW1/A. However, it is to be noted that the father of the respondent No.2 had not produced any documentary proof regarding the date of birth of respondent No.2 in the aforesaid school. The school had recorded the aforesaid date of birth of respondent No.2 merely on the basis of an affidavit sworn by the father of respondent No.2 (Ex. CW1/C) which also is un-attested. Therefore, it is manifests that there was no reliable and authentic document produced before the school authorities regarding date of birth of respondent No.2 and his date of birth has been recorded as 05.04.1995 merely on the basis of the representation of his father and un-attested affidavit (shapathpatra) filed by him. For these reasons, the date of birth of respondent No.2 mentioned in his school records cannot be taken to be true and correct."
>
> 10. On the contrary, as per the report submitted by the Medical Board, which conducted the ossification test upon the respondent

No.2, his age on the date of commission of offence comes to between 21 to 24 years. As noted herein above, the doctors who conducted the ossification test of respondent No.2 have been examined before the Board. They have been cross examined in detail and nothing contrary has come out in their cross examination. CW-2 Dr. Sameer Dhari, SR Dental Department, DDU Hospital had conducted the clinical dental examination of respondent No.2 and according to him, he had 32 permanent teeth in his mouth. He further stated that the third molar had erupted in all corners and that the third molar does not erupt before the age of 17 years. Doctor Sameer Raghuvanshi who had done radiological examination of respondent No.2 has been examined as CW-3 and as per his estimation, the age of respondent No.2 as on date of commission of offence would be more than 22 years and less than 25 years. During his cross examination, he deposed that there was no effect of physical exercise like push up, bench press and sit ups in fusion process of bones and there was also no effect of geographical distribution in fusion process of bones. According to him, the racial background of the person upon his hereditary traits, has no effect on the fusion process.

11. Dr. Sunil Kakkar, who was the Chairman of the Medical Board, deposed that as per the medical, dental and radiological examination of respondent No.2, his age would be between 22 to 25 years as on the date of his examination i.e. 23.01.2012 which means that his age on the date of commission of offence would be between 21 to 24 years. He further deposed that he had assessed the age of the respondent No.2 on the basis of fusion of medial end of clavicle and incomplete fusion of the sacrum. According to him, if the clavicle was not completely fused, the age would be assessed as 20 to 22 years. He also deposed that geographical factor, food, certain medical disorder can affect the fusion. He admitted that in the present case, no such, disorder was mentioned.

12. The father of the respondent No.2 has been examined as JW-1 and he deposed that he was married in February, 1991 and the respondent No.2 was born in village Habibpur in District Bulandshahar on 05.04.1995. He further deposed that at that

time, he had not obtained the birth certificate from the village Panchayat regarding the birth of respondent No.2."

4. In **Ashwani Kumar Saxena v. State of M.P.** (2012) 9 SCC 750, the Hon'ble Supreme Court deprecated the practice of converting an inquiry as envisaged under Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (Act of 2000) to a full-fledged trial under the Code of Criminal Procedure. The Supreme Court explained the scope of 7A of the Act of 2000 and Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (Rules of 2007). Paras 24 to 43 of the report is extracted hereunder:-

"24. We may, however, point out that none of the abovementioned judgments referred to earlier had examined the scope, meaning and content of Section 7-A of the Act, Rule 12 of the 2007 Rules and the nature of the inquiry contemplated in those provisions. For easy reference, let us extract Section 7-A of the Act and Rule 12 of the 2007 Rules:

"7-A. Procedure to be followed when claim of juvenility is raised before any court. - (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an enquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be: Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the Rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect."

(emphasis supplied)

"12. Procedure to be followed in determination of age. - (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining -

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii),

(iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these Rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these Rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this Rule. (6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

(emphasis added)

25 Section 7-A, obliges the court only to make an inquiry, not an investigation or a trial, an inquiry not under the Code of Criminal Procedure, but under the JJ Act. The criminal courts, Juvenile Justice Board, committees, etc. we have noticed, proceed as if they are conducting a trial, inquiry, enquiry or investigation as per the Code. The statute requires the court or the Board only to make an "inquiry" and in what manner that inquiry has to be conducted is provided in the JJ Rules. Few of the expressions used in Section 7-A and Rule 12 are of considerable importance and a reference to them is necessary to understand the true scope and content of those provisions. Section 7-A has used the expressions "court shall make an inquiry", "take such evidence as may be necessary" and "but not an affidavit". The Court or the Board can accept as evidence something more than an affidavit

i.e. the Court or the Board can accept documents, certificates, etc. as evidence, need not be oral evidence.

26. Rule 12 which has to be read along with Section 7-A has also used certain expressions which are also to be borne in mind. Rule 12(2) uses the expression "prima facie" and "on the basis of physical appearance" or "documents, if available". Rule 12(3) uses the expression "by seeking evidence by obtaining". These expressions in our view re-emphasise the fact that what is contemplated in Section 7-A and Rule 12 is only an inquiry. Further, the age determination inquiry has to be completed and age be determined within thirty days from the date of making the application; which is also an indication of the manner in which the inquiry has to be conducted and completed. The word "inquiry" has not been defined under the JJ Act, but Section 2(y) of the JJ Act says that all words and expressions used and not defined in the JJ Act but defined in the Code of Criminal Procedure, 1973 (2 of 1974), shall have the meanings respectively assigned to them in that Code.

27. Let us now examine the meaning of the words "inquiry", "enquiry", "investigation" and "trial" as we see in the Code of Criminal Procedure and their several meanings attributed to those expressions. "Inquiry" as defined in Section 2(g) CrPC reads as follows:

"2. (g) 'inquiry' means every inquiry, other than a trial, conducted under this Code by a Magistrate or court;" The word "enquiry" is not defined under the Code of Criminal Procedure which is an act of asking for information and also consideration of some evidence, may be documentary. "Investigation" as defined in Section 2(h) CrPC reads as follows:

"2. (h) 'investigation' includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf;"

The expression "trial" has not been defined in the Code of Criminal Procedure but must be understood in the light of the expressions "inquiry" or "investigation" as contained in Sections 2(g) and

2(h) of the Code of Criminal Procedure.

28. The expression "trial" has been generally understood as the examination by court of issues of fact and law in a case for the purpose of rendering the judgment relating to some offences committed. We find in very many cases that the court/the Juvenile Justice Board while determining the claim of juvenility forget that what they are expected to do is not to conduct an inquiry under Section 2(g) of the Code of Criminal Procedure, but an inquiry under the JJ Act, following the procedure laid down under Rule 12 and not following the procedure laid down under the Code.

29. The Code lays down the procedure to be followed in every investigation, inquiry or trial for every offence, whether under the Penal Code or under other penal laws. The Code makes provisions for not only investigation, inquiry into or trial for offences but also inquiries into certain specific matters. The procedure laid down for inquiring into the specific matters under the Code naturally cannot be applied in inquiring into other matters like the claim of juvenility under Section 7-A read with Rule 12 of the 2007 Rules. In other words, the law regarding the procedure to be followed in such inquiry must be found in the enactment conferring jurisdiction to hold the inquiry.

30. Consequently, the procedure to be followed under the JJ Act in conducting an inquiry is the procedure laid down in that statute itself i.e. Rule 12 of the 2007 Rules. We cannot import other procedures laid down in the Code of Criminal Procedure or any other enactment while making an inquiry with regard to the juvenility of a person, when the claim of juvenility is raised before the court exercising powers under Section 7-A of the Act. In many of the cases, we have come across, it is seen that the criminal courts are still having the hangover of the procedure of trial or inquiry under the Code as if they are trying an offence under the penal laws forgetting the fact that the specific procedure has been laid down in Section 7-A read with Rule 12.

31. We also remind all courts/Juvenile Justice Boards and the Committees functioning under the Act that a duty is cast on them to seek evidence by obtaining the certificate, etc. mentioned in Rules 12(3)(a)(i) to (iii). The courts in such situations act as

a parens patriae because they have a kind of guardianship over minors who from their legal disability stand in need of protection.

32. "Age determination inquiry" contemplated under Section 7-A of the Act read with Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court needs to obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court needs to obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the abovementioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.

33. Once the court, following the abovementioned procedures, passes an order, that order shall be the conclusive proof of the age as regards such child or juvenile in conflict with law. It has been made clear in sub-rule (5) of Rule 12 that no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof after referring to sub-rule (3) of Rule 12. Further, Section 49 of the JJ Act also draws a presumption of the age of the juvenility on its determination.

34. Age determination inquiry contemplated under the JJ Act and the 2007 Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion, etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a corporation or a municipal authority or a panchayat may not be correct. But court, Juvenile Justice Board or a committee functioning under the JJ Act is not expected to conduct such a roving enquiry and

to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the court, the Juvenile Justice Board or the committee need to go for medical report for age determination.

35. XXXXXXXXXX

36. XXXXXXXXXX

37. XXXXXXXXXX

38. XXXXXXXXXX

39. XXXXXXXXXX

40. XXXXXXXXXX

41. This Court in **Babloo Pasi v. State of Jharkhand** [(2008) 13 SCC 133 : (2009) 3 SCC (Cri) 266] held, in a case where the accused had failed to produce evidence/certificate in support of his claim, medical evidence can be called for. The Court held that:

"22. ... The medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence." This Court set aside the order of the High Court and remitted the matter to the Chief Judicial Magistrate heading the Board to redetermine the age of the accused."

42. In **Shah Nawaz v. State of U.P.** (2011) 13 SCC 751 the Court while examining the scope of Rule 12, has reiterated that medical opinion from the Medical Board should be sought only when matriculation certificate or equivalent certificate or the date of birth certificate from the school first attended or any birth certificate issued by a corporation or a municipal authority or a panchayat or municipality is not available. The Court had held that entry related to date of birth entered in the marksheet is a valid evidence for determining the age of the accused person so also the school leaving certificate for determining the age of the appellant.

43. We are of the view that admission register in the school in which the candidate first attended is a relevant piece of evidence of the date of birth. The reasoning that the parents could have entered a wrong date of birth in the admission register hence not a correct date of birth is equal to thinking that parents would do so in anticipation that child would commit a crime in future and, in that situation, they could successfully raise a claim of juvenility."

5. Thus as per Rule 12 (3)(a) of the Rules 2007 only three certificates are to be taken into consideration for the purpose of determining the juvenility. First of all the Matriculation or equivalent certificate, if the same is not available the date of birth certificate from the school other than a play school first attended, and if the same is also not available then the birth certificate given by a Corporation or a Municipal Authority or a *Panchayat*.

6. In the instant case much emphasis has been laid on a certificate issued by the Municipal Corporation (although its genuineness was not established). In fact, order dated 31.03.2012 passed by the JJB makes a specific reference to the said certificate. Relevant portion of the order dated 31.03.2012 passed by the JJB is extracted hereunder:-

"The IO was directed vide order dated 18.10.11 to get the birth certificate which had been obtained by the complainant verified by the concerned authority and report was received that record of birth certificate was not available in the West Zone. The Sub-Registrar MCD Births and Deaths from West Zone was summoned with the record and when he appeared before the Board on 24.11.11 he stated that the register containing the entries after no.2600 was not available and not traceable despite efforts. He was directed to conduct an enquiry and to file a report. Thereafter, the Sub-Registrar submitted that report of enquiry regarding the missing record pertaining to the birth certificate and alongwith that statement of two persons Shri Bagga Singh Maan and Shir Harvinder Pal Singh Kohli who were posted at the relevant time had also been recorded and they had stated that the birth certificate did not bear the signatures nor the code number which was necessary and that probably it was a fake certificate...."

7. There was no dispute about date of birth certificate issued by the School first attended as given in Rule 12 (3)(a) (ii) of the Rules 2007.

The Petitioner's date of birth at the time of admission in the year 2000 was mentioned as 05.04.1995. Of course, no document was produced by the Petitioner's father in support of the said date of birth except the Affidavit but that would not be of any significance in view of the provisions of Rule 12 of the Rules 2007. Thus, even if, the certificate issued by the Municipal Corporation is found to be genuine although it was held to be fake by the JJB, the same could not be looked into for the purpose of determining the issue of juvenility as the precedent has to be given to the date of birth certificate issued by the School first attended. The opinion of the Medical Board is relevant only when the certificates as envisaged in Rule 12 (3)(a) are not available.

8. The learned ASJ committed an error of law in relying on the ossification test in preference to the date of birth certificate from the school first attended.

9. The Petition has to succeed. The impugned order is set aside and the order passed by the JJB is restored. The Petitioner Aakash is declared to be juvenile.

10. The Petition is allowed in above terms.

11. Pending Application also stands disposed of.

ILR (2013) II DELHI 811
W.P. (CRL)

HARMINDER SINGH & ORS. .....PETITIONERS

VERSUS

STATE OF DELHI & ORS. .....RESPONDENTS

(G.P. MITTAL, J.)

W.P.(CRL.) NO. : 1748/2012 DATE OF DECISION: 15.01.2013

Constitution of India, 1950 – Article 226 – Petitioners seeking transfer of investigation of FIR – not expecting fair and proper investigation – allegations & counter allegations by the petitioner no. 1 and the police officials of concerned police station – whether investigation requires to be transferred? Held: It would be fair and instill confidence to both the parties and the public that the investigation is done by the Crime Branch of Delhi Police.

In the instant case, the Petitioners do not want investigation by a particular agency. There are allegations and counter allegations by the first Petitioner on the one hand by the police of PS Bharat Nagar on the other. According to the IO, Petitioner No. 1 was a party to the escape of Chanshivroop Singh. He was accompanying him in hotel Aira Xing, Pahar Ganj, Delhi and had accompanied the earlier said Chanshivroop Singh to the airport on the night intervening 27/28 November 2012 when he left India. **(Para 8)**

Therefore, without doubting the fairness of investigation carried out by the IO under the supervision of the senior officers of the North-West District, it would be fair and instill confidence to both the parties and the public that the investigation is done by the Crime Branch of Delhi Police. **(Para 9)**

[Lo Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Viraj Datar, Advocate with Mr. Surinder Singh, Advocate.

FOR THE RESPONDENT : Mr. Rajesh Mahajan, ASC for the State with Ms. Richa Oberio, Advocate. Mr. S. Saravanan, Addl. DCP/NW. Inspector Dinesh Kumar, PS Bharat Nagar.

CASES REFERRED TO:

1. *Vinay Tyagi v. Irshad Ali @ Deepak & Ors.* (Criminal Appeal Nos. 2040-2041/2012 decided by Supreme Court on 13.12.2012).

2. *State of West Bengal & Ors.* vs. *Committee for Protection of Democratic Rights, West Bengal & Ors.,* (2010) 3 SCC 571.

RESULT: Petition allowed.

G.P. MITTAL, J. (ORAL)

1. By virtue of this Petition under Article 226 of the Constitution of India, the Petitioners seek protection of their life and liberty and transfer of the investigation of FIR No.267 dated 06.12.2012 registered in Police Station Bharat Nagar. This Court by an order dated 14.12.2012 directed the police to summon the Petitioners for investigation in the manner as indicated in the order. The learned counsel for the Petitioners states that in view of the directions given to the police, the Petitioners do not press their prayer 'A' in the Petition. However, the Petitioners, particularly, Petitioner No.1 does not expect fair and proper investigation of FIR No.267/2012 by the police of PS Bharat Nagar and the local police of North-West District and, therefore, prays for transfer of investigation either to the CBI or to some other unit of the Delhi Police.

2. Before proceeding further, it would be appropriate to have an insight into the allegations/complaint made in the FIR No.267/2012.

3. On 04.12.2012 a report was allegedly made by Petitioner No.1 to DCP North-West to the effect that his son Chanshivroop Singh was an accused in Gitika suicide case. The Petitioner No.1 along with his son used to visit the Rohini Court in connection with the said case. On 2/3 occasions some unknown persons met him and his son there and threatened to shoot them. Some lawyers also met them and falsely prompted them to make a complaint to the Judge (dealing with the suicide case) that the police is threatening them to implicate him and his family members in other cases. He, further informed the police that his son got afraid of the threats and disappeared to some unknown place. Petitioner No.1 is further alleged to have made a complaint that persons at the behest of Govind (brother of Gopal Goel Kanda) were pressurizing him to go to the media and make a statement against the police.

4. According to the Petitioner No.1 he did not lodge the FIR No.267/2012 with the Police Station Bharat Nagar voluntarily. This FIR was lodged by him as dictated and at the instance of the police of PS Bharat Nagar.

5. The allegations leveled in the Petition and the fact that FIR No.267/2012 was got lodged from Petitioner No.1 by the police of PS Bharat Nagar are controverted by the IO. It is stated that infact on 31.10.2012 Chanshivroop Singh filed an application under Section 306 Cr.P.C. for grant of pardon in the Court and a statement under Section 164 Cr.P.C. was recorded on 07.11.2012 by Mr. Vishal Singh, learned Metropolitan Magistrate. The statement was again recorded on 27.11.2012. The status report filed by the police is extracted hereunder:-

> "During investigation of the case the role of Chanshivroop Singh son of Harminder Singh, R/o House No.2030, Sector-71 Mohali (Punjab) came to light. As per the charge sheet filed against Gopal Goyal Kanda & Aruna Chadha the role attributed to Chanshivroop Singh is as under:
>
> "In pursuance of the criminal conspiracy, Gopal Kanda and Aruna Chadha appointed one Chanshivroop Singh as Assistant HR Manager in MDLR Group with the sole objective of ensuring that Geetika remained under the control of Kanda. At the instance of Gopal Kanda and Aruna Chadha Chanshivroop went to Dubai to ensure that Geetika is removed from her job with the Emirates Airlines. He was sent to Dubai under the garb of investigating the issue of forged NOC submitted by Geetika which she had submitted to Emirates Airlines, believing it to be a genuine document and thereby make efforts to ensure her removal from Emirates Airlines. On reaching Dubai, he contacted the HR Department of Emirates but he could not get any favourable response from them.
>
> As per revelations made by Chanshivroop Singh, when he informed Gopal Goyal Kanda and Aruna Chadha of this fact, both the accused sent him a complaint from MDLR Airlines addressed to PS Civil Lines, Gurgaon. Chanshivroop Singh received this e-mail from the e-mail ID of ramkumar@gmail.com with an attachment containing a copy of the complaint against Geetika, purportedly given by MDLR authorities to PS Civil Lines, Gurgaon. He produced this document to the HR Department of Emirates Airlines and Gopal Goyal Kanda also talked to the Emirates authorities. Later, Chanshivroop Singh met Mr. Shirish Thorat, who was working in Emirates in the capacity of head of

investigation and security group. Chanshivroop Singh handed over one letter to him which was issued by MDLR on 03/08/10 by which he was authorized to investigate the said matter. He also gave the copy of a complaint by MDLR Group purportedly lodged by them against Geetika to the SHO, P.S. Civil Lines, Gurgaon, Haryana alleging therein commission of fraud and creation of fake and false experience certificates by Ms. Geetika Sharma as well as taking away some documents and laptop of the company."

Chanshivroop Singh was arrested in the present FIR No.178/2012 and was released on police bail on 30.10.2012. His father/Petitioner stood the surety for Chanshivroop Singh. The copy of the bail bond dated 30.10.2012 is annexed as Annexure R-1.

On 31.10.2012 Chanshivroop Singh filed an application U/s 306 Cr.P.C. for grant of pardon in the court of Sh. D.K. Jangala ACMM Delhi. His statement U/s 164 Cr.P.C. was recorded on 7.11.2012 in the Court of Sh. Vishal Singh, MM Rohini Courts, Delhi. The statement of accused Chanshivroop Singh U/s 164 Cr.P.C. was again recorded on 27.11.2012 in the court of Sh. Vishal Singh, MM Rohni. The hearing on the application of tender of pardon by accused Chanshivroop Singh was fixed for 30.11.2012, but on that day accused Chanshivroop Singh did not turn up in Court. On 01.12.2012 the surety of Chanshivroop Singh and the Petitioner herein i.e. his father Harminder Singh s/o Sardar Tarlochan Singh appeared in the Magistrates Court and submitted that he was not aware about the whereabouts of his son. He stated that he had last contacted his son on 27.11.2012 and since then he was having no contact with him. Copy of the order dated 01.12.2012 is annexed herewith as Annexure R-2.

On 04.12.2012 the father/Petitioner Sh. Harminder Singh came to the office of the DCP/North West District and lodged a complaint alleging that some unknown persons are threatening him and his son and directing them to meet Govind Goyal S/o Murlidhar Goyal who is younger brother of Gopal Goyal Kanda. On the basis of the above complaint a case FIR No.267/2012 U/s 195A/341/506 IPC was registered in P.S. Bharat Nagar and taken up for the investigation. Copy of FIR No.267/2012 U/s

195A/341/506 IPC, PS Bharat Nagar is annexed herewith as Annexure R-3.

During investigation it was revealed that Chanshivroop Singh had left India on the intervening night of 27/28 November 2012 for USA via Abu Dhabi by Flight number EY-211 of Etihad Airlines from Delhi on business visa. Copy of the immigration document and the ticket of the accused Chanshivroop Singh are annexed herewith as Annexure R-4 (Colly).

When these facts were brought to the notice of the Court of Ld. ACMM Rohini, the proceeding u/s 306 Cr.P.C. initiated on the application of accused Chanshivroop Singh were dropped on 13.12.2012 by the Hon'ble court of Sh. D.K. Jangla, ACMM. Copy of the said order dated 13.12.2012 is annexed herewith as Annexure R-5.

Inquiry into the disappearance of the accused Chanshivroop Singh, has revealed that during the intervening night of 27-28 of November, 2012, the Petitioner Harminder Singh stayed in Hotel Aira Xing, Pahar Ganj, Delhi along with his son Chanshivroop Singh and his brother-in-law Hardevinder Singh. Two friends of Chanshivroop Singh namely, Sudhanshu Karol and Avinash Rawat S/o Gajender Singh R/o H.No.422 Sec.37A Chandigarh also stayed in the same hotel with them. Their movement was recorded in the CCTV camera installed in the hotel. The recording of CCTV footage was obtained and studied. It revealed that on the intervening night of 27-28 of November, 2012 they left Hotel Aira Xing for Airport at around midnight. The surety/Petitioner and the brother in law of Chanshivroop had ensured that the immigration clearance was done. After seeing off his son and his friend Sudhanshu Karol they came back to the same hotel. His brother in law left the hotel early morning hours and the surety i.e. the father of the accused Chanshivroop Singh left for Mohali, Punjab at around 11.00 AM on 28.11.2012 along with Avinash Rawat. Copy of the 161 Cr.P.C. statement of Avinash Rawat dated 10.12.2012 has been annexed herewith as Annexure R-6. The CDR details of the surety Harminder Singh and other family members show that the family members of the accused Chanshivroop Singh and Petitioner are in constant touch with

one Vishnu Tatiya who is a relative/close aide of accused Gopal Goyal Kanda and head of the purchase/sale department of MDLR Group.

Details that have emerged during the investigation reveal that the Petitioner Sh. Harminder Singh made a false statement on 01.12.2012 before the court of Ld. ACMM, Sh. D.K. Jangala that, he had no contact with his son/accused Chanshivroop Singh, but the Petitioner Harminder Singh went along with his son and son's friend to the Airport and facilitated them to flee from India. Moreover, on the analysis of CDRs, the Petitioner Harminder Singh had contacted Vishnu Tatiya on 29.11.2012 i.e. the next day of the journey of accused Chanshivroop Singh. It is further submitted that Petitioner Harminder Singh never been called to Police Station till the disappearance of his son/accused Chanshivroop Singh on 27.11.2012. After disappearance of his son Petitioner came himself to attend the court to tell the whereabouts of his son being a surety of his son. Only after absconding of his son from India he had been issued a notice on 01.12.2012 by the undersigned who directed him to produce accused Chanshivroop Singh within 10 days as he is the surety of Chanshivroop Singh. The allegation made by the Petitioner that passport of the accused Chanshivroop Singh son of Petitioner has been confiscated by the Respondent is denied. The allegation about making calls to the Petitioner from the phone no.8750870262 on 05.12.2012 to threaten them is wrong and denied as a call has been made only to confirm about whether Chanshivroop Singh was coming to attend the court date i.e. 06.12.2012 or not.

Further Chanshivroop Singh is liable to be proceeded against as an accused and the acts of Chanshivroop and the Petitioner show the overarching influence of the co-accused Gopal Goyal Kanda and Aruna Chadha, who using their resources and associates such as Govind Goyal and Vishnu Tatiya have ensured that Chanshivroop Singh is not available for investigation and absconded. The present petition is an afterthought and filed as an abuse of process of the Court.

It is further submitted that the Petitioner and his family members were never called in the Police Station, the Petitioner is leveling

false allegations against the police.

Keeping in view of the above said facts and the circumstances it is requested that the petition is without merit and deserves to be dismissed."

6. It is urged by the learned counsel for the Petitioners that in view of the status report, it would not be fair that the investigation into FIR No.267/2012 is conducted by the police of PS Bharat Nagar. On the other hand, Mr. Rajesh Mahajan, learned Additional Standing Counsel for the State submits that transfer of investigation indirectly casts aspersion on the working of the Investigating Officer and, therefore, the Court should be slow in transferring the investigation. The learned counsel places reliance on **State of West Bengal & Ors. v. Committee for Protection of Democratic Rights, West Bengal & Ors.,** (2010) 3 SCC 571 and **Vinay Tyagi v. Irshad Ali @ Deepak & Ors.,** Criminal Appeal Nos.2040-2041/2012 decided by the Supreme Court on 13.12.2012.

7. The authorities cited are not attracted to the facts of the instant case. In *Committee for Protection of Democratic Rights* the Supreme Court dealt with the power of the High Court to direct investigation by the CBI. The Supreme Court held that the power of the High Court under Article 226 of the Constitution of India cannot be curtailed or diluted by Section 6 of the Delhi Special Police Establishment Act, 1946. It held that the High Court does have the power to order investigation in appropriate cases but the power must be used sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility to and instill confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Similarly, in Vinay Tyagi the Supreme Court held that an accused cannot have a choice to have investigation carried by a particular agency.

8. In the instant case, the Petitioners do not want investigation by a particular agency. There are allegations and counter allegations by the first Petitioner on the one hand and by the police of PS Bharat Nagar on the other. According to the IO, Petitioner No.1 was a party to the escape of Chanshivroop Singh. He was accompanying him in hotel Aira Xing, Pahar Ganj, Delhi and had accompanied the earlier said Chanshivroop Singh to the airport on the night intervening 27/28 November 2012 when he left India.

9. Therefore, without doubting the fairness of investigation carried out by the IO under the supervision of the senior officers of the North-West District, it would be fair and instill confidence to both the parties and the public that the investigation is done by the Crime Branch of Delhi Police.

10. Accordingly, I direct that investigation of FIR No.267/2012, dated 06.12.2012 registered under Section 195A/341/506 IPC at Police Station Bharat Nagar shall be carried out by an officer not below the rank of Assistant Commissioner of Police in the Crime Branch of Delhi Police. The investigation shall be supervised by an officer not below the rank of Additional Commissioner of Police.

11. The Petition is disposed of as directed above.

ILR (2013) II DELHI 819
CRL.REV. P.

GEE PEE FOODS PVT. LTD. & ORS. ....PETITIONERS

VERSUS

DIGVIJAY SINGH ....RESPONDENT

(G.P. MITTAL, J.)

CRL. REV. P. NO. : 65/2012 DATE OF DECISION: 15.01.2013

Negotiable Instruments Act, 1881 – Section 138 – Territorial Jurisdiction – Whether a complaint can be presented at a place where the complainant deposited the cheque in his bank? HELD: No. Notice from any place does not confer territorial jurisdiction. To confer jurisdiction, one or the other act which constitute the offence must be done within the jurisdiction of the court where the complaint under Section 138 of the Act is filed. In the instant case all the acts, i.e. the handing over of the cheque to the payee, i.e. the respondent was at Kolkata; the cheque was drawn at IDBI Bank having its branch at Kolkata; the cheque was dishonoured by the earlier said branch at Kolkata which was the drawee of the cheque. The drawer of the cheque inspite of the receipt of notice at Kolkata failed to make the payment within the stipulated period. HELD: Complaint not maintainable at Delhi.

Important Issue Involved: "to confer jurisdiction on a court for an offence of the dishonour of the cheque, one or the other act which constitutes the offence must be done within the jurisdiction of the court where the complaint under Section 138 of the Act is filed.

[Lo Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Ranjeet Kumar Jaiswal with Mr. Sheo Kumar Singh, Advocates.

FOR THE RESPONDENTS : Respondent in person.

CASES REFERRED TO:

1. *Ramaswamy S. Iyengar* vs. *The State (NCT of Delhi) & Anr.,* (Crl.M.C. 4140/2009 decided on 16.3.2011).
2. *Grandlay Electricals (India)* vs. *ESS Enterprises & Ors.*(CRP No. 313/2011 decided on 18.7.2011).
3. *Dushyant Verma* vs. *Tek Chand* (Crl.M.C. 3531/2010 decided on 30.8.2011).
4. *Religare Finvest Ltd.* vs. *State & Anr.,* (2010) DLT 185.
5. *Mahika Enterprises & Anr.* vs. *State (NCT of Delhi) & Anr.,* 173 (2010) DLT 361.
6. *Online IT Shoppe India Pvt. Ltd. & Ors.* vs. *State & Anr.* (Crl.M.C. 2695/2009 decided on 20.11.2009).
7. *ICICI Bank Limited* vs. *Subhash Chand Bansal & Ors.* 160 (2009) DLT 379.
8. *M/s. Harnam Electronics (P) Ltd. & Anr.* vs. *M/s. National*

Panasonic India Ltd., 2009 (1) SCC 720.

9. *Shroff Publishers & Distributors Pvt. Ltd.* vs. *Springer India Pvt. Ltd.,* 143 (2007) DLT 661.

10. *Shri Ishar Alloy Steels Ltd.* vs. *Jayaswals Neco Ltd.* (2001) 3 SCC 609.

RESULT: Petition allowed.

G.P. MITTAL, J. (ORAL)

1. The question that falls for determination in this Revision Petition is, *"whether a complaint under Section 138 of the Negotiable Instruments Act, 1881 (the Act) can be presented at a place where the Complainant deposited the cheque in his Bank (i.e. at the place where the collecting Bank is situated)."*

2. A complaint under Section 138 read with Section 142 of the Act was presented against the Petitioners on the averments that on 01.03.2009, the Respondent was appointed as Chief Executive Officer (CEO) with the First Petitioner on a monthly salary of Rs. 75,000/- to establish its operations in Northern India. In discharge of the liability to pay the salary, the Petitioners handed over a cheque No.082471 dated 29.04.2009 for Rs. 74,800/- drawn on IDBI Bank, 44, Shakespeare Sarani Branch, Kolkata-700 017 to the Respondent. The said cheque when presented with HDFC Bank, New Delhi stood dishonoured with remarks of 'insufficient funds'. In the complaint it was alleged that bouncing of the said cheque was brought to the notice of Petitioners No.2 and 3 and on their instructions, the Respondent presented the cheque again but it was again dishonoured on presentation with the remarks "payment stopped by drawer". When the factum of bouncing of the said cheque again was brought to the notice of Petitioners No.2 and 3 (accused No.2 and 3 before the learned Metropolitan Magistrate) they again apologized and assured to make arrangement for encashment of the cheque. The cheque was again dishonoured when presented on 18.08.2009. A legal notice through the lawyer at New Delhi was dispatched to the Petitioners and on failure to make the payment within the statutory period as laid down under Section 138 of the Act, a complaint under Section 138 read with Section 142 of the Act was filed against the Petitioners.

3. After recording pre summoning evidence, the Petitioners were summoned for the offence punishable under Section 138 of the Act.

They moved a Petition before the High Court for quashing of the complaint on the ground that the Delhi Courts had no territorial jurisdiction to try the complaint as no part of the cause of action took place within the jurisdiction of NCT of Delhi. It is stated that the said Petition was withdrawn with liberty to approach the Trial Court. Thus, the Petitioners filed an application under Section 177 of the Code of Criminal Procedure before the Court of learned Metropolitan Magistrate ('MM'). The following averments were made in the application:-

"(a) Applicants/accused are having their residence and office in Kolkata in the State of West Bengal.

(b) Complainant has been allegedly appointed as a CEO of the accused No.1 – Company in Kolkata.

(c) As per para 2 of the complaint, the cheque issued to the complainant which got allegedly bounced was drawn on IDBI Bank, 44, Shakespeare Sarani, Kolkata.

(d) As per para 3 of the complaint, the aforesaid cheque was re-presented to the applicants' banks at Kolkata which also stood allegedly returned.

(e) As per para 5 of the compliant, a legal notice was allegedly served upon the applicants/accused in Kolkata.

(f) The entire cause of action pertaining to the question of employment of the complainant as well as issuance of cheque and service of legal notice, if any, arose in Kolkata and no part of the same arose in Delhi (as per the averments of the complainant in the complaint itself). As such, this Ld. Court does not possess the territorial jurisdiction to try and proceed with the entire complaint."

4. It was stated that the legal notice allegedly served upon the Petitioners from Delhi will not confer jurisdiction of Delhi Courts.

5. The application moved under Section 177 Cr.P.C. was contested by the Respondent. However, the factum of the cheque in question having not been delivered to the Respondent at Kolkata being drawn on IDBI Bank 44, Shakespeare Sarani Branch, Kolkata-700 017 was not disputed. It was asserted that since the Respondent presented the cheque to HDFC Bank at New Delhi branch for collection, part of cause of

action arose within the Union Territory of Delhi and thus, the Delhi Courts did have the jurisdiction.

6. The learned MM relying on a judgment of learned Single Judge of this Court in **Religare Finvest Ltd. v. State & Anr.** 173 (2010) DLT 185 opined that the place where the cheque was presented by the payee was one of the essential ingredients of Section 138 of the Act and thus, part of the cause of action arose within the territory of Delhi, consequently, the application was dismissed.

7. In the Revision Petition, it is stated that in fact the Respondent had worked with the First Petitioner only for one month. It was stated that the first cheque was dishonoured on presentation on the ground of insufficient funds but because of suspicious and unbecoming conduct of the Respondent, they had stopped payment of the cheque and when the Respondent approached the Petitioners, the amount of Rs. 74,800/- was deposited in the Respondent's account but, thereafter the Respondent maliciously presented the cheque. Obviously, these questions being disputed questions of facts are not to be gone into at this stage. What is to be seen is whether on the basis of the averments made in the complaint, whether some of the essential acts forming part of the offence or cause of action was done within the territory of Delhi so as to confer jurisdiction on Delhi Courts. The question of presentation of the cheque at a place other than the drawee Bank directly came up for consideration before a learned Single Judge of this Court in **Online IT Shoppe India Pvt. Ltd. & Ors. v. State & Anr.** Crl.MC No.2695/2009 decided on 20.11.2009 (V.K.Jain, J.). The learned Single Judge while relying on **Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd;** (2001) 3 SCC 609 observed that Shri Ishar Alloy had dealt with the issue of "the Bank" referred to in Clause (a) to the proviso to Section 138 of the Act as the drawee Bank on which the cheque is drawn and not all the banks where the cheque is presented for collection including the Bank of the payee, in whose favour the cheque is issued. In paras 8 and 9, the learned Single Judge held as under:-

> "8. As regards presentation of the cheque, the learned counsel for the petitioner has relied upon the decision of the Hon'ble Supreme Court in **Shri Ishar Alloy Steels Ltd. Vs. Jayaswals Neco Ltd;** (2001) 3 SCC 609. In this case the Hon'ble Supreme Court, inter-alia, held that "The bank" referred to in clause (a) to the proviso of Section 138 of the Act would mean the drawee bank on which the cheque is drawn and not all the banks where the cheque is presented for collection including the bank of the payee, in whose favour the cheque is issued."
>
> It was further observed that "the payee of the cheque has the option to present the cheque in any bank including the collecting bank where he has his account but to attract the criminal liability of the drawer of the cheque such collecting bank is obliged to present the cheque in the drawee or Payee bank on which the cheque is drawn within the period of six months from the date on which it is shown to have been issued."
>
> In para 10 of the judgment the Hon'ble Supreme Court further observed that "Sections 3, 72 and 138 of the Act would leave no doubt in our mind that the law mandates the cheque to be presented at the bank on which it is drawn if the drawer is to be held criminally liable."
>
> 9. The ratio of the above referred judgment of the Hon'ble Supreme Court is that a cheque is deemed to have been presented to the banker of the drawer irrespective of the fact whether it is deposited by the payee in his own bank. The banker of the payee, after receiving the cheque from him, is required to present it to the banker of the drawer and therefore if the cheque issued from a bank in Ernakulam is deposited in Delhi, the bank in which it is deposited in Delhi, is required to present it to the bank at Ernakulam, for the purpose of encashment. Therefore, it cannot be said that the cheques issued by the petitioners were presented in Delhi, despite the fact that the bank in which the respondent No. 2 had an account was in Delhi, the cheque shall be deemed to have been presented only to the bank at Ernakulam on which they were drawn. Therefore, deposit of cheques in Delhi would not confer jurisdiction of Delhi court to try this complaint."

8. Another Single Judge of this Court in **Mahika Enterprises & Anr. v. State (NCT of Delhi) & Anr.** 173 (2010) DLT 361 relied on the judgment of the Supreme Court in **Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd;** (2001) 3 SCC 609 and the judgment of this Court in **Shroff Publishers & Distributors Pvt. Ltd. v. Springer India Pvt. Ltd.** 143 (2007) DLT 661; **ICICI Bank Limited v. Subhash Chand Bansal & Ors.,** 160 (2009) DLT 379; and **Online IT Shoppe India**

Pvt. Ltd. & Ors. v. State & Anr. I (2010) DLT (Crl.) 110 and held that to attract the criminal liability of the drawer of the cheque, the collecting bank is obliged to present the cheque in the drawer's bank and the Courts where the collecting Bank is situated on this ground itself will not have jurisdiction to entertain the complaint. Para 12 of the report is extracted hereunder:-

> "12. In **Shroff publisher and Distributors Pvt. Ltd. vs. Springer India Pvt. Ltd.** 2008 Criminal Law Journal 1217, it has been held that the payee has an option to present the cheque in any bank including the collecting bank where he has his account, but to attract the criminal liability of the drawer of the cheque such collecting bank is obliged to present the cheque in the drawer's bank, on which cheque is drawn. In **Ishar Alloy Steel Ltd. vs. Jayaswals** NECO Ltd. 2001 II AD (S.C.) 330, Supreme Court held that "the bank" referred to in Clause (a) to the proviso to Section 138 of the Act means the drawee bank on which the cheque is drawn and not all banks where the cheque is presented for collection including the bank of the payee in whose favour the cheque is issued. In **ICICI Bank Ltd. vs. Subhash Chand Bansal & Ors.** 160 (2009) Delhi Law Times 379, this Court held that the court in whose territorial jurisdiction drawee bank is situated would have territorial jurisdiction to entertain the complaint in question. Similar view has been taken in Online IT Shopee India Pvt. Ltd.,and V.S. Thakur (reports cited supra).

9. Yet another learned Single Judge of the Court in **Ramaswamy S. Iyengar v. The State (NCT of Delhi) & Anr.** Crl.MC No.4140/2009 decided on 16.03.2011; **Grandlay Electricals (India) v. ESS ESS Enterprises & Ors.** CRP No.313/2011 decided on 18.07.2011; and **Dushyant Verma v. Tek Chand** Crl.MC No.3531/2010 decided on 30.08.2011 also relied on **Shri Ishar Alloy** (supra) and held that the place where the cheque is presented by the payee for collection by itself will not have any jurisdiction.

10. In Ramaswamy S. Iyengar, the learned Single Judge opined that the judgment passed by the learned Single Judge of this Court in Religare Finvest Ltd. would be of no avail to the Complainant in view of the judgment of the Supreme Court in **Shri Ishar Alloy and M/s. Harman Electronics (P) Ltd. & Anr. v. M/s. National Panasonic India Ltd.,** 2009 (1) SCC 720.

11. To confer jurisdiction on a Court for an offence of dishonour of the cheque, one or the other act which constitute the offence must be done within the jurisdiction of the Court where the complaint under Section 138 of the Act is filed. In the instant case all the acts, that is, the handing over of the cheque to the payee, that is, the Respondent, was at Kolkata; the cheque was drawn at IDBI Bank having its branch at Kolkata; the cheque was dishonoured by the earlier said branch at Kolkata which was the drawee of the cheque. The drawer of the cheque in spite of the receipt of notice at Kolkata failed to make the payment within the stipulated period.

12. It is no longer res integra that service of notice from any place, in the instant case Delhi, would not confer jurisdiction on Delhi Courts (See **M/s. Harman Electronics (P) Ltd. & Anr. v. M/s. National Panasonic India Ltd.,** 2009 (1) SCC 720.). Similarly, on the strength of the judgment of the Supreme Court in Shri Ishar Alloy, the presentation of the cheque for collection at HDFC Bank New Delhi would not confer jurisdiction on Delhi Courts.

13. The learned MM erred in holding that the Delhi Courts have jurisdiction to entertain the complaint under Section 138 of the Act.

14. The Revision Petition, therefore, has to succeed; the same is accordingly allowed. Consequently, the complaint stands dismissed on the ground that Delhi Courts did not have any territorial jurisdiction.

ILR (2013) II DELHI 827
W.P. (CRL.)

RAVI NIGAM **....PETITIONER**

VERSUS

THE STATE (NCT OF DELHI) **....RESPONDENT**

(G.P. MITTAL, J.)

W.P. (CRL.) NO. : 75/2013 & CRL.M.A. NO. : 457/2013 **DATE OF DECISION: 15.01.2013**

Code of Criminal Procedure, 1973—Section 482—Exercise of extraordinary power of High Court—Petitioner seeking quashing of FIR under Sections 506/34/380/448 IPC—Investigation not complete—Averments in the FIR prima facie constitute the offence—Allegations to be gone into during investigation—FIR cannot be quashed at this stage. HELD: The power of quashing of FIR should be exercised very sparingly with circumspection and in rare cases—The Court is not justified in embarking upon an enquiry as to the reliability, genuineness or otherwise of the allegations made in the FIR. The Court will not normally interfere with an investigation and will permit an inquiry into the alleged offence to be completed—The parameters laid down in *State of Haryana v. Ch. Bhajan Lal & Ors.* need to be satisfied—The averments made in the FIR cannot be said that do not constitute any offence or make out any case against the Petitioner—The Petitioner's defence and veracity of allegations made by the complaint is to be gone into by the police during the investigation—The FIR should not be quashed at this stage.

[Lo Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Chetan Sharma, Sr. Advocate with Mr. Aman Vachher and Mr. Ashutosh Dubey, Advocates.

FOR THE RESPONDENTS : Mr. Saleem Ahmed, ASC with Ms. Charu Dalal, APP for the State and ASI Bhupender, PS Hauz Qazi.

CASES REFERRED TO:

1. *State of Orissa & Ors.* vs. *Ujjal Kumar Burdhan,* (2012) 4 SCC 547.
2. *State of MP* vs. *Awadh Kishore Gupta,* (2004) 1 SCC 691.
3. *State of Haryana* vs. *Ch. Bhajan Lal & Ors.,* AIR 1992 SC 604.
4. *State of West Bengal* vs. *Swapan Kumar Guha,* (1982) 1 SCC 561.

RESULT: Petition dismissed

G.P. MITTAL, J. (ORAL)

CRL MA.458/2013 (Exemption)

Exemption allowed, subject to all just exceptions. The Application is allowed.

WRIT PET. (CRL.) 75/2013 & CRL MA.457/2013 (stay)

1. By virtue of this Writ Petition under Article 226 of the Constitution of India read with Section 482 of the Code of Criminal Procedure (Cr.P.C.), the Petitioner seeks quashing of FIR No.164/2012 dated 07.10.2012 under Section 506/34/380/448 IPC, registered in Police Station Hauz Qazi.

2. The FIR was lodged on the complaint made by one Abhinav Krishan Aggarwal alleging that his father Shri Gopal Krishan Aggarwal was inducted as a tenant in the property No.1923, Gali Leshwan, Mohalla Imli, Bazar Sitaram, Delhi-110006 sometime in the year 1974 and was in continuous possession thereof till the lodging of the report. Abhinav Kumar Aggarwal informed that his father had been running the business

of printing in the name and style of M/s. M.G. Printers & Stationery and was being assessed to income tax and sales tax. For some reasons the business could not be continued since the year 2007 and the property was locked. Valuable goods including some machinery and raw material was stored in the property. One Ravi Nigam (the Petitioner herein) had been extending threats to them to forcibly dispossess them from the property. On 07.10.2012 the complainant received a call from one person, namely, Munshi that his father's office had been demolished and the articles have been stolen. The complainant made a call to the PCR and then reached the PS and lodged the report stated above.

3. In the Petition, the Petitioner alleges that in fact property No.1922-1923 Gali Leshwan, Mohalla Imli, Bazar Sitaram, Delhi-110006 was owned by Anand Swaroop Goel, Prem Prakash Goel, Santosh Kumar Goel and M.D. Goel. The Petitioner purchased the property from them on the basis of a Agreement to Sell dated 22.08.2012 and an earnest money of Rs. 60 lacs was paid by way of different cheques/cash against receipt. The Petitioner claims that after receipt of earnest money, the peaceful and vacant possession of the property was given to the Petitioner in August, 2012. According to him (the Petitioner) he was not aware of any tenant in the property. On inquiry from the erstwhile owner, the Petitioner came to know that one Gopal Krishan Aggarwal was the tenant in the ground floor portion of the property but he handed over the peaceful and vacant possession to the erstwhile owner in the year 2008 when he was involved in a murder case and was convicted.

4. The Petitioner states that by a letter dated 24.08.2012 he applied to the Municipal Corporation for carrying out certain repairs. In the last week of August, 2012 the Petitioner demolished the property and started construction thereon. According to the Petitioner Vinit Aggarwal started threatening the erstwhile owner (Prem Prakash Goel) with an illegal demand of Rs. 30 lacs lest he would be falsely implicated on the allegation of dispossession and stealing valuable articles from the property. A complaint in this regard was made against Vinit Aggarwal to the police. The police failed to take any action in respect of the complaint made against Vinit Aggarwal whereupon, the Petitioner filed a complaint under Section 200 read with Section 156(3) Cr.P.C. in the Court of learned Metropolitan Magistrate (MM). Another complaint dated 08.11.2012 was made by the Petitioner against complainant Abhinav Krishan Aggarwal for threat and extortion.

5. It is averred that the Petitioner was granted anticipatory bail by order dated 17.11.2012 passed by the learned ASJ. Thus, according to the Petitioner, the FIR lodged is false and is, therefore, liable to be quashed.

6. I have heard Mr. Chetan Sharma, learned senior counsel for the Petitioner and have perused the record.

7. It is important to note that the FIR was registered in the Police Station only on 07.11.2012 and the date of occurrence is given as 06.10.2012 to 17.11.2012. Admittedly, a DD No.16-A was also recorded on the basis of the information given to the PCR.

8. It is well settled that the power of quashing of FIR or a criminal proceeding should be exercised very sparingly with circumspection and in rare cases. The Court is not justified in embarking upon an inquiry as to the reliability, genuineness or otherwise of the allegations made in the FIR.

9. In **State of M.P. v. Awadh Kishore Gupta** (2004) 1 SCC 691, it was held that where the investigation was not complete, it was impermissible for the High Court to look into the materials the acceptability of which is essentially a matter for trial. The Supreme Court observed that the Court should not go into annexures of the Petition under Section 482 of the Code which cannot be termed as evidence without being tested and proved. Para 13 of the report is extracted hereunder:-

> "13. It is to be noted that the investigation was not complete and at that stage it was impermissible for the High Court to look into materials, the acceptability of which is essentially a matter for trial. While exercising jurisdiction under Section 482 of the Code, it is not permissible for the Court to act as if it was a trial Judge. Even when charge is framed at that stage, the Court has to only prima facie be satisfied about existence of sufficient ground for proceeding against the accused. For that limited purpose, the Court can evaluate material and documents on records but it cannot appreciate evidence. The Court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused. In **Chand Dhawan v. Jawahar Lal** (1992) 3 SCC 317 it was observed that when the materials relied upon by a party are required to be proved, no inference

can be drawn on the basis of those materials to conclude the complaint to be unacceptable. The Court should not act on annexures to the petitions under Section 482 of the Code, which cannot be termed as evidence without being tested and proved. When the factual position of the case at hand is considered in the light of principles of law highlighted, the inevitable conclusion is that the High Court was not justified in quashing the investigation and proceedings in the connected case (Crime No. 116 of 1994) registered by the Special Police Establishment, Lokayukta, Gwalior....."

10. In a recent report of the Supreme Court in **State of Orissa & Ors. v. Ujjal Kumar Burdhan** (2012) 4 SCC 547, the investigation initiated by the Vigilance Department of the State Govt. of Orissa into allegations of irregularities in receipt of excess quota, recycling of rice and distress sale of paddy by one M/s. Haldipada Rice Mill, Proprietorship concern of the Respondent was quashed by the High Court. The Supreme Court reversed the order passed by the High Court and observed that extraordinary power under Section 482 of the Code has to be exercised sparingly with circumspection and as far as possible for extraordinary cases where allegations in the complaint or the FIR taken on its face value and accepted in their entirety do not constitute the offence alleged. The Supreme Court relying on its earlier decision in **State of West Bengal v. Swapan Kumar Guha** (1982) 1 SCC 561 held that the Court will not normally interfere with the investigation and will permit an inquiry into the alleged offence to be completed. Paras 8 and 9 of the report are extracted hereunder:-

"8. It is true that the inherent powers vested in the High Court under Section 482 of the Code are very wide. Nevertheless, inherent powers do not confer arbitrary jurisdiction on the High Court to act according to whims or caprice. This extraordinary power has to be exercised sparingly with circumspection and as far as possible, for extraordinary cases, where allegations in the complaint or the first information report, taken on its face value and accepted in their entirety do not constitute the offence alleged. It needs little emphasis that unless a case of gross abuse of power is made out against those in charge of investigation, the High Court should be loath to interfere at the early/premature stage of investigation.

9. In **State of W.B. v. Swapan Kumar Guha** (1982) 1 SCC 561, emphasising that the Court will not normally interfere with an investigation and will permit the inquiry into the alleged offence, to be completed, this Court highlighted the necessity of a proper investigation observing thus: (Paras 65-66)

"65. ... An investigation is carried on for the purpose of gathering necessary materials for establishing and proving an offence which is disclosed. When an offence is disclosed, a proper investigation in the interests of justice becomes necessary to collect materials for establishing the offence, and for bringing the offender to book. In the absence of a proper investigation in a case where an offence is disclosed, the offender may succeed in escaping from the consequences and the offender may go unpunished to the detriment of the cause of justice and the society at large. Justice requires that a person who commits an offence has to be brought to book and must be punished for the same. If the court interferes with the proper investigation in a case where an offence has been disclosed, the offence will go unpunished to the serious detriment of the welfare of the society and the cause of the justice suffers. It is on the basis of this principle that the court normally does not interfere with the investigation of a case where an offence has been disclosed. ...

66. Whether an offence has been disclosed or not must necessarily depend on the facts and circumstances of each particular case. ... If on a consideration of the relevant materials, the court is satisfied that an offence is disclosed, the court will normally not interfere with the investigation into the offence and will generally allow the investigation into the offence to be completed for collecting materials for proving the offence."

11. In **State of Haryana & Ors. v. Ch. Bhajan Lal & Ors.** AIR 1992 SC 604 the Supreme Court considered its earlier decision on quashing of the FIR and observed that it would not be possible to lay down any precise, clearly defined, sufficiently channelized and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised. Some of the cases where the

powers to quash FIR could be exercised were enumerated as under:-

"(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

12. On the basis of the averments made in the FIR, it cannot be said that they do not prima facie constitute any offence or make out a case against the Petitioner. The Petitioner's defence and veracity of the allegations made by the Complainant is to be gone into by the police during the course of investigation. It is not a case where the FIR should be quashed at this stage. Consequently, the Petition is dismissed.

13. Pending application also stands disposed of.

ILR (2013) II DELHI 834
CRL. M.C.

PUNEET GUPTA & ANR. ....PETITIONERS

VERSUS

STATE ....RESPONDENT

(G.P. MITTAL, J.)

CRL. M.C. NO. : 756/2012 DATE OF DECISION: 15.01.2013

Prevention of Food Adulteration Act, 1954—Section 20—Consent is a condition precedent to a prosecution for an offence punishable under Section 16—Section 20A – Purpose defined – Petitioners were Directors of the accused manufacturer company and were accordingly, summoned under Section 20A – Purpose of Section 20A is to enable the Court to prosecute the manufacturer, distributor or dealer of the adulterated article when it transpires during trial that the adulterated article had been manufactured or distributed by some person other than the one who has not been prosecuted – Manufacturer company was already impleaded as one of the accused. HELD: Section 305 of Code of Criminal Procedure, 1973 lays down the procedure when corporation is made an accused in a criminal case – Procedure mandates the issuance of summons to the accused company through

its principal officer and it is for the company to decide as to through whom it is to be represented – Simply because there is no one to represent the accused company, the Directors of the company could not have been summoned to appear as accused – Section 20A could not have been used as an aid to issue summons to the Petitioners to face prosecution since Petitioners were neither manufacturer, dealers or distributors.

[Lo Ba]

APPEARANCES:

FOR THE PETITIONERS : Mr. Satish Kumar Tripathi, Advocate

FOR THE RESPONDENTS : Ms. Rajdipa Behura, APP.

CASE REFERRED TO:

1. *O.P. Shiv Prakash* vs. *K.I. Kuriapose,* (1999) 8 SCC 633.

RESULT: Summoning order quashed and Petition allowed.

G.P. MITTAL, J. (ORAL)

1. A complaint under Section 16 of the Prevention of Food Adulteration Act, 1954 (the Act) was filed as a sample of 'Fruit Yogurt' purchased from one Gian Chand Bedi was found to be not conforming to the standard of 'Fruit Yogurt' and thus adulterated. M/s L-Comps & Impex Pvt. Ltd. was impleaded as accused No.7 being the importer of the sampled commodity. One Anu Sharma was impleaded as accused No.8, as he was a nominee appointed under Section 17 of the Act of accused No.7.

2. While the prosecution evidence was being recorded in the complaint case filed by the Food Inspector, Govt. of NCT of Delhi, an application dated 20.11.2007 was moved by earlier said Anu Sharma for dropping proceedings against him on the ground that he was appointed as a nominee only for Chandigarh. Para 2 of the application is extracted hereunder:-

"2. That the sample in the present case was lifted by the Food Inspector, Delhi, at Delhi, whereas the present petitioner was the

nominee of the said firm only for Chandigarh. In support of his contention, the petitioner is enclosing herewith the photocopy of the letter issued by the Local Health Authority, Homoeopathic Dispensary, Sec. 28-A, Chandigarh Admn. dated 15.6.01 for the ready reference of the Hon'ble Court which clearly indicates that the petitioner was the nominee for the Chandigarh only."

3. The learned Metropolitan Magistrate('MM') came to dispose of the said application by an order dated 16.09.2008. He dropped proceedings against said Anu Sharma holding that the nomination of accused No.8 was received in the office of Local Health Authority (LHA) on 09.05.2001 and the same was accepted on 15.06.2001. The learned MM also held that the nomination of accused Anu Sharma was only for the territory of Chandigarh. The relevant portion of the order is extracted hereunder:-

"I have gone through the nomination i.e. form VIII of accused no.8 i.e. Anu Sharma. The same is dt. 5.1.01 as far as officials of accused no.7 is concerned. There is no date of acceptance on behalf of LHA. However, there is a document on record which is purported to be a communication sent by LHA to accused no.7. As per this document it appears that the nomination of accused no.8 was received by the office of LHA on 9.5.01 and the same is accepted on 15.6.01. From the perusal of this document it also appears that the nomination of accused no.8 is only limited for Chandigarh.

So this shows that on the date of alleged offence i.e. 17.3.01, accused no.8 was not the nominee of accused no.7. So he cannot be made liable for prosecution. Further, his nomination was accepted only for the area of Chandigarh so cannot be held responsible for the acts if any committed in Delhi."

4. An application under Section 20A read with Section 17(a)(ii) of the Act was moved by the complainant to implead the directors in charge of and responsible for the conduct of business of M/s L-Comps & Impex Pvt. Ltd. (accused No.7). In the application, it was stated that accused Anu Sharma was discharged and the proceedings against him were dropped by an order dated 16.09.2008. Thus, there was no one to represent the earlier said company. As per records and reply received from VATO-89, Shri S.P. Gupta, Pankaj Gupta and Puneet Gupta were the directors of the company. None of them were sleeping directors and thus they were liable to be prosecuted being in charge of and responsible

for the conduct of the business of the company (accused No.7). The application found favour with the learned MM who by his order dated 05.09.2011 directed summoning of the directors Puneet Gupta and Pankaj Gupta, the Petitioners herein.

5. In the Petition it is contended that the summoning order was illegal in view of the nomination dated 05.01.2001 duly received in the office of LHA. It is urged that the learned MM erred in dropping the proceedings against accused No.7 by an order dated 16.09.2008 and then summoning the Petitioners by an order dated 05.09.2011.

6. The legality of the order dated 16.09.2008 is not before this Court. There is no gainsaying that the Petitioners have been summoned by the aid of Section 20A of the Act. For the sake of convenience, Section 20A of the Act is extracted hereunder:-

> "[20A. Power of court to implead manufacturer, etc.- Where at any time during the trial of any offence under this Act alleged to have been committed by any person, not being the manufacturer, distributor or dealer of any article of food, the court is satisfied, on the evidence adduced before it, that such manufacturer, distributor or dealer is also concerned with that offence, then, the court may, notwithstanding anything contained in [sub-section (3) of section 319 of the Code of Criminal Procedure, 1973 (2 of 1974)] or in section 20 proceed against him as though a prosecution had been instituted against him under section 20].

7. It is not in dispute that accused No.7 M/s L-Comps & Impex Pvt. Ltd was the manufacturer of the sampled 'Fruit Yogurt' which was found to be not conforming to the standard. Apart from the manufacturer and the vendor and its directors/partners, the distributor was prosecuted as accused No.6. A close reading of Section 20A would reveal that it is only a manufacturer, distributor or dealer who can be summoned to face prosecution during the course of the trial. Section 20A was inserted in the Act w.e.f. 01.03.1965. The purpose of insertion of the Section appears to be to enable the Court to prosecute the manufacturer, distributor or the dealer of the adulterated article when it transpires during the course of trial that the adulterated article had been manufactured or distributed by some person other than the one who has not been prosecuted. In the case of **O.P. Shiv Prakash v. K.I. Kuriapose,** (1999) 8 SCC 633, it was held that power under Section 20A cannot be

invoked before the stage of adducing evidence in the trial. Admittedly, the consent under Section 20 of the Act is a condition precedent to a prosecution for an offence punishable under Section 16 of the Act. Section 20A of the Act also dispenses with the consent for prosecution required to be taken under Section 20 of the Act.

8. It is not a case where the manufacturer had not been impleaded and was sought to be impleaded by this application. The complainant sought to implead the directors only on the ground that the company which was earlier being represented by accused No.8 (Anu Sharma) was not being represented by anybody.

9. Section 305 of the Code of Criminal Procedure lays down the procedure for representation of a corporation as an accused. It would be fruitful to extract Section 305 hereunder:-

> "305. Procedure when corporation or registered society is an accused.- (1) In this section, "corporation" means an incorporated company or other body corporate, and includes a society registered under the Societies Registration Act, 1860 (21 of 1860).
>
> (2) Where a corporation is the accused person or one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose of the inquiry or trial and such appointment need not be under the seal of the corporation.
>
> (3) Where a representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that that thing shall be done in the presence of the representative or read or stated or explained to the representative, and any requirement that the accused shall be examined shall be construed as a requirement that the representative shall be examined.
>
> (4) Where a representative of a corporation does not appear, any such requirement as is referred to in sub-section (3) shall not apply.
>
> (5) Where a statement in writing purporting to be signed by the managing director of the corporation or by any person (by whatever name called) having, or being one of the persons having

the management of the affairs of the corporation to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section, is filed, the Court shall, unless the contrary is proved, presume that such person has been so appointed.

(6) If a question arises as to whether any person, appearing as the representative of a corporation in an inquiry or trial before a Court is or is not such representative, the question shall be determined by the Court."

10. Thus, it would be seen that a company can be represented through a representative appointed for this purpose. Sub-section (3) says that where a representative of a company appears, any requirement of this Code that anything shall be done in the presence of the accused, shall be construed as a requirement that, that thing shall be done in presence of the representative. Sub-section(4) says that if the representative of the corporation does not appear, the requirement as referred in sub-section (3) shall not apply. Thus, simply because there was nobody to represent the company, the directors could not have been summoned to appear as accused. The right course to be adopted was to issue summons to the company through its principal officer and it is for the company to decide as to through whom it is to be represented. Thus, simply on the ground that the company was not being represented, its directors who are the Petitioners herein could not have been summoned to face prosecution. Moreover, Section 20A of the Act could not have been used by the learned MM to issue the summons to the two directors for the reason that it is only a manufacturer, distributor or a dealer of the sampled food article who has not been prosecuted earlier and where it transpires during the trial that the said manufacturer, distributer or dealer has not been prosecuted that the Court may take cognizance against him as if the prosecution had been instituted against him.

11. There is another aspect of the matter. Although, in the application under Section 20A of the Act the Petitioners were not sought to be summoned on the ground that there was no valid nomination under Section 17 of the Act in respect of accused No.8 and proceedings against whom had been dropped, the learned MM preferred to summon the Petitioners on the ground that the nomination given under Section 17 of the Act was only limited for Chandigarh. This finding reached by the

learned MM is without any material. The nomination in form VIII under Rule 12-B is available on page 37 of the paper book. It simply says that Manager Purchase & Liaison has been nominated by the company (accused No.7) by a resolution passed in the meeting held on 01.01.2001 to be in charge of and responsible to the said company for the conduct of its business. It is nowhere stated that the nomination is confined only to the Union Territory of Chandigarh. The nomination was accepted by Anu Sharma on 05.01.2001.

12. Section 17(2) of the Act empowers a company having different establishments or branches or different units in any establishment to nominate separate persons in relation to any establishment or branch. M/s L-Comps & Impex Pvt. Ltd. (accused No.7) was only the importer of the sampled food article. It is nowhere the case of the complainant that it had different establishments or branches at different places. Thus, the finding reached by the learned MM that Anu Sharma (since discharged) was nominee only for the area of Chandigarh is not tenable.

13. It is not the case of the complainant in the Application under Section 20A of the Act that nomination in favour of Anu Sharma was not valid nor this is the ground for issuing summons against the Petitioners. I have already held above that the provision of Section 20A of the Act could be used only to summon a manufacturer, distributor or a dealer which is not the case here. At the same time, there are certain observations made by the learned MM in the order dated 16.09.2008(which is not subject matter of the instant Petition). Without any averment in this regard, the learned MM went on to observe that as per the acceptance letter issued by LHA, the nomination was received on 09.05.2001. It is true that the letter dated 15.06.2001 issued by the LHA says that the nomination dated 05.01.2001 was received in the office on 09.05.2001. But, at the same time, it is nowhere the case of the complainant that the nomination was not transmitted by accused No.7 on 05.01.2001 and was received in the office of LHA only on 09.05.2001. It is also not the case of the complainant that the nomination was ante dated by accused No.7 or any officer or director of the company.

14. In view of the above discussion, the Petition succeeds on the twin grounds that the cognizance could not have been taken against the Petitioners on the strength of Section 20A of the Act and also on the ground that the nomination made in favour of accused No.8 was confined

to the territory of Chandigarh or even that the nomination was not received in the office of LHA on 05.01.2001, when it purports to have been dispatched by accused No.7.

15. Consequently, the Petition succeeds. The summoning order against the Petitioners is set aside.

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FAO (OS)

YAPI KREDI BANK (DEUTSCHLAND) AG ....APPELLANT

VERSUS

ASHOK K. CHAUHAN AND ORS. ....RESPONDENTS

(S. RAVINDRA BHAT & S.P. GARG, JJ.)

FAO (OS) NO. : 511/2007, C.M. APPL. NO. : 14878/2008 & 3645/2012 **DATE OF DECISION: 17.01.2013**

Code of Civil Procedure, 1908—Order XXII—Rule 3 & 10—Plaintiff filed suit claiming money decree, defendants raised plea of suit being time barred and moved application for rejection of plaint—Application dismissed and order confirmed in appeal—During pendency of suit, plaintiff Bank-Kriess merged with YAPI KREDI BANK (appellant)—As a result, Yapi Kredi Bank took over all assets and liabilities of bank Kreiss AG and plaintiff bank ceased to exist—One of the defendants filed application for dismissal of suit on account of non-existence of plaintiff urging that application U/o XXII Rule 3 not moved, suit abated—On other hand, appellant moved application U/o XXII Rule 10 seeking leave of Court to continue suit in its name being successor of Bank Kreiss—Appellant urged, by

virtue of merger it look over all assets and liabilities of original plaintiff and therefore became its successor-in-interest—Ld. Single Judge dismissed application of appellant and suit was ordered to have abated—Aggrieved appellant filed appeal—During pendency C.H. Financial Investments moved application for being substituted as appellant as it succeeded to claims in suit by virtue of transfer deed executed by Yapi Kredi Bank—Application was resisted by defendants/respondents. Held: There is distinction between corporate death, as a consequence of final winding up order, U/s 481 of the Companies Act, and on the other hand, the extinguishment of corporate personality of the transferee as a result of amalgamation of companies. A corporate plaintiff does not die but it may cease to exist and suit cannot be abated by virtue of order XXII Rule 3. Order XXII Rule 10 CPC applicable to embark on an enquiry about successor entitled to continue with the suit.

Even if a company is a person, and winding up results in its death, as explained earlier, there is a radical difference between an amalgamation and a final winding up order, after all affairs of the company have been taken care of by the Court. It is therefore held that the conclusions of the learned single judge that the suit had abated by virtue of Order 22 Rule 3, on the "death" of the original plaintiff, cannot be sustained. **(Para 21)**

In the opinion of this Court, the law declared by the Supreme Court regarding the legal effect of a merger, or scheme of amalgamation, upon pending proceedings, in **Bhagwan Das Chopra** (supra) that "subject to such terms it becomes liable to be impleaded or becomes entitled to be impleaded in the place of or in addition to the transferor company or corporation in any action, suit or proceeding, filed against the transferor company or corporation by a third party or filed by the transferor company or corporation against a third party and that whatever steps have already taken

place in those proceedings will continue to operate against and the binding on the transferee company or corporation in the same way in which they operate against a person on whom any interest has devolved in any of the ways mentioned in Rule-10 of Order-22 of Code of Civil Procedure, 1908" affords the clearest guidance in such circumstances. Neither Saraswati Investment Syndicate, nor Singer nor any of the decisions is a direct authority on the question of succession to legal proceedings before a civil court. Even though **Bhagwan Dass** was rendered in the context of industrial adjudication, the Court expressly relied on Order 22 Rule 10, and spelt out its application in these circumstances. For these reasons, the conclusion of the learned Single Judge that as the suit had abated under Order 22 Rule 3, CPC, resulting in the consequent inapplicability of Order 22 Rule 10, appears to be based on a textual reading of that provision. **(Para 23)**

Important Issue Involved: There is distinction between corporate death, as a consequence of final winding up order, U/s 481 of the Companies Act, and on the other hand, the extinguishment of corporate personality of the transferee as a result of amalgamation of companies. A corporate plaintiff does not die but it may cease to exist and suit cannot be abated by virtue of order XXII Rule 3. Order XXII Rule 10 CPC applicable to embark on an enquiry about successor entitled to continue with the suit.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Sh. K.V. Viswanathan, Sr. Advocate with Ms. Hari Priya Padmanabhan, Sh. Nehul Gupta and Sh. Simon Benjamin, Advocates.

FOR THE RESPONDENT : Sh. P.V. Kapur, Sr. Advocate with Sh. Vinay Garg, Advocate for Respondent No. 1. Sh. Krishnamani, Sr. Advocate with Sh. Rajesh Yadav, Advocates for Respondent Nos. 2 to 4. Sh. Sudhir Nandrajog, Sr. Advocate with Sh. A.P. Singh and Sh. Rajan Chawla, Advocates for Respondent Nos. 5 to 13.

CASES REFERRED TO:

1. *General Electric Canada Inc. and Anr.* vs. *National Hydroelectric Power Corporation Limited* [CS(OS) 1480/2003, decided on 30.04.2012].
2. *Severn Trent Water Purification Inc.* vs. *Chloro Controls (India) Pvt. Ltd.* AIR 2009 SC 1290.
3. *Re Delta Distilleries Limited, Mumbai* vs. *(1) Shaw Wallace and Company Limited, Calcutta; (2) Shaw Wallace Distilleries Limited; (3) United Spirits Limited* (2008 [1] Mah.LJ 899).
4. *Meghal Homes (P) Ltd.* vs. *Shree Niwas Girni K.K. Samiti and Ors.* 2007 (7) SCC 753.
5. *Amit Kumar Shaw* vs. *Farida Khatoon* 2005 (11) SCC 403.
6. *Singer India Limited* vs. *Chander Mohan Chadha and Ors.* 2004 (7) SCC 1.
7. *S. Amarjit Singh Kalra (dead) by Lrs. and Ors. and Smt. Ram Piari (dead) by L.Rs. and Ors.* vs. *Smt. Pramod Gupta (dead) by Lrs. and Ors.* 2003(3) SCC 272.
8. *Mithailal Dalsangar Singh & Ors* vs. *Annabai Devram Kini & Ors.,* (2003) 10 SCC 691.
9. *Dhurandhar Prasad Singh* vs. *Jaypee University and Ors.* 2001 (6) SCC 534.
10. *Yorkshire Regional Health Authority* vs. *Fairclough Building Ltd. & Anr.* 1996 (1) All ER 519.
11. *Toprak Enerji Sanayi A.S.* vs. *Sale Tilney Technology Plc.* [1994 (3) All E.R. 483].
12. *Baytur S.A.* vs. *Finagro Holding S.A.* [1992] Q.B. 610, 619.

13. *Saraswati Industries Syndicate Ltd.* vs. *CIT Haryana, Himachal Pradesh, Delhi,* AIR 1991 SC 70.

14. *Bhagwan Dass Chopra* vs. *United Bank of India and Others* 1987 (Supp) SC 536.

15. *Narendra Bahadur Tandon* vs. *Shankar Lal (since deceased)* 1980 (2) SCC 253.

16. *Shri Rikhu Dev, Chela Bawa Harjug Dass* vs. *Som Dass (Deceased) through his Chela Shiam Dass* 1976 (1) SCC 103.

17. *Mercer Alloys Corporation* vs. *Rolls Royce Ltd.* [1971] 1 W.L.R. 1520.

18. *National Bank of Greece & Athens S.A.* vs. *Metliss* [1958] A.C. 509.

19. *Tymans Ltd.* vs. *Craven* [1952] 2 Q.B. 100.

20. *Rameshwar and Ors.* vs. *MT. Ganpati Devi and Anr.* AIR 1936 (Lah) 652.

21. *Lazard Bros. & Co.* vs. *Midland Bank Ltd.* [1933] A.C. 289.

22. *Morris* vs. *Harris* [1927] A.C. 252.

RESULT: Appeal allowed.

S. RAVINDRA BHAT, J.

1. The appeal throws up an interesting question, i.e whether the amalgamation, of a company (which institutes a suit, that is pending) with another, results in its corporate death, and consequent abatement of the suit, or does the transferee company become entitled to claim itself to be the successor, and continue with the suit, in terms of provisions of Order 22 Rule 10, Civil Procedure Code (variously described as "the Code" and "CPC"). The present judgment disposes of a plaintiff's appeal impugning the Order dated 23.10.2007 of a learned Single Judge in I.A. No. 8275/2003 and I.A. No. 8670/2003 in Suit No. 675/1999 ("the suit"). The impugned judgment held that the plaintiff's failure to take steps under Order 22, Rule 3, Civil Procedure Code (variously described as "the Code" and "CPC") resulted in abatement of its suit.

2. The plaintiff, in its suit, had claimed a money decree, based on

alleged transactions which took place in Germany. The defendants had urged that the suit was time barred; their application for rejection of plaint was however, dismissed; that order was confirmed by the Division Bench, which had left the plea open for consideration after trial. During the pendency of the suit, the Plaintiff Bank Kriess, merged with the Yapi Kredi Bank. The merger was affected in terms of a Deed dated 27.08.2001 with effect from 09.10.2001. As a result Yapi Kredi Bank AG took over all the assets and liabilities of Bank Kreiss AG; on and from 09.10.2001, the Plaintiff bank ceased to exist. The fourth defendant filed an application (I.A. 8275/2003) for dismissal of suit on account of non-existence of the plaintiff. The fourth defendant urged that as no application was made under Order XXII Rule 3 of the Code, the suit abated. Order XXII Rule 3, CPC requires that an application should be made for substituting the legal representatives of the 'deceased' plaintiff within a stipulated time, i.e. is 90 days from the death of the plaintiff. In this case, since the Plaintiff bank ceased to exist on and from 09.10.2001, therefore, the application under the said provision should have been made by 07.01.2002. Yapi Kredi Bank, the appellant in these proceedings, on the other hand, filed an application (I.A. 8670/2003) for its substitution on the record, as successor of Bank Kriess under Order XXII Rule 10 for leave of the Court to continue the suit in its name. That application was filed on 11.08.2003. It was contended by Yapi Kredi that by virtue of merger, it had taken over all the assets and liabilities of the original Plaintiff and therefore became its successor-in-interest. Therefore, the applicant contended that it was competent to continue the suit in place of the Plaintiff.

3. The defendants resisted the plea of Yapi Kredi, contending that the merger of the original plaintiff resulted in its corporate demise, in that it legally ceased to exist. Therefore, an application for substitution under Order 22 Rule 3 was the proper remedy, for succeeding to the legal proceeding; the lapse of the period stipulated for presenting that application resulted in abatement of claims in the suit. It sought for dismissal of Yapi Kredi's application, and also urged that no application under Order 22 Rule 10 could be filed, and that the consequence of abatement was that it stood absolved of defending the suit claims of Bank Kriess.

4. Learned Single Judge, on an appreciation of the facts and after considering the submissions, was of the opinion that the legal effect of a merger (i.e. amalgamation) of two companies was that the original

company which merges into the transferee company, loses its identity and ceases to exist. Learned Judge was of the view that the company, therefore, dies and that unless an application is preferred by the concerned parties, claiming to be legal representatives under Order XXII Rule 3 CPC, the suit abates. The impugned judgment also proceeded to hold that a transferee company, after merger, is not entitled to file application under Order XXII Rule 10, seeking its substitution in place of the transferor company. Learned Single Judge also relied upon the decision reported as **Narendra Bahadur Tandon v. Shankar Lal (since deceased)** 1980 (2) SCC 253 that once the company is dissolved, it ceases to exist and the liquidator cannot represent such a non-existing entity. The impugned judgment also relied upon **Saraswati Industrial Syndicate Ltd. v. CIT** AIR 1991 SC 70 and **Singer India Limited v. Chander Mohan Chadha and Ors.** 2004 (7) SCC 1.

5. During the pendency of the present appeal, an application (I.A. No. 14878/2008) was filed, for substituting C.H. Financial Investments as the appellant. The applicant contended that it succeeded to the claims in the suit – and consequently to the right to prosecute the present appeal – by virtue of transfer deed executed by Yapi Kredi Bank, on 23.01.2008. A copy of that assignment and transfer deed was placed on the record. It is contended that in terms of the assignment/transfer deed, the right and obligations of Yapi Kredi Bank against Kaunsoplast and the defendants in the original suit, out of which the present appeal has arisen, were assigned to the said applicant, C.H. Financial Investments. This application was resisted by the defendant/respondent who urged that Yapi Kredi Bank's right to prosecute the suit itself is suspect and under the circumstances, the claim by C.H. Financial Investments, to be its successor in respect of the claims in the litigation cannot, therefore, be countenanced. It was contended that the impugned judgment is erroneously premised on the equation of dissolution of a company with the devolution of interests of a previous entity in the successor company. In this regard, it was submitted by learned counsel for the appellant/applicant that while dissolution or winding-up results in death of a company, in the case of devolution of interest, the existence of erstwhile company continues. The claim has to be seen as not merely that of the company but as that of the shareholders who join to incorporate a company and, therefore, in a representative capacity. In such cases, where interest devolves, the Court has to satisfy whether the claim of the successor – be it the transferee

company or some other third-party, actually is *prima facie* borne-out. This is possible only upon an enquiry which can be properly done under the provisions of Order XXII Rule 10. It was contended that Section 394 of the Companies. Act allows "amalgamation" and "merger". After merger or amalgamation of two companies, there is devolution in the interests in the shape of assets and liabilities, upon the transferee in accordance with the scheme sanctioned by the Court. As a result, the appropriate provision, which was correctly invoked in this case, was Order XXII Rule 10, CPC. Learned counsel relied upon the decision reported as **Shri Rikhu Dev, Chela Bawa Harjug Dass v. Som Dass (Deceased) through his Chela Shiam Dass** 1976 (1) SCC 103, to say that when a suit is instituted in a representative capacity and there is devolution of interest on the representative, the applicable provision is Order XXII Rule 10. Learned counsel also relied upon the decision of the Supreme Court in **Bhagwan Dass Chopra v. United Bank of India and Others** 1987 (Supp) SC 536 to say that in every case of transfer, devolution, merger or scheme of amalgamation, in which rights and liabilities of one company are transferred or devolved upon another company, the successor-in-interest becomes entitled to the liabilities and assets of the transferor company subject to the terms and conditions of contract of transfer or merger, as it were. Contending that the principle enunciated in **Bhagwan Dass Chopra** (supra) applies to the facts of this case, learned counsel argued that the impugned judgment is in error of law in holding otherwise. Reliance was also placed upon the judgment of the Lahore High Court in **Rameshwar and Ors. v. MT. Ganpati Devi and Anr.** AIR 1936 (Lah) 652 in this regard. Learned counsel also relied upon the decision in **Dhurandhar Prasad Singh v. Jaypee University and Ors.** 2001 (6) SCC 534 to emphasize that Order XXII Rules 3 and 4 distinguish from Rule 10 and that in case of the former, the right to sue is extinguished when legal representatives are not brought on record. On the other hand, in case of Rule 10, even if the assignee or the individual upon whom the interest devolves, does not appear in Court, but steps into the shoes of the original litigant, the consequence would be that the case would continue and the party upon whom the interest has devolved risks being bound by any judgment and order. It is submitted that apart from overlooking this important distinction, the Court also fell into error in not noticing that under Order XXII Rule 10, a detailed enquiry at the stage of granting leave is not warranted and that the Court has to be prima facie satisfied that the leave to continue to prosecute or defend the suit has to be

granted, having regard to the facts and circumstances. In this regard, learned counsel relied upon the decision reported as **Amit Kumar Shaw v. Farida Khatoon** 2005 (11) SCC 403. Learned counsel for the applicant lastly relied upon the decision in **Severn Trent Water Purification Inc. v. Chloro Controls (India) Pvt. Ltd.** AIR 2009 SC 1290 where it was held that the expression "death" has to be understood in its grammatical sense as applicable to "natural" and not "artificial persons or entities". It was emphasized here that the provisions of Order XXII Rule 3 cannot be made applicable to companies and that the correct provision would be Order XXII Rule 10.

6. Learned counsel for the defendant/respondents contended that when a company ceases to exist for any reason whatsoever – either due to winding-up or amalgamation in terms of provisions of Companies Act, it in fact "dies". He relied upon the rulings which persuaded learned Single Judge to hold that provisions of Order XXII Rule 3 apply, i.e. **Narendra Bahadur Tandon** (supra); **Saraswati Industrial Syndicate Ltd.** (supra); **Singer India Limited** (supra). Learned counsel also relied upon two judgments of the learned Single Judge of this Court in Nicholas Piramal v. S. Sundaranayagam (Crl. M.C. 5392/2005, decided on 23.08.2007) and another in **General Electric Canada Inc. and Anr. v. National Hydroelectric Power Corporation Limited** [CS(OS) 1480/2003, decided on 30.04.2012]. It was submitted that in any event, the application made by the Bank Kreiss was after the suit had been abated and the period prescribed for the setting-aside of abatement, too had lapsed. In these circumstances, the argument of the applicant or Yapi Kredi Bank, claiming that either of it is a successor to the claims of the original plaintiff, should not be gone into.

7. Learned counsel for the defendants elaborated that like natural individuals and persons, a company too can be said to die. He relies upon a more reasoned decision of the Supreme Court in **Meghal Homes (P) Ltd. v. Shree Niwas Girni K.K. Samiti and Ors.** 2007 (7) SCC 753 where it was held that when a company court accepts the report of the official liquidator after directing winding-up and distributes the proceeds to creditors, workers and contributories, the ultimate result is the death of the company under Section 481 of the Act. He also relied upon the decision of the Division bench in Spice Entertainment Limited v. Commissioner of Service Tax (ITA 475-476/2011, decided on 03.08.2011) for the proposition that amalgamation of two companies results in the

death of amalgamating company which loses its entity.

8. It was lastly argued that C.H. Financial Investments Limited's assertion that it is the successor to the claims in the suit are unfounded and contradictory to the case set-up by Yapi Kredi Bank. In this regard, it was pointed out that Yapi Kredi Bank had stated that on 09.10.2011, the original plaintiff, i.e. Kreiss Bank ceased to exist. The suit was said to have abated by the order dated 23.10.2007. In this context, learned counsel for the defendant stated that C.H. Financial Investments Ltd. states that Yapi Kredi Bank has since merged with Fermin Credit Bank gmbH and that it ceases to exist. The assertion of C.H. Financial Investments Ltd. that it was a shareholder in Kreiss Bank and that devolution of Kreiss Bank's interest in the suit to Yapi Kredi Bank, which in turn assigned it to the said applicant (C.H. Financial Investments Ltd.) is not borne-out by the scanty documentation on the record. On the other hand, the documentation points to suppression of facts which go to establish that neither Kreiss Bank nor Yapi Kredi ever had the right to prosecute the suit. Having regard to these confusing and contradictory circumstances, which appear on a plain reading of the documents filed, it was argued that the Court should not proceed with the appeal and dismiss it. The respondents also emphasized that a case for contempt under Article 215 of the Constitution of India had been made out and pressed C.M. No. 3645/2012, filed in that regard.

9. The original claim in the suit was that Kreiss Bank granted Kaunstoplast Chemi gmbH a creditline through agreements dated 10.05.1993 and 30.04.1994, to the extent of DM 10,00,00,000/-. It claimed that the creditline was in several accounts in various currencies and meant for import/export financing. Thus, it was based on the official statements of Kaunsoplast Chemi gmbH and other defendants in the suit. The Kreiss Bank asserted that it had accepted absolute maximum suretyship to the extent of DM 12,000,000/- by a bond dated 10.05.1993. It realized that the defendants did not have the surplus projected and reported a loss to the extent of DM 53,500,000/-, which arose substantially from foreign exchange business. This resulted in dishonor of several bills furnished to the plaintiff Kreiss Bank. It discontinued its engagement with Kaunstoplast Chemi gmbH and informed its decision on 08.03.1994. It consequently invoked the bank guarantee and instituted a recovery proceedings in a Frankfurt Court. In that suit, it was claimed by Kreiss Bank that the judgment was stayed on 17.01.1995, allowing the entire claim. The liability

of the defendants on the date of the judgment was DM 450,110.77/- and the total amount payable on account of interest and other liabilities – as on the date of presentation of suit by Kreiss Bank before this suit in 1997 was DM 6205477.81/-. On the strength of these pleadings, the original plaintiff Kreiss Bank sought a decree for DM 6205000 equivalent Rs.15,30,20,000/- along with interest pendent lite @ 18 % per annum.

10. The suit records reveal that after summons were issued, the defendants moved for rejection of the plaint, inter alia contending that the suit itself was time-barred. That application, 4237/1999, was rejected on 02.08.1999. The defendants carried the matter in appeal, being FAO (OS) 287/1999. By order dated 27.01.2000, the Division Bench of this Court held that no interference with the order dismissing the application for rejection of the application was called for. In these circumstances, on 08.08.2003, the fourth defendant moved an application, stating that he became aware that the plaintiff bank had ceased to exist with effect from 09.10.2001 as it had merged with Yapi Kredi Bank and that since there was no claim of succession of any interest in the suit on account of the original plaintiff ceasing to exist, the suit itself was liable to be dismissed. On 11.08.2003, the plaintiff Yapi Kredi Bank AG moved an application, I.A. no. 8670/2003, stating that Kreiss Bank had merged with it and that the latter (the applicant) had taken-over assets and liabilities of Kreiss Bank as a result of which it was entitled to continue the suit.

11. The learned Single Judge was persuaded to hold, upon an analysis of the decisions in **Narendra Bahadur Tandon** (supra), **Saraswati Industrial Syndicate Ltd.** (supra) and **Singer India Limited** (supra) that when two companies merged into one, the transferor company loses its identity as it ceases to have business. It was further held that even though rights or liabilities are determined under a scheme or deed, yet the destruction of corporate entity results in death like situation as far as the transferor company is concerned. Therefore, in view of this finding, learned Single Judge was of view that since the time for bringing on record the setting-aside of the judgment had also expired on 07.01.2002 and no application under Order XXII Rule 3 had been preferred, the suit itself abated. On the applicability of Order XXII Rule 10, learned Single Judge was of the opinion that since the suit had abated and no such application had been preferred, the question of granting leave did not arise. The impugned judgment also proceeded on a plain reading of Order XXII Rule 10, which states that "the suit may, by leave of the Court be

continued" implying that "leave can be granted only in continuing proceeding and not one which is abated". In doing so, learned Single Judge relied upon **Kedarnath Kanoria v. Khaitan Sons and Co.** AIR 1959 Cal 368; **Devkinandan Lal v. Jogendra Prasad and Ors.** AIR 1980 (Pat) 71; **Goutami Devi Sitamony v. Madhavan Sivarajan** AIR 1977 (Ker) 83.

12. Before analyzing the rival contentions, it would be worthwhile extracting the relevant provisions of the Court, i.e. Order XXII Rules 3 and 10. The same read as follows:

"ORDER XXII

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES

3. Procedure in case of death of one of several plaintiffs or of sole plaintiff.-

(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule(1) the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

XXXXXX XXXXXX XXXXXX

10. Procedure in case of assignment before final order in suit.-

(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1)."

Analysis and conclusions

13. The first question which this Court proposes to address is whether a company "dies" within the meaning of Order 22, Rule 3, CPC and whether a suit filed against it abates upon its merger or amalgamation with another existing company. The impugned judgment relied on **Narendra Bahadur Tandon** (supra), where the Court held, inter alia, that "...once the company was dissolved it ceased to exist and the liquidator could not represent a non-existing company". In **Saraswati Industries Syndicate Ltd. v. CIT Haryana, Himachal Pradesh, Delhi,** AIR 1991 SC 70, the Supreme Court considered the question of amalgamation and the effect on the amalgamating company, in the context of income tax liability of the transferor company.

> "5. Generally, where only one Company is involved in change and the rights of the share holders and creditors are varied, it amounts to reconstruction or reorganisation or scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or amalgamation has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the share holders of each blending company become substantially the share holders in the Company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new Company, or by the transfer of one or more undertakings to an existing Company. Strictly 'amalgamation' does not cover the mere acquisition by a Company of the share capital of other Company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition."
>
> "6. ....the High Court was in error in holding that even after amalgamation of two companies, the transferor company did not become non-existent instead it continued its entity in a blended form with the Appellant Company. The High Court's view that on amalgamation there is no complete destruction of corporate personality of the transferor company instead there is a blending of the corporate personality of one with the other and it continues as such with the other is not sustainable in law. The true effect

> and character of the amalgamation largely depends on the terms of the scheme of merger. But there can be any doubt that when two companies amalgamate and merge into one the transferor company loses its entity as it ceases to have its business. However, their respective rights or liabilities are determined under the scheme of amalgamation but the corporate entity of the transferor company ceases to exist with effect from the date the amalgamation is made effective."

Similarly, the holding in **Singer India Ltd** (supra) was that:

> "8. ..there can be no doubt that when two companies amalgamate and merge into one, the transferor company loses its identity as it ceases to have its business. However, their respective rights and liabilities are determined under the scheme of amalgamation, but the corporate identity of transferor company ceases to exist with effect from the date the amalgamation is made effective."

14. The judgment reported in Shri Rikhu Dev relied on by the Applicant states, inter alia, that a representative suit does not come to an end with the death of the plaintiff, who sues on behalf of a body of persons, individual or juristic entities:-

> "8. This rule is based on the principle that trial of a suit cannot be brought to an end merely because the interest of a party in the subject matter of the suit has devolved upon another during the pendency of the suit but that suit may be continued against the person acquiring the interest with the leave of the Court. When a suit is brought by or against a person in a representative capacity and there is devolution of the interest of the representative, the rule that has to be applied is Order 22 Rule 10 and not Rule 3 or 4, whether devolution takes place as consequence of death or for any other reason. Order 22 Rule 10 is not confined to devolution of interest of a party by death; it also applies if the head of the mutt or manager of the temples resigns his office or is removed from office. In such a case, the successor to the head may be substituted as a party under this rule. The word 'interest' which is mentioned in this rule means interest in the property, i.e., subject-matter of the suit and the interest is the interest of the person who was the party to the suit."

15. The question of substitution of a transferee company in the

background of amalgamation of a company that was party to a legal proceeding directly arose before the Supreme Court in **Bhagwan Dass Chopra** (supra), where it was contended, like in the present case, that amalgamation of two companies resulted in the death of the transferor company. This theory was repelled by the Supreme Court, which held that:

> "In the circumstances it is reasonable to hold that in every case of transfer, devolution, merger, takeover or a scheme of amalgamation under which the rights and liabilities of one company or corporation stand transferred to or devolve upon another company or corporation either under a private treaty, or a judicial order or under a law the transferee company or corporation as a successor-in-interest becomes subject to all the liabilities of the transferor company or corporation and becomes entitled to all the rights of the transferor company or corporation subject to the terms and conditions of the contract of transfer or merger, the scheme of amalgamation and the legal provisions as the case may be under which such transfer, devolution, merger, take over or amalgamation as the case may be may have taken place. It follows that subject to such terms it becomes liable to be impleaded or becomes entitled to be impleaded in the place of or in addition to the transferor company or corporation in any action, suit or proceeding, filed against the transferor company or corporation by a third party or filed by the transferor company or corporation against a third party and that whatever steps have already taken place in those proceedings will continue to operate against and the binding on the transferee company or corporation in the same way in which they operate against a person on whom any interest has devolved in any of the ways mentioned in Rule-10 of Order-22 of Code of Civil Procedure, 1908 subject of course to any terms in the contract of transfer or merger, scheme of amalgamation or other relevant legal provisions governing the transaction under which the transferee company or corporation has become the successor-in-interest of the transferor company or corporation."

16. The conclusion of the learned Single Judge that the amalgamation of one company with another, results in the death of the former (i.e. the transferee company) cannot be faulted. Yet, that factor alone cannot, in

the opinion of this Court, be dispositive of the question thrown up in these proceedings. While extinguishment of the corporate personality, or "corporate death" as it were, in the event of a final winding up of a company or amalgamation of one company with another, may be a reality, that alone cannot afford an answer to what happens to a litigation to which the amalgamating company is a party. It is here that the analogy with either a company finally wound up, in dissolution proceedings, or the death of an individual, ends. In the case of winding up of a company, the final order directing dissolution, after all steps to settle its affairs are taken, and the Court is satisfied that such order as necessitated, is in fact made. The process of "winding up the affairs" includes settlement of claims against the company, in satisfaction of the creditor's rights; it also includes the right of the Official Liquidator to be impleaded in a pending suit, or other litigation, to which the company is party as a defendant, or which is instituted by it, and press the claim, or defend them. Thus, the "death" unlike in the case of an individual is not sudden; it is preceded by a series of steps – some of which include issuance of orders adjudicating rights of the company, and third parties- mandated by law, under the overall supervision of a judicial forum, i.e. the Company Court. In the case of amalgamation, however, such a detailed inquiry is not mandated by law; the company has to be satisfied that the terms of amalgamation or merger, as it were, provide adequately for the protection of interests of shareholders, creditors and other such parties. The terms in the most part are a result of negotiation, and the merger is itself in the nature of an arrangement whereby the two corporate entities – for reasons best determined by each of them, decide to amalgamate into one. In the case of amalgamation, the question of rights and liabilities and the right to succession in pending proceedings instituted or pending against the merging company need not necessarily be a matter engaging attention of the company court. It might well depend on the terms of the amalgamation scheme, or operation of law, as the case may be. In India, Sections 390 to 396A of the Companies Act govern the subject matter.

17. The distinction noticed by this Court between a corporate death, as a consequence of final winding up order, under Section 481 of the Companies Act, on the one hand, and the extinguishment of the corporate personality of the transferee (or amalgamating/merging) company cannot be lost sight of, because the element of voluntariness inherent in the latter circumstance together with the willingness of the transferee company to

"take over" the property, liabilities and functioning of the transferee company is lacking in the case of a company which is dissolved after all steps to wind it up are completed. In the latter eventuality, the question of any loose threads in the form of liabilities or assets for which no provision is made would not arise; the Liquidator who takes charge of its assets and affairs would have, in the course of the winding up process, provided for, or sought orders in respect of each eventuality. The Court is also mindful of Section 394 (2) which provides for the transfer of liabilities or property of the transferee company to the transferor company. In **Saraswati Industrial Syndicate,** this was precisely noticed, when the Supreme Court held that the *"..true effect and character of the amalgamation largely depends on the terms of the scheme of merger. But there can be any doubt that when two companies amalgamate and merge into one the transferor company loses its entity as it ceases to have its business. However, their respective rights or liabilities are determined under the scheme of amalgamation."* This position was again underscored in **Singer** (supra).

18. The question identical to the one posed to this Court in this case arose for consideration before the Bombay High Court. A learned Single Judge of that Court in **Re Delta Distilleries Limited, Mumbai v (1) Shaw Wallace and Company Limited, Calcutta; (2) Shaw Wallace Distilleries Limited; (3) United Spirits Limited** (2008 [1] Mah.LJ 899) held that:-

> "The effect of a Scheme of Amalgamation, as held by the **Supreme Court in Singer India Ltd. vs. Chander Mohan Chadha,** (2004) 7 SCC 1 is that as a result of amalgamation of two Companies into one, "the Transferor Company loses its entity as it ceases to have its business". The respective rights or liabilities are determined under the Scheme of Amalgamation but the corporate entity of the Transferor Company ceases to exist with effect from the date the amalgamation is made effective. The concept of abatement is inapposite where a merger takes place in the course of a Scheme of Amalgamation in pursuance of a sanction received from the Company Court. The transferor in such a case merges with the transferee who becomes the successor in interest of the assets, liabilities and business to the extent contemplated in the Scheme. There is in other words a devolution of interest. In law, what takes place in the course of a Scheme of Amalgamation is the devolution of the interest of the Transferor upon the Transferee."

The above views of the learned Single judge were confirmed by the Division Bench, of the Bombay High Court by its decision dated 11-02-2010 in Appeal No. 26/2008.

19. Similar questions arose on occasions in the Courts in England, which were called upon to decide the question whether claims and suits abated when plaintiff companies amalgamated with others. In **Mercer Alloys Corporation v. Rolls Royce Ltd.** [1971] 1 W.L.R. 1520 the Court held that:

> "where a plaintiff company is merged in its parent company so that it has itself ceased to exist as a separate corporate entity, the court has power to substitute the parent company as the plaintiff in the action, even after judgment, both under this rule and under its inherent jurisdiction:"

The matter was examined in detail, with reference to decided authorities, and the statutory provisions, in **Toprak Enerji Sanayi A.S. v. Sale Tilney Technology Plc.** [1994 (3) All E.R. 483], where a Turkish transferor company claimed that it succeeded to the claims, in litigation (in the UK) of a transferee company, after amalgamation. The relevant discussion by the Court is as follows:

> "First, these authorities do not consider a situation where during the course of English proceedings there is a transmission of interest from one party to another by virtue of the doctrine of universal succession or a foreign statute having similar effect. In **Baytur S.A. v. Finagro Holding S.A.** [1992] Q.B. 610, 619, the question for decision was whether an assignment of the rights and obligations of the buyers which took effect under a traite de scission in accordance with French law had the effect, without more, of rendering the assignee a party to an English arbitration as soon as the assignment took effect. The Court of Appeal held that it did not but expressly reserved the position "where the foreign law creates a universal successor, as in **National Bank of Greece & Athens S.A. v. Metliss** [1958] A.C. 509." The comment in the judgment of Lloyd L.J. [1992] Q.B. 610, 619 that "there cannot be a valid arbitration when one

of the two parties has ceased to exist," must be read subject to the same possible exception. The question I have to consider remains, on the authorities, an open one.

The second observation is that while the reported cases show quite clearly that a corporation which has ceased to exist is not entitled to maintain any legal proceedings, they do not show that where the dissolution occurs in the course of pending proceedings this necessarily deprives the court of any power to do what is just and convenient in the particular case. There are a variety of principles which apply in different situations and, so far as I am aware, there is no reason why the court should not be entitled to mould a procedure which takes account both of the interests of the parties and the needs of justice following a transmission of interest.

It was urged upon me that it is a general principle of English law that if a plaintiff or defendant named in English proceedings does not exist at the date the proceedings were commenced, then the proceedings are a nullity and must be set aside: see **Lazard Bros. & Co. v. Midland Bank Ltd.** [1933] A.C. 289. That principle is not in point since Enerji was a legal entity at the date the writ was issued. In any event the principle is not absolute since it is subject to the exception that where a mistake has occurred in naming a party, that mistake may be cured under Ord. 20, r. 5(3): see **Dubai Bank Ltd. v. Galadari** (No. 4), The Times, 23 February 1990. Consequently, if the transmission of interest has occurred before the writ is issued and by a mistake the transferor and not the transferee is named as plaintiff in the proceedings, then even though the transferor has ceased to exist, the misnomer can prima facie be cured so as to substitute the transferee as plaintiff: see The Sardinia Sulcis [1991] 1 Lloyd's Rep.

It was also urged that it is a general principle of English procedural law that where a plaintiff or a defendant to pending proceedings is a corporation and the corporation is dissolved during the course of the proceedings, this event brings the proceedings to an end for all time and they cannot subsequently be revived. This, I think, is to express the position far too

broadly. As the reported cases seem to indicate, it is necessary to draw a distinction between those situations where the action has merely "abated" so that it can be subsequently revived and those cases where the action has died for all time.

In **Foster Yates & Thom Ltd. v. Edgehill Equipment Ltd.,** The Times, 29 November 1978, the plaintiff commenced proceedings in February 1975 but on 24 December 1975 a resolution was passed for voluntary winding up. At the end of December 1976 the final accounts of the plaintiff were passed and the requisite returns were filed for registration with the result that under section 290(4) of the Companies Act 1948 the plaintiff was dissolved after the expiry of three months in March 1977. On 7 April 1978 an order was made under section 352(1) of the Act (corresponding to section 651 of the Companies Act 1985) declaring the dissolution to be void. It was held that the effect of that declaration was prospective only and did not validate acts done since the dissolution in March 1977. Consequently, once the company had been dissolved there was no possibility that proceedings which took place thereafter could subsequently be validated with the result that the action pending at the date of dissolution "ceases, not temporarily and provisionally, but absolutely and for all time:" per Megaw L.J. Both in **Morris v. Harris** [1927] A.C. 252 and in the Foster Yates & Thom case a distinction was drawn between a restoration under section 352 of the Act of 1948 (section 223 of the Companies (Consolidation) Act 1908) which was prospective only and other provisions of the Companies Acts which had retrospective effect and provided that "the company shall be deemed to have continued in existence as if its name had not been struck off:" section 353(6) of the Act of 1948; section 242 of the Act of 1908. In the Foster Yates & Thom case the Court of Appeal rejected the submission that where a restoration took place under section 352 of the Act of 1948, so that the restoration was prospective only, the action merely "abated." But both Megaw and Cumming-Bruce L.JJ. discussed the meaning of "abatement," and Cumming-Bruce L.J. said:

> "upon the failure of an action for want of a plaintiff or of a plaintiff with an interest in the proceedings the action

would abate but could revive if and when appropriate steps were taken to enable the action to proceed."

It was accepted that abatement did not put an end to an action but merely suspended it.

In **Tymans Ltd. v. Craven** [1952] 2 Q.B. 100 the Court of Appeal held that where a plaintiff company had been struck off the register pursuant to section 353(5) of the Act of 1948 and was therefore a non-existent person at the time certain county court proceedings were commenced, those proceedings were subsequently validated when an order was made under section 353(6) that "the company shall be deemed to have continued in existence as if its name had not been struck off." That decision was applied by Evans J. in **Eastern Capital Holdings Ltd. v. Fitter** (unreported), 19 December 1991, where a plaintiff company was dissolved after proceedings had been commenced and, before any order for restoration had been made, an application was made by the defendant for the action to be dismissed on the ground that the plaintiff company had ceased to exist. It was held by Evans J. that an action which might be revived under section 653(2) or (3) of the Act of 1985 (corresponding to section 353 of the Act of 1948) should not sensibly be dismissed but should be stayed.

I do not find anything in these authorities which should lead me to the conclusion that because Enerji ceased to exist on 30 November 1990 Seniteri cannot be substituted as plaintiff under Ord. 15, r. 7. It is true that on the evidence there remained no possibility after the merger that Enerji could be revived as a legal entity. But the provisions of Turkish law which resulted in the death of Enerji as a legal person included an element not present in the provisions of the Companies Acts considered in Morris v. Harris [1927] A.C. 252 and the Foster Yates & Thom case, The Times, 29 November 1978, namely, that by virtue of the same statutory provisions, all the assets and liabilities of Enerji were transferred to the absorbing company which thenceforth stood in the shoes of Enerji...."

20. The above decision, and conclusions recorded in it were approved in a Division ruling of the Court of Appeal, in **Yorkshire Regional**

Health Authority v Fairclough Building Ltd. & Anr. 1996 (1) All ER 519 where the Court observed that:-

".....When a litigant dies, or becomes bankrupt, the litigation does not cease, unless the cause of action is personal to him. It may be carried on by his personal representatives, or his trustee in bankruptcy, in their own names. There is, not surprisingly, provision in the RSC for the change in the identity of the party to be duly made: R.S.C., Ord. 15, r. 7. A corporate plaintiff does not die, but it may cease to exist. A particular example is when the corporation, which is a creature of statute, is terminated by statute and its rights and liabilities are transferred to some other person. When that occurs, the new person may become a party to pending proceedings in place of the old.

Although the identity of the party changes, the nature of the claim does not. It is, in legal terms, the same cause of action as it was before. There is no question of a new claim or cause of action being asserted, even though in the particular circumstances the claim is being made by a different person. Because it is the same cause of action, there is no scope for a limitation defence. The defendant cannot say that the time for bringing proceedings has expired when the new claimant replaces the old, because the essential point is that no new claim is being put forward.

Until 1980, this was entirely clear. Ord. 15, r. 7 regulated the change in the identity of the party. Ord. 15, r. 6 and Ord. 20, r. 5 provided for the quite different situation where a new or an existing party seeks to introduce a new claim into the proceedings after the relevant time-limit has expired.

The second defendants say that all this was changed by section 35 of the Limitation Act 1980 and by amendments to the Rules of the Supreme Court since that Act was passed. They say that the effect of the change in the identity of the claimant, if it takes place after the limitation period has expired, is to extinguish the claim, so that in the present case they, the defendants, fortuitously go scot-free.

The short answer to this submission, in my judgment, is that limitation defences have nothing to do with a change in the

identity of a party under Ord. 15, r. 7. It is quite obvious that the statute and the rule changes were not intended to have this extraordinary effect. It is equally obvious that if the so-called literal construction were to compel the conclusion for which the second defendants contend, then it would be as the result of an unfortunate oversight by Parliament and the draftsman of the rules.

Only if the court was obsessed by the strictly literal interpretation and oblivious to the common sense of the matter could the conclusion be entertained."

21. It would be relevant to notice, at this stage, the observations of the Supreme Court, in **Mithailal Dalsangar Singh & Ors v. Annabai Devram Kini & Ors.,** (2003) 10 SCC 691, where the Court held that in as much as abatement results in denial of hearing on the merits of the case, the provisions for abatement are to be construed strictly; likewise, a request for setting aside abatement and the dismissal consequent upon abatement has to be considered liberally. What cannot be lost sight of in the discussion is that while upon the death of an individual plaintiff or claimant, the court is empowered to substitute the legal heir or representative, failing which an abatement of action occurs – even that can be overcome if the heir or representative (who might not be aware of his rights, or might be in the dark about the litigation itself) applies for setting aside the abatement; if the time provided for doing so lapses, the residuary Article in the Limitation Act, 1963 applies, enabling such a course of action. The underlying thought is that a cause of action is not extinguished; the court has to trace, or at least make an effort to trace the rightful successor to prosecute the claim, or defend the proceeding. The argument based on Section 3(42) of the General Clauses Act, 1897 is also of no assistance, because even if a company is a person, and winding up results in its death, as explained earlier, there is a radical difference between an amalgamation and a final winding up order, after all affairs of the company have been taken care of by the Court. It is therefore held that the conclusions of the learned single judge that the suit had abated by virtue of Order 22 Rule 3, on the "death" of the original plaintiff, cannot be sustained.

22. As regard the second question, i.e applicability of Order 22 Rule 10, those provisions are enabling provisions meant to further ends of

justice. This was held in **S. Amarjit Singh Kalra (dead) by Lrs. and Ors. and Smt. Ram Piari (dead) by L.Rs. and Ors. v. Smt. Pramod Gupta (dead) by Lrs. and Ors.** 2003(3) SCC 272:-

"26. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights to citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. A careful reading of the provisions contained in Order 22 of CPC as well as the subsequent amendments thereto would lend credit and support to the view that they were devised to ensure their continuation and culmination into an effective adjudication and not to retard the further progress of the proceedings and thereby non-suit the others similarly placed as long as their distinct and independent rights to property or any claim remain intact and not lost forever due to the death of one or the other in the proceedings. The provisions contained in Order 22 are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice.

_____ _____ _____ _____

"31. But, in our view also, as to what those circumstances are to be cannot be exhaustively enumerated and no hard and rule for invariable application can be devised. With the march and progress of law, the new horizons explored and modalities discerned and the fact that the procedural laws must be liberally construed to really serve as handmaid, make it workable and advance the ends of justice, technical objections which tend to be stumbling blocks to defeat and deny substantial and effective justice should be strictly viewed for being discouraged, except where the mandate of law, inevitably necessitates it. Consequently, having regard to the nature of the proceedings under the Act and the purpose of reference proceedings and the appeal therefrom, the Courts should adopt a liberal approach in the matter of condonation of the delay as well as the considerations which should weigh in adjudging nature of the decree, i.e., whether it

is joint and inseparable or joint and severable or separable."

23. In the opinion of this Court, the law declared by the Supreme Court regarding the legal effect of a merger, or scheme of amalgamation, upon pending proceedings, in **Bhagwan Das Chopra** (supra) that "subject to such terms it becomes liable to be impleaded or becomes entitled to be impleaded in the place of or in addition to the transferor company or corporation in any action, suit or proceeding, filed against the transferor company or corporation by a third party or filed by the transferor company or corporation against a third party and that whatever steps have already taken place in those proceedings will continue to operate against and the binding on the transferee company or corporation in the same way in which they operate against a person on whom any interest has devolved in any of the ways mentioned in Rule-10 of Order-22 of Code of Civil Procedure, 1908" affords the clearest guidance in such circumstances. Neither Saraswati Investment Syndicate, nor Singer nor any of the decisions is a direct authority on the question of succession to legal proceedings before a civil court. Even though **Bhagwan Dass** was rendered in the context of industrial adjudication, the Court expressly relied on Order 22 Rule 10, and spelt out its application in these circumstances. For these reasons, the conclusion of the learned Single Judge that as the suit had abated under Order 22 Rule 3, CPC, resulting in the consequent inapplicability of Order 22 Rule 10, appears to be based on a textual reading of that provision. Order 22 Rule 10, CPC applies in cases like the present; the Court would have then, to necessarily embark on an inquiry – albeit a *prima facie* or rudimentary one, to decide if indeed the applicant concerned is the successor entitled to the carriage of the legal proceeding, i.e the suit. In fact, though in **General Electric Canada Inc** (supra) the learned Single Judge seems to rely on the proposition of corporate death, the decision itself indicates that the terms of amalgamation were considered, and the claim to succession (of the applicant) was turned down.

24. It is pertinent to note that procedural laws are meant to regulate the object of doing substantial and real justice and not to foreclose adjudication on merits. The court is mindful of the fact that barring the application of the principle *action personalis moritur cum persona,* (i.e a personal right of action dies with the death of the person) other claims do not extinguish, and can be continued. A creditor's claim to his dues therefore does not die. Even where abatement occurs, in the sense that the time prescribed for the setting aside of abatement expires - under

Article 120 of the Schedule to the Limitation Act expires, the creditor/ claimant, through the successor, or the successor, as the case may be, can request the court to condone the delay in moving an application, under Section 5 of the Limitation Act.

25. The Merger deed specifies that the entity as such has not ceased to exist but is continuing for limited purposes:

> "Within liquidation, our activities are limited to the collection of our receivables and settlement of our liabilities."

26. This Court, however desists from pronouncing on the issue, as that would be the subject matter of inquiry under Order 22 Rule 10, CPC, by the concerned court. As the learned Single Judge held that since Bank Kreiss AG the sole plain tiff, ceased to exist on and from 09.10.2001, it would be considered to be 'dead' and the suit abated and he further held that Order 22 Rule 10 CPC does not apply, there was no inquiry about the claim made regarding succession. Having regard to the conclusions reached by this Court, in the earlier portions of this judgment, it is just and appropriate that the claims of Yapi Kredi Bank, and its claimed successor, C.H. Financial Investments, should be inquired into under Order 22, Rule 10 CPC by the learned single judge. The said applications are accordingly restored to their original position on the file of the Court.

27. As a result of the above discussion, this Court is of the opinion that the impugned judgment and order of the learned single Judge are unsustainable; these are set aside. The matter is remitted for inquiry, as to who is the successor entitled to continue with the suit. The learned single judge would undertake that inquiry in accordance with the procedure applicable under Order 22 Rule 10, CPC. All rights and contentions of the parties, on the facts and merits of the rival claims are reserved. The appeal is allowed in the above terms without any order as to costs.

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CRL.A.

RATTAN @ RATAN SINGH ....APPELLANT

VERSUS

STATE (GOVT. OF NCT OF DELHI) ....RESPONDENT

(G.P. MITTAL, J.)

CRL.A. NO. : 605/2012 & 1239/2012 **DATE OF DECISION: 24.01.2013**

Narcotic Drugs and Psychotropic Substances Act, 1985 – Section 20 – Appeals against conviction under Section 20(b)(ii)(c) – the entire quantity of Charas would govern the fact whether it was a small or a commercial quantity. The Appellant Rattan found in possession of 1 kg of Charas and Appellant Bilal found in possession of 2 kgs of Charas – the same held to be clearly commercial quantities.

Narcotic Drugs and Psychotropic Substances Act, 1985 – Section 50 – discrepancy with regard to the language of the signatures on the notices recorded on the Rokka – whether material? – Held: No, since the same was not brought to the attention of the IO during cross examination. Narcotic Drugs and Psychotropic Substances Act, 1985 – Non-joining of Independent witnesses – whether the requirement is absolute? – Held: No. It is not always possible to find independent witnesses at all places at all the times – the obligation to join public witnesses is not absolute – The IO made genuine efforts to join independent witnesses on no less than three occasions – There is no reason to disbelieve the official witnesses even in the absence of any corroboration from independent witnesses.

Narcotic Drugs and Psychotropic Substances Act, 1985 – Seizure Memos – whether mere writing of the FIR number on the arrest and search memos can entirely falsify those documents? – Held: No. Mere mentioning of the FIR on the seizure memos would not mean that the memos were prepared after the FIR came into existence.

[Lo Ba]

APPEARANCES:

FOR THE PETITIONERS : Mr. Atul Kumar, Advocate (Crl.A. 605/2012) Ms. Saahila Lamba, Advocate (Crl.A. 1239/2012).

FOR THE RESPONDENTS : Ms. Rajdipa Behura, APP for the State.

CASES REFERRED TO:

1. *Bilal Ahmad vs. State,* 2011 III AD (Crl) (DHC) 293.
2. *Dilip vs. State,* (2011) CriL.J. 334.
3. *Ajmer Singh vs. State of Haryana,* (2010) 2 SCR 785
4. *Mohd. Yunus vs. CBI,* (2008) 1 JCC (Narcotics) 33.
5. *E. Micheal Raj vs. Intelligence Officer, Narcotic Control Bureau,* (2008) 2 JCC (Narcotics) 78.
6. *Union of India vs. Victor Nnamdi Okpo,* (Crl. Appeal No. 617/2004).
7. *Ramesh Kumar Rajput @ Khan vs. The State NCT of Delhi,* (Crl. Appeal No. 755/2004).

RESULT: Appeals dismissed. Sentence upheld.

G.P. MITTAL, J.

1. These Appeals are directed against the judgment dated 16.01.2012 and order on sentence dated 18.01.2012 whereby the Appellants were convicted under Section 20 (b) (ii) (c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) and were sentenced to undergo rigorous imprisonment for ten years each and to pay fine of Rs. 1,00,000/- each. In default of payment of fine, they were sentenced to

undergo simple imprisonment for a period of six months each.

2. According to the prosecution version on 28.10.2007 at about 1:00 P.M. SI Balbir Singh PW-3 (IO) while he was present in his office, received a secret information that two persons, namely, Rattan and Bilal, who were engaged in supply of Charas were to come in front of Okhla Subzi Mandi, Captain Gaur Marg at about 3:00 P.M. to deliver Charas. The information was brought to the notice of Inspector Vijay Singh, In charge, Special Staff, who in turn informed the ACP (Operation Cell) about the same. Inspector Vijay Singh directed SI Balbir Singh to take immediate action in the matter. DD No.5 was recorded in the office at about 1:30 P.M. and a copy of the DD entry was sent to the SHO Police Station (PS) Srinivaspuri through Constable Ashok.

3. A raiding party comprising of ASI Ashok Kumar (PW-4), HC Shyambir (PW-10), HC Manoj, HC Vijay, HC Bir Singh and HC Hawa Singh (PW-6) was organized. All of them along with the secret informer started from the office in a Qualis car at about 1:45 P.M. On the way at Chirag Delhi Bus stand, PW-3 (the IO) requested 4-5 passersby to join the raiding party but they declined. At Kalkaji Mandir again, some passersby were requested to join the raiding party but they also showed their inability.

4. At about 2:30 P.M. the raiding party reached Captain Gaur Marg in front of Okhla Subzi Mandi. The Qualis car was parked near Canara Bank and the raiding party kept a watch on the persons coming from the side of East of Kailash and going towards Modi Mill flyover. At about 3:15 P.M. two boys were seen coming from East of Kailash side. The secret informer pointed out towards them. The Appellant Rattan Singh was holding a white colour polythene in his hand whereas, the Appellant Bilal was holding a black colour polythene in his hand. At the pointing out of the secret informer both the Appellants were intercepted by the police party and were apprised of the secret information.

5. The Appellants were informed about their legal rights to be searched in presence of a Magistrate or a Gazetted officer. They were served with statutory notice under Section 50 of the NDPS Act. Both the Appellants declined to be searched in presence of a Magistrate or a Gazetted officer. In the meanwhile, some public persons gathered at the spot. They were requested to be witness to the search, but none of them agreed. On searching the white polythene being carried by Appellant

Rattan Singh it was found to contain one other black colour polythene which contained some black colour 'battinuma' substance which from its smell and appearance appeared to be Charas, which was also confirmed by Appellant Rattan Singh. The substance was weighed and found to be weighing one kg.

6. Similarly, the black colour polythene being carried by Appellant Bilal was found to contain two kgs. of Charas. PW-3 took two samples of 100 gms. each from each of the two substances suspected to be Charas found in possession of the Appellants. The samples and the residue were sealed with the seal of 'DK'. FSL forms were filled up by the IO. Seizure memos were prepared in respect of the recovery of Charas. The seal after use was given to HC Hawa Singh (PW-6).

7. The rukka along with the sealed pullandas, FSL forms, copies of the seizure memos and the notice under Section 50 of the NDPS Act were sent to the Duty Officer through HC Hawa Singh on the basis of which FIR No.545/2007 was registered in the PS.

8. The samples along with FSL forms were forwarded to FSL Rohini. On analysis the samples were confirmed to be of Charas. During trial, on the request of the Appellants fresh samples were taken out of the residue in the Trial Court on 01.10.2009 and were sent to the Central Revenue Control Laboratory (CRCL) for determination of percentage of Tetra Hydro Cannabinol (THC). As per the CRCL report, the THC percentage in the samples of the Appellants Rattan Singh and Bilal was found to be 4.9% and 5.1% respectively.

9. A charge for the offence punishable under Section 20 (b) (ii) (c) of the NDPS Act was framed by the learned Special Judge by an order dated 04.02.2009. During trial the prosecution examined 11 witnesses. SI Balbir Singh PW-3 (IO), ASI Ashok Kumar (PW-4), HC Hawa Singh (PW-6) and HC Shyamvir (PW-10) are the witnesses to the recovery of Charas from the Appellants. Rests of the witnesses are formal witnesses who deposed about the registration of the case, recording of certain DD entries and provided various links in the case of the prosecution.

10. On conclusion of the prosecution evidence, the incriminating evidence brought on record was put to the Appellants. The Appellants denied prosecution's allegations and pleaded false implication.

11. The Appellant Rattan Singh took up the plea that some police officials lifted him from Okhla Bus Stand on 24.10.2007 at about 6:30 P.M. He was taken to the office of the special staff at Ambedkar Nagar and was subsequently implicated in the case falsely. Appellant Bilal claimed that he was also lifted by the police from Okhla Subzi Mandi on that very day at 9:30 P.M. and Charas was planted on him and he was also falsely implicated in the case.

12. Appellant Rattan Singh produced his sister Pinky as DW-1. She deposed that in the year 2007 there was a quarrel between her brother and local police officials. His brother was physically assaulted and was threatened by the police officials to be falsely implicated in some case. Subsequently, his brother Rattan Singh was falsely implicated in this case. Appellant Bilal, however, declined to produce any evidence in his defence.

13. On appreciation of evidence, the learned Special Judge found that the recovery of one kg. of *Charas* from the possession of Appellant Rattan Singh and 2 kgs. of *Charas* from the possession of Appellant Bilal was fully established; there was no material contradiction to discard the testimony of the official witnesses, particularly when genuine efforts were made to join independent witnesses in the raiding party. The defence raised by the Appellants was found to be inconsistent and unsubstantiated. Thus, relying on the prosecution evidence, the learned Special Judge found that the prosecution case was established beyond shadow of all reasonable doubt. The learned Special Judge thus convicted and sentenced the Appellants as stated above.

14. The following contentions are raised by Mr. Atul Kumar, learned counsel for Appellant Rattan Singh and Ms. Saahila Lamba, learned Amicus for Appellant Bilal:-

(i) The provisions of NDPS Act entail heavy penalties in the shape of minimum substantive imprisonment. The legislature, therefore, enacted Section 50 in the NDPS Act entitling a person to be searched in presence of a Magistrate or a Gazetted Officer. In the instant case, the notice Ex.PW-3/A in case of Appellant Bilal and Ex.PW-3/B in case of Appellant Rattan Singh have been created by the IO without actually informing the Appellants about their rights. Thus, there is noncompliance with the provisions

of Section 50 of the Act. According to the rukka both the Appellants declined to be searched in presence of a Magistrate or a Gazetted officer; and in case of Appellant Rattan Singh the notice Ex.PW-3/B was signed in Hindi whereas Bilal thumb marked on his notice. It is urged that a perusal of the notice Ex.PW-3/B shows that Rattan Singh had signed the same in English and not in Hindi which belies the case of the prosecution.

(ii) No genuine effort was made to join any independent witness in the raiding party and the search was not conducted in presence of any independent witness. In a serious case of this nature, which entails minimum punishment, it is unsafe to rely on the testimony of police officials.

(iii) The seizure memos Exs.PW-3/E and PW-3/F were the first documents to be prepared at the spot even before sending of rukka to the Police Station. These documents contain FIR number on the top which shows that there was manipulation by the police officials and the Appellants were falsely implicated in the case. (iv) There are material contradictions and discrepancies in the testimonies of official witnesses produced by the prosecution to make them unworthy of reliance.

(v) There was delay in sending the samples to the CFSL which gives scope for manipulation.

(vi) As per the Notification issued under Section 2 of the NDPS Act possession of any quantity upto 100 gms. of Charas is to be considered as a small quantity and possession of one kg. and above of Charas is to be considered as commercial quantity. In the instant case, in case of Rattan Singh, the percentage of THC as per the report Ex.PA-2 of CRCL was found to be 4.9%. Whereas in case of Appellant Bilal it was found to be 5.1%. Thus, the quantity in real terms in their possession was only 49 gms. and 102 gms. respectively which was a small quantity in case of Appellant Rattan Singh and was of intermediate quantity in case of Appellant Bilal. The sentence awarded is, therefore, excessive and disproportionate. Reliance is

placed on **Mohd. Yunus v. CBI** 2008 (1) JCC (Narcotics) 33.

15. On the other hand, Ms. Rajdipa Behura, learned APP for the State submits that a notice under Section 50 of the NDPS Act was duly served upon the Appellants. The discrepancy in the rukka about the language in which the notice was signed by Appellant Rattan Singh is not very material. The other discrepancies pointed out by the learned counsel for the Appellants are not material and, therefore, do not affect the case of the prosecution. It is urged that it is a well known fact in order to avoid harassment in the investigation and during trial the public persons are reluctant to join the raiding party as a witness. With regard to incorporation of the FIR number on the seizure memos, it is urged that IO was not questioned on this aspect to seek his explanation. She contends that normally the FIR number is incorporated later on the seizure memo for record purposes and subsequent mentioning of the FIR number on the memo does not create any doubt with regard to recovery of the contraband substance and the prosecution version. The learned APP for the State relies on a Division Bench judgment of this Court in **Dilip v. State** 2011 Crl.J. 334 to urge that percentage of THC in *Charas* is not material because the Appellants were prosecuted under Section 20 of the NDPS Act for being found in possession of Charas, which is defined under Section 2(3) of the NDPS Act as being cannabis and not as a psychotropic substance like THC, which is also found in *Charas*.

16. I have bestowed my thoughtful consideration to the respective contentions raised on behalf of the parties.

RE: NOTICE UNDER SECTION 50 OF NDPS ACT

17. I have before me the notices Ex.PW-3/A in case of Appellant Bilal and Ex.PW-3/B in case of Appellant Rattan Singh and the rukka Ex.PW-3/G. It is true that in the rukka Ex.PW-3/G it has been mentioned that the notices under Section 50 of the NDPS Act were served upon both the Appellants. It is mentioned that Appellant Rattan Singh put his signatures in Hindi whereas Appellant Bilal put his right thumb impression. A perusal of the notice Ex.PW-3/B in case of Appellant Rattan Singh reveals that the English letters are not very clear. The IO being in a hurry might have taken those signatures to be in Hindi and accordingly recorded in the rukka that the Appellant Rattan Singh had signed the notice in Hindi. It is important to note that the attention of the IO to this discrepancy

was not drawn in cross-examination, had it been so, the explanation given by the IO would have been before the Court to appreciate the same. In the circumstances, the factum of recording in the rukka that Appellant Rattan Singh signed in Hindi rather strengthens the prosecution's case as if, there would have been any manipulation by the IO that would have been perfect and this discrepancy would not have been there. Thus, in the absence of any explanation being sought from the IO, I am not inclined to attach any importance to this discrepancy.

NON JOINING OF INDEPENDENT WITNESSES

18. SI Balbir Singh (IO) deposed about three attempts being made by him to join independent witnesses. First at Chirag Delhi bus stand, then at Kalkaji Mandir and ultimately after apprehension of the Appellants and before making their searches. PW-4 and PW-6 also deposed about the attempts made by the IO to join independent witnesses. Thus, it cannot be said that no attempt was made by the IO to join any independent witness before conducting the search of the Appellants. I am in agreement with the learned APP for the State that public witnesses are reluctant to come forward to join police investigation in order to avoid their repeated visits to the Police Station and Court. In **Ajmer Singh v. State of Haryana** 2010 (2) SCR 785, the Supreme Court held that it is not always possible to find independent witnesses at all the places at all the times. The obligation to join public witness is not absolute. If the police officer is unable to join any public witnesses after genuine efforts, the recovery made by the police officer would not be vitiated. The Supreme Court held that in such circumstances, the Court will have to appreciate the relevant evidence to determine whether the evidence of a police officer is believable so as to place implicit reliance thereon. A learned Single Judge of this Court in **Union of India v. Victor Nnamdi Okpo,** Criminal Appeal No.617/2004 decided on 16.09.2010 in a case under the NDPS Act echoed the sentiments that public is averse to become a witness because of the attitude of the Court in summoning the witnesses time and again and sending them back unexamined on the ground that either the counsel of the accused was not available or the accused was not there.

19. As stated earlier, the IO made genuine efforts to join independent witnesses on no less than three occasions. The evidence of four material witnesses (PW-3, PW-4, PW-6 and PW-10) examined by the prosecution is consistent and trustworthy. No material was placed on record so as

to impel this Court to construe that the Appellants would be falsely implicated in a serious case under the NDPS Act. Although, the Appellant Rattan Singh tried to build a case that he was falsely implicated in the case for refusing to provide free chicken to the police officers and a suggestion in this regard was also given to ASI Ashok Kumar, but no suggestion was given to the IO (PW-3) and other witnesses of the recovery. Thus, defence raised by Appellant Rattan Singh is not such so as to create a doubt in the prosecution's version. I do not find any reason to disbelieve the official witnesses even in the absence of any corroboration from independent witnesses.

MANIPULATION OF SEIZURE MEMOS

20. It is true that the seizure memos Exs.PW-3/E and PW-3/F do contain the FIR number on the top left side. SI Balbir Singh (IO) duly proved the seizure memos. No explanation was obtained by the defence counsel as to the presence of the FIR number thereon, particularly when the FIR had not come into existence by the time seizure memos were written. Thus, the contention raised on behalf of the State that the FIR number was subsequently mentioned by the IO for the purpose of the record is convincing and must be accepted. A similar contention was raised before the Delhi High Court in **Ramesh Kumar Rajput @ Khan v. The State NCT of Delhi,** Criminal Appeal No.755/2004, decided on 02.05.2008 where after referring to **Radhey Shyam v. State of Haryana,** JT 2001(3) SC 535 the learned Single Judge of this Court held as under:-

> "15. In any event the law as explained by the Supreme Court is that the mere writing of the FIR number on the arrest and search memos cannot entirely falsify those documents. Significant among the decisions is **Radhey Shyam v State of Haryana** JT 2001 (3) SC 535. Also, there is merit in the contention of the Respondent that there was no specific question put to the officers concerned in their cross-examination. What the counsel for the accused appears to have been done is to ask the witness whether the portion of the document from "point A to A" (which included the portion containing the FIR number) was written at the same time. This might be intelligent cross examination but if the defence wants to prove that the FIR number was in fact written at a later point in time the witness ought to have been asked that question. The failure to elicit any answer from the witnesses on this point can only indicate that the defence may have been inconvenienced by the possible answer that might have been given by the witness or that the witness may have explained that the writing of the FIR number was only for cross verification of the details and therefore the FIR number was written at a subsequent point in time."

21. Thus, mere mentioning of the FIR on the seizure memos Exs.PW3/E and PW3/F would not mean that the memos were prepared after the FIR came into existence.

CONTRADICTIONS & DISCREPANCIES

22. The learned counsels for the Appellants points out that as per the secret information the names of the persons who were to come to Okhla Subzi Mandi with the contraband Charas were disclosed to SI Balbir Singh, yet SI Balbir Singh (the IO) inquired names of the persons who were intercepted at the pointing out of the secret informer. If the prosecution version of the receipt of secret information is accepted, there was no necessity for the IO to have inquired the names of the two persons.

23. In my view, there is nothing unusual for the IO to inquire the names of the two persons who were apprehended on the basis of the secret information. Admittedly, the IO did not know them since before. Therefore, the names of the two persons who were intercepted were to be confirmed. This conduct of the IO is not unusual and does not in any way affect the prosecution case.

24. Learned counsels for the Appellants state that as per the IO DD No.5 was lodged in PS Srinivaspuri at 1:30 P.M. but the said DD was not produced. Similarly, it is stated that the rukka runs into three pages. However, the last page of the rukka has been numbered as '2' instead of '3'. It is urged that the rukka has been changed later on.

25. I do not find much substance in the contention. PW-3 SI Balbir Singh in his examination-in-chief had testified that DD No.5 was recorded at 1:10 P.M. and a copy of the DD entry was sent to the SHO, P.S. Srinivaspuri through Constable Ashok. The IO was not cross examined in respect of this part of the testimony. The IO's testimony shows that this DD was not recorded in the P.S. Srinivaspuri but was recorded in the office of the Special Staff, South District and a copy thereof was

sent t the SHO, P.S. Srinivaspuri. A perusal of the Trial Court record reveals that a copy of the said DD entry was proved as Ex.PA which makes a mention of the receipt of secret information by the IO and bringing it to the notice of the Inspector, Special Staff and ACP (Operation Cell). Similarly, giving number '2' on the last page of the rukka is also not of much significance, especially when no explanation with regard to the same was obtained from the IO. The first and the second page of the rukka is on the same leaf. It is just possible that the IO had given number '2' on the second leaf. In any case, it is not of much significance. It cannot be said that this page was subsequently added because the contents of the rukka had already been recorded in the FIR.

26. The learned counsels for the Appellants drew my attention to the discrepancies in the testimonies of PWs 3,4,6 and 10 as to the time till which they remained at the spot, they reached the Police Station and the time when PW-6 left with rukka and returned with the FIR. The official witnesses remain busy in carrying out one work or the other. They give the time of the various proceedings only by approximation. The discrepancies in carrying out different works, reaching Police Station and returning to the spot by themselves do not create any serious dent in the prosecution case so as to entitle the accused to acquittal.

27. Learned counsels for the Appellants urges that DD No.16 in P.S. Srinivaspuri talks about visit of HC Hawa Singh alongwith rukka, sealed packets containing case property, the samples and also the notice under Section 50 of the NDPS Act. It is urged that the DD was recorded at 7:50 PM. At the same time, malkhana register, copy of which is proved by the prosecution as Ex.PW11/C talks about deposit of the notice under Section 50 NDPS Act by SI Balbir Singh. It is urged that SI Balbir Singh admittedly reached Police Station only at 10.25 PM (vide DD No.21B Ex.PW3/R). Thus, the version as given in DD no.16 and in Ex.PW11/C is contradictory.

28. The contention raised by the learned counsels for the Appellants on the face of it appears to be very attractive but is without any substance. DD No.16 deals with visit of HC Hawa Singh along with the articles as stated earlier. This was for the purpose of registration of the case. After registration of the case etc., the property which is handed over to the duty officer is also to be deposited in the *malkhana* which is normally taken care of by the IO when he reaches the Police Station. Thus, not

only the notice under Section 50 NDPS Act but also other articles as mentioned in DD No.16 were deposited with the *moharar* Head Constable by the IO. Thus, in my view, there is no contradiction between the DD No.16 and the extract of *malkhana* register Ex.PW11/C.

29. The learned counsels for the Appellants points out that in the rukka Ex.PW3/G the Sections under which the FIR is sought to be recorded is 20/20/61/85 NDPS Act, whereas the FIR was registered under Section 20/29 of the NDPS Act. This, according to the learned counsels for the Appellants, indicates some manipulation. The contention raised is devoid of any merit. Sections 20 and 29 of the NDPS Act were stated to be contravened by the two Appellants who were found to be in possession of a large quantity of Charas. The figures 61 and 85 were mentioned in the rukka as NDPS Act is Act No.61 of the year 1985. Thus, there is no contradiction in the rukka and the FIR registered on the basis of the same.

DELAY IN SENDING SAMPLES:

30. It is urged by the learned counsels for the Appellants that there was delay of about one month in sending the samples to the FSL which would be fatal to the case of the prosecution as no explanation has been given for this delay. The learned Special Judge dealt with this submission raised on pages 21 to 24 of the impugned judgment and relied on **Ramesh Kumar Rajput @ Khan v. State of NCT of Delhi,** MANU/DE/0786/2008 and **Bilal Ahmad v. State,** 2011 III AD (Crl) (DHC) 293 where there was a delay of 59 days in sending of the samples to the FSL. Para (v) of page 24 of the impugned judgment is extracted hereunder:

> "In case of **Rajput @ Khan v. State of NCT of Delhi,** MANU/DE/0786/2008, there was a delay of 13 days in sending the sample pullandas to the CFSL, but the same was not considered to be fatal keeping in view the fact that there was nothing on record to suggest or to infer from that the sample pullandas were tampered in the police malkhana. In a recent case of **Bilal Ahmad v. State,** 2011 III AD (Crl) (DHC) 293 also even a delay of 59 days in sending of the samples was considered to be not fatal in the absence of any such evidence or inference of tampering with the sample pullandas on the basis of the record. Hence, in view of the above, this argument of ld. defence counsels also carries no weight."

31. All the samples duly sealed were properly received in the office of FSL. The learned Special Judge dealt with the testimony of PW11 HC Om Prakash with whom the samples had been deposited and Constable Harinder Singh PW5 who carried the samples to the FSL. In view of this, mere delay of about one month in sending the samples is not fatal to the prosecution.

COMMERCIAL QUANTITY:

32. It is urged by the learned counsels for the Appellants that a notification No.2941(E) dated 18.11.2009 was issued by the Government of India whereby it was clarified that the quantity shown in column No.5 and column No.6 of the table relating to respective drugs shown in column No.2 shall apply to the entire mixture of any solution or any one or more narcotic drugs or psychotropic substances of that particular drug. It is urged that in the instant case, the recovery was effected on 28.10.2007, that is, much before the notification referred to earlier. The notification cannot be made applicable to the Appellants to their detriment. Considering that the percentage of THC in the report Ex.PA2 of CRCL in case of Appellant Rattan was found to be 4.9% and in case of Appellant Bilal to be 5.1%, the quantity of THC in real terms was only 49 gms and 102 gms respectively and Appellant Rattan was really found in possession of small quantity of Charas whereas Appellant Bilal was found in possession of an intermediate quantity of *Charas*. The learned counsels for the Appellants place reliance on a judgment of a learned Single Judge of this Court in **Mohd. Yunus v. CBI,** 2008(1) JCC (Narcotics) 33 whereby recovery of 11 kgs of Charas on the basis of the percentage of Dyetetrahydrocanabil was converted into 473 gms and the Appellant in that case was convicted for intermediate quantity and sentenced to imprisonment for nine years and six months which he had already undergone. Reliance is also placed on the report of the Supreme Court in **E.Micheal Raj v. Intelligence Officer, Narcotic Control Bureau,** 2008 (2) JCC(Narcotics) 78 wherein quantity of 4 kgs of heroin was converted to 250 gms on the basis of purity.

33. The contention raised on behalf of the Appellants is fallacious. The question of purity of a contraband was considered by the Division Bench of this Court in **Dilip v. State,** (2011) Cri L.J., 334, wherein the judgment in *E.Micheal Raj* was also duly considered by this Court. The Division Bench considered the definition of cannabis as given in Section

2(iii) as including *Charas* in Section 2(iii)(a) of the NDPS Act, possession whereof is punishable under Section 20 of the NDPS Act and possession of psychotropic substances which is punishable under Section 21 of the Act. Charas as defined in Section 2(iii)(a) is the separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish. Thus, Charas is a separated resin, whether crude or purified obtained from the cannabis plant. For the purpose of applicability of Section 20 of the NDPS Act, the Court is simply to see whether the substance recovered is *Charas* or not and not its purity. Entry 150 of the notification No.S.O.527(E) dated 16.07.1996 shows that possession of just 2 gms of Tetra Hydro Cannabinol would fall in the small quantity and anything beyond 50 gms would be a commercial quantity, whereas in case of Charas, any quantity upto 100 gms would be small quantity whereas 1 kg and above of Charas will be commercial quantity. In para 14, the Division Bench in Dilip held as under:

> "14. From the above provisions, it is apparent that cannabis is a narcotic drug under Section 2(xiv). On the other hand, THC is a psychotropic substance as it finds mention at S.No.13 in the list given in the Schedule to the NDPS Act. Thus, while cannabis contains THC and THC forms an important constituent of cannabis, THC by itself is a psychotropic substance and is separately regarded under the NDPS Act. This is important because the nature of the offence and the punishment prescribed for the offence depends on whether a substance is a narcotic drug or a psychotropic substance. The punishment for contravention in relation to cannabis plant is specifically given in Section 20 of the NDPS Act. On the other hand, the punishment for contravention in relation to psychotropic substances is provided in Section 22 of the NDPS Act. Consequently, it would make a material difference as to whether the alleged contraband is cannabis (a narcotic drug) or THC (a psychotropic substance). The question that requires our decision is not in the context of the percentage of THC as a psychotropic substance, but, the percentage of THC in *charas* (cannabis), which is a narcotic drug. Thus, the classification of the recovery as a small, intermediate or commercial quantity has to be done from the standpoint of charas (a narcotic drug) and not from the standpoint of THC (a psychotropic substance)."

34. In this view of the matter, the entire quantity of Charas would govern the fact whether it was a small quantity or a commercial quantity. Since the Appellant Rattan was found in possession of 1 kg of Charas and Appellant Bilal was found in possession of 2 kgs of Charas, the same were clearly commercial quantities. The learned Special Judge rightly considered the quantity recovered to be commercial quantity.

35. In view of the above discussion, the learned Special Judge rightly concluded that the prosecution had established its case against the Appellants beyond shadow of a reasonable doubt. The Appellants have been awarded the minimum sentence as provided under Section 20(b)(ii)(C) of the NDPS Act.

36. The Appeals are, therefore, devoid of any merit. The same are accordingly dismissed.

ILR (2013) II DELHI 881
DEATH SENTENCE REF.

STATE **....PETITIONER**

VERSUS

KUMARI MUBIN FATIMA & ORS. **....RESPONDENT**

(GITA MITTAL & J.R. MIDHA, JJ.)

DEATH SENTENCE REF. NO. : 2/2012 & CRL. A. NO. : 474/2012, 472/2012 & 473/2012 **DATE OF DECISION: 29.01.2013**

Indian Evidence Act, 1872—Section 32—Dying declaration – admissibility of the statement attributed to the deceased – court must satisfy that the person making the declaration was conscious and fit to make the statement – upon being so satisfied, even an uncorroborated dying declaration can be the basis for finding of conviction of murder.

We also find that no record of the treatment given to the injured person after she was taken to the hospital has been placed or proved on record by the prosecution. A person who has suffered 100% burns and is suffering from muscle stiffness would be in absolute agony and there is every possibility of pain killers and sedatives having been administered to her. This factor renders it even more essential that expert opinion with regard to the fitness of the person to make a statement is taken immediately or proximately before the recording of the statement. Certainly no reliance can be placed on fitness taken four hours prior to the recording of the statement of such injured person. **(Para 48)**

The learned trial judge has therefore, erred in placing reliance on the endorsement of fitness on the MLC – Ex. PW15/A of the deceased. Firstly, the doctor who allegedly made such endorsement was not examined. Secondly, even if the endorsement of fitness at 4:00 am was correct, there was nothing on record to show that the deceased remained fit even at 7:50 am when PW-10 – Shri P.K. Sofat claims to have recorded the statement. **(Para 58)**

The tenor of the statement which records that the maker giving 'bayan' as well as the certification of the same statement being voluntary, in full consciousness and without any kind of pressure is not a statement which any lay person would make, let alone one who has suffered 100% burns. **(Para 61)**

Dying declaration – admissibility thereof – satisfaction of the person recording the dying declaration – Held: it is not the satisfaction of the person recording the dying declaration above with regard to the fitness of the persons to whom the same is attributed but the Court has to be satisfied that the person to whom the

statement is attributed was actually in a fit state of mind and actually made the statement which has been attributed to the victims.

It is therefore, well settled that it is not the satisfaction of the person recording the dying declaration alone with regard to the fitness of the persons to whom the same is attributed but the court has to be satisfied that the person to whom the statement is attributed, was actually in a fit state of mind and actually made the statement which has been attributed to her. **(Para 43)**

Indian Evidence Act, 1872 – Section 32 – dying declaration – use of words like 'patni', 'niwasi', 'vivah', 'pati', 'dinak', 'sambandh' etc. in the dying declaration of an Urdu speaking person – whether claim of SDM having recorded the statement 'word by word' believable? Held: No. Words used by the victim, Muslim by religion, are not used in common parlance even by a Hindi speaking person.

As the very name of the deceased suggests that the parties involved were Muslim and, therefore, would be speaking in Urdu. The SDM has claimed that he recorded the statement 'word by word'. The statement finds use of words like 'patni, niwasi, vivah, pati, dinak, sambandh, evam, uprokh, jaan se marne ki niyat' are not words used in common parlance even by a Hindi speaking person. These words would not be used by a Urdu speaking person. **(Para 60)**

Death reference – Indian Penal Code – Section 302/34 – Conviction based on dying declaration – material contradictions – gaps in the prosecution case – no evidence of struggle of any kind by the deceased – no sign of burning in the room – children continued to sleep in the immediate proximity – Held: Prosecution story implausible. Conviction not sustainable.

The incident involved three persons according to the statement attributed to the deceased by the SDM. It is alleged that Mubin Fatima, sister-in-law of the deceased

held the deceased while Gulbeg Ali pouring kerosene over her and set her aflame. It is not the case of the prosecution that the hands and feet of the deceased were tied. Any person would have responded violently to an attempt to burn her by third parties. Given the past history of disputes between the parties, certainly the deceased would not have willingly come down with her father-in-law or brother-in-law. She would also not have remained silent if efforts were made by a third person to put kerosene over her. There is no evidence led of any protest by the deceased. There is also no evidence of any kind of a struggle by the deceased in either trying to free herself from the clutches of Mubin Fatima if she had been held as alleged or of trying to escape from the room. The prosecution case is that the deceased was set alight in the same room where kerosene was poured over her. There is no sign of anything burning in the room. Most importantly that there is no explanation at all from the side of the prosecution as to how two children continued to sleep in the immediate proximity of such violence without being disturbed in any manner. **(Para 101)**

There are several gaps in the case of the prosecution as noticed above. One material factor established from the record of the police control room is a fact that the deceased made a telephone call at 3:00 am to the police control room complaining of a quarrel at the premises. She made another phone call to the police within three minutes thereafter, barely about two minutes before the police reached there. The prosecution has set up a case that three grown up adults were involved in the incident and were pitched against one lady, i.e., the deceased. How would three persons bent upon burning a lady to death, permit her to use her telephone to call the police, not once but twice over? This story is implausible to say the least. **(Para 147)**

Indian Evidence Act, 1872 – Section 32 – dying declaration is a substantive piece of evidence – can be relied upon – Medial evidence and surrounding circumstances – cannot be ignored or kept out of

consideration.

It is well settled that dying declaration is a substantive piece of evidence which can be relied on, provided it is established that the same was made voluntarily and truthfully by a person who was in a fit state of mind. If so made, conviction can be based on the dying declaration. Medical evidence and surrounding circumstances cannot be ignored and kept out of consideration by the court placing exclusive reliance upon the testimony of a person recording the dying declaration. **(Para 153)**

[Lo Ba]

APPEARANCES:

FOR THE PETITIONER : Ms. Ritu Gauba, APP.

FOR THE RESPONDENTS : Mr. Ajay Verma with Mr. M.L. Yadav, Ms. Ananya (in D.S.Ref. 2/2012 Mitra and Mr. Gaurav Bhattacharya, Advocates & Crl.A. 473/2012) for Mubin Fatima (in Crl.A. 474/2012) Mr. Sumeet Verma, Advocate for Gulbeg Ali (in Crl.A.472/2012) Mr. Bhupesh Narula, Advocate for Zulfikar Ali.

CASES REFERRED TO:

1. *Kunal Majumdar* vs. *State of Rajasthan,* (2012) 9 SCC 320
2. *Sandesh @ Sainath Kailash Abhang* vs. *State of Maharashtra,* (2012) 12 SCALE 407.
3. *Sangeet & Anr.* vs. *State of Haryana,* (2012) 11 SCALE 140.
4. *Oma @ Omprakash & Anr.* vs. *State of Tamil Nadu,* (2012) 12 SCALE 112.
5. *State* vs. *Sanjay,* (2011) 4 JCC 2478.
6. *State of Rajasthan* vs. *Wakteng,* AIR 2007 SC 2020.

7. *Nallapati Sivaiah* vs. *Sub Divisional Officer, Guntur, Andhra Pradesh,* (2007) 11 SCALE 477.
8. *Lehna* vs. *State of Haryana,* (2002) 3 SCC 76.
9. *Smt. Laxmi* vs. *Om Prakash & Ors.,* (2001) AIR SCW 2481.
10. *Arvind Singh* vs. *State of Bihar,* 2001 (3) SCALE 549.
11. *Hindustan Times Ltd.* vs. *Union of India and Ors.,* (1998) 2 SCC 242.
12. *Machhi Singh* vs. *State of Punjab,* (1983) 3 SCC 470.
13. *Bachan Singh* vs. *State of Punjab,* (1980) 2 SCC 684.
14. *Shivaji Sahabrao Bobade* vs. *State of Maharashtra,* (1973) 2 SCC 793.
15. *Khushal Rao* vs. *State of Bombay,* AIR 1958 SC 22.
16. *Atley* vs. *State of Uttar Pradesh,* AIR 1955 SC 807.

RESULT: Conviction set aside and quahsed.

GITA MITTAL, J. (Oral)

1. By way of Death Sentence Reference No.2/2012, this court is required to consider the legality and validity of the judgment dated 17th March, 2012 whereby the respondents in Death Reference no.2/2012 have been found guilty for commission of offences under Section 302 read with Section 34 of the IPC as well as order of sentence dated 26th March, 2012 whereby they have all been sentenced to death penalty for commission of such offences as well as payment of fine of Rs.5,000/-each and in case of default, one month's rigorous imprisonment each.

2. The respondents have assailed the said judgment and said order of sentence by way of the criminal appeals being Crl.A.No.472/2012, Zulfikar Ali v. State; Crl.A.No.473/2012, Mubin Fatima v. State; and Crl.A.No.474/2012, Gulbeg Ali v. State. Inasmuch as the three appeals and the death reference arise out of the same judgment based upon the same record and raise similar questions of law and fact, we are taking them together for consideration. So far as reference to parties is concerned, for the purposes of convenience, we are referring to the convicts as the respondents in the present judgment.

Scope of consideration in a case of confirmation of sentence

3. The principles which would govern the consideration by us of the impugned judgment as well as the sentence of death imposed by the learned trial court on the respondents are well settled. We may usefully refer the recent pronouncement of the Supreme Court placed by Ms. Ritu Gauba, learned APP before this court which is reported at (2012) 9 SCC 320, **Kunal Majumdar v. State of Rajasthan** wherein the Supreme Court noticed the applicable statutory provisions and laid down binding principles thus:"

> 16. In a case for consideration for confirmation of death sentence Under Section 366 (1) Code of Criminal Procedure., the High Court is bound to examine the Reference with particular reference to the provisions contained in Sections 367 to 371 Code of Criminal Procedure. Under Section 367, Code of Criminal Procedure., when Reference is submitted before the High Court, the High Court, if satisfied that a further enquiry should be made or additional evidence should be taken upon, any point bearing upon the guilt or innocence of the convict person, it can make such enquiry or take such evidence itself or direct it to be made or taken by the Court of Sessions. The ancillary powers as regards the presence of the accused in such circumstances have been provided under Sub-clauses (2) and (3) of Section 367, Code of Criminal Procedure. Under Section 368, while dealing with the Reference Under Section 366, it inter alia provides for confirmation of the sentence or pass any other sentence warranted by law or may annul the conviction itself and in its place convict the accused for any other offence of which the Court of Sessions might have convicted the accused or order for a new trial on the same or an amended charge. It may also acquit the accused person. Under Section 370, when such Reference is heard by Bench of Judges and if they are divided in their opinion, the case should be decided in the manner provided Under Section 392 as per which the case should be laid before another Judge of that Court who should deliver his opinion and the judgment or order should follow that opinion. Here again, under the proviso to Section 392, it is stipulated that if one of the Judges constituting the Bench or where the appeal is laid before another Judge, either of them, if so required, direct for rehearing of the appeal

> for a decision to be rendered by a larger Bench of Judges.
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> xxx
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> 18. We are, however, duty bound to state and record that in a Reference made Under Section 366 (1) Code of Criminal Procedure., there is no question of the High Court short-circuiting the process of Reference by merely relying upon any concession made by the counsel for the convict or that of counsel for the State. A duty is cast upon the High Court to examine the nature and the manner in which the offence was committed, the mens rea if any, of the culprit, the plight of the victim as noted by the trial Court, the diabolic manner in which the offence was alleged to have been performed, the ill-effects it had on the victim as well as the society at large, the mindset of the culprit vis-a-vis the public interest, the conduct of the convict immediately after the commission of the offence and thereafter, the past history of the culprit, the magnitude of the crime and also the consequences it had on the dependants or the custodians of the victim. There should be very wide range of consideration to be made by the High Court dealing with the Reference in order to ensure that the ultimate outcome of the Reference would instill confidence in the minds of peace loving citizens and also achieve the object of acting as a deterrent for others from indulging in such crimes."

4. The consideration by this court of the judgment and the sentence imposed by the learned trial judge would abide by the above principles.

5. As noticed above, three appeals filed by three convicts have also been placed before us. So far as scope of consideration by an appellate court in an appeal against the conviction is concerned, the principles thereof have been laid down by the Supreme Court in a judgment which has been reported as back as in AIR 1955 SC 807, Atley v. State of Uttar Pradesh wherein the court held as follows:

> "5. It has been argued by the learned counsel for the appellant that the judgment of the trial court being one of acquittal, the High Court should not have set it aside on mere appreciation of the evidence led on behalf of the prosecution unless it came to the conclusion that the judgment of the trial Judge was perverse. In our opinion, it is not correct to say that unless the appellate

court in an appeal under Section 417, Criminal P.C. came to the conclusion that the judgment of acquittal under appeal was perverse it could not set aside that order.

It has been laid down by this Court that it is open to the High Court on an appeal against an order of acquittal to review the entire evidence and to come to its own conclusion, of course, keeping in view the well established rule that the presumption of innocence of the accused is not weakened but strengthened by the judgment of acquittal passed by the trial court which had the advantage of observing the demeanour of witnesses whose evidence have been recorded in its presence.

It is also well settled that the court of appeal has as wide powers of appreciation of evidence in an appeal against an order of acquittal as in the case of an appeal against an order of conviction, subject to the riders that the presumption of innocence with which the accused person starts in the trial court continues even up to the appellate stage and that the appellate court should attach due weight to the opinion of the trial court which recorded the order of acquittal.

If the appellate court reviews the evidence, keeping those principles in mind, and comes to a contrary conclusion, the judgment cannot be said to have been vitiated. (See in this connection the very cases cited at the Bar, namely, **'Surajpal Singh v. The State',**; **Wilayat Khan v. State of Uttar pradesh'**. In our opinion, there is no substance in the contention raised on behalf of the appellant that the High Court was not justified in reviewing the entire evidence and coming to its own conclusions."

These well settled principles have guided our consideration.

Case of the prosecution

6. The instant case commences on an incident on the night intervening 21st/22nd October, 2009. The place of occurrence is cited as the First Floor of House No.B-22, Gali No.3, Chaman Park, Near Bhagirathi Vihar, Delhi-110094, a property constructed on a plot of 22 sqr.yrds.

Sub-Inspector Mukesh Kumar Jain (Draughtsman) who appeared

as PW-8 inspected the spot which allegedly was the first floor (upper ground) of this property and prepared the scaled site plan (Ex.PW8/A). PW-8 has stated that the passage for going from one floor to another was only a bamboo ladder which was only about 50 cms vide. There was therefore, no permanent or fixed staircase even. The bamboo ladder going to the upper floors was kept inside the house itself.

7. Perusal of the site plan – Ex.PW-8/A would show that the property was one of a row of tenements built wall to wall with no open space on any side. The properties were opening out on to the narrow gali itself.

8. It is undisputed that the said property was owned by Gulbeg Ali who was residing on the first floor (also referred to as the upper ground floor) with his daughters Mubin Fatima and Chand Kiran. The elder son of Gulbeg Ali, Sarfaraz was residing with his wife Shama Praveen (deceased) and their two children on the second floor. The ground floor was occupied by Gulbeg Ali's younger son Zulfikar Ali and his family.

9. It is the case of the prosecution that on the 26th of October 2009 (Ex.PW13/A), at about 3:07:43 hrs, the Delhi Police Control Room received information from the informant –'Shama Devi' from the phone no.'9312668396' giving her address as R-73, Gali No.3, Brahmpuri, New Delhi-110053 that there was a 'quarrel' at Chaman Park, Gali No.3, B-22, Near Aksha Masjid. This information was recorded by PW-13 – Woman Ct. Vinod Kumari who has in the same report again noted that the incident related to a 'jhagra'.

10. The receipt of this information has been established in the testimony of PW-13 – Lady Ct. Vinod Kumari who filled-up this information into the computer and dispatched it to the wireless section wherefrom the information was transmitted to the PCR vehicles, the concerned police station, etc. The police control room record of the entire information regarding the occurrence in question was proved as Ex.PW13/A on record.

11. The testimony of PW-13 is corroborated by PW-14 – Head Constable Ravi Shankar Sharma who has stated that on the 22nd of October 2009, he was on duty as incharge of the PCR vehicle which was based at Pulia, Brij Puri, Near Bhagirath Vihar, Delhi. While on duty at about 3:10 am, PW-14 received information on his wireless sent from

the control room to the effect that there was a quarrel at B-22, Near Aksha Masjid, Gali No.3, Chaman Park, Bhagirathi Vihar, Delhi. The witness has stated that he duly recorded an entry with regard to the receipt of this information and proceeded to the spot by PCR vehicle.

12. At the Police Station Gokulpuri, Delhi, on receipt of the said information of the quarrel at the said house being House No.B-22, Gali No.3, Chaman Park, Near Bhagirathi Vihar, Delhi-110094 from the police control room, DD No.40A was recorded at 3:10 am on the 22nd of October 2009 as Ex.PW12/A. This information was given to PW-16 ASI Sona Ram on the mobile phone for taking appropriate action.

13. With regard to the situation at the spot, PW-14 HC Ravi Shankar Sharma, incharge of the PCR, has disclosed that at the spot, he found Gulbeg Ali, an old man was coming out of the house followed by a lady in burning condition. PW-14 helped extinguish the fire and put a blanket over the body of the said lady. PW-14 categorically states that Gulbeg Ali and his son Zulfikar Ali had helped him in extinguishing the fire.

As per PW-14, when he interrogated the said lady, she had replied that she was put on fire by her father-in-law, brother-in-law (dewar) and sister-in-law (nanad).

14. At this stage, it is necessary to notice other contemporaneous police documentation which has material bearing on the case. As per the Delhi police control room report (Ex.PW13/A), the police control room has recorded a report received from the PCR van at 03:27:57 hrs to the effect that *'lady ne khud ko aag laga rakhi hai Aag bujha di Laker GTB Hosp ja rahe hai jali avastha me baki halat baad me'* (which when translated reads as 'Lady has set herself alight. Fire has been extinguished. Being taken to GTB Hospital in burnt condition. Rest of the condition later').

15. PW-14 – HC Ravi Shankar Sharma further disclosed that, before reaching the spot, he had made a telephone call to the mobile phone of the informer Shama Praveen, which was mentioned in the information received at the control room. The informant Shama Praveen had told PW-14 that he should reach the spot soon as there was a quarrel at her house. PW-14 has categorically stated that when he made the call to the informer, the PCR van was only about 2 minutes away from the spot.

16. PW-14 – HC Ravi Shankar Sharma disclosed that not only was

Shama Praveen taken to the Guru Teg Bahadur Hospital but Gulbeg Ali had also suffered burn injuries in the incident and was taken to the hospital by the same PCR van.

17. As per the MLC no.A/4964/09 (Ex.PW15/A) of deceased Shama Praveen, she reached the hospital at 4:00 am on the 22nd of October 2009. The MLC was recorded by one Dr. Satish Chandra, a Jr. Resident in the emergency ward. The doctor has noted that CE examination of the patient showed that she had suffered 100% burns all over the body; that the patient was conscious and oriented though her pulse rate was high at 120 per minute. The doctor was unable to record the blood pressure of the patient because of extensive 'skin stiffness'. Given the condition of the patient, a reference was sent to the surgery ward. One elastic rope which was on the deceased was handed over to the duty constable. The MLC notes that the patient had given a history of burns by in-laws. A perusal of the MLC of the deceased (Ex.PW15/A) shows that the deceased was referred to the surgery ward (room no.149). There is no reference at all to the deceased having been referred to or sent to the Burns ward.

With regard to the initial treatment administered to the patient, it is noted that the patient was prescribed injection TT; injection voveran; oxygenated.

18. The prosecution has also proved as Ex.PW15/B, the MLC bearing no.C/4897/09 of Gulbeg Ali who was also taken to the hospital by PW-14 – HC Ravi Shankar Sharma and was medically examined at 4:20 am in the GTB Hospital. This MLC is also recorded by Dr. Satish Chandra, Jr. Resident who has noted that Gulbeg Ali had suffered 10% burns which involved both hands; left thigh; and left knee. The doctor had recommended that the patient be kept under observation in the hospital.

19. It now becomes necessary to examine the intervention of the investigating officer in the matter. PW-16 – ASI Sona Ram has stated that on 22nd October, 2009, he was on night emergency duty at the police station when at about 00:15 am, a copy of DD no.40A (Ex.PW12/A) was assigned to him to take action into the matter in connection with a quarrel at the aforesaid House No.B-22, Gali No.3, Chaman Park, Near Bhagirathi Vihar, Delhi-110094. PW-16 – ASI Sona Ram with Constable Sachin Yadav reached the spot where he learnt that the injured Shama Praveen had already been removed to GTB Hospital by the PCR officials. PW-16 inspected the spot on the first floor of room in the said house

and noticing some incriminating evidence; he left Constable Sachin Yadav to guard the spot while he proceeded to the hospital. In the GTB Hospital at about 4:15 am, he collected the MLC of Shama Praveen when it came to his notice that according to the MLC, she was fit to make a statement. PW-16 has deposed that he informed the Executive Magistrate on the phone that the incident had taken place within seven years of marriage. It is in evidence that Shama Praveen was married to Sarfaraz – PW-3 in around the year 200304 and that they had two children from the marriage.

20. Reference at this stage may usefully be made to the deposition of PW-10 -Shri P.K. Sofat, Executive Magistrate, Seelampur, Delhi who claims to have arrived at the hospital at about 7:00 am. PW-10 has stated that he met the injured Shama Praveen, wife of Sarfaraz Hussain with the assistance of a police official whose name he could not remember. The witness states that the injured had been declared fit to make a statement and that he recorded the statement (Ex.PW10/A) of the injured Shama Praveen in the burns ward at about 7:50 am. PW-10 further states that he obtained the right thumb impression of the injured at point 'A' on her statement. So far as the contents of the statement are concerned, the witness testified that *"whatsoever injured told to him, same was recorded in her statement word by word by him. The statement of injured is correct. I had read over the same to the injured"*.

21. PW-10 – Shri Sofat has further deposed that after going through the statement of the injured, he realized that action had to be taken against the accused persons and therefore, he made an endorsement addressed to the SHO, Police Station Gokulpuri to take action as per the law. The witness delivered the statement – Ex.PW10/A to a police official to hand over the same to the SHO and left the GTB Hospital.

22. It appears that Shama Praveen could not recover and was declared clinically dead at 2:20 am on the 23rd of October 2009 (Ex.PW16/E).

23. The PW-16 -ASI Sona Ram, the investigating officer informed the SDM about the death vide DD No.17A. Information was also given to the police station Gokulpuri which was recorded as DD No.27A at 3:50 am on the 23rd of October 2009 (Ex.PW7/A).

24. The SDM, Shri P.K. Sofat thereafter conducted inquest proceedings and sent the body for post-mortem examination. The post-

mortem was conducted by Dr. Jyoti who was not available at the time of recording of evidence. The post-mortem report dated 23rd October, 2009 was proved on record as Ex.PW16/E1 wherein the doctor opined the cause of death as *"shock as a result of antemortem flame burn involving about 96% of the total body surface area"*. It is important to note that as per the death summary (Ex.PW16/E), the deceased was taken to the general surgery emergency on 22nd October, 2009.

25. Inasmuch as, the entire edifice of the prosecution case rests on the statement attributed to Shama Praveen claimed to have been recorded by PW-10 – Shri P.K. Sofat, the same deserves to be considered in extenso and reads as follows:-

"DDNo.40A Dated 22.10.09 PS Gokulpuri"

"Mein Shama Parveen **patni** Shri Sarfaraz Hussain **nivasi** makan no.22 B Gali No.3 Chaman Park Johri Pur Delhi umar 26 saal ye bayan karti hu ki mera **vivah** muslim **reeti rivaz** se panch baras pehle Delhi (Brahmpuri) me hua tha mere do bachche hain ek ladka aur ladki. Main apne sasural walon se **alag** dusri manzil par apne pati ke sath rehti hu ghar jaydaad ke bantware ke **sambandh** me mere sasur va dewar se jhagra hota rehta tha mere sasur mujhe aur mere **pati** ko property se bedakhal karna chahte the isi baat par pehle bhi kai baar jhagra hua hai **dinak** 21.10.2009 ko mere pati kaam par chale gaye the aur raat ko ghar par nahi the aur akele bachchon ke sath apne kamre me so rahi thi waqt kareeb 2.30 baje mera sasur Gulbeg Ali va dewar Zulfikar Ali mujhe apne kamre me pehli manzil lay lastic ki rassi mere dewar ne mere gale me bandh di aur nanad Mubin Fatima ne mujhe pakar aur sasur ne mitti ka tel mujh par daalkar machis ki tilli jala **jaan se marne ki niyat** mujhe aag laga di meri maut ka zimmewar mera sasur dewar evam nanad **uprokt** honge.

Mein bayan apni marji se pure hosh hawaas **evam** bina kisi dabav ke diye hain. Bayan parkar sun liye hain. Bayan sahi hai."

(Emphasis supplied)

Registration of FIR

26. According to PW-16 – ASI Sona Ram, at about 8:00 am, the statement of the injured person was delivered to him by the Executive

Magistrate to take action into the matter as per law. The witness – PW-16 has stated that he made an endorsement (Ex.PW16/A) on the statement after registration of the FIR and sent the same with Constable Sachin Yadav to the police station at about 9:00 am. In this regard, our attention is drawn to the rukka recorded by PW-16 – ASI Sona Ram at about 9:00 am on the 22nd of October 2009 on the statement claimed to be recorded by PW-10 – Shri P.K. Sofat, Executive Magistrate disclosing commission of offences under Sections 307/34 of IPC. The rukka was sent by PW-16 to the police station through Constable Sachin Yadav. Based on this rukka, FIR No.320/09 was registered under Sections 307/34 of IPC. DD No.3A was recorded at 9:20 am with regard to the registration of the case.

Investigation

27. PW-16 – ASI Sona Ram states that he had made inquiries from Shama Praveen but he did not record what she told him. 28. So far as the investigation into the case is concerned, PW-16 – ASI Sona Ram has stated that he had taken one sealed parcel containing an elastic rope vide seizure memo – Ex.PW2/A which was produced by lady Constable Karamveer from the hospital. He proceeded from the hospital to the spot where he met Sarfaraz, husband of the injured at the spot. PW-16 has proved the site plan of the place of occurrence which was Ex.PW3/B prepared in his presence which bears signatures of Sarfaraz as well as the police officer. PW-16 directed the photographer constable Tarun Kumar Sharma (PW-6) to take photographs. PW-16 – ASI Sona Ram and constable Tarun Kumar Sharma (PW-6) visited the spot between 5:00 am to 5:30 am and took the photographs (Ex.PW6/A1 to Ex.PW6/A11). The crime team which included Sub-Inspector A.S. Yadav inspected the crime scene and advised PW-16 to lift incriminating articles from the spot.

29. So far as the recoveries are concerned, PW-16 has deposed that vide recovery memo dated 22nd October, 2009 (Ex.PW16/B), he had seized burnt clothes of the injured; a match box of the make 'ship' containing two used match sticks; and an empty plastic bottle of two litres having a red lid from which smell of kerosene was coming. The witness deposed that he had also recorded the statements of Sub-Inspector A.S. Yadav and Constable Tarun.

30. The judgment dated 17th of March 2012 rests primarily on the

finding that the accused persons had the motive for the crime on account of a property dispute. It has based the conviction on the finding that the deceased had made a voluntary and truthful declaration (Ex.PW10/A) recorded by PW-10 – Shri P.K. Sofat in a fit state of mind. The other statements attributed to the deceased on the fateful night have not been considered material by the learned trial judge. Both these findings have been staunchly assailed by learned counsels for the convicts. We first take up for consideration the challenge to Ex.PW10/A.

Fitness of the deceased

31. Mr. Bhupesh Narula, learned counsel has urged that she was in a critical condition at the time of her admission at 4:00 am in the GTB Hospital. Her condition was only deteriorating and she expired on 23rd October, 2009 at 2:20 am. As per the death summary, she had suffered 96% thermal burns which included facial burns and respiratory burns with deep burns all over the body. Her condition with passage of time could not have improved and by 7:50 am when the SDM claims to have recorded her statement, she would have certainly be more critical than when she was admitted over four hours earlier when she was admitted to hospital.

32. Mr. Bhupesh Narula, learned counsel has also drawn our attention to the post-mortem report – Ex.PW16/E1 which recorded that her lungs were congested and ademotus.

33. In this regard, Mr. Ajay Verma, learned counsel has placed the relevant extract from Medical Jurisprudence and Toxicology by Cox wherein it is noticed that in the survivor of burns, there may be severe respiratory damage due to the inhalation of flame and smoke which damage the lining of the larynx, trachea bronchi and even deeper portion of the lung. This may itself lead to death from respiratory insufficiency but may also be followed by severe, sometimes fatal, respiratory infection. It is urged that in such burnt condition the deceased would be really agitated as is evident from her high pulse rate.

34. Learned counsels for the respondents strongly challenge the fitness of the deceased to have made any dying declaration. It is pointed out that PW-10 had admittedly neither taken medical fitness of the deceased from any doctor nor verified the same in any manner. It is pointed out that Ex.PW10/A contains no evidence of her fitness.

35. Before dealing with this contention, we may touch upon the well settled principles on the issue. The tests which a statement attributed to a dead person has to satisfy before it is admissible in evidence as a dying declaration under Section 32 of Evidence Act are laid down in the landmark judgment of the Supreme Court in AIR 1958 SC 22 **Khushal Rao vs. State of Bombay** which holds the field. In this binding judicial pronouncement, the Supreme Court conducted a review of the relevant provisions of the Evidence Act as well as judicial precedents of the Supreme Court as well as High Courts in India and laid down the principles thus :-

> "16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other piece of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been

> consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties."

(Underlining by us)

36. So far as the scrutiny which the court has to conduct and the conclusion which could be drawn, based on a dying declaration is concerned, in para 17, the court had observed as follows :-

> "17. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case."

(Underlining by us)

37. The issue of reliability of a dying declaration arose for consideration before the Supreme Court in AIR 2007 SC 2020 **State of Rajasthan vs. Wakteng**. In this case, the dying declaration was recorded two days after the occurrence. The doctor's certificate about the mental state of the deceased was absent. There was also no evidence as to why the magistrate could not be called for recording the statement. The court held that such a declaration would be unreliable. In para 15 of this pronouncement, the Supreme Court observed thus:-

"though great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lie or to concoct a case so as to implicate an innocent person however it cannot be sufficiently emphasized that the court has to be careful to ensure that the statement was not the result of either tutoring, prompting or a product of the imagination. It is, therefore, essential that the court must be satisfied that the deceased was in a fit state of mind to make a statement, had clear capacity to observe and identify the assailant and that he was making the statement without any influence or rancor. Once, the court is satisfied that the dying declaration is true and voluntary, it is sufficient for the purpose of conviction".

38. As noticed above, upon being satisfied with regard to the admissibility of a statement attributed to a deceased, the court must satisfy that the person making the declaration was conscious and fit to make the statement. It is well settled that upon being so satisfied, even an uncorroborated dying declaration can be the basis for finding a conviction for murder. This proposition is unassailable.

39. The Supreme Court had occasion to consider the entire gamut of law relating to dying declarations; their admissibility and relevance in the pronouncement reported at (2001) AIR SCW 2481 **Smt. Laxmi vs. Om Praksh & Ors.** In this case, the prosecution was relying upon five dying declarations which included, firstly, a statement alleged to have been made by the deceased to the ASI on way from the residence of accused persons to the hospital; secondly, a statement of the deceased to the attending doctor; a third dying declaration alleged to have been made to the magistrate; a fourth dying declaration made to the investigating officer and the fifth declaration, alleged to have been made to her brother. These five statements attributed to the deceased coming from the mouths of different witnesses were not found worthy of being accepted or acted upon as such dying declarations to base a conviction thereon. It was held by the Supreme Court that none of these statements could form the basis for conviction of the accused persons, inter alia, for the reason that there was no medical evidence to show that the deceased was in a fit state of mind and physical condition to have made the statement at the relevant time when it was recorded.

40. In **Laxmi vs. Om Prakash & Ors.** (supra), the Supreme Court has pointed out that the admissibility of the dying declaration rests on the principle of necessity. The principles thereof have been culled out in the following terms in paras 28 and 29 of the pronouncement which shed valuable light on the issue under examination in the present case and read as follows:-

"28. A dying-declaration not being a deposition in Court, neither made on oath nor in the presence of the accused and therefore not tested by cross-examination is yet admissible in evidence as an exception to the general rule against the admissibility of heresay. The admissibility is founded on the principle of necessity. The weak points of a dying declaration serve to put the court on its guard while testing its reliability and impose on the court an obligation to closely scrutinise all the relevant attendant circumstances. [see **Tapinder Singh Vs : State of Punjab** 1970CriLJ1415. One of the important tests of the reliability of the dying declaration is a finding arrived at by the Court as to satisfaction that the deceased was in a fit state of mind and capable of making a statement at the point of time when the dying declaration purports to have been made and/or recorded. The statement may be brief or longish. It is not the length of the statement but the fit state of mind of the victim to narrate the facts of occurrence which has relevance. If the court finds that the capacity of the maker of the statement to narrate the facts was impaired or the court entertains grave doubts whether the deceased was in a fit physical and mental state to make the statement the court may in the absence of corroborate evidence lending assurance to the contents of the declaration refuse to act on it. In **Bhagwan Das vs State of Rajasthan** [1957] 1 SCR 854 the learned Sessions Judge found inter alia that it was improbable if the maker of the dying declaration was able to talk so as to make a statement. This Court while upholding the finding of the learned Sessions Judge held the dying-declaration by itself insufficient for sustaining a (SIC)con charge of murder. In **Kako Singh @ Surendra Singh Vs State of M.P.** 1982 CriLJ 986 : 1982 CriLJ 986 the dying declaration was refused to be acted upon when there was no specific statement by the doctor that the deceased after being burnt was conscious or could have

made coherent statement. In **Darshan Singh Vs . State of Punjab** : 1983 CriLJ 985 this Court found that the deceased could not possibly have been in a position to make any kind of intelligible statement and therefore said that the dying declaration could not be relied on for any purpose and had to be excluded from consideration. In **Mohar Singh and Ors. etc. vs. State of Punjab:** 1981 CriLJ 998 the dying declaration was recorded by the investigating officer. This Court excluded the same from consideration for failure of the investigating officer to get the dying declaration attested by the doctor who was alleged to be present in the hospital or any one else present".

(Emphasis supplied)

41. Mr. Sumeet Verma, learned counsel appearing for the respondent -Gulbeg Ali has drawn our attention to the judgment of the Supreme Court reported at (2007) 11 SCALE 477, **Nallapati Sivaiah v. Sub Divisional Officer, Guntur, Andhra Pradesh** wherein the court ruled thus:

"28. In **K. Ramachandra Reddy v. Public Prosecutor** [(1976) 3 SCC 618 : 1976 SCC (Cri) 473 : AIR 1976 SC 1994] the Court having noticed the evidence of PW 20 therein who conducted the post-mortem that there were as many as 48 injuries on the person of the deceased out of which there were 28 incised wounds on the various parts of the body including quite a few gaping incised injuries, came to the conclusion that in view of those serious injuries it was difficult to believe that the deceased would have been in a fit state of mind to make a dying declaration. It was also a case where the Magistrate did not put a direct question to the injured whether he was capable mentally to make any statement. In the circumstances this Court came to the conclusion that the Magistrate committed a serious irregularity in "not putting a direct question to the injured whether he was capable mentally to make any statement". It has been observed that even though the deceased might have been conscious in the strict sense of the term,

"there must be reliable evidence to show, in view of his intense suffering and serious injuries, that he was in a fit state of mind to make a statement regarding the occurrence".

The certificate issued by the doctor that the deceased was in a fit state of mind to make statement by itself would not be sufficient to dispel the doubts created by the circumstances and particularly the omission by the Magistrate in not putting a direct question to the deceased regarding the mental condition of the injured.

29. In the case in hand before the actual recording of Ext. P-8, dying declaration, the Magistrate (PW 7) did not seek and obtain any opinion and a certificate or endorsement from the duty doctor as to the physical and mental condition of the declarant to give statement. The Magistrate did not put any question as to whether the declarant was making a voluntary statement and whether he was in a fit condition to make the statement and whether any sedatives had been administered.

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35. In **Laxman v. State of Maharashtra** [(2002) 6 SCC 710 : 2002 SCC (Cri) 1491] a Constitution Bench of this Court held: (SCC pp. 713-14, para 3)

"3. ... The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or promoting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a Magistrate absolutely necessary, although to assure authenticity

it is usual to call a Magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise."

(emphasis supplied)

36. The Constitution Bench in its authoritative pronouncement declared that there is no requirement of law that dying declaration must necessarily contain a certification by the doctor that the patient was in a fit state of mind especially when a dying declaration was recorded by a Magistrate. It is the testimony of the Magistrate that the declarant was fit to make the statement gains the importance and reliance can be placed upon declaration even in the absence of the doctor provided the court ultimately holds the same to be voluntary and truthful. The judgment does not lay down a proposition that medical evidence, even if available on record, as also the other attending circumstances should altogether be ignored and kept out of consideration to assess the evidentiary value of a dying declaration whenever it is recorded by a Magistrate.

37. The Constitution Bench in Laxman [(2002) 6 SCC 710 : 2002 SCC (Cri) 1491] resolved the difference of opinion between the decisions expressed by the two Benches of three learned Judges in **Paparambaka Rosamma v. State of A.P.** [(1999) 7 SCC 695 : 1999 SCC (Cri) 1361] and **Koli Chunilal Savji v. State of Gujarat** [(1999) 9 SCC 562 : 2000 SCC (Cri) 432] and

accordingly held that there is no requirement of law that there should be always a medical certification that the injured was in a fit state of mind at the time of making a declaration and such certification by the doctor is essentially a rule of caution and even in the absence of such a certification the voluntary and truthful nature of the declaration can be established otherwise."

42. Mr. Sumeet Verma, learned counsel appearing for Gulbeg Ali has also placed the pronouncement of the Supreme Court reported at 2001(3) SCALE 549, **Arvind Singh v. State of Bihar** wherein also the prosecution case rested on a dying declaration made to the mother of the deceased. In this case, the court observed as follows:-

"17. Be it noted that the dying declaration herein has not been effected before any Doctor or any independent witness but to the mother who is said to have arrived at the place only in the morning -the mother admittedly is an interested witness: though that by itself would not discredit the evidence tendered in Court but the fact remains the Doctor's evidence considering the nature of the burn posed a considerable doubt as to whether such a statement could be made half an hour before the death of the accused. It is not that the statement of the unfortunate girl was otherwise not clear or there was existing some doubt as to the exact words on the contrary the definite evidence tendered is that there is clear unequivocal statement from the daughter of the family that the conjoint efforts of putting kerosene thereafter with lighted match stick has resulted the burn injury. The severity of the burn injury and its impact on the body speaks volume by reason of the death of the deceased. It is the reliance on such a dying declaration by the High Court shall thus have to be scrutinised with certain degree of caution.

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20. Dying declarations shall have to be dealt with care and caution and corroboration thereof though not essential as such, but is otherwise expedient to have the same in order to strengthen the evidentiary value of the declaration. Independent witnesses may not be available but there should be proper care and caution in the matter of acceptance of such a statement as trustworthy evidence. In our view question of the dying declaration to the

mother is not worth acceptance and the High Court thus clearly fell into an error in such an acceptance. ...

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24. ... There is no challenge by the State as against the order of acquittal of other three accused person under Section 304B as such we are not inclined to delve into the matter as regards the involvement of the other three persons but the appellant's explanation of stove-burst being the cause of the event cannot be brushed aside. It is undoubtedly a social and heinous crime to have the wife burnt to death but without any proper and reliable evidence, the law court can not by itself also justify its conclusion in the matter of involvement of the husband; Direct evidence may not be available but circumstantial evidence with reasonable probity and without a snap in the chain of events would certainly tantamount to a definite evidence about the involvement but not otherwise. What is the evidence available in the matter To put it shortly, there is none! The factum of burn injury cannot be doubted and the subsequent unfortunate death but that is about all. Why was the Investigation officer not examined -No answers are forthcoming even at this stage -but why not? Is it a lacuna? We need not dilate thereon but the fact remains there is not a whisper in regard thereto!"

43. It is therefore, well settled that it is not the satisfaction of the person recording the dying declaration alone with regard to the fitness of the persons to whom the same is attributed but the court has to be satisfied that the person to whom the statement is attributed, was actually in a fit state of mind and actually made the statement which has been attributed to her.

44. In (2011) 4 JCC 2478, **State v. Sanjay,** the State had sought leave to appeal against acquittal of the respondents inter alia on the ground that the dying declaration recorded by the SDM was not accompanied by his certification of the fitness of the deceased to make the statement. The following observations of this court while dismissing the State's petition shed valuable light on the challenge by the respondents before us:-

"6. ... The Supreme Court held stated that there is no obligation

that the dying declaration must necessarily contain a doctor's endorsement to the effect that the patient or injured person is fit and in an oriented state of mind to make a statement; as long as the person recording it, is able to depose about it, and is credible and trustworthy, the dying declaration can be said to have been recorded in the circumstances, in a given case.

7. In this case, significantly, the Trial Court concluded that the deceased had been declared fit to make the statement at 11.30 AM in the morning, whereas the declaration was recorded only at 03.00 PM and given the severity of her burns, while she might have been fit to make the statement at 11.30 AM, there was no reassurance that she was fit to make it at 03.00 PM. The SDM, it was held, therefore, should have obtained certification as to her fitness right before he sought to record her statement, at 3.00 PM. We find no infirmity or misapplication of law in this approach. While a person, with extensive burn injuries might be in a position to make a statement or declaration, at the time, when she is brought to the hospital, as long as she is conscious, the longer the time taken in recording any statement, the likelihood of the injured's mental condition deteriorating is strong, given that in most cases, they are administered sedatives to ease the pain and trauma. In such circumstances, it would be reasonably expected that before a dying declaration is recorded, the SDM or responsible officer, assures that the patient indeed is in a position to make a statement, and is conscious to do so. The prosecution's failure to lend assurance was a serious infirmity which cast a doubt on its version."

45. We may note that the facts in **State v. Sanjay** (supra) are similar to the factual matrix placed before us.

46. Ex.PW10/A does not reflect any certification of the injured person's fitness to make the statement. There is no document accompanying the statement wherein medical information with regard to the injured person's fitness to make the statement has been given by a doctor. PW-10 has categorically stated that he had not taken a fitness certificate of the injured from the doctor on the paper upon which the statement of the injured was recorded. He has volunteered that the fitness certificate was recorded by the doctor on her medical papers and she

was fit to make a statement *"as per my estimation"*. PW-10 has claimed that he put some questions to the injured when he found her fit to make a statement. He admits that he had not recorded any such questions put to the injured on any paper. Such questions are not part of Ex.PW10/A. The witness also states that the injured was feeling pain at the time when he claimed to have recorded the statement. What were the medical papers looked at by PW-10 remains a mystery.

47. PW-10 – Shri P.K. Sofat has at another stage stated that he relied in declaration of the petitioner's fitness to make the statement as recorded on her MLC. This MLC has been recorded at 4:00 am in the morning. This witness claims to have recorded the statement at about 7:50 am i.e. almost four hours after the recording of the MLC. No questions appear to have been put to the injured person which could establish her fitness to make the statement. The above circumstances manifest that there is no evidence which would show that the injured person was in a fit condition to make the statement which has been attributed to her.

48. We also find that no record of the treatment given to the injured person after she was taken to the hospital has been placed or proved on record by the prosecution. A person who has suffered 100% burns and is suffering from muscle stiffness would be in absolute agony and there is every possibility of pain killers and sedatives having been administered to her. This factor renders it even more essential that expert opinion with regard to the fitness of the person to make a statement is taken immediately or proximately before the recording of the statement. Certainly no reliance can be placed on fitness taken four hours prior to the recording of the statement of such injured person.

49. Dr. Satish Chandra, Jr. Resident in Guru Teg Bahadur Hospital, Shahadara, Delhi-110095 who recorded the MLC was not examined as a witness. Instead the Medical Superintendent, GTB Hospital deputed Dr. Ravinder Singh, Chief Medical Officer who was examined as PW-15. Dr. Ravinder Singh could merely identify the writing and signatures of the junior doctor in 'official capacity' as a doctor had performed duty with him in the GTB Hospital in those days. PW-15 has merely reproduced the contents of the MLC in his oral deposition and has confirmed that the patient was referred to the surgery department for further management. PW-15 has stated that the doctors from surgery department were called and had attended and taken the patient for further management. Dr.

Singh has categorically stated that his deposition before the court was based only on what has been recorded in the MLC (Ex.PW15/A and Ex.PW15/B) and that the same were not prepared in his presence. The witness also stated that the articles mentioned in the MLC – Ex.PW15/A (elastic rope) had not been sealed by the concerned doctor in his presence. This witness therefore had no personal knowledge about the condition of the deceased or her fitness.

50. It is complained that as a result of the non-production of Dr. Satish Chandra, Jr. Resident who scribed the MLC of the deceased, the defence has been deprived of an opportunity to cross-examine the doctor who has recorded the MLC with regard to his claimed observations or the fitness of the patient to make any statement at all or the correctness of the noting recorded by him on Ex.PW15/A.

51. Before us, the respondents have strongly assailed the fitness of the patient to have made any kind of statement or the fact that she was at all oriented. In this regard, our attention has been drawn to the fact that even the MLC notes that she had suffered 100% burns all over the body and that there was extensive stiffness of skin while her pulse rate was 120 per minute.

52. Medical texts support the conclusion that it is not skin stiffness, it is actually muscle stiffness.

53. Before this court, Ms. Ritu Gauba, learned APP for the State has urged that the statement recorded by the Executive Magistrate does not require medical certification and that the only requirement of law is the satisfaction of the Magistrate of the fitness of the maker of the statement. It has been contended that this satisfaction was duly effected by PW-10. This submission is to be noted only for the sake of rejection. In the instant case, the statement – Ex.PW10/A does not support that the Executive Magistrate took any steps for being satisfied about the fitness of the deceased.

There is no material at all that she was in a fit state of mind to give the long statement which is attributed to her.

54. Ms. Ritu Gauba, learned APP for the State has drawn our attention to chapter 13A relating to Dying Declaration of Volume III of the Delhi High Court Rules. Rules 3,4,7 and 8 are relevant and read as follows:

"3. **Fitness of the declarant to make the statement should be got examined –** Before proceeding to record the dying declaration, the Judicial Magistrate shall satisfy himself that the declarant is in a fit condition to make a statement, and if the medical officer is present, or his attendance can be secured without loss of time, his certificate as to the fitness of the declarant to make a statement should be obtained. If, however, the circumstances do not permit waiting or the attendance of the Medical Officer, the Judicial magistrate may in such cases proceed forthwith to record the dying declaration but he should note down why he considered it impracticable or inadvisable to wait for a doctor's attendance.

4. **The Statement of the declarant should be in the form of a simple narrative –** The statement, whether made on oath or otherwise, shall be taken down by the Judicial Magistrate in the form of a simple narrative. This, however, will not prevent the Judicial Magistrate from clearing up any ambiguity, or asking the declarant to disclose the cause of his apprehended death or the circumstances of the transaction in which he sustained the injuries. If any occasion arises for putting questions to the dying man, the Judicial Magistrate should record the question also the answers which he receives. The actual words of the declarant should be taken down and not merely their substance. As far as possible the statement should be recorded in the language of the declarant or the Court language.

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7. **Recording of a Dying declaration by a Police Officer or Medical Officer –** Where a dying declaration is recorded by a Police Officer or a Medical Officer, it shall, so far as possible, be got attested by one or more of the persons who happen to be present at the time.

8. **Fitness of the Declarant to make a statement to be certified by the Judicial Magistrate or other officer concerned –** The Judicial Magistrate or other officer recording a dying declaration shall at the conclusion of the dying declaration certify that the declarant was fit to make a statement and it contained a correct

and faithful record of the statement made by him as well as of the questions, if any, that were put to him by the justice recording the statement. If the accused or his counsel happens to be present at the time the dying declaration is recorded, his presence and objection, if any, raised by him shall be noted by the judicial Magistrate or the officer recording the dying declaration, but the accused of his counsel shall not be entitled to cross-examine the declarant."

55. Learned counsel for the respondents have also placed reliance on the above Rules which mandate the manner in which the dying declaration is to be recorded. It was urged that in the instant case, the SDM violated the Rules and proceeded in the manner unknown to law.

56. There is no certification by PW-10 – Shri P.K. Sofat in the instant case in compliance with Rule 8 as well. PW-10 has also violated the mandate of Rules 3 and 4 aforenoticed.

57. The above discussion would show that clearly there is no evidence at all that the deceased was fit to make a statement when Ex.PW10/A was recorded.

58. The learned trial judge has therefore, erred in placing reliance on the endorsement of fitness on the MLC – Ex.PW15/A of the deceased. Firstly, the doctor who allegedly made such endorsement was not examined. Secondly, even if the endorsement of fitness at 4:00 am was correct, there was nothing on record to show that the deceased remained fit even at 7:50 am when PW-10 – Shri P.K. Sofat claims to have recorded the statement.

Challenge to the language of the dying declaration

59. The PW-10 has deposed that he has recorded the statement 'word by word' and that the same took 15 to 20 minutes. It is noteworthy that the investigating officer – PW-16 -ASI Sona Ram has testified that the statement of the injured – Shama Praveen was recorded by PW-10 on the 'dictation of the injured/deceased – Smt. Shama Praveen'.

60. As the very name of the deceased suggests that the parties involved were Muslim and, therefore, would be speaking in Urdu. The SDM has claimed that he recorded the statement 'word by word'. The

statement finds use of words like *'patni, niwasi, vivah, pati, dinak, sambandh, evam, uprokt, jaan se marne ki niyat'* are not words used in common parlance even by a hindi speaking person. These words would not be used by a Urdu speaking person.

61. The tenor of the statement which records that the maker giving 'bayan' as well as the certification of the same statement being voluntary, in full consciousness and without any kind of pressure is not a statement which any lay person would make, let alone one who has suffered 100% burns.

62. Mr. Sumeet Verma, Mr. Ajay Verma, Mr. Bhupesh Narula, learned counsels representing the respondents in Death Reference no.2/2012 (the appellants in the appeals) have drawn our attention to the top of Ex.PW10/A. The document mentions the DD No.40A as well as PS Gokulpuri thereon. PW-10 – Shri P.K. Sofat says that he has mentioned the daily diary no.40A on Ex.PW10/A. PW10 has also stated that there was an overwriting in mentioning the date on Ex.PW10/A which he had not initialled. However, PW-16 – Investigating Officer ASI Sona Ram has stated that the SDM has mentioned the DD No.40A on the document but the date as well as the name of the police station has been mentioned by him (PW-16) on Ex.PW10/A -the statement attributed to the deceased.

63. Interestingly, PW-10 – Shri P.K. Sofat confirms that the doctor estimated the injured having suffered 100% burns but in his deposition, he challenges the same contending that it was not correct according to his opinion.

64. Ms. Ritu Gauba, learned APP for the State strongly urged that the deceased was removed to the GTB Hospital by PW-14 – HC Ravi Shankar Sharma to whom she alleged that she had been burnt by her in-laws. It is urged that such statement is also on the MLC.

65. It is noteworthy that the learned trial court has relied upon only the statement recorded by PW-10 as the dying declaration in the instant case. Neither the last statement appearing on the PCR Form – Ex.PW13/A nor the statement attributed to the deceased as recorded on the MLC – Ex.PW15/A were rightly pressed as dying declaration before the trial court. The learned trial judge has also not relied upon statements attributed to the deceased by PW-3, PW-14 or PW-16. In any case, we have commented upon the reliability and evidentiary value thereof in our above discussion.

66. It is important to note also that it is in this MLC, recorded in the hospital almost one hour after the incident, that for the first time the deceased has attributed the responsibility of her condition to her in-laws.

67. Our attention is drawn to the endorsement contained in the form of the Police Control Room (Ex.PW13/A), more than one hour later, at 04:27:32 hrs on the 22nd of October 2009, the following contradictory report is recorded *'Inj lady sama parveen d/o sarfarsh r/o above age-26 years jiski sadi ko 5 sal huve hai 2 bache hai sasue, devar, v nnd ka name le rahi hai 100/-jali hui hai add. sho moka hosp. me.* (Translated, it reads : Injured Lady Shama Praveen D/o Sarfaraz R/o above aged 26 years, who got married 5 years ago, having two children blamed her father-in-law, brother-in-law and sister-in-law. She is 100% burnt. In the presence of Add. SHO in hospital).

68. We have noticed above, the three prior statements of the deceased noted on the form of the Delhi Police Control Room. The statement attributed by PW-14 as having been made by the deceased attributing the culpability to her in-laws was more than one hour after the incident while in the custody of the police and in hospital and is shrouded in suspicion.

69. PW-3 – Sarfaraz while claiming absence from the scene has attributed a statement having been made by the deceased to this effect in his presence thereof. He discloses neither time nor place of the statement. Given her first complaint to the police and the first record on Ex.PW13/A at 3:07 am of a quarrel and then at 3:27:57 after the PCR van had reached, it is recorded that a lady having self immolated herself, the third statement attributed to the deceased blaming her in-laws is shrouded in suspicion. Even if such statements were made the possibility of tutoring of PW-3 given the animosity nursed by him against his father and other siblings for property, cannot be ruled out.

70. In para 118 of the trial court judgment, the learned trial judge has recorded that the dying declaration recorded by PW-10 stood corroborated by the Police Control Form – Ex.PW13/A; MLC – Ex.PW15/A; and the FSL report – Ex.PW17/3. We have discussed in detail above that the Police Control Form does not support the case of the prosecution or the dying declaration in any manner. The doctor who is alleged to have endorsed the MLC – Ex.PW15/A was not produced while the Forensic Science Laboratory report does not support the prosecution.

71. In para 124 of the impugned judgment, the learned trial judge has referred to the accused persons as caretakers of the deceased who have acted "just to deprive her from property". We are unable to find any factual basis for the same.

Place of recording Ex.PW10/A

72. There is important doubt urged by learned counsels for the respondents on the recording of this statement as claimed by PW-10 – Shri P.K. Sofat. This witness has repeatedly stated that he reached the hospital at 7 o.clock and recorded the statement of the deceased in the 'burns ward.. The witness has categorically stated that the police officials had taken him to the bed of the injured in the 'burns ward' of the GTB Hospital. The witness has claimed that he contacted the doctor on duty in the 'burns ward' for five minutes only. He reiterates that he did not visit any other place except 'burns ward'.

73. Our attention has been drawn by learned counsels for the accused to the categorical claim by Shri P.K. Sofat as PW-10 that the injured person was in the burns ward; that he met the doctors in this ward before recording her statement. It is urged that the hospital records falsify the claim of PW-10. Our attention is drawn to the following death summary (Ex.PW16/E) relating to Shama Praveen recorded on 23rd October, 2009 by the doctor:-

> "23/10/09 Pt. Shama Praveen age 26 y/f with CRNo.-200925479053, MLC – Mo – a – 4964/9 was admitted in general surgery emergency on 22-10-09 c alleged H/o thermal burn and diagnosed as 96% thermal burn c facial burn and respiratory burn with deep burn all over body. Pt. Immediately put on conservative management O2 iv. fluids, w-antibiotics, iv analgesic, and iv antacids Pt. was critical as the time of admission. ICU, ophthalmology referral were made. At 10.am pt. transferred to burn ward on 23-10-09. Pt. complained of restlessness and cardiopulmonary resuscitation was done. But despite of all efforts of Medical, Paramedical and nursing staff patient couldn.t be revived and declared clinically dead at 2.20 AM on 23.10.09."
>
> (Emphasis by us)

Therefore, as per the death summary dated 23rd October, 2009 (Ex.PW16/E), the patient was critical at the time of her admission. She was shifted to the Burns Ward of the GTB Hospital only at 10:00 am.

74. The MLC – Ex.PW15/A shows that the patient was referred to the surgical ward. The document proved on record establishes that the injured was transferred to the burns ward only at 10:00 am and not before. It is therefore, clear that PW-10 – Shri P.K. Sofat is not even sure of the place where he met the deceased. PW-16 ASI Sona Ram has also stated that SDM reached the hospital at about 7:00 am and recorded the statement in the burns ward. The deceased was not in the burns ward at 7:00 am or at 9:00 am.

75. Before us learned APP for the State has submitted that the statement of PW-10 to the effect that he recorded Ex.PW10/A in the burns ward was a mistaken statement and deserves to be ignored as it is only a matter of detail. Perhaps, if there were no other circumstances casting doubt over the dying declaration, we may have been persuaded by the learned APP to hold so. However, we have noted above the several reasons which cast doubt with regard to the recording of the dying declaration. It is, therefore, not possible to agree with the learned APP.

76. Most importantly, this was not the case of the prosecution before the trial court. A perusal of the impugned judgment dated 17th March, 2012 would show that in para 100, the learned trial judge has also concluded that the dying declaration was recorded in the burns ward. In our view, this finding ignores material documentary evidence specially to the effect that the deceased had not even shifted to the burns ward at 7:50 am where PW-10 – Shri P.K. Sofat claimed to have recorded the statement. This finding is, therefore, unsustainable.

77. As per the record of GTB Hospital, Shahadara, Delhi, the injured had suffered thermal burns which were diagnosed as 96% thermal burns with included facial burns and respiratory burns with deep burns all over the body. The patient was critical at the time of her admission. ICU as well as ophthalmology referrals were made. The patient was transferred to the burns ward only at 10:00 am on 23rd October, 2009. While PW-10 – Shri P.K. Sofat claims to have recorded the statement at 7:50 am, PW-3 – Sarfaraz Hussain has stated that the SDM recorded the statement at 9:00 am.

Persons present when Ex.PW10/A allegedly recorded

78. As per PW-10 – Shri P.K. Sofat when he reached the bed of the injured – Shama Praveen, no one was present near her. As against this, PW-3 – Sarfaraz Hussain has stated that PW-16 – ASI Sona Ram had recorded the statement of his wife (the injured Shama Praveen) at GTB Hospital in his presence and that he had read over her statement to his wife which was recorded by ASI Sona Ram after 15 to 20 minutes of reaching the hospital when ASI Sona Ram, two other police officials and he were present. PW-3 has claimed that his elder brother-in-law Shamim Raja (PW4) was also present there at that time.

79. PW-3 – Sarfaraz Hussan has further stated that his wife's statement was recorded after 9:00 am by the SDM in his presence. PW-3 – Sarfaraz Hussain also states that ASI Sona Ram had recorded the statement of his wife at the GTB Hospital in his presence. PW-3 categorically stated that doctors had obtained the thumb impression of Shama Praveen on her dying declaration in his presence and that he had also put his signatures on some other documents. PW-4 – Shamim Raja, PW-10 – Shri P.K. Sofat and PW-16 – ASI Sona Ram do not make such a deposition. No such statement with thumb impressions of PW-3 – Sarfaraz Hussain has been placed before us.

80. PW-10 – Shri P.K. Sofat does not disclose the particulars of the person who identified Shama Praveen to him. He is unable to give the names of any doctor, nurse, police personnel or relatives in the hospital. The respondents have doubted the testimony of PW10 on this short ground as well and submitted that PW-10 neither visited the hospital nor recorded any statement of the deceased.

81. It is evident from the above discussion that the Executive Magistrate, Shri P.K. Sofat (PW-10) has violated Rules 3 and 4 of Chapter 13A of Volume III of the Delhi High Court Rules. There is strength in the submission of learned counsel for the respondents that the statement appears to be in the language of parlance used by the police while recording statements and therefore, would support the submission that the statement was not recorded by the PW-10 in the manner or circumstances as alleged.

82. Mr. Ajay Verma, learned counsel appearing in Crl.A.No.473/2012 filed by Mubin Fatima and representing her in the Death Reference

no.2/2012, has urged at length that the testimony of PW-10 – P.K. Sofat, PW-14 – HC Ravi Shankar Sharma and PW-16 – ASI Sona Ram requires to be disbelieved. It is contended that the above noticed circumstances cast considerable doubt as to whether PW-10 at all visited GTB Hospital. We may note that neither the police nor PW-10 have produced any document which would support that he visited the hospital at all.

83. The above discussion also shows that the time of recording the statement; fitness of the injured person as well as the place where the statement is claimed to have been recorded are all doubtful. There is doubt even with regard to the persons present at the time. PW-3 has stated that a statement was recorded by the police officials. Looked at from any angle, the statement is not in the language of the deceased.

Challenge to recoveries

84. As per the case of the prosecution, an elastic rope was tied around the neck of the deceased by the accused Zulfikar Ali before kerosene was poured over her and she was set alight.

85. We have set out hereinbefore the complete details of the articles which were seized by the police from the spot. This recovery in the very early hours of the 22nd October, 2009 was effected in the presence of husband of the deceased, Sarfaraz Hussain who has signed the recovery memo as a witness thereto.

86. The prosecution has sought to establish the recovery through the testimony of PW-3 – Sarfaraz Hussain. The sealed parcels were opened in the court when his statement was being recorded. PW-3 has proved the recovery of rubber/elastic – Ex.P-1 which was approximately 12 inch long stated to have been recovered from neck of the deceased in the GTB Hospital. The second parcel which was found sealed with the seal of the FSL, Rohini produced by the MHC (M) was found containing one matchbox; some burnt cloth pieces; having a 16 inch long electric wire and pieces of broken bangles of sky blue and golden colour. When the matchbox of the make 'ship' was opened, it was found containing three used matchsticks, 8 alive matchsticks, four broken pieces of bangles of golden and sky blue colour which were collectively exhibited as Ex.P-2. The prosecution has given no explanation with regard to the discrepancy and as to how additional items which were not mentioned in the recovery memo – Ex.PW16/B (that is the electric wire; three, instead of two used

matchsticks; broken pieces of bangles).

87. It is important to note that PW-16 – ASI Sona Ram has categorically testified that the matchbox (ship) had two used matchsticks. There is also no mention of electric wire or broken bangles either in his oral testimony or in Ex.PW1/B. The number of used matchsticks has gone up from two to three and articles added. Forensic examination

88. It is in evidence that these recovered articles as well as elastic rope allegedly found on the neck of the deceased were sent to the Forensic Science Laboratory for a forensic examination.

89. The report dated 30th November, 2010 of the Forensic Science Laboratory has been proved on record as Ex.PW17/B. Our attention is drawn to the report of the forensic examination on the following articles:-

"DESCRIPTION OF ARTICLES CONTAINED IN

THE PARCEL(S)/EXHIBIT(S)

xxx

Exhibit-'1' : Stretchable strip stated to be "plastic thread".

Exhibit-'2' : One sealed cloth parcel sealed with the seals of "SR". It was found to contain exhibits '2A' & '2B' wrapped in a polythene.

Exhibit-'2B': One match box make SHIP KARBORISED containing burnt & unburnt match sticks, kept in a polythene.

Exhibit-'3' : One empty plastic bottle with cap.

Exhibit-'4A' : One partially burnt/torn kurta with dirty stains.
Exhibit-'4B' : One partially burnt/torn pyajama with dirty stains.

Exhibit-'5' : Bunch of hair."

90. The result of the forensic examination of these recovered articles is as follows:-

"RESULTS OF EXAMINATION

On Chemical & GC examination, (i) Exhibits '3' and '4A' were found to contain residue of Kerosene.

(ii) Residue of Kerosene/Petrol/Diesel could not be detected in exhibits '1', '2A', '2B', '4B' and '5'."

Thus as per the report of the laboratory, no kerosene was found on plastic/elastic rope around the neck of the deceased; on the hair of the deceased; partially burnt clothes of the deceased; or on the matchsticks.

Improbability of prosecution case

91. Learned counsels for the accused persons have pointed out that the impossibility of the incident having taken place in the manner as projected before the trial court is manifest from the claim of the prosecution that there was an elastic/plastic rope around the neck of the deceased. As noticed above, the length of such rope was barely 12 inch which would be much less than the neck of the deceased person. Even if such rope was around her neck as claimed, the prosecution has set up a case of the rope being tied around the neck of Shama Praveen and kerosene being poured before setting her alight. It is an admitted position that the injured was excessively burnt when she was taken to the hospital. The burns covered her face as well as chest area and all limbs. If the rope had been around the neck of a person who was burning, such plastic or elastic rope would have itself got burnt and damaged. Both plastic and elastic are highly combustible substances. Plastic has a very low burning threshold. The manner in which the plastic has been recovered would by itself suggests that this rope was not around the neck of the deceased at the time when she was burning.

92. On this aspect, we find that in the post-mortem report – Ex.PW16/E1, the doctor has observed a ligature mark present on the front of her neck to right side back of the neck having the total length of 28 cms. The prosecution has not connected the rope which was allegedly recovered with the ligature mark. It would be difficult to use a rope of 12 inches to result in a ligature mark of 28 cms. (equal to about 12 inches). It remains a mystery as to how, if the rope was actually around the neck of the deceased before she was burnt, this elastic/plastic rope did not suffer any damage of burning.

93. Learned APP for the State has submitted that there were marks of the struggle on the body of the deceased which depicted that homicide injuries had been imposed on her. Learned APP for the State has urged that the presence of the plastic rope shows that the accused tried to gag

the mouth so that no cries of the victim could be heard by the neighbours. There is no evidence to support this. The above discussion would show that there is doubt that the rope was around the neck of the deceased before she was set alight. In this regard reference may be made to the testimony of PW-18 – Dr. Meghali Kelkar who has stated that if ligature material is used on the person of injured in burnt condition, ligature mark would appear. Given the presence of public persons as well as arrival of the police, it was for the prosecution to explain how such marks of the rope appeared on the body of the deceased which they are failed to do so.

94. No kerosene has been detected on the hair or clothes of the deceased. The MLC also does not have any record of smell of kerosene from the body of the deceased.

Improbability of the incident as alleged

95. We may now examine as to whether the offences could have been committed in the manner made out in the dying declaration – Ex.PW10/A. As per Ex.PW10/A, Gulbeg Ali and Zulfikar Ali brought the deceased Shama Praveen to the room on the first floor; Zulfikar Ali tied the elastic rope around the neck of Shama Praveen and thereafter the third accused Mubin Fatima held her while her father-in-law, Gulbeg Ali put kerosene oil on her and set her alight with a matchstick.

96. Learned counsel for the respondent has drawn our attention to the photographs (Ex.PW6/A1) to Ex.PW6/A11) taken by the police of the scene of occurrence. We may note that these photographs were put to the investigating officer – PW-16 ASI Sona Ram who had confirmed that these photographs correctly depicted the scene of the crime. Ex.PW6/A6 is a photograph showing a bottle claimed to have been smelling of kerosene seized from the spot from which kerosene was allegedly poured over the deceased. This photograph also includes the photograph of the foot of a child who is sleeping on a mat on the ground right next to the bottle. The photograph – Ex.PW6/A7 of the same spot includes the image of another child sleeping on the same mat with a similar covering in the room. The photographs contain no sign of any violence or an incident in which kerosene could have been poured over a healthy adult and she could have been burnt in the room.

97. It is in evidence the Gulbeg Ali was staying with his unmarried

daughters on the first floor while Zulfikar Ali was residing on the ground floor with one child. Only the deceased had two children with whom she was residing. The photographs of the room where the kerosene bottle has been found show that toys, utensils and other articles are all lying in their places in intact condition. There is no sign of any violence at all. It is a case of prosecution that the photographs were taken at the earliest between 5:00 am to 5:30 am in the morning and there is no allegation of tampering with the spot. It is, therefore, quite clear that the deceased was not burnt in the circumstances which she has alleged in the statement attributed to her or as sought to be established by the prosecution.

98. Learned counsel has drawn our attention to the site plan of the premises – Ex.PW8/A which would show that the total room size of the first floor (including the area of the WC) was 208/228 cms. It included a WC of 67/90 cms. If the area of the WC was taken out, space of barely about 5 feet x 7 feet is left out. The photographs show that there was furniture and other articles in the first floor room.

99. We have noticed in the opening of the judgment that the property in question is a 22 sqr.ydrs. tenement in the Chaman Park, Delhi. The property forms one in a row of similar tenements as per the sketch of the area – Ex.PW3/B. The house has no open area and access to the first floor (upper ground floor) as well as second floor is by bamboo ladders. There is thus not even a staircase. The width of the ladder as per the evidence on record is barely 50 cms. Gulbeg Ali is stated to be 74 years of age while his son Zulfikar Ali is also a grown up married adult of 27 years.

100. As per the site plan – Ex.PW8/A, the bamboo ladder going to the first floor premises is shown to be of 169 cms length and 50 cms vide. It is alleged that Gulbeg Ali, father-in-law of the deceased and Zulfikar Ali, her brother-in-law, first brought her to the first floor from the second floor where she was set aflame. She then came down through the ladder to the ground floor. Thus the case of the prosecution was that the deceased came down the ladder after she had been set aflame.

101. The incident involved three persons according to the statement attributed to the deceased by the SDM. It is alleged that Mubin Fatima, sister-in-law of the deceased held the deceased while Gulbeg Ali pouring kerosene over her and set her aflame. It is not the case of the prosecution that the hands and feet of the deceased were tied. Any person would

have responded violently to an attempt to burn her by third parties. Given the past history of disputes between the parties, certainly the deceased would not have willingly come down with her father-in-law or brother-in-law. She would also not have remained silent if efforts were made by a third person to put kerosene over her. There is no evidence led of any protest by the deceased. There is also no evidence of any kind of a struggle by the deceased in either trying to free herself from the clutches of Mubin Fatima if she had been held as alleged or of trying to escape from the room. The prosecution case is that the deceased was set alight in the same room where kerosene was poured over her. There is no sign of anything burning in the room. Most importantly that there is no explanation at all from the side of the prosecution as to how two children continued to sleep in the immediate proximity of such violence without being disturbed in any manner.

102. If the deceased was burnt on the first floor and reached the outside of the building while still burning and met PW-14, there would have been some tell tale signs of burns. Other articles in the room may have caught fire given the size of the room. The bamboo ladder also remained intact.

103. As noticed above, there is not only no sign of violence in the room but also nothing to show that the deceased has been set alight in the room. No damage from the fire has been caused to the bamboo ladder even. Even otherwise, it is difficult, if not impossible for two persons to bring down another adult on this ladder in the circumstances alleged without any protest from her side.

104. There is evidence of several persons in the public having met PW-14 – Ravi Shankar Sharma as well as PW-16 – ASI Sona Ram but no neighbour has heard of any protest or noise except for the noise when the deceased was burning.

105. It is also noteworthy that the bottle reflected in the photographs wherefrom smell of kerosene was coming seized from the spot was having small neck. If kerosene was poured on any person of a bottle of such a small neck, it is inevitable that it would have splashed on other articles or split on the floor. PW-14 – HC Ravi Shankar Sharma and PW-16 -ASI Sona Ram claims to have reached the spot at 3:30 am to 3:40 am. They make no mention at all of finding any oil split on ground or anywhere else in the room.

106. The photographs show the bottle from which the smell of kerosene was coming as lying in the room where the children of the deceased were sleeping as well. The family of the deceased resided on the second floor. The photographs of the first floor show water cans lying in the premises. The photographs thus show that no incident took place on the first floor.

107. It is left to imagination as to how Mubin Fatima held the deceased while kerosene was being poured over her without any kerosene spilling on to her clothes.

108. PW-3 – Sarfaraz was the only eye-witness to the occurrence who has alleged that the incident took place on the ground floor. Mr. Bhupesh Narula, learned counsel for Zulfikar Ali points out that as per the alleged dying declaration and the prosecution, the incident occurred on the first floor of the property. All these circumstances completely belie the case of the prosecution.

109. The learned trial judge has also erred in holding that Gulbeg Ali has not explained how and when the deceased came to the first floor. The same is apparent from the testimony of PW-3 – Sarfaraz, husband of the deceased detailed above.

Arrest of accused persons

110. PW-16 ASI Sona Ram has attempted to cast a doubt over the conduct of Gulbeg Ali, his son Zulfikar Ali and daughter Mubin Fatima after the incident. He has stated that he made a search of the accused persons and "overpowered them from their Gali at some distance from the spot on the pointing out of PW-3 – Sarfaraz Hussain at about 7:30 pm on the 22nd of October 2009".

111. Surprisingly, this witness, the investigating officer states that he was not even aware of the fact that Gulbeg Ali was removed to the hospital by PW-14 – Head Contable Ravi Shankar Sharma and that as per the MLC (Ex.PW15/B), he had also suffered 10% burns and was kept under observation at the GTB Hospital. The accused persons have alleged that they were arrested by PW-16 from the GTB Hospital.

Explanation of the accused persons

112. It is an integral part of 'fair trial' that the accused persons are given an opportunity to render their explanation with regard to the

incriminating circumstances brought out against them. The statute provides such opportunity under Section 313 of CrPC. In their statements, the three accused persons have stated that they are innocent and have been falsely implicated. Gulbeg Ali in this regard has stated as follows:-

> "I am quite innocent and have been falsely implicated in the present case. I had been lifted from my house at about 05:00 a.m. on 22.10.2009. On the intervening 21st ndnight of and 22, October, 2009, I woke up on hearing the noise and noticed that deceased Shama Praveen was crying and the smell of kerosene oil was coming from her body, she was saying that today she would get implicated all of us in the present false case and in the meantime her husband also came but at that time she had put herself on fire. I along with my son Zulfikar tried to save her and in doing so I sustained burn injuries. Someone had called PCR, which came and took me and injured Shama Praveen to GTB Hospital and after that my sons – Sarfraz and Zulfikar also came to GTB Hospital. At P.S. police obtained my signatures on some blank papers. My son Sarfraz so many times beaten my daughters Mubin Fatima and Chandkiran. Only Sarfraz along with deceased Shama Praveen used to quarrel with me on claiming his share in the house, but, I always advised them to give the same after getting marriage of my other daughters and deceased Shama Praveen after giving false statement got us implicated in the present case. After the present case, since long I am in JC my son Sarfraz alongwith Smt. Shahnaz and other took my household goods by selling out my house. Now I have got registered FIR No.36/2012 with Police Station Gokalpuri against Sarfraz, Smt. Shahnaz and others u/s 420/34 IPC."

113. The other accused persons have deposed on similar terms. In terms to question no.44, Zulfikar Ali has stated as follows:-

> "I am quite innocent and have been falsely implicated in the present case. I had been lifted from GTB Hospital at 5:00 a.m. on 22.10.2009. On the intervening night of 21st and 22nd, October, 2009, I woke up on hearing the noise and noticed that deceased Shama Praveen was crying in burnt condition and my father and sister were trying to save her by extinguishing the fire and I also tried to save the deceased Shama Praveen. Someone had called PCR, which came and took my father and injured Shama Praveen to GTB Hospital and after that I and my brother, Sarfraz also went to GTB Hospital. At P.S. police obtained my signatures on some blank papers. My brother Sarfraz so many times beaten my sisters Mubin Fatima and Chandkiran. Only Sarfraz along with deceased Shama Praveen used to quarrel with my father on claiming his share in the house, but, my father on always advised them to give the same after getting marriage of my sisters and deceased Shama Praveen after giving false statement got us implicated in the present case."

114. Mubin Fatima has rendered a similar explanation in the following terms:-

> "I am quite innocent and have been falsely implicated in the present case. I had been lifted from my house at about 04:30pm on 22.10.2009. On the intervening night of 21st and 22nd, October, 2009, I woke up on hearing the noise and noticed that deceased Shama Praveen crying and the smell of kerosene oil was coming from her body, she was saying that today she would get implicated all of us in the present false case and in the meantime her husband also came but at that time she had put herself on fire. My father tried to save her and in doing so he sustained burn injuries. Someone had called PCR, which came and took my father and injured Shama Praveen to GTB Hospital and after that my brothers – Sarfraz and Zulfikar also went to GTB Hospital. At P.S. police obtained my signatures on some blank papers. My brother Sarfraz so many times beaten me and my sister Chandkiran. Only Sarfraz along with deceased Shama Praveen used to quarrel with my father on claiming his share in the house, but, my father on always advised them to give the same after getting marriage of my other sisters and deceased Shama Praveen after giving false statement got us implicated in the present case."

115. It is noteworthy that the defence put suggestions on these terms to the prosecution witnesses.

<u>Available public witnesses not joined in the investigation</u>

116. Learned counsels also submit that despite several public persons

being available, admittedly the police made no effort to join them in the investigation or produce them during trial.

117. In this regard, our attention is drawn to the evidence of PW-16 – ASI Sona Ram who has claimed that he made inquiries in the neighbourhood of the spot and interrogated Babu Khan and two other persons whose names he did not remember. These persons had told the police that they had seen the injured Shama Praveen and Gulbeg Ali being taken away by a PCR van to the GTB Hospital. However, PW-16 had not recorded statements of these persons. PW-16 has further stated that public persons had gathered in front of house of the accused persons and had told the police that the incident had occurred on the first floor but the police had not recorded the statements of these public persons. At a later stage in his evidence, PW-16 had stated that he had called public persons from the vicinity including Babu Khan to join the proceedings of sealing and seizing the articles from the spot. He claimed that no public persons had joined investigations of the case at the spot at the time of sealing and seizing. The investigating officer claims that he made no inquiries from doctors whether Gulbeg Ali had been shifted to some other place or hospital nor he made any effort to record the statement of doctors. PW-16 – ASI Sona Ram has stated that he had reached the spot at around 3:30 am on 22nd October, 2009 and he had inquired about the deceased having been set aflame from Saleem Khan, Smt. Shehnaz and Babu Khan.

118. It is in the testimony of the investigating officer – PW-16 – ASI Sona Ram that Shama Praveen succumbed to the burn injuries on the 23rd of October 2009 and that FIR No.320/2009 was originally registered under Sections 307/34 of the IPC. Section 302 of the IPC was added after the death on 23rd October, 2009. Our attention is drawn to the statements under Section 161 of the CrPC attributed to Sub-Inspector A.S. Yadav (PW-11) and Constable Tarun Kumar (PW-6) as having been recorded on 22nd October, 2009. It is pointed out that the investigating officer has noted that the statements are dated 22nd October, 2009 yet the FIR is stated to be one under Section 302 of the IPC. The submission is that this fact establishes that the prosecution has concocted the case against the accused persons.

119. No finger prints at all have been lifted from the kerosene bottle which would have gone a long way in establishing the culpability of the accused persons.

120. It is in evidence that apart from the three accused persons, one Chand Kiran, another daughter of Gulbeg Ali was residing with him. The police made no effort to join her in the investigation or to ascertain from her the real facts. No member of the public, which was admittedly present was joined in the investigation.

121. It is urged before us by learned counsel for the respondents that the investigating officer deliberately did not record the statements of these persons because their deposition supported the defence and established their innocence.

Defence evidence ignored

122. It has been bitterly complained by learned counsels appearing for the convicts that the learned trial judge has completely ignored the defence evidence brought on record. Our attention is drawn to the evidence led by the defence. The prosecution has failed to examine these persons from the spot. However, the defence examined two neighbours, namely, Mohd. Usman and Babu Khan who have been referred to by the investigating officer as well.

123. It is in the testimony of DW-1 – Mohd. Usman that he was residing in front of the house of the deceased person on the 21st of October 2009. In the odd hours, he heard noise of the accused persons. When he reached there, the deceased was crying that she would implicate all the family members of the accused persons. The witness stated that he saw the deceased was on fire but he was unable to state as to who has set the deceased aflame. He stated that the eldest son of Gulbeg Ali informed the police. In his cross-examination by the learned APP, the witness stated that he had heard quarrels between Sarfaraz and accused persons on the issue of property four or five times earlier and he had intervened in the matter earlier as well. The witness stated that Sarfaraz used to demand his share from the house of his father. This witness has explained that Sarfaraz was residing with his family consisting of his wife and two children on the second floor of the house; Gulbeg Ali with Mubin Fatima and his two other daughters were residing on the first floor of the house and the ground floor was occupied by Zulfikar Ali, his wife and his son.

124. DW-1 – Mohd. Usmaan has categorically stated that he had reached the first floor of the house of the accused persons where he had

seen that the deceased was aflame. The witness clearly stated that her husband PW-3 -Sarfaraz as well as all the accused persons were also present there.

125. We may also note the testimony of DW-2 -Babu Khan who corroborated the testimony of DW-1 to the effect that there was a subsisting quarrel between Gulbeg Ali and his elder son Sarfaraz on the issue of share in the property. Babu Khan has stated that the deceased used to demand share of her husband from Gulbeg Ali in his property and threatened to implicate her in-laws otherwise. 21st With regard to the incident on October, 2009, the witness stated that he had heard noise at about 3:00 am or 4:00 am from the house of the accused persons and that he along with other mohalla people reached the house of the accused. He saw that the deceased was aflame and the three accused persons and other family members were trying to put off the fire. As per this witness, police officials came on the calling of Sarfaraz. The witness stated that he had also reached the first floor of the house where the incident had taken place. He corroborated DW-1 – Mohd. Usman's presence at the spot. This witness had also stated that he had heard quarrel about 100 times from the house of the accused persons after the marriage of Sarfaraz who was Gulbeg Ali's elder son; and that there were many complaints between the deceased and the accused persons to the police. The witness denied the statement that Sarfaraz was not present at the spot at the time of the incident.

The defence witnesses establish the presence of Sarfaraz Hussain at the spot at the time of the incident and points towards innocence of the respondents. The defence witnesses also establish motive on the part of Sarfaraz and his deceased wife to falsely implicate the respondents. This material evidence has been ignored.

Testimony of PW-3 – Sarfaraz Hussain, son of Gulbeg Ali and husband of the deceased – Shama Praveen

126. The conduct and testimony of PW-3 – Sarfaraz Hussain makes interesting reading. He was first examined as PW-3 on the 16th of August 2010. Half way through his evidence, the learned APP requested the court to declare him hostile and sought an opportunity to cross-examine this witness. After commencing the cross-examination, his further statement was deferred on the pretext that the case property has not been received from the Forensic Science Laboratory. This witness was thereafter

not examined for a period of almost one year till he was produced on 14th July, 2011 for his further cross-examination by the learned APP. At the end of his cross-examination by the learned APP, suddenly the witness stated that he wanted to volunteer a further statement. He then volunteered a statement which was a complete volte-face in a concerted effort to implicate his father – Gulbeg Ali, brother – Zulfikar Ali and sister – Mubin Fatima in the commission of the offence.

127. In his examination-in-chief on the 16th of August 2010, this witness disclosed that on the 21st of October 2009, he was sleeping in his house. At around 2:00 am, he heard noise of crying which woke him. He found that his children (one son aged about 3 years and daughter aged about 2 years) were sleeping while his wife was missing. PW-3 claimed that he saw his wife on the ground floor having kerosene oil on her body and a bottle of kerosene oil was lying there. The witness categorically stated that his wife was saying that she will kill herself and implicate her whole family. As soon as PW-3 tried to go down to ground floor 'she put herself on fire'. The witness claims to have put water upon her and that her family members and his younger brother also woke up when she cried. PW-3 also stated that he has made a call to 100 number and PCR van came there and took his wife to GTB Hospital. In his examination-in-chief, the witness corroborated the recovery of articles but claims that they were recovered from the ground floor. When cross-examined by the learned APP after having been declared hostile, the witness denied having made any statement dated 22nd October, 2006 in connection with the incident to the police under Section 161 Cr.PC. He stated that he had married Shama Praveen against the wish of his parents. The witness admitted that he was having a property dispute with his family members which included a civil case concerning the said dispute. He denied that he was on duty at the time of the incident or that he learnt about it and his wife admission in GTB Hospital later. The witness also denied the suggestion by the learned APP that he had told the police that in the hospital his wife told him that she had been taken away at around 2:30 am by her father-in-law and younger brother to their room or that his brother tied a plastic rope around her neck while his sister – Mubin Fatima held her, his father had poured kerosene oil and threw burning matchstick upon her.

128. On the 14th of July 2011, the learned APP put the articles claimed to have been seized from the spot to the witness. Thereafter the

witness stated he wanted to make a further statement and made deposition completely contrary to his statement recorded on 16th August, 2010. The witness deposed that his wife Shama Praveen was beaten by his father -Gulbeg Ali, brother -Zulfikar Ali, sister -Mubin Fatima four to five times before the present incident; that his father was taken to the police lock-up of police station Gokulpuri as his father has beaten his wife. So far as his earlier statement given on 16th August, 2010 is concerned, PW-3 – Sarfaraz stated that he had made the deposition on tutoring by the previous counsel of the accused person and that he had written on a paper (Ex.PW3/B) the dictation by the previous counsel of accused persons of such deposition.

129. This witness now claimed that on 22nd October, 2009, he was informed about his employer Sher Ali about the incident at 2:45 am when he was present on his job place in Gonda Chowk, Delhi and that he had rushed to the GTB Hospital and met his wife. The witness claimed that his wife had told him that the three accused persons had put pressure on him not to go to Seelampur Court as the matter was fixed for evidence there. This witness for the first time stated that the wife told him that Zulfikar had tied her neck; Mubin Fatima had caught hold her hands; and Gulbeg Ali sprinkled kerosene and ablaze her.

130. The witness gives no time of his visit to the hospital. None of the other witnesses mention the presence of PW-3 at the GTB Hospital. If the deceased had actually made such a statement to PW-3, then the same would have been on police record. It would have been the basis of recording the FIR. It is not so.

131. It is in the evidence of PW-3 – Sarfaraz that his sister Chand Kiran had lodged a complaint against him under Sections 107/151 of the CrPC on allegations of his beating her. PW-3 stated that he had not beaten her but merely had "warned her not to meet his brother-in-law, Tahir who was in JC during that period". PW-3 has further stated that he was lodged in jail on the aforesaid complaint under Sections 107/151 of Cr.PC. The witness Sarfaraz further admitted the suggestion that he had beaten his sister Mubin Fatima in the year 2009 on the accusation that she had beaten his wife Shama Praveen 10 to 12 days before the present case.

132. It is also in the testimony of PW-3 – Sarfaraz that he was having some property dispute with his family members which included

a civil case concerning the said dispute.

133. PW-3 has referred to a case pending in the Seelampur Court details whereof having not been disclosed.

134. PW-3 – Sarfaraz has denied the suggestion that House No.B22, Gali No.3, Chaman Park, Delhi was not sold out at the time of the statement. The witness admitted that the said property was owned by his father. He later volunteered that the transaction regarding the sale and purchase of the said house was completed between his father Gulbeg Ali and one Sher Ali. The witness claimed that he had received an amount of Rs.1,90,000/-as his share in the sale consideration.

135. Mr. Ajay Verma, learned counsel further contended that PW-3 – Sarfaraz, husband of the deceased has not spoken the truth on 14th July, 2011 before this court. It is urged that the statement of this witness that he testified on the lines suggested by an advocate of the accused persons is absolutely false.

136. Learned counsels for the appellants have strongly urged that PW-3 – Sarfaraz gave the true version of the occurrence in his deposition on 16th August, 2010 when he stated that the deceased had herself alight in a self-immolation bid with the intention of falsely implicating her in-laws for the same. It is urged that he turned turtle because of the dispute regarding sale of the property.

137. PW-3 has attempted to claim that the house was sold on 22nd June, 2010 and that he had received this amount on 23rd October, 2010. This fact is disputed by the accused persons.

138. Gulbeg Ali in the statement under Section 313 of the CrPC has explained that he has been falsely implicated in the case and arrested. He has further stated after the present case, since Gulbeg Ali was in judicial custody, his son along with his wife Smt. Shahnaz has taken his household goods and has sold his house.

139. We are informed by learned counsel for Gulbeg Ali that Gulbeg Ali filed an application under Section 156(3) of the Cr.PC resulting in the passing of an order dated 30th January, 2012 by the Metropolitan Magistrate directing registration of FIR against Sarfaraz. We are further informed that FIR No.36/2012 was registered on 5th February, 2012 against Sarfaraz under Sections 420/34 of the IPC.

140. The above narration would show that having taken the amount after selling the property, PW-3 – Sarfaraz completely turned around on 14th July, 2011 and made the deposition against his father, brother and sister.

141. Interestingly, the witness attributes neither threat nor fear or undue influence of any kind by the previous counsel for testifying on given lines on 16th August, 2010. On the contrary, it is a case of the witness – PW-3 that he was inimical to the accused persons; that there was several complaints and cross-complaints between them including proceedings under Sections 307/151 of the Code of Criminal Procedure and even a civil case pending. It is implausible to say the least that such being the state of affairs between the sides, PW-3 could have been persuaded by any person, let alone the respondents or their lawyer, out of goodness of his heart or love and affection for his father, brother or sister to make the first statement which he did on oath in court.

142. PW-3 -Sarfaraz has made a false statement that he received information of the incident at 2:45 am. There is affirmative evidence that the incident took place at around 3:00 am.

143. It is also noteworthy that PW-16 -ASI Sona Ram has stated that he met the husband of the deceased Shama Praveen on the spot in the early hours of morning. PW-3 – Sarfaraz in his statement on 16th August, 2010 has also admitted his presence in the house at the time of the incident. The same is corroborated by several other pieces of evidence. Recoveries were effected in his presence from the spot in the early hours. Both DW-1 – Mohd. Usman and DW-2 – Babu Khan have stated that Sarfaraz was present at the spot. These statements would support the presence of Sarfaraz at the spot at the time of incident and laying credence to the testimony given by him on 16th August, 2010 as the truthful account of what transpired. The same is also supported by the evidence of the photographs which show that two sleeping children were present in the room. It is noteworthy that PW-3 claimed to be engaged in the work of nickel plating. It is urged that such work is taken during the day hours.

144. We are persuaded to accept the submissions of learned counsels for the respondents. In this regard, we find that PW-3 – Sarfaraz had originally testified on 16th August, 2010. He thereafter kept quiet for a period of almost one year till his further examination was conducted on

14th July, 2011. Sarfaraz has placed on record with regard to other complaints and litigations between him and his father, brother and sister. Therefore, he is not a person who did not have legal assistance or did not know court proceedings. Before the trial court, PW-3 had the assistance of the police as well as the prosecutor. His very silence till 14th July, 2011 would show that his testimony to the effect that he had given an incorrect statement in his deposition on 16th August, 2010 at the instance of an advocate for the accused persons is unreliable and unworthy of any credence.

145. So far as PW-14 – HC Ravi Shankar Sharma is concerned, a perusal of his cross-examination would show that he has made considerable improvements in his prior statements under Section 161 of the Cr.PC by the investigating officer. He was repeatedly confronted with different portions of court testimony vis-a-vis statement under Section 161 of the Cr.PC (Ex.PWD/A). The witness had not made any disclosures in Ex.PWD/A. The omissions include the important circumstances as to the alleged declaration made by the deceased implicating her father-in-law, brother-in-law and sister-in-law for the commission of offence and other important facts which were stated by him in court. Mr. Ajay Verma, learned counsel for Mubin Fatima has drawn our attention to the fact that his statement under Section 161 of the Cr.PC (Ex.PWD/A) also makes a reference to Section 302 of IPC and it is contended that clearly the statement was recorded after the deceased had died.

146. We may note that PW-14 has proved the Police Control Form – Ex.PW13/A which contains four statements attributed to the deceased. The first two are telephone calls received at 3:07:43 hrs. The second report at 3:27:57 hrs is after the police reached the spot refers to a self immolation bid by a lady. It is only after the deceased had been admitted to GTB Hospital that at 4:27 am, the allegation of burning surfaces for the first time. Such allegation is also unsupported by any evidence of fitness of the deceased or any other witnesses to the statement. The three prior statements are supported by the other evidence on record.

147. There are several gaps in the case of the prosecution as noticed above. One material factor established from the record of the police control room is a fact that the deceased made a telephone call at 3:00 am to the police control room complaining of a quarrel at the premises. She made another phone call to the police within three minutes thereafter, barely about two minutes before the police reached there. The

prosecution has set up a case that three grown up adults were involved in the incident and were pitched against one lady, i.e., the deceased. How would three persons bent upon burning a lady to death, permit her to use her telephone to call the police, not once but twice over? This story is implausible to say the least.

148. Learned counsels for the respondents have suggested that the unfortunate incident was a result of bad planning at the instance of the deceased and her husband Sarfaraz who had set up a facade of her being burnt at the hands of the respondents so as to falsely implicate them in a criminal case because of the motive of grabbing the immovable property owned by Gulbeg Ali. It is submitted that for this reason, the deceased appears to have made the first phone call to the police to seek the police action before pouring kerosene over herself as is manifested from the statement made by PW-3 – Sarfaraz on the 16th of August 2010 in court. She confirmed that police was underway by the second telephone call before setting herself alight. Learned counsel for the respondents have suggested that the deceased least expected that she would suffer burns of the nature or extent which would take her life in this incident.

149. Learned counsel for the respondents have also vehemently urged that the investigation in the instant case is shoddy and the prosecution has failed to gather vital information and evidence which would have established the innocence of the respondents. It is contended that the prosecution failed to prove the call details of telephone no.9312668396 and failed to produce the doctor who had recorded the MLC. It is contended that the treatment chart of the deceased was also not produced which would have established that she had been administered sedatives and was not in a fit condition to make any statement.

Motive and intention

150. So far as motive is concerned, it has been vehemently contended by Ms. Ritu Gauba, learned APP for the State that the respondents had motive to kill the deceased for the reason that she had married Sarfaraz son of Gulbeg Ali against their will. This motive however was not the case of the prosecution before the learned trial judge. We may also notice that the marriage appears to be more than four years old. Furthermore documentary evidence was led with regard to the palpable animosity nursed by PW-3 – Sarfaraz and the deceased against Gulbeg Ali and the other family members on account of property dispute.

151. The prosecution attempted to establish the property dispute as the motive for killing the deceased. The trial judge accepted this suggestion. However, in drawing this conclusion, a material factor has been completely lost sight of. The property was owned by Gulbeg Ali. It was Sarfaraz, husband of the deceased who was seeking his share therein. Mubin Fatima or Zulfikar Ali, the other children of Gulbeg Ali were placed similarly as Sarfaraz. Shama Praveen had no right or claim in or against the said property. If the property dispute was the motive being nursed by the accused persons, then killing Shama Praveen achieved no purpose at all inasmuch as the claim of Sarfaraz would have survived and subsisted. On the contrary, the evidence on record supports the defence to the effect that the deceased had set herself aflame with the intention of falsely implicating her father-in-law and his other children with the intent to grab the property. Unfortunately, the plan misfired and she suffered burns which led to her death.

152. Learned APP for the State has tried to suggest that Shama Praveen (deceased) was married to PW-3 – Sarfaraz against the wishes of the accused persons for which reason as well they had put her on fire. This was not the case of the prosecution before the trial court. Such a case was not even put to the accused persons.

Conclusion

153. It is well settled that dying declaration is a substantive piece of evidence which can be relied on, provided it is established that the same was made voluntarily and truthfully by a person who was in a fit state of mind. If so made, conviction can be based on the dying declaration. Medical evidence and surrounding circumstances cannot be ignored and kept out of consideration by the court placing exclusive reliance upon the testimony of a person recording the dying declaration.

154. In the instant case, if the statements attributed to the deceased are kept aside, there is no evidence at all to support the case of the prosecution. There is no reliable evidence at all to establish that the deceased was in a fit state of mind at the time of making the statements attributed to her. Furthermore, the respondents have examined witnesses in their defence who have cast considerable doubt on the correctness of the case sought to be established by the prosecution.

155. The unfolding of the evidence or the offence as suggested by the prosecution are not supported by the spot inspection; the site plan

proved by the prosecution on record. The entire incident is falsified by the photographs which have been taken by the police at the spot very shortly after the alleged incident.

156. We have also noticed above that the prosecution has failed to produce the members of the public who were available at the spot when the incident took place. The doctors who examined the deceased have not been examined.

157. It is settled law that if there is some material on record which is consistent with the innocence of the accused which may be reasonably true, even though it is not positively proved to be true, the accused would be entitled to acquittal. In (1973) 2 SCC 793 **Shivaji Sahabrao Bobade vs. State of Maharashtra,** the Supreme Court had stated that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.

Sentencing

158. Before parting with the case, it is essential to notice and comment on the manner in which the learned trial court has proceeded in passing the order on sentence. Our attention has been drawn to para 129 of the judgment dated 17th March, 2012 wherein the trial court has observed as follows:-

> "129. Since it has been established that death of deceased, helpless Shama Praveen had been caused by extreme brutal act of accused persons while setting the deceased under fire just to crush her voice for demanding her rights. It is very shameful for a society where woman including girls have been victimizing either inside or outside the four walls of house which cannot be permitted or allowed for anyone to cause death of any person in such a cruel manner. Woman must be respected everywhere. **"Jahan istri ka samman hota hai waha devta vaas karte hai".**

159. It has therefore been observed in para 130 that a dying declaration enjoys almost a sacrosanct status, as a piece of evidence, coming as it does from the mouth of the deceased victim.

160. Thereafter while recording an order on sentence dated 26th March, 2010, the learned trial court has noted the following factors:-

(i) Kumari Mubin Fatima is a young lady.

(ii) Zulfikar Ali is aged about 26 years at that time and was having a responsibility of his wife and a minor child.

(iii) The convict Gulbeg Ali is an old age man.

(iv) All the convicts belong to a poor family.

(v) The convicts were not having previous convictions and had crystal clear antecedents.

161. The order on sentence of death is premised on the learned judges, view that convicts were involved in a murder of helpless woman committed in an extreme brutal manner which stood established by the dying declaration of the deceased. So far as the motive was concerned, reference was made to litigation between the deceased and accused person over the property. The brutality of the crime was concluded from the 'way of killing'. The learned trial judge has observed that 'pain and suffering of the deceased while burning could be felt'. It was further observed that the accused persons had been the 'caretaker of the deceased and they must have some alternative way to resolve the dispute in the family and in order to crush the voice of the deceased with the common intention set the deceased on fire'.

162. The learned trial judge simply observed that the mitigating circumstances for sentencing the accused persons are not sufficient to consider for lenient view and that 'faith of caretaker will be lost and if the court keeps silence without any action then system of justice delivery would be collapsed and that the brutal act of the accused persons comes under the category of 'rarest of rare cases'. We may observe that the judge has noticed the pronouncement of the Supreme Court reported at (1980) 2 SCC 684, **Bachan Singh v. State of Punjab** as well as (1983) 3 SCC 470, **Machhi Singh v. State of Punjab**.

163. So far as the sentencing is concerned, we may refer to the discussion by the Supreme Court in a recent judgment reported at (2012) 11 SCALE 140, **Sangeet & Anr. v. State of Haryana** wherein the court considered the entire gamut of judicial pronouncements on the award of death sentences as well as the sentencing policy and inter alia concluded as follows:-

> "80. The broad result of our discussion is that a relook is needed at some conclusions that have been taken for granted and we

need to continue the development of the law on the basis of experience gained over the years and views expressed in various decisions of this Court. To be more specific, we conclude:-

1. This Court has not endorsed the approach of aggravating and mitigating circumstances in Bachan Singh. However, this approach has been adopted in several decisions. This needs a fresh look. In any event, there is little or no uniformity in the application of this approach.

2. Aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal. A balance sheet cannot be drawn up for comparing the two. The considerations for both are distinct and unrelated. The use of the mantra of aggravating and mitigating circumstances needs a review.

3. In the sentencing process, both the crime and the criminal are equally important. We have, unfortunately, not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become judge-centric sentencing rather than principled sentencing.

4. The Constitution Bench of this Court has not encouraged standardization and categorization of crimes and even otherwise it is not possible to standardize and categorize all crimes.

5. The grant of remissions is statutory. However, to prevent its arbitrary exercise, the legislature has built in some procedural and substantive checks in the statute. These need to be faithfully enforced.

6. Remission can be granted Under Section 432 of the Code of Criminal Procedure in the case of a definite term of sentence. The power under this Section is available only for granting "additional" remission, that is, for a period over and above the remission granted or awarded to a convict under the Jail Manual or other statutory rules. If the term of sentence is indefinite (as in life imprisonment), the power Under Section 432 of the Code of Criminal Procedure can certainly be exercised but not on the basis that life imprisonment is an arbitrary or

notional figure of twenty years of imprisonment.

7. Before actually exercising the power of remission Under Section 432 of the Code of Criminal Procedure the appropriate Government must obtain the opinion (with reasons) of the presiding judge of the convicting or confirming Court. Remissions can, therefore, be given only on a case-by-case basis and not in a wholesale manner.

81. Given these conclusions, we are of the opinion that in cases such as the present, there is considerable uncertainty on the punishment to be awarded in capital offences-whether it should be life imprisonment or death sentence. In our opinion, due to this uncertainty, awarding a sentence of life imprisonment, in cases such as the present is not unquestionably foreclosed. More so when, in this case, there is no evidence (contrary to the conclusion of the High Court) that Seema's body was burnt by Sandeep from below the waist with a view to destroy evidence of her having been subjected to sexual harassment and rape. There is also no evidence (again contrary to the conclusion of the High Court) that Narender was a professional killer."

164. On the same aspect, reference requires to be made to another pronouncement of the Supreme Court reported at (2012) 12 SCALE 112, **Oma @ Omprakash & Anr. v. State of Tamil Nadu**. In this judgment, the Supreme Court noticed certain prior judicial pronouncements in the following terms:-

"50. In **Lehna v. State of Haryana** : (2002) 3 SCC 76 a three-Judge Bench, after referring to the pronouncements in **Bachan Singh** (supra) and **Machhi Singh** (supra), ruled under what circumstances the collective conscience of the community is likely to be shocked. We may fruitfully quota a passage from the same:

"A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making

him suffer a sentence of imprisonment. *Award of punishment following conviction at a trial in a system wedded to the rule of law is the outcome of cool deliberation in the court room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed man i.e. the Judge that leads to determination of the lis.*

The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, *for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt."*

(Emphasis added)

165. On the manner in which, the learned trial judge must proceed, the Supreme Court observed as follows:-

"56. In **Hindustan Times Ltd. v. Union of India and Ors.** : (1998) 2 SCC 242, a two-Judge Bench of this Court referred to an article On Writing judgments, by Justice Michael Kirby of Australia (1990) 64 ALJ 691) wherein it has been highlighted, apart from any facet that the legal profession is entitled to have, it demonstrated that the Judge has the correct principles in mind, has properly applied them and is entitled to examine the body of the judgment for the learning and precedent that they provide and further reassurance of the quality of the judiciary which is the centre-piece of our administration of justice. Thus, the fundamental requirement is that a Judge presiding over a criminal trial has the sacrosanct duty to demonstrate that he applies the correct principles of law to the facts regard being had to the

precedents in the field. A Judge trying a criminal case has a sacred duty to appreciate the evidence in a seemly manner and is not to be governed by any kind of individual philosophy, abstract concepts, conjectures and surmises and should never be influenced by some observations or speeches made in certain quarters of the society but not in binding judicial precedents. He should entirely ostracise prejudice and bias. The bias need not be personal but may be an opinionated bias."

166. Unfortunately, in the case in hand, the learned trial judge has completely misdirected itself in convicting the appellants as well as the order on sentence.

167. We may also notice a pronouncement of the Supreme Court reported at (2012) 12 SCALE 407, **Sandesh @ Sainath Kailash Abhang v. State of Maharashtra** wherein the court has noticed the judgment of **Sangeet & Anr.** (supra). So far as the circumstances which are required to weigh with the court while awarding the death penalty is concerned, the principles laid down in this judgment in para 24 read as follows:-

"24. We have already noticed that it is not possible to lay down as a principle of law as to in which cases the death penalty should or should not be imposed. The above judgments are on their own facts, but one aspect that certainly is stated in these judgments is the possibility of the accused being reformed, he being young and having no criminal involvement in similar crimes are relevant considerations. In the present case the prosecution had led no evidence to show that the Appellant was a hardened criminal and there was no possibility of his being reformed. There is also no evidence to show that during the time when he was in jail, his conduct was unworthy of any concession. It is a heinous and brutal crime that the accused has committed, but other relevant considerations outweigh it for the Court to state that the present case is one that of rarest of the rarest of rare cases."

168. In the case in hand, no evaluation of the aggravating and mitigating circumstances effected. The learned trial judge has not even considered the aspect of possibility of reformation of the appellants while awarding the death penalty to the appellants.

169. In view of the above discussion, we have no hesitation in

holding that the impugned judgment dated 17th March, 2012 and order on sentence dated 26th March, 2012 are not sustainable in law. The same are hereby set aside and quashed. The respondents in Death Reference No.2/2012 who are appellants in Crl.A.Nos.472/2012, 473/2012 and 474/2012 are hereby directed to be set at liberty forthwith. The death reference is answered and the Crl.A.Nos.472/2012, 473/2012 and 474/2012 are allowed in the above terms.

ILR (2013) II DELHI 941
CRL.M.C.

VIJAY SINGH **....PETITIONER**

VERSUS

HINDUSTAN ANTIBIOTICS LTD. & ANR. **....RESPONDENTS**

(G.P. MITTAL, J.)

CRL.M.C. NOS. : 1151/2012, 1705/2012, 1706/2012 & 1707/2012 **DATE OF DECISION: 30.01.2013**

Negotiable Instruments Act, 1881 – Section 138 – Whether a fresh cause of action can arise on subsequent dishonour of cheques and non compliance of the legal notice – Yes. Assurance of payment to the payee by the drawer of the cheque on a future date may be one of the causes for deferring the prosecution under Section 138. HELD: The payee or the holder can defer prosecution till the cheque which is presented again gets dishonoured for the second or successive time - Respondent No 1. was well within its right to launch prosecution on the basis of the dishonour of cheques on 30.3.2001 which was followed by the issuance of the notices within 15 days of the dishonour of the cheques.

[Lo Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Rajiv Bajaj, Advocate.

FOR THE RESPONDENTS : Ms. Rajdipa Behura, APP for the State.

CASES REFERRED TO:

1. *MSR Leathers* vs. *S. Palaniappan & Anr.* Criminal Appeal No.261-264 of 2002, decided on 26.09.2012.
2. *Sadanandan Bhadran* vs. *Madhavan Sunil Kumar* (1998) 6 SCC 514.

RESULT: Petition dismissed.

G.P. MITTAL, J. (ORAL)

1. By virtue of these Petitions under Section 482 of the Code of Criminal Procedure (Cr.P.C.), the Petitioner seeks quashing of the cognizance taken by the learned Metropolitan Magistrate ('MM') in four criminal complaints arising out of the dishonour of the four cheques which are tabulated hereunder:-

Sl.No.	Cheque No.	Date	Amount	Drawn on
1.	050842	15.01.2001	2,00,000/-	Bank of Punjab Ltd. Roshan Ara Road, New Delhi.
2.	050843	01.02.2001	2,00,000/-	-do-
3.	050844	15.02.2001	2,00,000/-	-do-
4.	050846	28.02.2001	1,47,481/-	-do-

2. It is admitted case of the parties that after the four cheques were dishonoured on account of *'stop of payments/insufficient funds'* a legal notice under Section 138 of the Negotiable Instruments Act, 1881 (the Act) was served upon the Petitioner. The Respondent No.1 did not take any action in pursuance of the first notice. All the four cheques were presented for collection to the Bank of Punjab. The cheques were again dishonoured as intimated to the Respondent No.1 by memo dated

30.03.2001.

3. The short question for determination in these Petitions is, whether a fresh cause of action can arise on subsequent dishonour of the cheques and non compliance of the legal notice under Section 138 of the Act. In these cases, subsequent notices were sent by registered post to the Petitioner on 14.04.2001 and the same are deemed to be served on 17.04.2001. The cause of action for filing of the complaint arose after 15 days of the service, that is, on 02.05.2001. The instant complaints were filed on 29th May, 2001.

4. The law laid down in **Sadanandan Bhadran v. Madhavan Sunil Kumar** (1998) 6 SCC 514 that the failure of the holder of the cheque/payee to file a complaint within one month resulted in forfeiture of the Complainant's right to prosecute the drawer which forfeiture cannot be circumvented by him by presenting the cheque afresh and inviting the dishonour to be followed by a fresh notice was revisited by a three Judge Bench of the Supreme Court in **MSR Leathers v. S. Palaniappan & Anr.** Criminal Appeal No.261-264 of 2002, decided on 26.09.2012.

5. It is, however, urged by the learned counsel for the Petitioner that the cheques can be presented on second or subsequent occasion only if an assurance of payment is made by the drawer of the cheque. I am unable to agree to the submissions raised on behalf of the Petitioner.

6. In *MSR Leathers* the Supreme Court analyzed the provisions of Sections 138 and 142 of the Act. It was held that there was nothing in Section 138 or Section 142 of the Act to curtail the right of the payee on failure of the holder of the cheque to institute prosecution against the drawer when the cause of action to do so had first arisen. The Supreme Court held the payee or the holder of the cheque can defer prosecution till the cheque which is presented again gets dishonoured for the second or successive time. Paras 21 and 31 of the report are extracted hereunder:-

> "21. There is, in our view, nothing either in Section 138 or Section 142 to curtail the said right of the payee, leave alone a forfeiture of the said right for no better reason than the failure of the holder of the cheque to institute prosecution against the drawer when the cause of action to do so had first arisen. Simply because the prosecution for an offence under Section

> 138 must on the language of Section 142 be instituted within one month from the date of the failure of the drawer to make the payment does not in our view militate against the accrual of multiple causes of action to the holder of the cheque upon failure of the drawer to make the payment of the cheque amount. In the absence of any juristic principle on which such failure to prosecute on the basis of the first default in payment should result in forfeiture, we find it difficult to hold that the payee would lose his right to institute such proceedings on a subsequent default that satisfies all the three requirements of Section 138.
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> x x x x x x x x x x
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> 31. Applying the above rule of interpretation and the provisions of Section 138, we have no hesitation in holding that a prosecution based on a second or successive default in payment of the cheque amount should not be impermissible simply because no prosecution based on the first default which was followed by a statutory notice and a failure to pay had not been launched. If the entire purpose underlying Section 138 of the Negotiable Instruments Act is to compel the drawers to honour their commitments made in the course of their business or other affairs, there is no reason why a person who has issued a cheque which is dishonoured and who fails to make payment despite statutory notice served upon him should be immune to prosecution simply because the holder of the cheque has not rushed to the court with a complaint based on such default or simply because the drawer has made the holder defer prosecution promising to make arrangements for funds or for any other similar reason. There is in our opinion no real or qualitative difference between a case where default is committed and prosecution immediately launched and another where the prosecution is deferred till the cheque presented again gets dishonoured for the second or successive time."

7. Thus, the Supreme Court clearly laid down that there would be second or successive cause/causes of action so long as the cheque is re-presented and is dishonoured within a period of its validity, that is, subject to the outer limit of six months of when it is drawn.

8. The fact that the drawer of a cheque assures the payee of

payment of the cheque amount on a future date may be one of the causes for deferring the prosecution under Section 138 of the Act. In Para 21 in MSR Leathers the Supreme Court was quite categorical that the failure to prosecute the drawer of the cheque on the basis of first default in payment would not result in any forfeiture of the payee's right to institute the proceedings under Section 138 on a subsequent default if it satisfies all the three requirements under Section 138.

9. In view of the latest pronouncement in MSR Leathers, the Respondent No.1 was well within its right to launch prosecution on the basis of the dishonour of the cheques on 30.03.2001 which was followed by issuance of the notices within 15 days of the dishonour of the cheques.

10. The Petitions are devoid of any merit; the same are accordingly dismissed.

11. Pending Applications also stand disposed of.

ILR (2013) II DELHI 945
CRL.M.C.

KRISH INTERNATIONAL P. LTD. & ORS. ....PETITIONERS

VERSUS

STATE & ANR. ....RESPONDENTS

(G.P. MITTAL, J.)

CRL. M.C. NOS. : 905/2012 & 906/2012 DATE OF DECISION: 30.01.2013

Negotiable Instruments Act, 1881 – Section 138 – Whether a cheque issued by the Client (the Borrower) in a Factoring Agreement is towards liability or security? – Factor filing complaints under Section 138 against borrower on failure of the debtor to pay – Metropolitan Magistrate taking cognizance and ordered issuance of summons – Issuance of summons challenged. Held: At this stage, it cannot be said that the cheques issued by the Petitioners were only towards security – Prima facie, the same were towards the Petitioners' liability which was co-extensive with the Debtor.

Negotiable Instruments Act, 1881 – Section 138 – Cheque given purely as a security – Its dishonor would not make the drawer of the cheque criminally liable under Section 138 of the Act.

[Lo Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Vikas Gupta with Mr. Nakul Ahuja, Advocates.

FOR THE RESPONDENTS : Ms. Rajdipa Behura, APP for the State. Mr. M.S. Vinaik, Advocate & Mr. Deepak Bashta, Advocate for R-2.

CASES REFERRED TO:

1. *Shree Bhagwati Apparels India Limited & Ors.* vs. *M/s. Bibby Financial Services India Pvt. Ltd.* (Crl. M. C. No. 31977/2010).
2. *Dhanjit Singh Nanda* vs. *State & Anr.,* 2009 (2) JCC (NI) 1999.
3. *M/s. Collage Culture & Ors.* vs. *Apparel Export Promotion Council & Anr.,* 2007 (4) JCC (NI) 388.
4. *C.C. Alavi Haji* vs. *Palapetty Muhammed & Anr.,* (2007) 6 SCC 555.
5. *Exports India & Anr.* vs. *State & Anr.,* 2007 (3) JCC (NI) 252.
6. *MCD* vs. *State of Delhi & Anr.,* (2005) SCC (Cri) 1322.
7. *ICDS Ltd.* vs. *Beena Shabeer & Anr.* (2002) 6 SCC 426.
8. *M/s. Balaji Sea Foods Exports (India) Limited* vs. *Mac*

Industries Ltd. (Madras), 1999 (1) RCR (Criminal) 683.

RESULT: Petition dismissed.

G.P. MITTAL, J.

1. These two Petitions raise a very interesting question for consideration, viz. whether a cheque issued by the Client (the borrower) in a Factoring Agreement is towards liability or security.

2. The facts of the case are not very much in dispute. The Petitioner Company (M/s. Krish International Pvt. Ltd.) approached Respondent No.2 IFCI Factors Limited to grant it domestic factoring facilities. Respondent No.2 by an Agreement dated 18.02.2010 allowed the factoring facility to the maximum pre-payment amount of Rs.5 crores. M/s. Koutons Retails India Limited (Koutons) was approved as debtor in terms of Clause 4 (i) of the Agreement. The approved terms of trade was 90 days or less from invoice date as was to be approved by Respondent No.2 (the factor). A copy of the Factoring Agreement dated 18.02.2010 has been placed on the paper book by the Petitioners as well as by Respondent No.2.

3. The Petitioner was granted pre-payment (after deducting the commission) to the extent of Rs. 3 crores. The cheques for this sum of Rs. 3 crores issued by the debtors (Koutons) were dishonoured. The Respondent No.2 presented the cheques bearing Nos.541554, 541555, 541556, 541557, 541558 and 541559, dated 15.12.2010, all drawn on Punjab National Bank, New Rajendra Nagar, New Delhi of amount Rs. 50 lacs each, which got dishonoured on presentation. A legal notice under Section 138 of the Negotiable Instruments Act, 1881 (the Act) dated 17.01.2011 was served upon the Petitioners calling upon them to make the payment of the cheque amounts along with interest failing which a complaint under the Act was to be filed against the Petitioners.

4. On failure to pay the amount, Respondent No.2 filed two separate Complaints under Section 138 of the Act (in respect of three cheques each).

5. By order dated 09.03.2011, the learned Metropolitan Magistrate ('MM') took cognizance and ordered issuance of the summons against the Petitioners.

6. The following contentions are raised on behalf of the Petitioners:-

(i) Admittedly, the cheques issued by Koutons were dishonoured. Notice under Section 138 of the Act was issued to Koutons and on failure to pay the amount, complaints under Section 138 of the Act was instituted against M/s. Krish International Pvt. Ltd. and the officers responsible for the conduct of its business. These facts were not disclosed by Respondent No.2 in the criminal complaint filed against the Petitioners and thus, the Court of learned 'MM' was mislead in issuance of summons.

(ii) The Petitioners were wrongly described as borrowers in the Complaint when in fact they were not the borrowers.

(iii) The cheques given by the Petitioners were by way of security and thus in case of dishonour of cheque, the Petitioners were not criminally liable under Section 138 of the Act. The learned counsel for the Petitioners places reliance on **M/s. Collage Culture & Ors. v. Apparel Export Promotion Council & Anr.** 2007 (4) JCC (NI) 388; **Exports India & Anr. v. State & Anr.** 2007 (3) JCC (NI) 252; and **MCD v. State of Delhi & Anr.** 2005SCC (Cri.) 1322.

7. On the other hand, learned counsel for the Respondent contends that there was no misrepresentation by Respondent No.2. The Petitioners were rightly described as borrowers as the amount was paid by Respondent No.2 to Petitioner No.1.

8. As per the terms of the Agreement dated 18.02.2010 entered into between the parties, the Petitioners were liable to make the payment in case of non performance of the obligation by Koutons. A personal undertaking dated 18.02.2010 was also given by Alok Aggarwal (Petitioner No.2) whereby he undertook to make the payment for oustanding prepayments or values of reassigned. Petitioner No.2 also undertook to keep sufficient balance in the account and to honour the cheques when presented. It is urged that the Petitioners' liability was co-extensive with the debtor M/s. Koutons Retails India Limited. Learned counsel for Respondent No.2 places reliance on a judgment of this Court in **Dhanjit Singh Nanda v. State & Anr.** 2009 (2) JCC (NI) 1999 and a judgment of the Punjab & Haryana High Court in **Shree Bhagwati Apparels India**

Limited & Ors. v. M/s. Bibby Financial Services India Pvt. Ltd. Crl.Misc. No.M-31977 of 2010 decided on 25.04.2011.

9. There is no dispute about the proposition of law as laid down in M/s. Collage Culture that a cheque issued not for an existing due but issued by way of security would not attract the provisions of Section 138 of the Act. In **M/s. Collage Culture** the learned Single Judge of this Court (Pradeep Nandrajog, J.) drew distinction between a cheque issued for a debt in present but payable in future and second for a debt which may become payable in future upon the occurrence of a contingent event. Paras 20 to 24 of the report in M/s. Collage Culture are extracted hereunder:-

> "20. A post dated cheque may be issued under 2 circumstances. Under circumstance one, it may be issued for a debt in presenti but payable in future. Under second circumstance it may be issued for a debt which may become payable in future upon the occurrence of a contingent event.
>
> 21. The difference in the two kinds of post-dated cheques would be that the cheque issued under first circumstance would be for a debt due, only payment being postponed. The latter cheque would be by way of a security.
>
> 22. The word 'due' means 'outstanding at the relevant date'. The debt has to be in existence as a crystallized demand akin to a liquidated damages and not a demand which may or may not come into existence; coming into existence being contingent upon the happening of an event.
>
> 23. Section 138 of the Negotiable Instruments Act 1881 reads as under:-
>
> > "138. Dishonour of cheque for insufficiency, etc., of funds in the account.– Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returnedby the bank unpaid, either because of the amount of money standing returned by the bank unpaid, either because of the amount of money standing returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both: Provided that nothing contained in this section shall apply unless—
> >
> > (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;
> >
> > (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
> >
> > (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.
> >
> > Explanation.– For the purposes of this section, .debt or other liability. means a legally enforceable debt or other liability..
>
> 24. It would be relevant to note that the statute does not refer to the debt being payable, meaning thereby, a post dated cheque for a debt due but payment postponed at a future date would attract Section 138 of the Negotiable Instruments Act 1881. But the cheque issued not for an existing due, but issued by way of a security, would not attract Section 138 of the Negotiable Instruments Act 1881, for it has not been issued for a debt which has come into in existence..

10. Similarly in **Exports India & Anr.** A.K.Sikri, J. (as his Lordship then was) while relying on **M/s. Balaji Sea Foods Exports (India)**

Limited v. Mac Industries Ltd. (Madras), 1999 (1) RCR (Criminal) 683 held that where a cheque was given as a security against the agency agreement its dishonour would not entail the criminal consequences under Section 138 of the N.I. Act.

11. Thus, there is no dispute about the proposition which is well settled that wherever a cheque is given purely as a security, its dishonour would not make the drawer of the cheque criminally liable for an offence under Section 138 of the Act.

12. Before adverting to the facts whether the cheque in the instant case was given as a security or it was towards liability to the Petitioners, I would refer to the contention raised by the Petitioner about misrepresenting the Court of learned 'MM' or playing fraud by Respondent No.2. In Para 3 of the Complaint it was clearly stated by Respondent No.2 that the Complainant, that is, Respondent No.2 had agreed and made available the factoring facilities to the Petitioners for an amount of Rs. 5 crores.

13. Thus, the factum of factoring agreement was not concealed by Respondent No.2. Thus, it would be difficult to hold that the summoning order was obtained by misrepresentation or by playing any fraud upon the learned 'MM'.

14. At this stage, it would be appropriate to refer to the factoring agreement. The learned counsel for the Petitioners urged that recourse and set off is provided under Clause 11 of the Agreement. If the cheques issued by Koutons were dishonoured, Respondent No.2 was at liberty to have recourse as mentioned in the Agreement. Para 11 of the Agreement as relied upon by the learned counsel for the Petitioners is extracted hereunder:-

"11. RECOURSE AND SET-OFF

(1) As regards each receivable which the Debtor is or claims to be unable to pay whether by reasons of legal constraints or acts or orders of government or for any other reason whatsoever and each receivable in respect of which the Debtor or his legal representative has disputed liability. The Factor shall have recourse to the Client as follows:-

(a) On the expiry of notice to the Client of the length specified in paragraph 14 of the Schedule or (b) on the insolvency of the debtor whichever is the earlier.

After the exercise of recourse by the Factor in respect of any such receivable the Factor will credit the Client with all sums subsequently recovered by the Factor in respect of it as the result of enforcement or realization of any associated rights. The said receivable and any associated rights relating thereto shall, unless otherwise determined by the Factor remain vested in the Factor until the repurchase price has been fully discharged, whether by payment to the Factor or by set off of an amount payable to the Client under the provisions of this Agreement.

(2) The Factor may set off against any sum payable to the Client the amount of any liability the Client to the Factor, whether under this Agreement or otherwise, whether existing, future or contingent and whether by way of debt damages or restitution..

15. Thus, Respondent No.2 was entitled to have recourse to the Client, that is, the Petitioners on the expiry of notice to the Client of the length specified in paragraph 14 of the Schedule or (b) on the insolvency of the debtor whichever was earlier. As per Para 14 of the Schedule "Recourse to the Client will be automatic on the expiry of 30 days from the due date of payment by the Debtor, or earlier, as advised by IFCI Factors Limited for each Debtor from time to time..

16. Thus, recourse to the Client was automatic on the expiry of 30 days from the due date of payment by the debtors, that is, Koutons or earlier as advised by IFCI Factors, i.e. Respondent No.2 for each debtor from time to time.

17. The Petitioners have placed on record a copy of the complaint under Section 138 of the Act filed by Respondent No.2 against Koutons and its Managing Director, etc. The due dates of payment were ranging between May to September, 2010. Thus, the period of 30 days had already expired from the due date of payment by the debtors, i.e. Koutons and, therefore, recourse to the Client, i.e. the Petitioners was automatic after the expiry of 30 days. In the instant case, the cheques issued by the Petitioners were presented only in the month of December, 2010. Moreover, as per the Clause 14 of the Schedule to the Agreement, the expiry period of 30 days from the due date of payment by the debtor was not mandatory in as much as Respondent No.2 was at liberty to curtail this period and thus serving of notice dated 17.01.2011 was sufficient to the Petitioners and they could have avoided prosecution by immediately paying the amount on receipt of the notice dated 17.01.2011.

18. In the case of **C.C. Alavi Haji v. Palapetty Muhammed & Anr.** (2007) 6 SCC 555 the Appellant disputed the service of the statutory notice under Section 138 of the N.I. Act. The Supreme Court observed that any drawer (of cheque) who claims that he did not receive the notice sent by post, can within 15 days on receipt of summons from the Court in respect of complaint under Section 138 of the N.I.Act, may make payment of the cheque amount and submit to the Court that he had made payment within 15 days on receipt of the summons and, therefore, the complaint is liable to be rejected. Thus, applying the analogy of C.C. Alavi Haji when the Petitioners became aware of the presentation of the cheques issued on behalf of Petitioner No.1 on receipt of notice dated 17.01.2011; it could have made the payment within a period of 30 days and similarly informed the learned 'MM' for dismissal of the complaint.

19. It is very strenuously canvassed by the learned counsel for the Petitioners that the cheques issued by the Petitioners were only by way of security. I have earlier referred to the terms of the Agreement including clause 11 recording recourse as relied on by the learned counsel for the Petitioners. The tanner of the Agreement was that the amount was advanced by Respondent No.2 to the Petitioners, thus, the amount was borrowed by the Petitioners and it was at Petitioners' behest and on their undertaking that cheques issued by the Petitioners' debtor i.e. Koutons were accepted on the condition that it will be honoured on presentation. It was the term of the factoring agreement that in case the Petitioners' debtor was unable to pay, the Petitioners would pay the amount (which obviously had been received by Petitioner No.1 from Respondent No.2). A personal guarantee for payment of all the amounts payable by the obligatee in respect of purchase of receivables was also given by Petitioner No.2 (Alok Aggarwal). Petitioner No.2 on behalf of Petitioner No.1 also undertook the payment of the outstanding pre-payments or for values of reassigned. He, further, undertook to keep sufficient balance in the account and to honour the cheques on presentation. Thus, factoring agreement along with undertaking and the Bond of guarantee clearly indicates that the cheques had not been given by the Petitioners as security but towards the liability which was co-extensive with that of the debtor.

20. A reference may be made to a report of the Supreme Court in **ICDS Ltd. v. Beena Shabeer & Anr.** (2002) 6 SCC 426 wherein the Supreme Court interpreted the words .where any cheque. and "other liability. as used in Section 138 of the N.I. Act and held that the cheque

issued by a guarantor would be deemed to be issued against any other liability. Paras 10 and 11 of the report are extracted hereunder:-

> "10. The language, however, has been rather specific as regards the intent of the legislature. The commencement of the section stands with the words .Where any cheque.. The abvoenoted three words are of extreme significance, in particular, by reason of the user of the word .any. – the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well. This aspect of the matter has not been appreciated by the High Court, neither been dealt with or even referred to in the impugned judgment.
>
> 11. The issue as regards the coextensive liability of the guarantor and the principal debtor, in our view, is totally out of the purview of Section 138 of the Act, neither the same calls for any discussion therein. The language of the statue depicts the intent of the law-makers to the effect that wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act. 'Any cheque' and 'other liability' are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the statue. Any contra-interpretation would defeat the intent of the legislature. The High Court, it seems, got carried away by the issue of guarantee and guarantor's liability and thus has overlooked the true intent and purport of Section 138 of the Act. The judgments recorded in the order of the High Court do not have any relevance in the contextual facts and the same thus do not lend any assistance to the contentions raised by the respondents".

21. The case is also squarely covered by a judgment of the Division Bench of this Court in **M/s. Collage Culture & Ors. v. Apparel Export Promotion Council & Anr.** 2007 (4) JCC (NI) 388 where it was held that a cheque issued towards debt which is due but whose only payment is postponed would attract Section 138 of the N.I. Act.

22. The question of issuance of the cheque towards liability or merely as a security fell for consideration before a learned Single Judge of Punjab & Haryana High Court in a factoring Agreement in **Shree Bhagwati Apparels India Limited & Ors. v. M/s. Bibby Financial Services India Pvt. Ltd.** Crl.Misc. No.M-31977 of 2010 decided on 25.04.2011. Facts in Shree Bhagwati Apparels India Limited are extracted from Paras 4 and 5 of the judgment hereunder:-

> 4. The petitioners were granted domestic factoring facilities on 18.03.2011 by the respondent to the tune of Rs. 2,00,00,000/- with the condition of maximum pre-payment of 80%. The petitioner gave the cheques of security amounting to Rs. 2,00,00,000/- without date towards guarantee as guarantee of Liverpool Retail India Limited. On 09.06.2009, M/s Liverpool Retail India Limited was supplied goods and their invoices were discounted and M/s Liverpool Retail India Limited too issued the cheques for the said amount. The cheques were of different dates i.e. 14.09.2009 to 16.12.2009. On 05.11.2009, the said cheques were dishonoured for insufficient funds. Thereafter, the respondent had no choice but to deposit the cheques given by the petitioners as guarantee. Their cheques were dishonoured. Hence, on 20.04.2010, the respondent filed the complaint against M/s Liverpool Retail India Limited and its Directors. Thereafter the complainant deposited the cheques issued by the petitioner as guarantor of the said amount. The cheques issued by the petitioner were also dishonoured. Accordingly, the second complaint was filed on 28.07.2010 under Section 138 of the Negotiable Instruments Act against the petitioners. The petitioners were summoned vide order dated 28.07.2010.
>
> 5. While praying for quashing of the complaint and the summoning order, learned counsel for the petitioners raised following arguments: -
>
> (i) that the post dated cheques were given towards security, therefore, no complaint under Section 138 of the Negotiable Instruments Act is maintainable. Reliance was placed on the judgments of Hon'ble the Apex Court rendered in the case titled as **M.S. Narayana Menon @ Mai v. State of Kerala** passed in Criminal Appeal No. 1012 of 1999, 2006 (3) R.C.R. (Criminal) 504 (SC). and the judgment of Delhi High Court rendered in the case titled as Collage Culturev. Apparel Export Promotion Council passed in Crl M.C. No. 3011/2004.
>
> (ii) The respondent has already preferred a complaint under Section 138 of the Negotiable Instruments Act against M/s Liverpool Retail India Limited whose invoices were financed by the respondent and who duly acknowledged the domestic factoring facilities and in response thereto issued the cheques for the whole amount of the invoices. Therefore, the respondent cannot maintain two complaints for same liabilities.
>
> (iii) that no notice as per the terms and conditions of the settlement was issued to the petitioners and, therefore, the complaint was not maintainable.

23. The Punjab and Haryana High Court in Shree Bhagwati Apparels India Limited held as under:-

> 7. After hearing learned counsel for the petitioners, the first issue that requires to be decided is as to whether the cheques, in dispute, were towards security or the word used is a misnomer in the undertaking.
>
> 8. The Managing Director of the petitioner firm-Shri Bhagwati Apparels India Limited gave an undertaking on 30.03.2009. Learned counsel for the petitioners referred to Clause 2 of the Undertaking to show that the cheques were towards security. The same reads as under: -
>
> "2. That in consideration of you, Bibby Financial Services (India) Private Limited, a company incorporated under the Companies Act, 1956 having its office at Plot No. 121, First Floor, Sector 44, Gurgaon, Haryana sanctioning factoring facilities upto a Prepayment Limit of Rs.

2,00,00,000/- (Rupees Two Crores only) ('Facility') to the Borrower, the Executant deposits herewith post dated/ security cheques, details whereof are mentioned in Schedule 1 attached hereto for a total amount of Rs. 2,00,00,000/- only, favouring yourself. In case the Borrower fails to make payment of the amount outstanding under the Facility within a period of seven days after a demand is made by you for the said amount you shall have a right to present the cheques issued by the Executant for the said amount."

9. No doubt, the cheques are stated to be mentioned as given towards security as per the under taking and there is also no dispute that the cheques that were deposited were the same as mentioned in the said Schedule. However, at the same time, we cannot loose sight of the fact that they were submitted in pursuance to the liability, which is apparent from perusal of the same Undertaking given by the Managing Director of the petitioner's firm, which reads as under:–

"3. That neither the Executant nor any other authorized representative/official of the Borrower shall issue stop payment instructions to the banker in respect of the cheque/s issued to you, and affirm that the Executant or anybody else authorized by the Borrower shall not intimate the bankers to stop the payment due on the said cheque/s. The Executant agrees to ensure the availability of adequate funds in the bank account of the Borrower on which these cheques favouring Bibby Financial Services (India) Private Limited are issued, and undertake that the bank account shall not be closed, without prior intimation to you".

10. In fact, the said paragraph further goes on to read that in the event the Borrower defaults in honouring any of the cheque/s, the respondent, herein, shall be at liberty to initiate proceedings under the relevant provisions of the Negotiable Instruments Act, the Indian Penal Code, and/or any other enactment/s.

11. Thus, the entire undertaking has to be read a whole to arrive at the conclusion that the cheque is towards security or liability.

12. Further, an agreement had been executed between the parties i.e. the petitioner No. 1 as Borrower and the respondent as Factor. Clause 9.1(xviii) of the Agreement reads as under:–

"9.1 The Borrower hereby warrants, agrees and undertakes as under:- (xviii) that the Borrower shall at all times ensure that sufficient funds are made available in his bank account, on which the post dated/security cheques issued by the Borrower to Bibby have been drawn. Bibby shall not be required to give any notice to the Borrower before presenting the post dated/security cheques. In the event Bibby presents the post dated/security cheques furnished to it and the same are dishonoured for any reason whatsoever Bibby shall inter alia, have a right to proceed against the Borrower under the Negotiable Instrument Act, 1881;.

13. Thus, the cheques were issued by the petitioners were actually subject to the terms of the Undertaking dated 30.03.2009 and conditions in the Agreement also of the same date.

14. Moreover, as per the nature of the transaction between the parties, the Borrower who in the present case, happens to be the petitioner No. 1 makes itself liable for rendering all outstanding amounts to the Factor i.e. the respondent in the event of the purchaser of goods i.e. M/s Liverpool Retail India Limited defaulting in making payment.

15. In view of the above, it cannot be said, at this stage, that the cheques were towards security. The said fact being disputed and debatable, it is a matter to be decided in trial.,,,,,,,,,,,,,,,,,,,.

24. I am in respectful agreement with the view taken by the learned Single Judge of Punjab & Haryana High Court in *Shree Bhagwati Apparels India Limited*. In my view, at this stage, it cannot be said that the cheques issued by the Petitioners were only towards security. Prima facie, the same were towards the Petitioners' liability which was co-extensive with the debtor, i.e. Koutons.

25. The Petitions are devoid of any merit; the same are accordingly dismissed.

26. The above observations were necessary for disposal of the instant Petitions and the same will not amount to expression of any opinion on the merits of the case pending before the learned 'MM'. The learned 'MM' shall be entitled to take any view without being influenced by observations made hereinabove.

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RFA

MADHUR BHARGAVA AND ORS. ....APPELLANTS

VERSUS

ARATI BHARGAVA AND ORS. ....RESPONDENTS

(S. RAVINDRA BHAT & S.P. GARG, JJ.)

RFA NO. : 732/2003, C.M. APPL. NO. : 1696/2003, 6452/2004, 11416/2004, 13190-13191/2004, 13877/2008 & 10055/2010. RFA NO. : 855/2003, C.M. APPL. NO. : 2099/2003, 2182/2003, 4688/2004, 13259/2006, 10056/2010 & 5670/2012, RFA NO. : 878/2003, C.M. APPL. NO. : 2144/2003, RFA NO. : 912/2003, C.M. APPL. NO. : 2235/2003

DATE OF DECISION: 30.01.2013

Plaintiffs sought decree for possession and mesne profits in respect of second floor terrace with construction thereof of property at Asaf Ali Road, New Delhi—Suit decreed partially, claim for recovery of possession allowed and claim for recovery of mesne profit was denied—Parties to suit instituted four different appeals to challenge the judgment—Prior to this, Sh. Kavi Kumar brother of defendatns had filed a suit for partition against defendants being his sisters and mother Smt. Savitri Devi—During course of partition suit, parties agreed to refer disputes to arbitration—Award passed and made rule of Court—Subsequently, a Deed of Family Arrangement entered into between parties and suit property was also one of subject matter of Deed—Plaintiffs challenged the Family Arrangement being void nonest and ineffective in suit filed possession—Defendants refuted claim raised by plaintiffs and urged, their deceased brother Sh. Kavi Kumar was predecessor in interest of the plaintiff's and was privy and party to Family Arrangement—Also, questioning legality of Family settlement was barred by limitation as filed 7 years after death of Kavi Kumar and Savitri Devi—They further urged to have acquired ownership of suit property by adverse possession. Held:- A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving honour. The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld.

This Court discerns a palpable fallacy in the argument of the plaintiffs. The law governing the binding nature of family settlements, as noticed earlier, is clear that judges would be circumspect to place themselves in the shoes of the family

members who enter into such deeds or arrangements. Therefore, facts such as adequacy or otherwise, of the shares given in a previous arrangement, whether final consensually or through decree of court, cannot be gone into. **(Para 24)**

Important Issue Involved: A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour. The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANTS : Sh. Ram Jethmalani, Sr. Advocate with Sh. Alok Kumar, Ms. Lata Krishnamurti, Sh. Karan Kalia, Sh. Ashish and Sh. Pranav Diesh, Advocates for appellants in RFA 855/2003 and for respondents in RFA 732/2003, RFA 878/2003 & RFA 912/2003.

FOR THE RESPONDENTS : Sh. Kailash Vasdev, Sr. Advocate with Ms. Shraddha Bhargava and Ms. Richa Kapoor, Advocates. Sh. Virender Goswami with Ms. Soni Singh and Sh. Sankalp Sharma, Advocates for appellant in RFA 912/2003.

CASES REFERRED TO:

1. *T. Anjanappa and Ors* vs. *Somalingappa and Anr.* (2006) 7 SCC 570.
2. *Hansa Industries (Ltd)* vs. *Kidar Sons (P) Ltd.* 2006 (8) SCC 531.
3. *Prem Singh* vs. *Birbal* (2006) 5 SCC 353.
4. *Ramiah* vs. *N. Narayana Reddy (dead) by Lrs.* (2004) 7 SCC 541.
5. *A.C. Ananthaswamy* vs. *Boraiah* [(2004) 8 SCC 588].
6. *Karnataka Board of Wakf* vs. *Government of India and Ors.* (2004) 10 SCC 779.
7. *Ramesh Chand* vs. *Raj Kumar* JT 2002 (5) SC 69.
8. *State of Maharashtra* vs. *Pravin Jethalal Kamdar (dead) by Lrs.* AIR 2000 SC 1099.
9. *D.N. Venkatarayappa* vs. *State of Karnataka* (1997) 7 SCC 567).
10. *Parsinni* vs. *Sukhi* (1993) 4 SCC 375.
11. *V. Tulasamma and Ors.* vs. *Sesha Reddy (Dead) by Lrs.* [1977] 3 SCR 261.
12. *Kale and Ors.* vs. *Deputy Director of Consolidation and Ors.,* AIR 1976 SC 807.
13. *M.V.S. Manikayala Rao* vs. *M. Narasimhaswami and others* AIR 1966 SC 470.
14. *Maturi Pullaiah and Anr.* vs. *Maturi Narasimham and ors.*(AIR 1966 SC 1836.
15. *Ram Charan Das* vs. *Girjanandini Devi and Ors.* AIR1966 SC 323.
16. *Potti Lakshmi Perumallu* vs. *Potti Krishnavenamm* AIR 1965 SC 825.
17. *Ram Charan Das* vs. *Girjanandini Devi* [1965]3SCR841.
18. *S.M. Karim* vs. *Bibi Sakina* AIR 1964 SC 1254.

19. *Sahu Madho Das* vs. *Mukand Ram* AIR 1955 SC 481.

RESULT: Appeal No. 732/13 dismissed, appeals bearing Nos. 855/03, 878/03 and 912/03 allowed.

S. RAVINDRA BHAT, J.

1. This common judgment will dispose of four first appeals (RFA Nos. 732, 855, 878 and 912 of 2003) which challenge the judgment dated 23.08.2003 of the learned Additional District Judge (hereafter "the Trial Court") in Suit no 188 of 2000. The suit, was instituted by Ms. Madhur Bhargava, Ms. Gayatari Bhargava and Ms. Shraddha Bhargav; (hereafter "the plaintiffs"); the defendants were Arati Bhargava, Bharati Bhargava, (hereafter referred to as D-1 and D-2 or collectively as "the sisters") and Ajay Sanghi (third defendant) and Ekta Agro Industries Ltd. (fourth defendant) (hereafter referred to as "the tenants" or "D-3" and "D-4"). The plaintiffs' appeal (RFA No. 732/2003) is restricted to the denial of mesne profits. The sisters' appeal (RFA 855/2003) challenges the findings and decree of the trial court denying their title to the suit property as well as the decree for possession; whereas the tenants' appeals (RFA NOs. 878/03 and 912/03) challenge the decree for possession granted to the plaintiffs, against them.

2. The plaintiffs sought a decree for possession and mesne profits in respect of the second floor terrace with construction thereon of Property no. 2522/X (i.e. front and hind portions on the 3rd floor) on plot no. 3/13-B, Asaf Ali Road New Delhi (hereinafter referred to as "suit property"). The suit was decreed partially to the extent that the claim for recovery of possession was allowed, and the claim for recovery of mesne profits was denied.

3. The facts emerging from the pleadings and admitted at the stage of the appeals by the parties are that one Mrs. Savitri Devi Bhargava ("Savitri Devi") married one Shri Dularey Lal Bhargava ("Dularey Lal") in 1940/ 1941. Their marriage did not work out and Savitri Devi left the matrimonial house at Lucknow. She took her eldest child and at that time only son, Kavi Kumar Bhargava (referred to as "Kavi Kumar" or "the son") with her. At the time of separation, Savitri Devi's mother-in-law gave her substantial cash and jewellery. While the plaintiffs claim that the cash and jewellery were given to Savitri Devi as her Stridhan, the sisters assert that these were given for creating a trust in favour of the children

(of Savitri Devi and Dularey Lal). Even after leaving Lucknow, Savitri Devi stayed on and off with her husband Dularey Lal. They had two daughters, first in 1950 and then in 1952 (D-2 Bharti, and D-1 Arti,). Using this jewellery, Savitri Devi made prudent investments and bought the following properties in the years 1953-54:

(1) Commercial plot measuring 44.44 sq. yards being No. 3/13-B, Asaf Ali Road, Delhi from the Delhi Improvement Trust. A three storeyed construction on this plot (ground, first and second floor) and a basement was completed;

(2) A two storeyed residential built up property No. E-15, 16, Nizamudin West, New Delhi and a *barsati*. This was acquired on September 1, 1959 with the help of a loan raised from bank.

4. The son and the two daughters were brought up by Savitri Devi. Kavi Kumar, the son, on completion of his college education joined Indian Police Service and some time thereafter married the first plaintiff, daughter of a member of Delhi Higher Judicial Service on 21st April 1969. This marriage, allege the Plaintiffs, however, did not carry the approval of Savitri Devi and on that count serious differences arose between the son and his wife on the one hand, and the mother, on the other. The plaintiffs alleged that the sisters exploited the situation for their personal gain.

5. Kavi Kumar and his wife (the first plaintiff) had a girl child, Pooja, who unfortunately did not survive; her birth was not taken too kindly by Savitri Devi. The suit alleges that this was followed by an era of abortions/ miscarriages suffered by the first plaintiff for a period of about ten years and she (i.e. the daughter in law) could neither win love nor sympathy of Savitri Devi despite her being respectful and courteous to her through-out. Savitri Devi was too headstrong and domineering to reconcile with her son and daughter in law. A few years later, she stopped giving Kavi Kumar his share of the income from the trust properties of which he was one of the beneficiaries. His sisters, after graduation were gainfully employed as journalists in leading daily newspapers, Indian Express and Hindustan Times and were enjoying a luxurious life with their mother. In order to keep a firm hold over Kavi Kumar, his mother told him bluntly that she was the exclusive owner of the properties which she herself had purchased and they stood in her name (although that was so only on account of her children being minors

at that time), and declared that she possessed an absolute right of disposal over them.

6. The suit alleged that by reason of his mother's irksome utterances and conduct, Kavi Kumar, who knew the truth about acquisition of the said properties, instituted Suit No. 477 of 1974 ("the previous suit") for partition and rendition of accounts against Savitri Devi and his sisters in July,1974 narrating how he had become suspicious about the intentions of her mother and was seeking separation of his share in the two properties by metes and bounds and also for the rendition of accounts. In the suit, the plaintiff (Kavi Kumar) alleged that the cash and jewellery given by her grandmother to his mother was for the creation of a trust for the maintenance and education of the children (i.e. himself and his two sisters). His mother, Savitri Devi, on the other hand, argued that the cash and jewellery had been given to her as her *stridhan* and she was the absolute owner of all the properties purchased from its proceeds. During the course of the suit, the parties agreed to refer the disputes to arbitration by the (Retired) Chief Justice of India B. P. Sinha. He made his award on 28.03.1975 whereby it was held that the cash and jewellery had been given for the benefit of all, and thus "each one of the four persons should, in law and equity, have one-fourth share each". The award, (hereafter called "the award") which has a bearing on the issues in this case, reads as follows:-

"**Award** (dated March 28 1975)

This unfortunate dispute between very close relations is pending decision in the High Court. Parties have been well advised to have the matters in dispute settled through Arbitration. By consent of the parties, the High Court has referred the whole case to me as the sole Arbitrator. I have heard the parties, as also the counsel for the plaintiffs and heard the parties, as also the counsel for the plaintiff, and recorded the summary of their statements, in support of their respective cases.

2. The Crucial issue between the parties is whether the properties in dispute consisting of (1) the commercial building on near Ali Road, New Delhi, and (2) the residential house in Nizamuddin West, New Delhi, are the exclusive properties of the first defendant , the mother of the plaintiff, and the second and the third defendants, its claimed by her or are the joint properties of all

the four persons as asserted on the other side. After considering all the facts and circumstances of the case, I have come to the conclusion that the properties in question were required for the benefit of all to them.

3. As it is a suit for partition, my award is that each one of the four persons should, in law and equity, have one-fourth share each.

4. As the properties in suit are not capable of division by metes and bounds, they have to the divided in such a way that there should be the least possibility of friction in the future, in the enjoyment of their respective shares. Accordingly, I make the following allotments.

(a) The Plaintiff (Shri Kumar Bhargava) is allotted the first floor of the property NO. 3/13-B, Asaf Ali Road, New Delhi as absolute owner from 31st March, 1975 and the second floor of the said Asaf Ali Road, property, and the residential house at 15 & 16 E Nizamuddin West, New Delhi, subject to the life interest of the first defendant, Smt. Savitri Bhargava, who shall continue to possess and enjoy the aforesaid second floor of the property at Asaf Ali Road and the Nizamuddin Property aforesaid, after the demise of the first defendants.

(b) The first defendant Smt. Savitri Bhargava is allotted a life interest in the second floor of the property at 3/13-B, Asaf Ali Road, New Delhi at 15 & 16-E, Nizamuddin West, New Delhi, which on her demise will become the absolute property of the plaintiff.

(c) The second defendant, Kumar Bharati Bhargava, is allotted the ground floor of the property at 3/13-B Asaf Ali Road, New Delhi in absolute right as the full owner.

(d) Finally, the third defendant, Kumar Arati Bhargava, is allotted the Basement of the property at 3/13-B, Asaf Ali Road, New Delhi in absolute right as the full owner.

5. The aforesaid allotments shall effect on he night of 31st March, 1975. The tenants occupying portions of the aforesaid Asaf Ali Road, Property, shall become respectively the tenants of

the party allotted that portion, with effect the tenants of the party allotted that portion, with effect from 1st of April, 1975, i.e. the first defendant will continue to realize rent of the premises as hither before until the end of March 1975.

6. As the property at the Asaf Ali Road has common staircases passages, corridors and other amenities of common convenience, those will remain the joint property of all the shares and the parties shall be entitled to use them as here to fore, and be responsible for the proper maintenance and repairs of those common conveniences. In respect of the portions allotted as aforesaid to each one of the parties, they will be entitled to realize rent from their respective tenants from 1st April, 1975 and be responsible for payment of the proportionate share of ground rent, income tax wealth tax, other municipal taxes and all other public demands in respect of the portions of the properties allotted to them. Be it noted that all the outstanding dues for the aforesaid properties upto 31st March 1975 shall be paid by all the parties proportionately, i.e. one for the share each. It follows hat each party will be entitled to have its name separately registered in the Municipal Records, the records of separately registered in the Municipal Records, the records of Delhi Development Authority and other public bodies concerned with the property. A portion of the residential house at Nizamuddin West is in occupation of a tenant. The first defendant shall continue to realize the rent thereof during her life time even as she will be entitled to the full use and occupation of the Nizamuddin Property. She will be liable for the payment of ground rent and other public demands in respect of this property.

7. There is a claim for accounts against the first defendant. I see no reason to make her responsible for rendition of accounts and accordingly disallow that part of the claim.

8. A further question was raised by the first defendant of to the valuation of the suit properties. After taking into consideration the latest valuation report made by an approved Valuer, I fix the value of the property at 3/13-B, Asaf Ali Road, New Delhi in round figures at Rs.5,75,000/- and that of the property at 15 & 16 –E Nizamuddin West, New Delhi at Rs.1,25,000/- This being

a suit for partition, the award has been engrossed on non-judicial stamp papers valued at Rs.5,300/- which I understand is sufficient, if there is any deficiency, the same shall be made good by the parties in equal shares.

10. In this circumstances of the case, there shall be no order as to costs."

7. The award remained unchallenged by all the parties; consequently it was made a rule of court, and a decree was drawn, by this Court, in its terms. The said decree-dated 15th May, 1975, reads as follows:

"DECREE DATED 15.05.1975

"The four parties to the suit shall have ¼ share in the properties in the suit in the following manner.

a) The plaintiff Sh. Ravi Kumar Bhargava shall be the owner in possession of the first floor of the property bearing No. 2/12-B, Asaf Ali Road, New Delhi as from the midnight of 31st of March 1975, and he shall also be the absolute owner of the second floor of the said building and the residential house at 15 and 16-E, Nizamuddin West, New Delhi subject to the life interest of Smt. Savitri Devi Bhargava who shall continue to possess and enjoy the aforesaid second floor of the property at Asaf Ali Road and the house at 15 and 16E, Nizamuddin West, New Delhi, during her life time.

b) The Second defendant Kumar Bharti Bhargava shall be the absolute owner with possession of the ground floor of property at 2/12-E, Asaf Ali Road, New Delhi and the shall be deemed to be the owner of that property as from the midnight of 31st March 1975.

C) The third defendant Kumari Arati Bhargava shall be the absolute owner of the basement of the property at 2/12-B. Asaf Ali Road, New Delhi and the shall enjoy the rights as full owner in that property as from the midnight of 31st March, 1975.

It is further ordered that the tenants occupying portions of the properties, mentioned above, shall attorn to the respective owners as determined by this decree. The owners shall be entitled to realize rents from the tenants as from the 31st April, 1975. The

common stair cases, passages corridors as well as other amenities of common convenience, which the property as Asaf Ali Road, shall remain the joint property of all the parities to the litigations, who are very clearly related.

It is further ordered that those who have become absolute owners in terms of this decree shall be responsible for proportionate payments of the ground rent, income taxi, wealth tax, house tax and other municipal taxes as well as all other public demands in respects of the portions of the properties of which they have become the owners. It is further ordered that in case it is found that there are any outstanding dues, the parties to this suit shall pay to the extent of 1/4th share each so as to satisfy the dues. Each of the person to whom she ownership has been decreed shall be entitled to get his/her ownership registered with the Municipal Corporation of Delhi and all other authorities where it may be essential to get it noticed of registered a portion of the residential house at Nizamuddin West is in the occupation of a tenant. Defendant No. 1 Smt. Savitri Devi Bhargava who is the mother of the rest of the parties to this litigation, shall continue to realize the rent during her life time and shall be entitled to full and occupation of the Nizamuddin Property, and the shall be liable for the payment or ground rent and other public demands in respect of that property.

It is further ordered that shall be no decree fro rendition of accounts. It is hereby lastly ordered that the parties shall bear their own costs."

8. After the award, and the decree arising out of it, on 9th June 1983, a Deed of Family Arrangement was entered into between Kavi Kumar, Savitri Devi, and the daughters, Bharti and Arti. In that, the parties agreed that the top portion i.e. the terrace of the Asaf Ali Road property would be divided into two parts. The front part was to belong to Bharti (D-1) and the rear part was agreed to belong to Arti (D2). The deed further stated that the daughters shall be the absolute owners of the share allotted to them, and that Kavi Kumar and Savitri Devi had thereby waived all their rights in the portion allotted to the said two sisters. The deed,-after reciting the previous dispute leading up to the award and the decree arising out of it (in which the first party was Savitri Devi, the second party was Kavi Kumar, and the third and fourth parties were Arti

and Bharti)-recorded as follows:

"AND WHEREAS the sole arbitrator made an award which was accepted by the parties and was ultimately made a decree of the court.

AND WHEREAS the parties having accepted the award and the decree of the court, are in possession of the respective shares as allotted by the decree of the court.

And Whereas parties one and two are residing in their respective shares in the house, difficulty may arise in future in respect of parties Three and Four.

And Whereas all the parties as to this deed realise that the parties Three and Four may experience difficulty in future and they therefore approached the First and Second parties to agree to an arrangement, by way of family settlement for providing additional source of income to parties Three and Four and they have very generously agreed to the following arrangement for the benefit of parties Three and Four:

Wherefore, all the parties to this deed of family settlement have agreed to make the following provision for the benefit of parties Three and Four:

1. The top portion of the house, the terrace, on 03/13-B, Asaf Ali Road, New Delhi, which belongs to party No. Two subject to the life interest of party No. One, shall be divided into two parts as follows: The First part, that is to say between the staircase and facing the main Asaf Ali Road (Front Portion) measuring approximately 1200 sq. Ft. should be allotted in absolute right to Miss. Arati Bhargava, Party No. Four. And the rear half that is to say between the staircase and the back of the building (Back portion) measuring approximately 1165 sq. Ft allotted in absolute right to Ms. Bharati Bhargava, party No. Three.
2. Parties Three and Four will enjoy the respective allotted portions as aforesaid as absolute owners.
3. Parties Three and Four will have the right to use the property in any way convenient to them including the

right to build upon their respective portions.

The parties one and two have hereby waived whatever rights they had or have in future in the portions allotted to the parties Three and Four as aforesaid.

All the parties to this deed have agreed to the aforesaid terms of this deed for family settlement after considering all the pros and cons, with a view of removing the difficulty felt by the parties Three and Four.

The value of this deed of family settlement is put at Rs. 5000 for the purpose of registration."

9. The plaintiffs – who filed the suit, on 25-09-2000-claimed that D-2 (Bharati) married one of her colleagues while in London in 1977, without incurring any conventional marriages expenditure and thereafter returned to India. Her husband was well settled in life being the only son in his family (besides one sister) which owns moveable and immovable properties of considerable value in Mumbai and Hyderabad. Arti, the D-1 preferred to remain single. She is a senior journalist working with the Hindustan Times since May 1984 and holds huge deposits. The suit alleges that she got her name added to the Bank deposits and accounts of Savitri Devi and appropriated to herself all the money left by her. Besides this, she appropriated to herself a large range of expensive items of furniture, jewelery and clothing etc, in fact everything that her mother had acquired and saved in her life time. The plaintiffs contended that after the arbitral award (which was made a rule/decree of Court) there was nothing left undivided which could have been the subject matter of a family arrangement The suit further alleged that:

"In 1983 defendant 1 and 2 and Mrs. Savitri Devi Bhargava entered into a criminal conspiracy to grab the terrace of the second floor on he plot NO. 3-13-B, Asaf Ali Road, which had fallen to the share of Mr. KK Bhargava subject to life interest of Mrs. Savitri Devi Bhargava to possess and enjoy the same during her life time, the instigation having come from defendants 1 and 2 Mrs. Savitri Devi Bhargava made misrepresentations about the extent of her rights and powers in the terrace rights of Mr. KK Bhargava and perpetrated fraud by exercise of undue influence and even coercion on him as to be detailed hereinafter, and got

his signature on typed draft of family arrangement dated 9th May 1983, which had been got prepared through an advocate known to defendant No.1

According to the alleged deed of family arrangement, the terrace on the second floor of property on plot no. 3/13-B Asaf Ali Road, New Delhi, which was the absolute property of Mr. KK Bhargava subject only to the life interest of Mrs. Savitri Devi Bhargava to possess and enjoy during her life time was split up into portions measuring 1200 sq. feet in the front and 1165 sq., ft on the hind for defendants 1 and 2 respectively, with right to posses and enjoy and raise such construction as sanctioned for the benefit of he defendants 1 and 2 may experience difficulty in future. Some thing patently false, frivolous and them.

13. The aforesaid alleged family arrangement is not a family arrangement at all in the eye of law. It is void, nonest and ineffective on the undisputable rights acquired by Mr. K.K. Bhargava and declared by the Hon'ble High Court of Delhi and after his untimely demise in 1993, vested in the plaintiffs as only legal heirs representative..."

10. The plaintiffs also alleged that in 1984, when Savitri Devi was seventy years, a chronic diabetic and heart patient, she actually suffered two heart attacks during the period from 1984 to 1986 and remained in the National Heart Foundation, an institute of repute, in East of Kailash New Delhi at the cost of Kavi Kumar, she was under the undue influence of the sisters especially D-1 who was always scheming and planning to grab the properties (of Kavi Kumar) by using the mother as a tool. On 22nd July 1984 D-1 got a fictitious lease deed prepared purporting to be executed by her mother in respect of the first floor and the barasati floor of house No. F-15-16 Nizamuddin West, on monthly rental of a ridiculous and repulsive figure of Rs.500/- against the then prevailing market rent of more than Rs.15,000/- per month in her favour through ex-parte hands and got it signed by her mother but kept it as a closely guarded secret. It came to notice only in September 1990 after the demise of Savitri Devi Bhargava when D-1 secured an ad-interim ex-parte injunction order against her brother in this Court restraining him from dispossessing her from the floors of the Nizamuddin House by mis-stating facts, since Savitri Devi's life interest had ended with her death on 7th March 1990.

Thereafter, she delayed the proceedings of that suit in several ways including forging of documents containing fictitious admissions of Kavi Kumar that she was a tenant on payment of Rs.500/- per month in respect of the first and Barsati floors and that the said tenancy propounded by her was protected by the provisions of the Delhi Rent Control Act, 1958. On these pleadings, the plaintiffs sought a decree for possession and mesne profits. The suit impleaded the tenants, because they had been let into the portions which had fallen to the share of the sisters. The relief sought against them too was a decree for possession in respect of the concerned portions under their occupation.

11. The daughters contended, in their written statements, that by a Family Arrangement between their mother, their brother (predecessor in interest of the plaintiffs,) and themselves, they were given portions of terrace floor demarcated in that deed (family arrangement). The sisters argued that the predecessor in interest of the plaintiffs was privy and party to the arrangement with respect to the terrace and it was voluntary and they cannot be dispossessed of the same after having invested their resources therein and having enjoyed the same all these years as owners thereof. The preliminary objections have also been taken with respect to the valuation of the suit as well as to the jurisdiction of the civil court. They also urged to having acquired ownership by adverse possession. They contend that the plaintiffs are not entitled to any of the reliefs claimed in this suit and that the suit was time barred (to say this, it would appear that the sister's case was that the suit, for questioning the legality of the settlement was barred by limitation, as it was filed 7 years after the death of Kavi Kumar, who expired in 1993. Savitri Devi had died in 1990).

12. The other defendants' (D-3 and D-4) plea is that they are tenants in occupation of respective portions under D-1 and D-2 respectively and they are not concerned with dispute, if any between their landlords and the plaintiffs and they cannot be called upon to vacate their respective premises or to pay any damages to the plaintiffs.

13. After considering the pleadings, the Trial Court framed the following issues:

1. Whether the document dated 9th June, 1983 relied upon by defendant no. 1 and 2 is not a family arrangement as recognized by Hindu law and marriage?

2. If Issue no. 1 is found not affirmative whether the said family settlement is initiated by conspiracy and fraud, undue influence and action etc as alleged in the plaint?
3. Whether the suit is barred by time?
4. Whether terrace on second floor was included in the judgment and decree of suit no. 477 decided on 15th May, 1975 by the Hon'ble High Court of Delhi?
5. Whether defendant no. 1 and 2 were estopped from taking the contrary plea mentioned in Issue 4?
6. Whether construction on the terrace was made by defendant no. 1 and 2 at their expense, if so it effects on plaintiff?
7. Whether defendant no. 1 and 2 and defendant no. 3 and 4 are liable to pay damages to plaintiffs, if so for what amount?
8. Whether the suit is not correctly valued for the purposes of court fees and jurisdiction?
9. Whether this court has jurisdiction to try the suit?
10. Whether defendant no. 1 and 2 have become owners of the property in possession by adverse possession and whether this plea is available to them?
11. Whether para no. 6, 10, 11 and 14 are liable to be struck down from the pleadings in view of Order 6 Rule 16 CPC?
12. Relief.

14. The first plaintiffs, examined herself; the two sisters, D1 and D2 examined themselves as witnesses to support their case. Ajay Sanghi (D-3) examined himself, and for D-4, one T. C. Chandel was examined. After considering the arguments and the material on record, the Trial Court decreed the suit in favour of the plaintiffs. Issue 1, 3, 4, 5, 6, 8, 9 and 10 were answered in favour of the plaintiffs. Issue 7 and 11 were answered in the affirmative. The Trial Court held that the terrace of the Asaf Ali Road property was given by Kavi Kumar to his two sisters as a license. It was reasoned that since the sisters had known and understood that the suit property belonged to him, there was no question or any

possible dispute concerning the title to the suit property-being the basis of a family arrangement. The Trial Court held that since Issue No.1 had been answered to the effect that the family arrangement was not recognized under Hindu law, there was no need to make a finding on Issue 2. The relevant findings of the Trial Court are as follows:

"XXX XXX XXX

24. The certified copy of the decree in the partition suit No. 477/ 1974 is Ex. C-7 and C-6, the judgment on the basis of which the decree is drawn up is Ex. C-5 the award on the basis of the which the suit was decree is Ex. C-4 Ex. C-3 is the certified copy of the written statement of defendants 1 and 2 in that suit wherein they are defendants 2 and 3. The certified copy of the written statement of defendant No.1, who was the mother of the plaintiff and defendants 2 and 3 is Ex. C-7 Ex. DW 2/ P1 is the certified copy of the plaint in the partition suit from the aforesaid documents and in particular the certified copy of the judgment and the decree there is no scope for any argument that any part of the suit property situated at Asaf Ali Road, was left undivided. There was no third floor as such when the decree was drawn up and it was for that reason only that the terrace floor as it is now being described was actually a part of the second floor of the building which fail to the share of predecessor in interest of plaintiffs. I have no hesitation, therefore, to hold that the terrace on the second floor of the property situated suit has been filed was definitely included in the judgment and decree of the suit no 477/74 decided on 15.5.75 by the Hon'ble High Court of Delhi. This issue is, therefore, answered in affirmative.

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28. In view of my findings on issue no. 4 above, Kavi namely the brother of defendants 1 and 2 was the absolute owner of the suit property by virtue of the decree in the partition suit on 15.05.1975 and was clearly understood by all the parties to that suit thereafter as well and in any case atleast till 9th June 1983 there was no suit by any of the parties to that partition suit seeking to re open the decree in the circumstances in which it was voluntarily suffered by all the parties to the partition suit.

29. As on 9th June 1993 when the impugned arrangement, which is the subject matter of controversy in the present suit, was arrived at, the document itself speaks as to what was understood by the parties as on 09.06.1983. The document in question namely Ex. PW1/ DX, which is also exhibited as Ex. C-8, clearly records that the top position of the house, the terrace, on the Asaf Ali Road, property belongs to party No. 2 and the party no.2 is described as Kavi Kumar Bhargav namely the brother of the defendants 1 and 2. Thus, there is no scope for argument that as on 9.6.83 the parties to the document of that date had any illusion as to who owned the second floor including the terrace of the second floor and it was clearly understood by defendants 1 and 2, their brother and their mother as well that the property belonged to Kavi.

30. By virtue of the said document there has been no transfer of any interest in the immovable property to defendant 1 and 2 within the meaning of the term transfer of property under the transfer of property Act. 1887.

31. This document can only be construed to be a licence, namely a permission for Kavi to his two sisters Arti and Bharti, to do something which, but, for this permission would have entailed civil and penal consequences it is pertinent that Smt. Savitri Devi purports to give nothing by way of this document and her presence in the document appears to be a facilitator for the concession from her son to her daughters. Defendants 1 and 2 were, therefore permitted to enjoy the fruits, if any, from out of the terrace floor so long as the aforesaid concession subsisted which this court considers to be nothing more than a licence. Being a licence by the very nature of it the same was revocable at any time during the lifetime of the grant or namely the predecessor in interest of the plaintiffs and after his death by the plaintiffs and the filing of the present suit is a stick towards the recall of the aforesaid arrangement."

15. The present appeals were preferred, by the defendants; the plaintiffs filed an appeal insofar as the Trial Court denied *mesne profits*. During the hearing of these appeals from the impugned judgment, this Court, -on an application made, by its order dated 25-8-2004, remanded

the matter with a direction that the Trial Court should return its finding on Issue No. 2 (i.e. *"whether the said family settlement is initiated (sic vitiated) by conspiracy and fraud, undue influence and action etc as alleged in the plaint"*). By order dated 24.9.2004, the Trial Court (after such remand) answered the issue in favour of the defendants, holding that the plaintiff was unable to prove that the family settlement was vitiated by conspiracy and fraud, undue influence and action etc as alleged in the plaint. The relevant findings of the Trial Court's, on this aspect, are as follows:

> "PW-1 Smt. Madhur Bhargava is wife of Shri. K.K. Bhargava. She deposes that her mother in law Smt. Savitri Devi Bhargava knew number of influential people (persons) in Delhi and Shri K.K. Bhargava used to shiver under her threats specially at the time of making so called family arrangement. Mrs. Savitri Bhargava had in the presence of witness and otherwise repeatedly been saying not to talk about this so called family settlement to her father (witnesses' father) because in case Shri. K.K. Bhargava and the witness spoke to the father of the witness about this, she (Mrs. Savitri Bhargava) would reopen the case and put both the properties in litigation forever. Her husband was left with no choice but to scumble (sic succumb) to her wishes.
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> 7. In cross examination, it is denied that no coercion or fraud was applied by Smt. Savitri Bhargava in the execution of the family settlement.
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> 8. It is worth noting that PW1 Smt. Madhur Bhargava, in cross examination, deposes that the family settlement was signed by Shri K.K. Bhargava before the Sub-Registrar. Document Ex. PW1/DX bears the signatures of Shri. K.K. Bhargava at point A on all the pages. Further PW1 Smt. Madhur Bhargava deposes that her husband is B.A. Hons and LLB from Delhi University. After completing his education he joined the IPS cadre of police and he rose to the post of Suptd of Police and subsequently to Inspector General of police. It is worth noting that PW1 deposes in her evidence that her husband filed a suit in 1994 against his mother and sisters.
>
> 9. In view of the admission by PW-1 about the signatures of Shri. K.K. Bhargava on all the pages of the deed of family

> arrangement dated 9.9.1983, in view of educational qualification of Shri. K.K. Bhargava and also in view of the fact that Shri K.K. Bhargava filed a suit for partition against his mother and sisters, I am of the considered view that family settlement was not initiated by conspiracy, fraud, undue influence and action, etc as alleged in the plaint. Accordingly, issue No. 2 is decided against the plaintiffs and in favour of defendant Nos 1 and 2."

16. The plaintiffs had complained that the order deciding Issue No. 2 was made without hearing them. They filed CM No. 13191/2004, i.e objections against the order, and sought that it be set aside. Later, they moved an application (CM. 13877/2004) stating that the Issue No. 2 itself be struck off. It was contended, by the plaintiff, in the said latter application (CM 13877/2008, in their appeal RFA No. 732/2003, which was affirmed by Ms. Madhur Bhargava) that:

> "The Plaintiffs-Appellants herein moved CM No. 13191 of 2004 praying that proceedings may be set aside in the entirely and fresh finding be procured through some other learned Additional District Judge. This application was taken up by this Hon'ble Court and during the course of hearing of RFA No. 855 of 2003 query was made if it was really desired to have a fresh finding to which it was submitted on behalf of the Appellants that Issue No. 1 alone required being framed in as much as Kale's case (supra) after review of a large number of decided cases 12 principles were enunciated at Page 813 out of which the first two, are:
>
> (i) That the Family settlement must be a bona fide one as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;
>
> (ii) The settlement must be voluntary and should not be induced by fraud, coercion ir undue influence.
>
> The absence of vitiating elements like fraud and undue influence is vital and essential for holding Family Settlement as valid. It is something implicit and it was on this consideration that issue No.2 was held to be redundant in view of the finding recorded in the affirmative under issue No.1. In the peculiar facts and

circumstances of the case where right to construct over the terrace of the floor of the property was not included in the grant nor procured subsequently there could be no giving or taking of right /property.

In the premises, it is humbly prayed that the Finding recorded by the learned Trial Judge under issue No.2 be upheld and issue No.2 be taken as having been answered as stated in the impugned judgment or appropriate order as may be deemed just and expedient may be pass to keep the record straight."

17. During the hearing of the appeal, arguments were addressed on all issues except Issue 8, 9 and 11. This court proposes to record its findings on the basis of the arguments addressed by the parties.

Analysis and findings

Issue 1: Whether the document dated 9th June, 1983 relied upon by defendant no. 1 and 2 is not a family arrangement as recognized by Hindu law and marriage?

18. Learned senior counsel for D1 and D2, (the appellants in RFA 855/2003) Mr. Jethmalani contended that the family arrangement was valid and enforceable under law. He placed reliance on **Sahu Madho Das and Ors. v. Mukand Ram and Anr.,** AIR 1955 SC 481 **Ram Charan Das v. Girjanandini Devi and Ors.** AIR1966 SC 323; **Kale and Ors. v. Deputy Director of Consolidation and Ors.,** AIR 1976 SC 807. It was urged that these cases recognize love and affection as a sufficient cause for an arrangement. It was asserted that the concept of family settlement/arrangement is not necessarily restricted to Hindu law. Counsel submitted that the Trial Court fell into an obvious error in holding that once division took place as a result of an award, which resulted in a decree, the parties knew their shares, took charge of it, leaving no scope for a future family arrangement. It was submitted that the award in substance directed partition by metes and bounds; it left no grey area for future disputes. In these circumstances, the question of the parties entering into a settlement in regard to their disputes, did not arise.

19. Counsel for the plaintiffs, on the other hand, contended that after the partition pursuant to the decree in the 1975, there was no joint family which had ceased to exist. Furthermore, argued Counsel, that there was no Hindu family in 1983 of which Kavi Kumar, D1 and D2

were members. Therefore, there was no question of entering into any family arrangement. It was argued that at the relevant time in 1983, D1 and D2 were well-off, and were not likely to experience any financial difficulty. None of the parties, i.e Savitri Devi, or D-1 and D-2 had any antecedent title in respect of the portions of the property that was subject matter of the family arrangement. Savitri Devi no doubt, had a life interest, but on account of the award and decree, the daughters had none. On the other hand, Kavi Kumar had title – subject to his mother's interest. Therefore, in the absence of any dispute or claim, or antecedent title, or a potential dispute over a matter left out from the award and decree, which effected a complete partition, there could be no valid and binding family settlement, as claimed by the sisters, that conferred any interest upon them. For their arguments, the plaintiffs placed reliance on **Ramesh Chand v. Raj Kumar** JT 2002 (5) SC 69, **Potti Lakshmi Perumallu v. Potti Krishnavenamm** AIR 1965 SC 825. It was held in the latter decision (Potti Lakshmi Perumallu) that:

"No doubt, a family arrangement which is for the benefit of the family generally can be enforced in a court of law. But before the court would do so, it must be shown that there was an occasion for effecting a family arrangement and that it was acted upon. It is quite clear that there is complete absence of evidence to show that there was such an occasion or the arrangement indicated in the will was acted upon. The letter Ex. B12 upon which reliance was placed before the High Court on behalf of the defendant has not been found by it to be genuine. The defendant had also pleaded that the provisions under the will were given effect to but no satisfactory evidence has been adduced to prove that the plaintiff was in enjoyment of the properties allotted to her under the will."

In Ramesh Chand, the Supreme Court held that:

"16. Coming to the question, whether the document exhibit-P4 can be said to be a family arrangement/family settlement we are of the view that in stricto senso it cannot be said to be a family arrangement/settlement for the simple reason that all the members of the family are not signatories to the document. Nothing has been indicated therein that the arrangement was purportedly to settle any existing dispute or apprehended dispute amongst members of the family."

20. This Court has considered the arguments. The Supreme Court has, starting from the decision in **Madho Das** (supra) to **Kale** (supra) and subsequently in **Hansa Industries (Ltd) v. Kidar Sons (P) Ltd.** 2006 (8) SCC 531, has consistently ruled on the sanctity of family arrangements. The following extracts from **Kale** (supra) briefly sums up the position:

> "9.... A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour... Family arrangements are governed by principles which are not applicable to dealings between strangers. The Court, when deciding the rights of parties under family arrangements or claims to upset such arrangements, considers what in the broadest view of the matter is most for the interest of families, and has regard to considerations which, in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements.
>
> 10. In other words to put the binding effect and the essentials of a family settlement in a concretized form, the matter may be educed into the form of the following propositions:
>
> (1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;
>
> (2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;
>
> (3) The family arrangements may be even oral in which case no registration is necessary;
>
> (4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document

> containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the Court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in Immovable properties and therefore does not fall within the mischief of Section 17(2) (sic) (Section 17(1)(b)?) of the Registration Act and is, therefore, not compulsorily registrable;
>
> (5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld, and the Courts will find no difficulty in giving assent to the same;
>
> (6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.
>
> 13. In **Sahu Madho Das v. Mukand Ram** AIR 1955 SC 481, this Court appears to have amplified the doctrine of validity of the family arrangement to the farthest possible extent, where Bose, J. Speaking for the Court, observed as follows:
>
> "It is well settled that a compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognising the right of the others, as they had previously asserted it, to the portions allotted to them respectively. That explains why no conveyance is required in these cases to pass the title from the one in whom it resides to the person receiving it under the family arrangement. It is assumed that the title claimed by the person receiving the

property under the arrangement had always resided in him or her so far as the property falling to his or her share is concerned and therefore no conveyance is necessary. But, in our opinion, the principle can be carried further and so strongly do the Courts lean in favour of family arrangements that bring about harmony in a family and do justice to its various members and avoid in anticipation, future disputes which might ruin them all, and we have no hesitation in taking the next step (fraud apart) and upholding an arrangement under which one set of members abandons all claim to all title and interest in all the properties in dispute and acknowledges that the sole and absolute title to all the properties resides in only one of their number (provided he or she had claimed the whole and made such an assertion of title) and are content to take such properties as are assigned to their shares as gifts pure and simple from him or her, or as a conveyance for consideration when consideration is present."

13.In **Ram Charan Das v. Girjanandini Devi** [1965]3SCR841 this Court observed as follows:

> "Courts give effect to a family settlement upon the broad and general ground that its object is to settle existing or future disputes regarding property amongst members of a family. The word 'family' in the context is not to be understood in a narrow sense of being a group of persons who are recognised in law as having a right of succession or having a claim to a share in the property in dispute....The consideration for such a settlement, if one may put it that way, is the expectation that such a settlement will result in establishing or ensuring amity and goodwill amongst persons bearing relationship with one another. That consideration having been passed by each of the disputants the settlement consisting of recognition of the right asserted by each other cannot be permitted to be impeached thereafter." (emphasis supplied)"

This Court also recollects the ruling in **Maturi Pullaiah and Anr. v. Maturi Narasimham and ors.**(AIR 1966 SC 1836) that even if there was no conflict of legal claims but the settlement was a *bona fide* one it could be sustained by the Court. Similarly it has also held that even the

disputes based upon ignorance of the parties as to their rights were sufficient to sustain the family arrangement. In this connection the Court observed as follows:

> "It will be seen from the said passage that a family arrangement resolves family disputes, and that even disputes based upon ignorance of parties as to their rights may afford a sufficient ground to sustain it.
>
> * * * * *
>
> Briefly stated, though conflict of legal claims in presenti or in future is generally a condition for the validity of a family arrangement, it is not necessarily so. Even bona fide disputes, present or possible, which may not involve legal claims will suffice. Members of a joint Hindu family may, to maintain peace or to bring about harmony in the family..."

The crucial proposition in Kale on this aspect may once again be underlined, namely that *"Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld, and the Courts will find no difficulty in giving assent to the same."*

21. In the present case, it is clear that the parties to the family arrangement had antecedent claim to interest/title in the suit property. Kavi Kumar claimed that the properties were to be held in trust by his mother, and sought partition. The previous suit led to a reference to an Arbitrator, an award, which was embodied in a decree of court. That decree no doubt, spelt out the rights of parties. The subject matter of the family settlement however was not only Kavi Kumar's share. His share, (first floor of the Asaf Ali Road property and absolute title to the second floor subject to his mother's life interest) remained undisturbed. The position remains that antecedent interest in the suit property was held amongst the parties to the family arrangement only and none else. The decision in *Ram Charan* clarifies that the expression "family" would have to be understood broadly. Merely because there had been partition of properties between the parties earlier would not imply that the same parties (mother and her children) would not constitute a family for the

purposes of executing a family arrangement. It is also clarified that the concept of family arrangement is not exclusive to Hindu law. As explained in the extract quoted above, their purpose is to avert/compromise disputes, present or future, and to maintain harmony within the members of the family. This being so, there exists no reason why the same would be applicable only under Hindu law. Kale clarifies beyond any doubt that the most important ingredient is the existence of bona fides of the parties to the family settlement. If this were to be satisfied, even if one of the parties to the settlement has no title *"but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld"*.

22. The Plaintiffs relied on two decisions, **Ramesh Chand** (supra) and **Potti Lakshmi Perumallu** (supra). The former case held that before the court enforces a family arrangement, it must be satisfied that there was an occasion for effecting a family arrangement, and that it was acted upon. The plaintiffs, during the appeal, contended that the purported reason (of the family settlement of 1983) being amelioration of the financial position of D1 and D2, was actually not correct. On this score, this is what the recitals in the document had to say:

> "And Whereas parties one and two are residing in their respective shares in the house, difficulty may arise in future in respect of parties Three and Four.
>
> And Whereas all the parties as to this deed realise that the parties Three and Four may experience difficulty in future and they therefore approached the First and Second parties to agree to an arrangement, by way of family settlement for providing additional source of income to parties Three and Four and they have very generously agreed to the following arrangement for the benefit of parties Three and Four.."

23. The plaintiffs argued that the provision made in the award and decree, which was understood and accepted unreservedly by the sisters implied that there was no occasion for them to complain of inadequacy of the portions or shares falling to them. Furthermore, after the decree was drawn, and parties took charge of their shares, there was nothing to establish that the sisters were facing hardship, or financial constraints, to lead the parties to agree to the family arrangement. There was no new

development that resulted in the basis of the award being rendered iniquitous or onerous to the sisters, requiring the family to revisit their shares. They too did not lead any evidence on this point. Consequently, the court should go behind the document and see that it was not bona fide.

24. This Court discerns a palpable fallacy in the argument of the plaintiffs. The law governing the binding nature of family settlements, as noticed earlier, is clear that judges would be circumspect to place themselves in the shoes of the family members who enter into such deeds or arrangements. Therefore, facts such as adequacy or otherwise, of the shares given in a previous arrangement, whether final consensually or through decree of court, cannot be gone into. In any event, the plaintiffs, if they were so minded, had the opportunity of leading evidence to show that the document was a sham, and that the apprehension of future difficulty or hardship, arising from the award, to the sisters, was not *bona fide*. Nothing worthwhile in the form of objective material was brought on record. Therefore, it cannot be said that the premise of the family settlement, i.e that the shares given to the sisters could possibly lead to their financial difficulty during later years, was baseless or unfounded. This Court cannot therefore engage in a fact finding exercise on the likelihood of the difficulty, had there been no family arrangement in which D1 and D2 were made beneficiaries. The Court is mindful of the position that family arrangements may be executed for purposes other than settling present or future legal disputes. Even bringing harmony in a family, doing justice to its various members, and avoiding, in anticipation, future disputes which may ruin them all, are accepted and recognised purposes of a family arrangement (**Sahu Madho Das**). The consideration for such a settlement, if one may put so, is the expectation that such a settlement will result in establishing or ensuring amity and goodwill amongst persons bearing relationship with one another. Keeping this in mind, this Court is of the opinion that the observation made in **Ramesh Chand** does not assist the plaintiffs.

25. In the second decision relied upon by the plaintiffs, i.e. **Potti Lakshmi Perumallu,** the Court had observed that the joint-ness in the Hindu family comes to an end when a partition is proved. This observation was made in a case where the plaintiffs-appellants claimed partition. The defendants' case was that there had already been a partition between the parties, and therefore, the suit was maintainable; their view being accepted

by the courts till the appeal before the Supreme Court. In this Court's opinion, the observations in **Potti Lakshmi** cannot be made applicable to the case at hand since the observation there was made specifically with regard to a setting where upon partition, the joint nature of the family, ceased. A prior partition, as in this case, would not debar the parties – as long as the settlement is *bona fide* – from anticipating a future conflict. The matter could also be looked at in another way. In the facts of the present case, there was no mention of the rights of any of the parties regarding terrace rights (over the second floor of the Asaf Ali Road property). Seen from the backdrop of the circumstance that the sisters were allotted the basement and first floor of the said property, and the son was given first floor rights absolutely and the second floor, subject to his mother's life interest, besides the Nizamuddin property, there is no reason to doubt the bona fides of the apprehension felt by the sisters as well as the need for additional income. At any rate, the Court cannot substitute its judgment, to conclude whether such needs were justified or otherwise. These are, at the best of times, left to the wisdom of the parties concerned.

26. Further, arguendo, assuming that the family arrangement were invalid, it was argued on behalf of D1 and D2 that they had become owners of the suit property. In support of this argument, it urged that the suit property had become absolute property of Savitri Devi since she had been granted a life interest in the second floor and the said interest stood enlarged due to operation of section 14, Hindu Succession Act, 1956. Reliance was placed on the decision in **V. Tulasamma and Ors. v. Sesha Reddy (Dead) by Lrs.** [1977] 3 SCR 261. The plaintiffs, in response to this argument, asserted that the case fell within the ambit of sub-section (2) of section 14, Hindu Succession Act.

27. Section 14 of the Hindu Succession Act reads as:

> "14. Property of a female Hindu to be her absolute property (1) Any property possessed by a Female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.
>
> Explanation: In this sub-section, "property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.
>
> (2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

28. It is undeniable that the decree in the 1974 suit created a life interest in favour of Savitri Devi in the second floor of the Asaf Ali Road property. The terrace of the suit property at that time of the award in the 1974 suit was not expressly provided for. It could therefore be argued that it was left undivided as joint property of Kavi Kumar, Savitri Devi, and the sisters. In this light, the question whether or not the estate of Savitri Devi (in respect of the suit property) stood enlarged by virtue of section 14 of the Hindu Succession Act, 1956 does not arise. This court is mindful that this aspect was not explored in detail, or argued elaborately and therefore rests its findings on the above reasoning.

29. In view of the above discussion, it is held that the first issue has to be answered in favour of the first two defendants, i.e the sisters, and against the plaintiffs. The issue is answered accordingly; the findings of the Trial Court, on this score are set aside.

Issue 2: If Issue no. 1 is found not affirmative whether the said family settlement is initiated by conspiracy and fraud, undue influence and action etc as alleged in the plaint?

30. At the outset, the Court hereby records that the counsel for the plaintiffs did not advance arguments on this issue, though a faint attempt was made to say that the findings of the Trial Court recorded after remand cannot be sustained. The counsel for the sisters, on the other hand, pointed out the pleadings in 13877/2008 stating that the Issue No. 2 itself be struck off. The Court nevertheless, proposes to deal with the issue, on the basis of the pleadings and the materials on record.

31. The 1983 family arrangement was challenged on the ground that it was induced by misrepresentation, fraud, coercion and undue

influence. This family arrangement was entered into between the mother, the son (Kavi Kumar) and his sisters, under which the former two parties waived their share/rights in the terrace in favour of the latter two parties, who were made the absolute owners of separate parts (front and rear) of the terrace. The basis for the waiver, as per the Family Arrangement, was that Kavi Kumar and his mother (Savitri Devi) realized that D1 and D2 may experience difficulties in future, and thus intended to provide additional source of income to them.

32. PW-1 Smt Madhur Bhargav, wife of Kavi Kumar, deposed during the trial of the suit that Savitri Devi used to know several influential people, and Kavi Kumar used to shiver under her threats, especially at the time when the family arrangement was made. She further stated that due to Savitri Devi's threats, her husband was left with no choice but to succumb to her wishes. In her cross-examination, she denied that any coercion or fraud was applied by her mother in law in the execution of the family arrangement. She identified the signature of her husband, Kavi Kumar, on the family arrangement at all the pages. Undeniably, that Kavi Kumar completed his BA (Hons) and LLB from Delhi University, and had joined the IPS cadre rising to the post of Superintendent of Police, subsequently to Inspector General of Police. It is also an admitted fact that in 1994, he filed a suit against his mother and sisters. It is also a matter of record that Savitri Devi died in 1990, and Kavi Kumar lived for three years after his mother's death but there was no challenge made to the validity of the family arrangement during his lifetime. D1 and D2 relied on these facts to discredit the allegations made by the plaintiffs.

33. The plaintiffs, on the other hand, argued that both D1 and D2 had Marriage Insurance Policies in the sum of Rs. 35,000/- each which they duly realized upon attaining maturity. The Plaintiffs re-iterated their allegations in the suit that both D1 and D2 had been gainfully employed after their graduation as journalists. It was also argued that in 1984, Savitri Devi had been a heart patient, and suffered two severe heart attacks during 1984-1986. It was further pointed out even if Kavi Kumar did sign some document, the same was done under immense pressure and undue influence from his mother whom he had always held in awe since childhood. It was emphasized that the son, Kavi Kumar had put his signature believing that his rights which were absolute would, on the demise of his mother, not be effected. Lastly, it was pointed out that after the mother's demise, Kavi Kumar requested D1 and D2 to vacate

the third floor; they evaded for some time, and eventually D1 filed a suit for injunction to restrain Kavi Kumar from evicting her contending that she was a lawful tenant (of the mother by virtue of Lease Deed dated 27.7.1984)

34. The burden of proving invalidity of a family arrangement lies on the party who alleges it; in this case it lay upon the plaintiffs. Kavi Kumar was an educated person, who joined the IPS cadre and was promoted to the post of Inspector General. Moreover, during his lifetime the family arrangement was never challenged on the ground of being induced by fraud, undue influence, misrepresentation or coercion. Previously, Kavi Kumar had instituted the 1974 suit against his mother. Even PW-1 Smt Madhur Bhargava identified his signatures on the family arrangement. Had he been aggrieved by the terms of the family settlement, there was no reason why during his life time, he did not impeach it. Instead, he accepted it, and expired 10 years after its execution, in 1993. It is a settled principle of law that even pleadings in relation to fraud, undue influence or misrepresentation have to be specific; the party alleging it also has a responsibility of proving it. Order VI, Rule 4 of the Code of Civil Procedure reads as under:

> "4. Particulars to be given where necessary In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."

The Supreme Court underlined this requirement, in **A.C. Ananthaswamy v. Boraiah** [(2004) 8 SCC 588], in the following observations:

> "Fraud is to be pleaded and proved. To prove fraud, it must be proved that representation made was false to the knowledge of the party making such representation or that the party could have no reasonable belief that it was true. The level of proof required in such cases is extremely higher. An ambiguous statement cannot per se make the representor guilty of fraud. To prove a case of fraud, it must be proved that the representation made was false to the knowledge of the party making such representation. [See: Pollock & Mulla on Indian Contract & Specific Relief Acts _ (2001) 12th Edition page 489]."

35. In the present case, there was no specific pleading how the plaintiffs' predecessor in title, Kavi Kumar was coerced, or fraud played on him. Neither was there any such pleading in regard to those vitiating circumstances as far as Savitri Devi was concerned. Indeed, the plaintiffs' case was that Kavi Kumar was prevailed upon to execute the family arrangement. Therefore, to say that Savitri Devi too was subjected to undue influence or coercion would have been inconsistent. In any case, the suit alleges that Savitri Devi was a chronic diabetic, and was hospitalized in the National Heart Institute, in 1984, which is after the family arrangement was entered into. During the evidence too, no material to establish that either Kavi Kumar was prevailed upon, or coerced, or undue influence was brought to bear on him, or that he was the victim of a fraud, was brought on record. In light of these circumstances, the Court is of the opinion that the plaintiffs did not discharge their burden of proving that Kavi Kumar (the first plaintiff's husband and the father of the other plaintiffs) was made to enter into the family arrangement under coercion, fraud, misrepresentation or undue influence.

36. The plaintiffs had sought to challenge those findings, on the ground inter alia, that they were not given a hearing on this aspect after the remand. This is one of the important grounds urged in CM 13191/2004. It was contended, by the plaintiff, in a subsequent application (CM 13877/2008, in their appeal RFA No. 732/2003, which was affirmed by Ms. Madhur Bhargava), inter alia, that:

> "...The absence of vitiating elements like fraud and undue influence is vital and essential for holding Family Settlement as valid. It is something implicit and it was on this consideration that issue No.2 was held to be redundant in view of the finding recorded in the affirmative under issue No.1. In the peculiar facts and circumstances of the case where right to construct over the terrace of the floor of the property was not included in the grant nor procured subsequently there could be no giving or taking of right /property.
>
> In the premises, it is humbly prayed that the Finding recorded by the learned Trial Judge under issue No.2 be upheld and issue No.2 be taken as having been answered as stated in the impugned judgment or appropriate order as may be deemed just and expedient may be pass to keep the record straight."

This Court would be justified in concluding the above issue, regarding lack of hearing on the basis of the above averments alone. Yet, in order to satisfy its conscience, the court examined the Trial Court records, especially the proceedings after remand, in 2004. The order sheet of the Trial Court discloses that after receipt of this court's order on 10-9-2004, the matter was directed to be transferred to another judge. The District Judge, on 14th September, 2004, was directed to be listed back to the concerned Additional District Judge, who on the next day, i.e 15th September, 2004, initially recorded that none of the parties were present. Later, the same day, the third plaintiff, Ms. Shraddha Bhargava (who is also a counsel) appeared; the Trial court directed the office to receive back the file from this court, and listed the suit for compliance of his directions, the next day, i.e 16th September, 2004. The suit was again listed on 16-9-2004. That day, the plaintiff was unrepresented; the matter was again listed on 20-9-2004. On the latter date of hearing, the plaintiffs were unrepresented. The court waited for the appearance of counsel for plaintiff and later heard arguments. The Court directed the matter to be listed for orders on 24th September, 2004. On that day, the order was pronounced. The plaintiffs were aware that the matter had been remanded for recording finding on Issue No. 2 (by the order of this Court dated 25-8-2004); the third plaintiff was in fact present, when the case was listed on 15-9-2004; the next date of hearing was made known to her. The plaintiffs chose not to appear on the subsequent dates of hearing, or ensure their appearance through counsel. In these circumstances, they cannot complain of denial of right to hearing.

37. This Court, consequently is in agreement with the finding of the Trial Court in the order dated 24.9.2004 that the plaintiffs were unable to prove issue No. 2. The said issue is accordingly answered against the plaintiffs, and in favour of the first two defendants/sisters.

> Issue Nos 3: Whether the suit is barred by time?
>
> Issue No.10 Whether defendant no. 1 and 2 have become owners of the property in possession by adverse possession and whether this plea is available to them?
>
> Issue No. 6: Whether construction on the terrace was made by defendant no. 1 and 2 at their expense, if so it effects on plaintiff?

38. The sisters, D1 and D2 contended that the suit was barred due

to limitation. This claim was based on firstly, the 1983 Family Agreement, and secondly, on their continuous and exclusive possession of the suit property. They contended that for a declaration that the 1983 family arrangement was invalid in law and therefore unenforceable, the limitation period was of only three years. Since the suit was filed much after the expiry of 3 years, it was barred by limitation. They urged that Article 59 of the Schedule to the Limitation Act applied. Additionally, it was argued that if Article 59 is assumed to be inapplicable, then Article 65 would be applicable, and thus, the suit was barred, nevertheless, as D1 and D2 had become owners of the terrace by way of adverse possession for more than 12 years. It was argued that it is an admitted position that the sisters took over possession of the suit property (i.e. the terrace to the Asaf Ali Marg property) in 1984, subsequently let it out to D3 and D4. Thus, it was asserted that the sisters, D1 and D2 have been in exclusive and continuous possession of front and hind portions of the suit properties respectively since 1984.

39. On the issue of limitation, the plaintiffs firstly contended that since the 1983 family arrangement was void ab *intitio* (being induced by fraud, coercion, undue influence and misrepresentation), there was no need to seek a declaration to this effect. Thus, no limitation period would be applicable to such a suit. In this connection, reliance was placed on **Prem Singh v. Birbal** (2006) 5 SCC 353. Furthermore, relying on the decision **State of Maharashtra v. Pravin Jethalal Kamdar (dead) by Lrs.** AIR 2000 SC 1099, it was contended that when possession is taken under a void document, then suit for recovery of possession simpliciter can be filed, without the need to seek a declaration about invalidity of the documents. Moreover, even if such relief of declaration is sought along with the relief of decree for possession, it would be governed by Article 65 and not Article 58. It was further contended that **Kavi Kumar's** right to sue for recovery of possession of the suit property arose only upon the death of Savitri Devi, on 7.3.1990 since during her lifetime, she had a life interest in it. To support this argument, plaintiffs placed reliance on **M.V.S. Manikayala Rao v. M. Narasimhaswami and others** AIR 1966 SC 470 stating that adverse possession begins only when the plaintiff becomes entitled to possession. To support the contention that Article 65 would apply to the case at hand, plaintiffs also relied on **Ramiah v. N. Narayana Reddy (dead) by Lrs.** (2004) 7 SCC 541. Lastly, in response to the defendants' claim of title based on adverse possession, the plaintiffs

relied on **T. Anjanappa and Ors v. Somalingappa and Anr.** (2006) 7 SCC 570 to contend that the defendants were required to show by clear and unequivocal evidence that their possession was hostile to the real owner and amounted to denial of their title to the property claimed.

40. The suit from which appeals have been preferred was one for recovery of possession and *mesne profits*. The plaintiff's basis for recovery of possession has been that the title in the suit property vested in their predecessor-in-interest, Kavi Kumar. This title was based on the decree in the previous suit under which ownership rights over the second floor were conferred on him subject to the life interest of Savitri Devi, his mother. Thus, the question that arises is what, if any would be the period of limitation applicable for the present suit. It is pertinent to reproduce the relevant provisions:

"Limitation Act, 1963:

27. Extinguishments of right to property -At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

ARTICLE	*DESCRIPTION OF SUIT NO.*	*PERIOD OF LIMITATION*	*TIME FROM WHICH PERIOD BEGINS TO RUN*
59	To cancel or set aside an instrument or decree or for the rescission of a contract.	*Three years*	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first becomes known to him.
65	*For possession of immovable property or any interest therein based on title*	*Twelve years*	*When the possession of the defendant becomes adverse to the plaintiff.*

Provisions of the Specific Relief Act, 1963.

"31. **When cancellation may be ordered.** (1) Any person against whom a written instrument is void or voidable, and who has

reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such-officer shall not on the copy of the instrument contained in his books the fact of its cancellation."

41. It is trite that to decide a question whether the suit is barred by limitation, averments in the plaint have to be read without looking into the defence. It is averred in the suit that Kavi Kumar was induced by coercion, undue influence, misrepresentation and fraud to enter into the family arrangement. A family arrangement is no doubt an agreement. Section 19 and 19-A of the Indian Contract Act, 1872 provide that an agreement consent to which is obtained by any of the aforementioned four means is voidable at the option of the party whose consent was so caused. Thus, the family arrangement was voidable, *in the terms of the pleadings in the suit,* at the option of Kavi Kumar. Section 31 of the Specific Relief Act provides for a relief of a cancellation of an instrument which is void or voidable. Article 59 restricts the period for cancelling an instrument as 3 years starting from the time of the plaintiff's knowledge of the facts entitling cancellation. Plaintiffs relied on the Supreme Court's decision in **Prem Singh** (supra) to contend that when a transaction/ instrument is void ab intio, there is no need for a declaration stating so. However, the Court in **Prem Singh** also held that the Limitation Act would continue to apply in case of a plaintiff who, due to a void transaction, is not in possession of his property. It held that the Limitation Act would continue to apply since a right by reason of adverse possession may still be claimed. Here too, the facts present a similar situation. However, it must be noticed that the allegation that the family arrangement was induced by coercion, undue influence, misrepresentation and fraud, if assumed to be correct, causes the agreement (family arrangement) to be voidable at only Kavi Kumar's instance. The family arrangement would not become void *ab initio*. Therefore, the three year limitation period to get the family arrangement cancelled would still apply. The plaint states that the cause of action first arose upon the death of Savitri Devi who had a life interest in the suit property. Thus, it can be assumed that Kavi

Kumar had knowledge about the voidability of the family arrangement in 1990. The suit, which was instituted in 2000, was, thus, beyond the limitation period envisaged in Article 59, and therefore barred by time.

42. The plaintiffs relied on the decision in **Pravin Jethalal Kamdar** to contend that in such a case, the suit would be governed by Article 65, and not Articles 58/59. However, in that case, the transaction (a decree) in question was void, and considering that the Court held since same was a nullity, there was no need to seek a declaration about its invalidity. The Court concluded that instead of Article 58, Article 65 would apply. Thus, since the transaction therein was void, the case is of no assistance to the plaintiffs. In this case, the time from which the period begins to run would have to be determined. The suit property in 1984, when the sisters (D1 and D2) first took over possession (of the terrace) was either a joint property of the mother, Savitri Devi and her children, or its ownership rights belonged to Kavi Kumar subject to the life interest of the mother. Savitri Devi passed away in 1990. In both the cases, the intention of the sisters D1 and D2 would be relevant.

43. Interestingly, the plaintiffs aver, in the suit (Para 14) that during Savitri Devi's lifetime, after the family arrangement, the existing tenant, Sheri Daulat Ram Prem, vacated the portion over the second floor of the Asaf Ali Property. After this, state the plaintiffs,

> "It would be sufficient to mention only one fact by way of demonstration that at or about the same time Defendant No. 2 let out the hind flat poorly built with constructed area of 550 sq. Feet and that too on the 3rd Floor at Rs. 5500/-per month with 10 per cent increase after every three years..."

The written statement of the sisters states as follows:

> "14. The said family settlement settling the terrace of the said property in favour of the sisters was given effect to. The defendants No. 1 and 2 the charge of the respective portions assigned to them of the said top floor. They have been leasing out the property, realising rents, paying taxes and exercising all other incidents of ownership in the said suit property, right from 1983 till date peacefully, continuously and without any objection from anybody including the plaintiffs.

15. The plaintiffs owned the first and second floors of the said property. The terrace floor is above the second floor of the property. The assertion and exercise ownership rights in the terrace tops floor by the defendants No. 1 and 2 had always been in the knowledge of the plaintiffs.

16. Thus, the defendants No.1 and 2 categorically state that by virtue of the said registered family settlement Institute and by their brother, the husband of plaintiff no. 1 and the mother in 1983, they had become and continue to be the absolute owners of the portions of the suit property respectively allotted to them."

PW-1, Ms. Madhur Bhargava, in deposition during cross examination, stated that:

"It is correct that M.G. Motors was inducted as tenant in the premises in suit by Arti Bhargav in the year 1986. It is also correct that the tenancy was created during the lifetime of Sh. K.K. Bhargav. My husband Sh. K.K. Bhargav raised an objection to the creation of tenancy by Arti Bhargav in the year 1986. No letter or notice was given by my husband to Arti Bhargav or to M.G. Motors objecting to the creation of tenancy in the year 1986. My husband did not initiate any action objecting to the creation of tenancy...My husband raised objection to the creation of tenancy by Arti Bhargav with discussions to her.."

She further deposed that:

" Mrs. Savitri Bhargava died on 7-3-1990. Mr. K.K. Bhargav expired on 29-5-1993. It is correct that the suit property was let out the defendant no. 04 during the lifetime of Savitri Bhargava with the consent and knowledge of Sh. K.K. Bhargav... I did protest against letting to defendant no. 04 after the death of Sh. K.K. Bhargav. I am not placed on record any document of protest against defendant no. 04 in view of whatever as stated above..."

The affidavit evidence of the sisters (D-1 and D-2) that they asserted ownership rights in respect of their portions of the terrace went unchallenged. In fact, during the cross examination of DW-1 (Arti) specifically she was asked whether the previous partition after the decree included ownership to the terrace; she deposed that such portion was not

included. She also explained, later, in the cross examination, that the family arrangement was necessary because she had turned 31, and her mother was 70 and there was need for more income. The cross examination also shows that the value of the Nizamuddin Property at the time of partition (1975) was Rs. 1,25,000/- (it fell to the share of the brother) and the total value of the Asaf Ali Road property was a little more than Rs. 4 lakhs. DW-4, Ajai Sanghi, partner of the fourth defendant, stated that the said defendant was a tenant of the plaintiffs in the second floor, and had a tenancy in respect of the terrace portion of the third floor. Possession of the third floor premises by the sisters, during the lifetime of their mother and brother, (during which time even tenants were inducted and leases created afresh), clearly established that all these events were within the knowledge of the others. This clearly amounted to asserting title. The leasing out of premises – unless by a lessee or person authorized by the owner to sub-lease or create an interest to third parties, is quintessentially an act of asserting ownership and title to the property; in this case, the two portions of the terrace. As to what are the necessary ingredients to prove adverse possession was explained thus, in **Karnataka Board of Wakf v. Government of India and Ors.** (2004) 10 SCC 779 by the Supreme Court:

"11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See **S.M. Karim v. Bibi Sakina** AIR 1964 SC 1254, **Parsinni v. Sukhi** (1993) 4 SCC 375 and **D.N. Venkatarayappa v. State of Karnataka** (1997) 7 SCC 567) Physical fact of exclusive possession and the animus possidendi to hold as owner in

exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. Mahesh Chand Sharma (Dr.) v. Raj Kumari Sharma : (1996) 8 SCC 128." 44. In view of the above discussion, it is held that the suit for possession, on the basis that the family arrangement was void and inoperative, was clearly time barred. The defendants have also been able to establish that they enjoyed open, hostile and continuous possession in respect of the portions of the third floor/terrace of the Asaf Ali Road property, pursuant to the family arrangement of 1983. They could clearly assert – and have proved title by adverse possession. Issue Nos. 3 and 10 are answered in favour of the sisters, the first two defendants and against the plaintiffs. The findings in the impugned judgment and decree, to this extent, are set aside.

45. The discussion on issue No. 6 by the Trial Court and its findings were hinged largely on the findings recorded about legality and efficacy of the family settlement/arrangement. It held that the sisters did not prove that they had spent money and built the structures on the third floor.

46. In two affidavits in evidence dated 8th July 2002, affirmed by Arti and Bharti, respectively, they affirmed that the structures on the second floor had existed before the Plan for the area came into force and that they renovated or repaired the structure, as that had become dilapidated due to passage of time. This is to be seen in Para 30 (of Arti's affidavit) and Para 28 (Bharti's affidavit). The plaintiffs did not challenge the sisters' assertion during cross examination. Even otherwise, the evidence on record suggests that tenants were inducted in the terrace portion as early as 1986, during the lifetime of both Savitri Devi and Kavi Kumar.

47. In view of the findings recorded regarding efficacy and legality of the family arrangement, and the discussion above, it is held that Issue No. 6 too has to be answered in favour of the sisters, i.e the first two defendants. The findings of the Trial Court on this issue are accordingly set aside.

Issue 4: Whether terrace on second floor was included in the judgment and decree of suit no. 477 decided on 15th May, 1975 by the Hon'ble High Court of Delhi?

Issue 5: Whether defendant no. 1 and 2 were estopped from taking the contrary plea mentioned in Issue 4?

48. The plaintiffs contended that the decree in the 1974 suit conferred the ownership rights over the suit properties to Kavi Kumar, subject to the life interest of Savitri Devi. Counsel for the plaintiffs contended that the subject matter of roof rights was unknown to the parties because the 1952 Lease entered into with the Central Government confined the grant (or the demise) to those portions. The sisters, D1 and D2 contended that the rights in the suit property were not specifically divided by the decree in the 1974 suit, and thus the suit property (of this suit) had remained the joint property of all four parties to the 1974 suit.

49. The 1974 suit resulted in an arbitral award in terms of which the properties in question were divided in specific terms to Savitri Devi, her daughters and her son. Savitri Devi was conferred life interest in the second floor of the Asaf Ali Road property, and after her death, the property was to devolve absolutely upon the son, Kavi Kumar. D1 was given ownership of the basement, D2 was made the absolute owner of the ground floor of the Asaf Ali Road property. The Nizammudin West property went in entirely to the son, Kavi Kumar. The award – (and consequently the decree arising out of it), makes no mention of the terrace rights. However, the basis for the Arbitrator's decision was that the properties therein in question had been acquired for the common benefit of all. The arbitrator thus, divided the property equally in the aforementioned manner. The plaintiffs had strenuously argued that at the time of making the award, the Delhi Ajmeri Gate Scheme (pg. 1138 of the Trial Court records) permitted construction of only three storeyed (i.e. ground, first and second floor) buildings and thus, though in 1984 a floor above the second one was built, it may have been the case that at the time of the award, a third floor was not permissible due to the then

bye-laws, and therefore the learned arbitrator did not deem it necessary to mention the terrace rights in the division. This Court cannot comment on the legality of the constructions above the second floor.

50. A plain construction of the award reveals that there is no mention of any rights over the terrace. This absence, has to be seen in the light of the other rights, which the Award conferred on all members of the family, equally:

> "6. As the property at the Asaf Ali Road has common staircase, corridors and other amenities of common convenience, these will remain the joint property of all the sharers and each of the parties shall be entitled to use them as heretofore, and be responsible for the proper maintenance and repairs of those common conveniences."

51. All the parties to the 1974 suit consented to the award, and a decree was made in terms of the award partitioning the properties in question therein in the aforementioned manner. The silence, on the one hand, and clause 6 (of the award) in one sense led to ambiguity which could have potentially been a source of future conflict. This Court holds therefore, that the terrace was not separately given to any of the parties to the 1974 suit. Instead it remained the joint property of Savitri Devi and her children (Kavi Kumar, and D1 and D2). Even if the finding were to be otherwise, and Savitri Devi, as life owner (and after her, Kavi Kumar) were to be owners of terrace rights, as the owner(s) of the second floor, this issue would nevertheless be answered in favour of the sisters (Defendant Nos. 1and 2) because the family settlement was lawfully entered into, and bound Savitri Devi as well as Kavi Kumar, who gave up such rights.

52. The plaintiffs contended that since the family arrangement itself states that the suit property fell to the share of Kavi Kumar subject to the life interest of Savitri Devi, D1 and D2 are estopped from taking a contrary plea. The relevant extract of the family arrangement is extracted below:

> "And whereas all the parties to this deed realize that the parties Three and Four may experience difficulty in future and they therefore approached the First and Second parties to agree to an arrangement, by way of family settlement for providing additional

> source of income to parties Three and Four and they have generously agreed to the following arrangement for the benefit of parties Three and Four:
>
> ***
>
> 1. The top portion of the house, the terrace, on 3/13-B Asaf Ali Road, New Delhi, which belongs to party no Two subject to the life interest of party No. One, shall be divided into two parts as follows:
>
> *** ***
>
> Parties One and Two have hereby waived whatever rights they had or have in future in portions allotted to parties Three and Four as aforesaid.
>
> (emphasis supplied)

53. The above reveals that at the time of execution of the family arrangement, all the parties (including D1 and D2) believed Kavi Kumar to be the owner of the suit property subject to the life interest of the mother. This recital of course binds the parties, particularly D1 and D2. However, the question of estoppel does not arise, because even though at the time of execution of the family settlement, the understanding might have been that the brother had unfettered rights to the terrace subject to the mother's life interest, nevertheless the parties were clear that the brother would give up those rights, in order to assure his sisters (D-1 and D-2) additional income; he did so by executing the deed of family arrangement. As this court has already held, in respect of Issue No. 1 that the family arrangement was valid and binding and further, in regard to Issue No. 2 that the plaintiffs could not prove that the document was vitiated by fraud, undue influence, or coercion, the question of the first two defendants (i.e the sisters) being estopped in any manner, does not arise. Issue No. 5 is accordingly answered against the plaintiffs and in favour of the defendants; the findings of the Trial Court are hereby set aside. Issue No. 7 Whether defendant no. 1 and 2 and defendant no. 3 and 4 are liable to pay damages to plaintiffs, if so for what amount.

54. The issue of damages was struck at the behest of the plaintiffs, in view of the relief of decree for possession, damages and mesne profits claimed by them. However, this court, as held in the previous discussion,

has recorded findings to the effect that the sisters – as well as Kavi Kumar and Savitri Devi, had acted on the family arrangement which is valid and binding. The court has further held that the suit as brought by the plaintiffs, is time barred.

Therefore, the plaintiffs' claim for damages has to fail. In any case, the Trial Court had not granted this relief. The issue is accordingly held in favour of the defendants and against the plaintiffs.

Issue Nos 8,9 and 11

55. As noticed at the outset, the parties had not made any arguments on these issues. There is no need to address the same.

56. In view of the above findings, the Court holds that the suit filed was not maintainable; it is accordingly dismissed. The plaintiffs' appeal, RFA No. 732/2003 is dismissed. The appeals of the defendants (RFA Nos. 855/03, 878/03 and 912/03) have to succeed, in view of the findings recorded by this court. They are accordingly allowed. The Plaintiffs shall bear the costs of each appeal, quantified at Rs. 50,000/-. The costs shall be shared by all defendants in equal shares.

ILR (2013) II DELHI 1003
CRL. A.

MEHBOOB AHMED **....APPELLANT**

VERSUS

STATE **....RESPONDENT**

(SANJIV KHANNA & SIDDHARTH MRIDUL, JJ.)

CRL. A. NO. : 655/2009 **DATE OF DECISION: 01.02.2013**

Indian Penal Code, 1860—Section 302—Punishment for murder, The Code of Criminal Procedure, 1973—Section 377—Appeal against Conviction and Indian

Evidence Act, 1872—Sections 106, 146 and 138—Whether contradiction in testimony of witness dents the case of prosecution?—Held—Normal discrepancies do not corrode the credibility of parties' case, material discrepancies do so. Further, evident contradiction in testimony to be specifically put to witness in order to enable the witness to explain the same. The same is rule of professional practice in the conduct of the case, but it is essential to fair play and fair dealing of the witness. Appeal Dismissed.

Important Issue Involved: "Evident discrepancies in the testimony should be specifically put to the witness to enable him to explain the same"

"Material discrepanices in testimony of witness corrodes the credibility of parties case."

[As Ma]

APPEARANCES:

FOR THE APPELLANT **:** Mr. S.K. Sethi, Advocate.

FOR THE RESPONDENT **:** Mr. Sanjay Lao, APP.

CASES REFERRED TO:

1. *Kathi Bharat Vajsur and Anr.* vs. *State of Gujarat,* AIR 2012 SC 2163.
2. *Sunil Kumar Sambhudayal Gupta (Dr.)* vs. *State of Maharashtra,* (2010) 13 SCC 657.
3. *State of UP* vs. *Nahar Singh,* AIR 1998 SC 1328.
4. *Sukhvinder Singh* vs. *State of Punjab,* (1994) 5 SCC 152.

RESULT: Appeal Dismissed.

SIDDHARTH MRIDUL, J.

1. By the impugned judgment, dated 18.05.2009, the appellant

Mehboob Ahmed has been convicted under Section 302 of the Indian Penal Code, 1860 (IPC, for short), for the murder of Rumana Praveen on 30.12.2005 in their residence, at H.No. F-277 Gali No.14 Khajuri Khas, Delhi. The appellant has been sentenced to life imprisonment and to pay fine of Rs.10,000/-, in a default of which, he is to undergo simple imprisonment, for six months.

2. The prosecution case is that on 30.12.2005, at around 10 a.m., the appellant, his step daughter-the deceased and Rubina Praveen (PW1), were present in his residence. Nasim Fatima (PW10), the mother of the deceased was at her shop, right outside their home. Noise of cries emanating from the inner room of the house, where the deceased and the appellant were sleeping, was heard by both PW1 and PW10. They rushed to the room and saw the appellant with a knife in his hand, smeared in blood. The deceased was lying on the floor with injuries on her neck and face and blood oozing profusely. PW10 tried to apprehend the appellant but he overpowered her, threw the knife and ran away. They raised alarm and Shehzad Ahmed (PW2), husband of PW1, came there. They took the deceased to Guru Teg Bahadur Hospital in a TSR where she was declared to have been brought dead.

INCRIMINATING CIRCUMSTANCES THAT STAND ESTABLISHED AGAINST THE APPELLANT

Homicidal Death and Medical Testimony

3. It is undisputed that the deceased died a homicidal death in the morning of 30.12.2005. Dr. Arvind Kumar (PW19), who conducted the post mortem, has opined the cause of death to be hemorrhagic shock due to ante mortem injuries to neck and facial vessels caused by a sharp edged weapon.

4. The Post Mortem Report (Ex.PW19/A), conducted by Dr. Arvind Kumar, Senior Demonstrator, GTB Hospital, Shahdara, Delhi has recorded 19 injuries of which Injuries 'vi' to 'ix' were sufficient to cause death in the ordinary course of nature.

5. The injuries are as below:

i. Incise wound of size 4cm X 0.3cm X bone deep placed horizontally present over the right side of forehead on the hair line.

ii. Incise wound of size 4.5cm X 0.3cm X bone deep with making cut marks on the underlying bone placed vertically present over the left temporal region 3 cm above and posterior to the upper lobe of left ear.

iii. Superficial incise wound of size 5cm X 0.2cm X 0.2 cm making a flap of skin placed vertically in front of right ear.

iv. Incise wound of size 3.5cm X 0.5cm X 0.5cm present right side of cheek bone placed obliquely starting 4cm medial to injury No.3 and extending upto right ala of nose.

v. Incise wound of size 2cm X 3cm full thickness present over right ala of nose.

vi. Incise wound of size 28cm X 0.9cm X 0.2cm starting from right angle of mandible going obliquely upward involving both the angle of mouth and left ear upper lobe cutting the vessel and muscle of the face of left side.

vii. Incise wound of size 6cm X 0.2cm X bone deep placed obliquely over the right mandible.

viii. Three incise wounds merging into each other making one wound of size 105cm X 1cm present right side of the neck, cutting the underlying neck muscles, right carotid vessels and trachea. The wound is 2.4 cm below the lower border of right year and 7cm above the calvical bone and 3cm right to the midline.

ix. Incise wound of size 4cm X 0.2cm X 0.5cm placed horizontally just below the chin.

x. Superficial incise wound of size 7cm X 0.2cm X 0.2cm present in front of neck below the thyroid cartilage.

xi. Superficial incise wound of size 5.5cm X 0.1cm X 0.2CM present 2cm below the injury No.10.

xii. Incise wound of size 7cm X 0.2cm X 0.8cm present over the palmer aspect of finger involving all the fingers except the thumb placed obliquely.

xiii. Incise wound of size 1cm X 0.3cm X 0.8cm deep and 2cm width present over the palmer aspect of thump, middle finger and ring finger of right hand.

xiv. Superficial incise would of size 13cm X 0.3cm X 0.1cm present over lateral aspect of left leg starting 4cm above the left heel going upward, obliquely up to the lower 1.3 of the shin.

xv. Two superficial incise wound '7' shaped present on the lateral aspet of middle of left thigh. The horizontal arma is 9cm X 0.1cm X 0.1cm and other arm is 14cm X 0.1cm X 0.1cm. The pointed end is 23cm below the itiac crest, 17cm above the left knee.

xvi. Over shape stab wound 0.7cm to 0.9cm in length and 0.4cm X 0.5cm in breadth, 1cm to 1.5cm in depth present over the lower aspect of right chest and lateral aspect of right chest. Four in number, present in an area of 11cm X 9cm. The upper wound is 0.8cm below and lateral to right nipple. The margin of all the wound is abraded.

xvii. Oval shape stab wound 0.8cm X 0.3cm present right side of abdomen, 4cm right and lower to the umbilicus.

xviii. Oval shape stab wound, three in number, 0.7 cm X 0.8cm in length, 0.3cm in width, 1cm to 1.5cm deep present lateral aspect of left forearm, 2cm below the lateral epicondyle of elbow join, margin are abraded.

xix. Oval shape stab wound, four in number, 0.8cm to 1cm long, 0.4cm broad, 1cm to 1.9cm deep placed in a line obliquely, the maximum distance between two is 14cm, the lower one is 17cm above the knee and upper most one is 27cm above the knee. Margins are abraded, present over the right thigh in front.

6. After examination of the knife (weapon of offence) PW19 has opined that Injury 'i' to 'xv' are possible with the knife i.e. the weapon given for examination.

Witnesses to the incident

7. The next question and issue is whether the appellant is responsible and had caused the said injuries. The prosecution in this regard relies upon statements of PW1 Rubina Praveen and PW10 Nasim Fatima. They claim that they were eye witnesses to the incident. PW1 is the real sister of the deceased and was residing in the house of the appellant on the date

of the incident. PW1 and PW10, the mother of the deceased, who were present in the house, have proved the presence of the appellant in the house at the time of incident. The offence having been committed in a dwelling house, the occupants of the same are natural witnesses to the incident and their presence is thus most probable in the instant case.

8. They have both affirmed that they saw the appellant with a knife (murder weapon), smeared in blood, standing next to the deceased and on the arrival of PW1 and PW10 in the room of the incident, he dropped the knife and ran away. Their testimony remains unshaken through the test of cross examination and is affirmed in all its material aspects.

9. It was submitted out through the statement of PW10 that there exist certain contradictions in her statement so as to establish her actual presence at the spot. Perusal of the rukka (Ex.PW10/A) read with the testimony of the witness shows that she states in the rukka that she was at her shop at the time when she heard cries coming from her house whereas in her testimony she has deposed that she was offering prayers. There is no material contradiction in both these statements. One does not make the other improbable. She could be offering prayers in her shop. Either way her presence does not become doubtful due to this minute variance in her testimony.

10. It should also be pointed out that PW10 was cross examined on 28.08.2006, nearly 8 months after the incident. It is highly probable that she did not have perfect recollection of her exact spot at the time of incident. The human mind has imperfect memory and such like minor deviations is natural and not sufficient to make her presence doubtful. If we see these witnesses through microscope, it is true that the above mentioned contradictions would be visible but they have proved and established the case of the prosecution. The so called contradictions are not material and do not dent the prosecution case.

11. In a recent case reported as **Kathi Bharat Vajsur and Anr. v. State of Gujarat,** AIR 2012 SC 2163, the Supreme Court examined the law on material contradictions in the testimony of a witness and observed:

> "19. This Court, in the case of **Sunil Kumar Sambhudayal Gupta (Dr.) v. State of Maharashtra,** (2010) 13 SCC 657, summarized the law on material contradictions in evidence thus:

"Material contradictions

30. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons. (Vide **State v. Saravanan**)

31. Where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and the other witness also makes material improvements before the court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence. (Vide **State of Rajasthan v. Rajendra Singh**)

32. The discrepancies in the evidence of eyewitnesses, if found to be not minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence or with the statement already recorded, in such a case it cannot be held that the prosecution proved its case beyond reasonable doubt. (Vide **Mahendra Pratap Singh v. State of U.P.**)

33. In case, the complainant in the FIR or the witness in his statement Under Section 161 Code of Criminal Procedure, has not disclosed certain facts but meets the prosecution case first time before the court, such version lacks credence and is liable to be discarded. (Vide **State v. Sait**)

34. In **State of Rajasthan v. Kalki,** while dealing with this issue, this Court observed as under: (SCC p. 754, para 8)

> "8. ... In the depositions of witnesses there are always normal discrepancies however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person."

35. The courts have to label the category to which a discrepancy belongs. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. (See **Syed Ibrahim v. State of A.P.6 and Arumugam v. State**)

36. In **Bihari Nath Goswami v. Shiv Kumar Singh** this Court examined the issue and held: (SCC p. 192, para 9)

> "9. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test the credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility."

37. While deciding such a case, the court has to apply the aforesaid tests. Mere marginal variations in the statements cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution case, render the testimony of the witness liable to be discredited.""

12. Furthermore, no specific suggestion has been put to PW10 to explain any such contradiction. If there is an evident contradiction in the testimony of PW10 to establish her exact presence at the spot, then the same should have been put to her to enable her to explain the same. Whether she was at the shop or at home offering prayer, would have been explained if it were suggested to her. No such suggestion was put to her during her cross-examination.

13. In the case reported as **State of UP v. Nahar Singh,** AIR 1998 SC 1328, the Supreme Court has observed:

> "13. It may be noted here that part of the statement of PW-1 was not cross-examined by the accused. In the absence of cross-examination on the explanation of delay, the evidence PW-1

remained unchallenged and ought to have been believed by the High Court. Section 138 of the Evidence Act confers a valuable right of cross-examining the witness tendered in evidence by the opposite party. The scope of that provision is enlarged by Section 146 of the Evidence Act by allowing a witness to be questioned:

(1) to test his veracity.

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

14. The oft quoted observation of Lord Herschell, L.C. in **Browne v. Dunn,** (1893) 6. The Reports 67 clearly elucidates the principle underlying those provisions. It reads thus:

> "I cannot help saying, that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which, it is suggested, indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness, you are bound, whilst he is in the box, to give an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses.'"'

14. The evidence of PW1 and PW10 which is reliable and worthy of credence has thus, justifiably been relied upon by the court.

Registration of FIR and Investigation

15. PW10 is the complainant in the case and the FIR was registered at her instance. Insp. B.S.Khushwah (PW17), the IO in this case, has deposed that on 30.12.2005 at around 10:45am, information was received vide DD No. 6A that a girl had been stabbed. He reached the spot with SI Rakesh Kumar (PW14) and recorded statement of PW10 (Ex.PW10/A). Meanwhile, information was received regarding admission of the deceased in GTB Hospital. He rushed to the hospital, collected her MLC and prepared rukka vide endorsement Ex.PW 5/A. The FIR was registered at about 1:30 p.m. Thus we do not perceive that the registration of the FIR is belated or delayed.

16. The crime team and photographer were summoned at the spot. The crime team inspected the spot and took photographs. Vide memo Ex.PW 9/A the IO seized blood stained churri, sample of dari and bedsheet, blood samples, earth samples and earth control and prepared site plan of the spot at the instance of PW10.

17. The body of the deceased was identified by Suhail Adnan (PW3), husband of the deceased and Modh Khalid (PW4), brother of the deceased vide Ex.PW3/A and Ex.PW4/A respectively.

Disclosure and Recovery

18. The appellant was arrested on 31.12.2005 vide arrest memo Ex PW14/ B by Insp. B.S. Khushwah, PW17, in front of Raja Dhaba, Loni. His personal search was conducted vide memo Ex.PW14/C and disclosure statement Ex.PW14/D was recorded wherein he disclosed that he could get recovered the blood stained kurta pajama and kababseak behind a toilet on platform No.2 of Shahdara Railway Station.

19. It strongly emerges from the evidence on record that there are two weapons of offence. The knife that was seized from the crime scene itself and the kababseak that was got recovered by the appellant. The post mortem report records 19 external injuries on the person of the deceased. PW19, Dr. Arvind has examined the knife and has opined that Injuries i-xv are possible by the weapon of offence i.e. the knife. After examination of the iron rod (seak), on subsequent opinion, PW19 has opined that Injuries 'xvi' to 'xix' are possible by the weapon of offence i.e the iron rod (seak).

20. Both PW1 and PW10 have deposed that they saw the appellant in the room, holding a knife in his hand and on seeing them enter the room, he dropped the knife and ran away.

21. It is highly unnatural that the appellant would take one weapon of offence i.e. the iron rod (seak) with him in the process of fleeing the crime scene and at the same time drop the other weapon.

22. Another material irregularity in this regard is the testimony of PW10 who has deposed the following in her cross examination:

> "At this state, a parcel duly sealed with Court seal is opened and a plastic jar is taken out. It is containing dari piece and bedsheet piece. Those pieces are Ex.P2/1 to 2 and Ex.P3 which are the same, which were cut and seized by the police from my house. Another parcel duly sealed with court seal is opened and a plastic jar containing a dagger is taken out. Dagger Ex.P1 is the same, which was seized by the police from my house. I had seen this dagger in the hands of accused, when I entered the inner room of my house, as detailed above. At the time of incident, accused was wearing kurta and pyjama. I can identify the same, if shown to me. Another parcel duly sealed with court seal is opened and kurta-pyjamaare taken out. Kurta Ex.P5 and Pyjama Ex.P6 are the same, which the accused was wearing at that time.
>
> XXXXXXXXXX by Sh. Arun Sharma, Advocate for the accused.
>
> I cannot say whether my supplementary statements were recorded by the police or not. I had put my thumb impressions over all my statements. (At this juncture, defence counsel wants copies of those supplementary statements and Ld. Prosecutor replied that only one statement of the witness bears her thumb impression). I had not stated before the police in my statement anything about seizure of kurta-pyjama. Kurta Ex.P5 and pyjama Ex.P6 were seized by the police from our house. It is correct that clothes of the accused were kept on pegs in the house. I am not aware whether police had recorded the factum of seizure of kurta-pyjama in my statement or not. Kurta Ex.P5 and pyjama Ex.P6 were lying in the room where blood was lying. Police reached our house 9.30-10 a.m."
>
> (Emphasis supplied)

23. The witness correctly identifies the clothes of the appellant worn at the time of the incident. These same clothes i.e. blood stained kurta and pajama were gotten recovered by the appellant through his disclosure statement. The fact that the witness states that the same kurta pajama Ex.P5 and Ex.P6 was lying in the room where the blood was lying makes the recovery notably doubtful and gives reason to believe that they may have been planted. We ignore the disclosure and consequent alleged recovery.

24. The Supreme Court on the aspect of re discovery of discovered fact, in case reported as **Sukhvinder Singh v. State of Punjab,** (1994) 5 SCC 152 has observed:

> "17. The first piece of circumstantial evidence relied upon against them revolves around the recovery of the dead body of Varun Kumar from the house of Sukhvinder Singh and his parents on the disclosure statement made by Sukhvinder Singh, Sukhdev Pal and Puran Chand Ex. PW10/B, Ex. PW10/C and Ex. PW10/D respectively. We are surprised at the manner in which the disclosure statements were recorded by the investigating agency and relied upon by the Designated Court. That Section 27 of the Evidence Act is an exception to the general rule that a statement made before the police is not admissible in evidence is not in doubt. However, vide Section 27 of the Evidence Act, only so much of the statement of an accused is admissible in evidence as distinctly leads to the discovery of a fact. Therefore, once the fact has been discovered. Section 27 of the Evidence Act cannot again be made use of to 're-discover' the discovered fact. It would be a total misuse-even abuse-of the provisions of Section 27 of the Evidence Act."

25. The testimony of PW10 discloses that the kurta pyjama was seized by the police from her house itself. The statement of PW10 shows that she is truthful and did not merely go by the police version and was not tutored. Also, close scrutiny of the evidence on record makes the possibility of the appellant running away with the iron rod (seak), at a time when he is seen dropping the knife, very doubtful. The dual effect of both these circumstances make the alleged recovery very suspicious and it cannot be relied upon. Thus we exclude that disclosure and recoveries from the incriminating material which can be relied upon, but as noticed

this does not effect the final finding.

Motive and Conduct of the appellant

26. It was alleged that the appellant had sexual contact forcibly with the deceased, prior to her marriage with PW3. PW10 has stated that such information was communicated to her by the deceased on a previous occasion after which she confronted the appellant. However, the appellant threatened to divorce her and therefore out of fear for herself and disgrace to family name she did not disclose this fact to anyone. This fact has been affirmed by PW3 in his cross examination.

27. PW1 has deposed that the deceased had confided in her regarding the same. PW1 has further stated that the appellant had tried to sexually exploit her as well about which she had informed her husband and on his advice she had stopped visiting the room of the appellant thereafter.

Absconder

28. It is also established that the appellant was absconding from his house after the incident till he was arrested on 31.12.2005 at 8:45p.m. as per his arrest memo Ex.PW14/B.

Examination of the appellant

29. The appellant has denied all allegations against him and stated that he has been falsely implicated in this case. He also alleges that PW9 was having intimate relations with his wife and therefore has deposed against him.

30. The appellant has taken the plea of alibi to prove his innocence and in his defence, he has examined his brother Aziz Ahmed DW1.

31. Aziz Ahmed DW1 has deposed that the appellant left his house at 7am on the date of incident. The defence witness has only stated about the appellant's presence at the spot till about 7/7:15a.m. The incident occurred somewhere between 9:30 -10a.m. No other person has been examined to establish the plea of alibi. It is noteworthy to mention that on a suggestion put to PW10 that the appellant left his home at 8am, the same has been denied. A suggestion was also put to PW10 that the appellant offered tea to a certain Hazi Shamsuddin at around 8a.m. and then left for work. This has also been denied by PW10. Further, the appellant has not examined any Hazi Shamsuddin to prove the same.

32. Section 106 of the Indian Evidence Act casts the burden to prove a fact especially within the knowledge of any person upon such person. Thus, in view of the evidence put forth, the appellant has not been able to establish his plea of alibi to the satisfaction of this Court.

33. It is also to be seen that the explanation of false implication is extremely vague and unconvincing. The appellant claims that his wife was pressurizing him to transfer his property in her name. The testimony of DW1 does not even mention the name of PW9 or any other circumstance to show that PW10 was having any intimate relations with PW9. Hence, this allegation has gone unsubstantiated.

34. The appellant has explained another reason for PW10 to falsely implicate him. He alleges that PW10 used to criminally intimidate him and pressurized him to forcibly occupy the room that was the property of his brother. She also used to fight with the appellant to transfer the said room in her name and since he did not accede to the same, she has falsely implicated him in this case. This explanation is quite absurd. Firstly, if PW10 wanted the property as desperately as the appellant claims, it would make more sense for her to threaten the appellant's brother and falsely implicate him. Secondly, and more importantly it is quite farfetched that she would let off the real culprit behind her daughter's murder in order to falsely implicate the appellant, who is none other than her own husband.

35. There is therefore, no evidence to suggest the possibility of the same and to believe this to be the reason for falsely implicating the appellant.

Injuries on appellant

36. PW20 has deposed that the appellant was brought to GTB Hospital on 31.12.2005 for medical examination and the following injuries were noted on his person:

i) Old multiple superficial cut incised marks present at anterior aspect of neck just at the level of thyroid cartridge. Injuries were about 24 hours old.

37. The appellant has explained that the same were caused by a razor while shaving. Again it worth mentioning that despite opportunity, PW20 was not cross examined and therefore, no suggestion was put to

him as to whether the said injury could have been caused by a razor to ascertain the truthfulness of the appellant's explanation.

38. Since the appellant was arrested the very next and day and taken for medical examination, the doctor's opinion about the injuries on his neck and the time when they were sustained assume importance as a further incriminating circumstance against the appellant and he has not been able to explain the same. The said injuries may have been sustained by the appellant in the course of struggle between the appellant and the deceased at the time of the incident. However, the doctor who had examined these injuries has not opined on the cause of such injuries and at the same time the appellant has not been able to prove his explanation to the same.

39. De hors the fact that we disbelieve the recovery effected at instance of the appellant, we are of the considered view that the evidence adduced by the prosecution at the trial is sufficient to establish the guilt of the appellant before us beyond all reasonable doubt. We say so in view of the ocular testimony of PW1, which is confirmed and corroborated by PW10 in all its material aspects. Further, motive for the murder proved by the combined testimony of PW1, PW10 and PW3 is highly incriminating evidence established against the appellant. The appellant has neither been able to prove his plea of alibi nor sufficiently explained the injuries sustained by him soon after the incident of murder.

40. The appeal is accordingly dismissed. Conviction and sentence awarded are upheld and maintained.

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ARB. A.

INTERTOLL ICS CECONS O & M CO. PVT. LTD. ....APPELLANT

VERSUS

NATIONAL HIGHWAYS AUTHORITY OF INDIA ....RESPONDENT

(S. MURALIDHAR, J.)

ARB. A. NO. : 5/2012 & I.A. NO. : 22361/2012 DATE OF DECISION: 04.02.2013

Arbitration and Conciliation Act, 1996—Section 9 and Section 17—Power of the Arbitral Tribunal.

Whether the scope of the power of Arbitral Tribunal under Section 17 of the Act is narrower than or as wide as that of Section 9 of the Act? Held-Power of the Arbitral Tribunal under Section 17 is not as wide as that of the Court under Section 9 of the Act and that the principles underlying Section 9 of the Act, would not ipso facto to applicable to Section 17.

What constitutes "subject matter of dispute" in the context of Section 17 of the Act? Held—Subject matter of disputed in terms of Section 17 of the Act refers to tangible "subject matter of dispute" different from an 'amount of dispute'.

Whether the Arbitral Tribunal has power to order the Claimant to furnish security as 'interim measure of protection' at interlocutory stage without prima facie determination as to the likelihood of success of the counterclaim? Held-The Arbitral Tribunal does not have

power to order furnishing of security at interlocutory stage, without prima facie determination as to the likelihood of success of the counterclaim? Held-The Arbitral Tribunal does not have power to order furnishing of security at interlocutory stage, without prima facie determination as to the likelihood of success of the counterclaim even on the principles analogous to those governing the power of Court under Section 9 of the Act. Grant of interim relief under Section 17 is required to be preceded by determination that the party seeking interim relief has a prima facie case.

Code of Civil Procedure, 1908—Order XXXVIII Rule 5 and Order XXV—Attachment before Judgment.

Whether the impugned orders are supportable on the principles underlying the grant of an order of 'attachment before judgment'? Held—Power of the Court under Order XXXVIII Rule 5 is drastic and extraordinary and is to be used sparingly and strictly in accordance with the Rule. Order of the Tribunal requiring furnishing of security for monetary amount of claim has to satisfy the requirements of Order XXXVIII Rule 5. Order XXV Rule 1 only enables the Court to require the Plaintiff to furnish security for payment of costs incurred or likely to be incurred by defendant. The discretion is to be exercised as per merits of each case, depending upon its own circumstances. Arbitration Tribunal Appeal allowed.

Important Issue Involved: "Power of the Tribunal under Section 17 is not as wide as that of the Court in Section 9 of the Act and that the principle underlying Section 9 of the Act, would not ipso facto be applicable to Section 17."

[As Ma]

APPEARANCES:

FOR THE APPELLANT : Mr. Ciccu Mukhopadhaya, Senior Advocate with Mr. Balaji Subramanian, Ms. Jasleen Oberai and Ms. Rohini Sisodia, Advocates.

FOR THE RESPONDENT : Mr. Parag P. Tripathi, Senior Advocate with Mr. Abhimanyu Bhandari, Mr. Samanvya Dwivedi, Mr. Kunal Bahari and Ms. Monisha Handa, Advocate.

CASES REFERRED TO:

1. *Simplex Infrastructures Ltd.* vs. *National Highways Authority of India* (decision dated 14th January 2011 in FAO (OS) No. 200 of 2010).
2. *Steel Authority of India Ltd.* vs. *AMCI Pty. Ltd.* 2011 (3) Arb.LR 502 (Delhi).
3. *Indowind Energy Ltd.* vs. *Wescare (India) Ltd.* (2010) 5 SCC 306.
4. *Kashi Math Samsthan* vs. *Shrimad Sudhindra Thirtha Swamy* (2010) 1 SCC 689.
5. *Vinod Seth* vs. *Devinder Bajaj* (2010) 8 SCC 1.
6. *Shin Satellite Public Co. Ltd.* vs. *Jain Studios Ltd.* 153 (2008) DLT 604.
7. *Ajay Mohan* vs. *H.N. Rai* (2008) 2 SCC 507.
8. *Raman Tech. & Process Engg. Co.* vs. *Solanki Traders* (2008) 2 SCC 302.
9. *Adhunik Steels Ltd.* vs. *Orissa Manganese and Minerals (P) Ltd.* (2007) 7 SCC 125.
10. *New Machine Co. Ltd.* vs. *SB Air Controls Pvt. Ltd* (decision dated 13th February 2009 in I.A. No. 6532 of 2006 in CS (OS) No. 493 of 2006).
11. *National Highways Authority of India* vs. *M/s. China Coal Construction Group Corporation* AIR 2006 Delhi 134.

12. *National Shipping Company of Saudi Arabia* vs. *Sentrans Industries Ltd.* AIR 2004 Bom 136.

13. *MD, Army Welfare Housing Organisation* vs. *Sumangal Services (P) Ltd.* (2004) 9 SCC 619.

14. *Goel Associates* vs. *Jivan Bima Rashtriya Avas Samiti Ltd.* 114 (2004) DLT 478 (DB).

15. *Delta Construction Systems Ltd., Hyderabad* vs. *Narmada Cement Company Ltd., Mumbai* 2002 (2) Arb.LR 47 (Bombay).

16. *Rajender Singh* vs. *Ramdhar Singh* (2001) 6 SCC 213.

17. *M/s. Global Company* vs. *M/s. National Fertilizers Ltd.* AIR 1998 Delhi 397.

18. *M/s. H.M. Kamaluddin Ansari & Co.* vs. *Union of India* (1983) 4 SCC 417.

19. *Union of India* vs. *Raman Iron Foundry* (1974) 2 SCC 231.

20. *S. Milkha Singh* vs. *M/s. N.K. Gopala Krishna Mudaliar* AIR 1956 Punjab 174.

21. *Iron & Hardware (India) Co.* vs. *Firm Shamlal & Bros.* AIR 1954 Bom 423.

22. *Jabed Sheikh* vs. *Taher Mallick* AIR 1941 Calcutta 639.

RESULT: Arbitration Tribunal Appeal allowed.

S. MURALIDHAR, J.

1. Intertoll ICS Cecons O & M Co. Pvt. Ltd. ('Appellant') has in these two appeals under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 ('Act') challenged two separate impugned orders dated 6th February 2012 passed by the arbitral Tribunal ('Tribunal') in applications filed by the Respondent National Highways Authority of India ('NHAI') under Section 17 of the Act. By the impugned orders the Tribunal directed the Appellant to furnish security either of immovable property or in the form of a bank guarantee ('BG') for the satisfaction of the amount of counter claims of the NHAI that may be awarded by the Tribunal. The amount of such security was determined as Rs.2,93,70,70,025 as regards Package-1 and Rs. 32,85,12,572 as regards Package-2.

Background Facts

2. The facts leading to the filing of the present appeals are that pursuant to the bids invited by NHAI for operation and maintenance of four lane highway sections in NH-2 (Delhi Agra-Km 18.80 to Km. 198.00) and NH-24 (Moradabad Bypass Km. 148.43 to Km. 166.65) ('Package-2'), a joint venture agreement ('JVA') was entered into between Intertoll ICS Pvt. Ltd., CE Constructions Ltd., and a South African company, Intertoll (Pty) Ltd. The JV submitted a bid on 22nd October 2001 which was accepted by NHAI on 1st July 2002. As required by NHAI, the Appellant (i.e the JV) was incorporated on 26th July 2002 specifically to enter into and execute the contract for operation and maintenance of the above stretches of NH-2 and NH-24. On 8th August 2002, an agreement was executed by the Appellant and NHAI. A similar agreement was executed by the parties for the maintenance and operation of a four lane highway on NH-8 (Gurgaon-Kotputli-Amer sections) in the States of Haryana and Rajasthan ('Package-1').

3. In terms of Clause 10.16.1 of the contract the Appellant submitted performance bank guarantees ('PBGs') of a total value of Rs.18,10,97,371. The Apellant states that although Clause 10.16.5 of the contract stated that in addition the 'Operator' i.e. the Appellant "shall provide a parent company guarantee in the form attached thereto", there was no such form attached to the agreement. In fact the said clause was in fact not acted upon as NHAI did not require the Appellant to furnish any 'parent company guarantee'.

4. The Appellant states that in regard to both the contracts its efforts were frustrated on account of persistent breaches by NHAI. As regards Package-2 the Appellant contends that apart from wrongly calling the PBGs, NHAI also unjustifiedly withheld retention money of Rs.5,42,96,773. Likewise in relation to Package-1, NHAI withheld the retention money of Rs.4,21,52,472. In both contracts NHAI also additionally withheld certain other amounts payable to the Appellant.

5. The Appellant terminated both contracts by notices dated 21st November 2005. The Appellant states that, as a counter measure, NHAI issued letters on 30th November 2005 terminating both contracts. On 3rd April 2006, the Appellant raised final bills in respect of each contract setting out the amount due and payable to it by NHAI. On its part NHAI issued final certificates on 15th and 29th May 2007 in respect of Packages

2 and 1 respectively, claiming certain amounts from the Appellant. On 20th November 2008, an arbitration agreement was entered into between the Appellant and NHAI agreeing to refer all their disputes to arbitration.

Arbitral proceedings

6. In September 2009, a three-Member Tribunal comprising two former Chief Justices of India and a former Judge of the Supreme Court was constituted. The first sitting of the Tribunal was held on 12th September 2009. The Appellant filed in relation to Package-2 a total claim for the sum of Rs.1,68,40,14,481 (as amended) and in relation to Package-1 a claim for a sum of Rs.1,31,34,69,925 (as amended). On 31st May 2010, NHAI filed counter claims (after deducting the withheld amounts) in the sums of Rs.2,03,60,04,064 for Package-2 and Rs.4,26,91,36,681 for Package-1. Of the said counter claims, a substantial sum of Rs.2,12,88,91,779 in respect of Package-2 and Rs.4,26,99,59,941 in respect of Package-1 pertained to leakages, recovery of costs incurred in completing certain periodic maintenance work and damages for alleged breach of contract by the Appellant.

7. It is stated that after pleadings were completed and affidavits by way of evidence filed, when the cross-examination of the witnesses commenced, NHAI filed on 3rd October 2011 two separate applications under "provisions and principles analogous to Order 25 CPC read with Section 151 thereof and Section 17 of the Act" seeking directions to the Appellant to furnish security of an amount equivalent to the counter claims filed by NHAI. Replies to the said applications were filed by the Appellants on 21st October 2011. The applications were heard by the Tribunal in the first week of November 2011.

Impugned orders of the Tribunal

8. By two separate impugned orders dated 6th February 2012, the Tribunal required the Appellant to furnish security in the aforementioned sums in relation to Package-1 and Package-2. The amounts were arrived at by subtracting the amount of claim from the amount of the counter claims in respect of each package. The security was directed to be furnished to the satisfaction of the Registry of this Court.

9. In the impugned orders, on the basis of the pleadings of the parties, the Tribunal framed the following issues for determination:

"(a) Whether an Arbitral Tribunal can, in exercise of the power conferred on it by Section 17 of the Act direct a party before it to furnish security for the amount claimed and to disclose the source wherefrom the party is arranging finances for the litigation?

(b) In the event of question (a) being answered in favour of the Respondent, whether the Claimant should be directed to furnish security for the amount of counter claim? If so, in what amount?"

10. The conclusions of the Tribunal in relation to the above issues in the impugned orders were as under:

(i) The principle underlying Section 9 of the Act could determine the scope and ambit of the power conferred on the Tribunal under Section 17 of the Act. A narrow construction did not have to be placed on Section 17 of the Act.

(ii) For the purpose of Section 17 of the Act, the 'subject matter of the dispute' did not have to be only tangible property. It could include a monetary claim.

(iii) The Tribunal did have the power to call upon a party before it to furnish security for the claimed amount where it was in the interests of justice and where a case is made out for affording protection to the subject matter of litigation.

(iv) *Prima facie* the Appellant was impecunious. It was a shell company whose business activities had come to an end. It was not possessed of any property movable or immovable and certainly not in India. In the event of NHAI succeeding in its counter claims, in whole or in part, it would be practically impossible for NHAI to recover the awarded sum from the Appellant. Although the Appellant could not be attributed motives of defeating the recovery of NHAI's counter claims, yet facts existed which supported the findings arrived at by the Tribunal on the averments of NHAI.

(v) The Appellant was asked to furnish security for the differential amounts of the counter claims and the claims as an interim measure "in the peculiar facts and circumstances of this case".

11. The Court has heard the submissions of Mr. Ciccu Mukhopadhaya, learned Senior counsel appearing for the Appellant and Mr. Parag P. Tripathi, learned Senior counsel appearing on behalf of NHAI.

Scope of Section 17 and Section 9

12. The scope and powers of the Tribunal under Section 17 of the Act is one of the central issues that arise for determination in the present appeal. Section 17 of the Act reads as under:

> **"S. 17 Interim measures ordered by arbitral tribunal.-**(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute.
>
> (2) The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under sub-section (1)."

13. The interim measure of protection under Section 17 of the Act has to be understood with reference to the "subject-matter of the dispute". A plain reading of the provision shows that an arbitral Tribunal can in exercise of its powers thereunder direct a party "to take any interim measure of protection" "in respect of the subject-matter of the dispute". The words "take" and "protection" give an indication as to the legislative intent behind the words "subject-matter of the dispute." The protection envisaged is in relation to some tangile property and not an indeterminate monetary claim.

14. The scope of the powers of an arbitral Tribunal under Section 17 of the Act has been explained by the Supreme Court in **MD, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd.** (2004) 9 SCC 619 as under (SCC, p.649):

> "58. A bare perusal of the aforementioned provisions would clearly show that even under Section 17 of the 1996 Act the power of the arbitrator is a limited one. He cannot issue any direction which would go beyond the reference or the arbitration agreement. Furthermore, an award of the arbitrator under the 1996 Act is not required to be made a rule of court; the same is enforceable on its own force. Even under Section 17 of the 1996 Act, an interim order must relate to the protection of the subject matter of dispute and the order may be addressed only to a party to the arbitration. It cannot be addressed to other parties. Even under Section 17 of the 1996 Act, no power is

> conferred upon the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof."

15. The question whether scope of the power of the Tribunal under Section 17 of the Act is narrower than or as wide that of a Court under Section 9 of the Act calls for examination next. Section 9 of the Act reads as under:

> **"S. 9. Interim measures, etc. by Court.-**A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-
>
> (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or
>
> (ii) for an interim measure of protection in respect of any of the following matters, namely:-
>
> (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;
>
> (b) securing the amount in dispute in the arbitration;
>
> (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
>
> (d) interim injunction or the appointment of a receiver;
>
> (e) such other interim measure of protection as may appear to the Court to be just and convenient,
>
> and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

16. The view expressed by the Tribunal in the impugned orders that its powers under Section 17 are as wide as that of the Court under

Section 9 is not consistent with the earlier decisions of this Court. In **National Highways Authority of India v. M/s. China Coal Construction Group Corporation** AIR 2006 Delhi 134 this Court observed as under:

> "14...In my view, the powers under Section 9 available to the Court and the powers under Section 17 available to the Arbitral Tribunal to make interim measures are independent. There may be some degree of overlap between the two provisions but the powers under Section 9 are much wider inasmuch as they extend to the period pre and post the award as well as with regard to the subject matter and nature of the orders..." (Emphasis added)

17. Likewise, in **Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.** 153 (2008) DLT 604 it was observed as under:

> "36...despite the overlap between the powers under Section 17 and Section 9 of the Arbitration and Conciliation Act, 1996, it is apparent that the powers under Section 9 of the Act are much wider inasmuch as they extend to period 'pre-and post-the award' as well as with regard to subject matter and nature of orders." (Emphasis added)

18. This Court is of the view that to the extent that there is a clear enunciation in Section 9 of the types of interim relief that can be granted it does appear that powers of the Court thereunder are by their very nature wider than the powers of a Tribunal under Section 17 of the Act. Therefore, it is not possible to accept the contention of NHAI, which found favour with the Tribunal in the instant case, that the powers of the Tribunal under Section 17 are as wide as that of the Court under Section 9 of the Act and that the principle underlying Section 9 of the Act would ipso facto be applicable to Section 17 of the Act.

'Subject-matter of dispute'

19. However, for examining the question as to what could constitute the 'subject-matter of the dispute' in the context of Section 17 of the Act, it would be useful to draw a comparison with Section 9 of the Act. A reading of the various sub-clauses of Section 9 makes it apparent that a distinction has been drawn between the words 'subject-matter of the dispute' [used in Section 9 (ii) (a) and (c)] and 'amount in dispute' [used in Section 9 (ii) (b)]. It is arguable that where the legislature in the same

provision uses the words 'subject-matter of the dispute' in two sub-clauses and uses the words 'amount in dispute' in another sub-clause it intends to draw a distinction between the two. When Section 9(ii)(a) use the words 'subject matter of the dispute', they refer to 'goods' in respect of which there could be an order of 'preservation' or 'interim custody'. The same words in Section 9(ii)(c) refer to 'any property or thing' in respect of which there could be an order of 'detention, preservation or inspection of.' Where the claim is of a monetary nature Section 9 (ii) (b) talks of 'securing the amount in dispute in the arbitration.' By the same analogy the words 'subject-matter of the dispute' in Section 17 should be understood as referring to a tangible 'subject matter of dispute' different from an 'amount in dispute'.

Security in relation to a definitive and not an indeterminate monetary claim

20. Notwithstanding the above legal position, considering that the reliefs sought by the Appellant in its claim and by NHAI in its counter claims are monetary in nature, even if the language of the words 'subject matter of the dispute' in Section 17 are taken to include monetary claims, the provision of 'security' in relation to such subject matter can perhaps be in the form of providing a bank guarantee. However, a direction of that nature at an interlocutory stage would indeed be an extraordinary one and has to necessarily be preceded by a determination of the possible extent of the claim that is likely to be awarded. In other words, the power of the Tribunal under Section 17 of the Act, even if assumed to be as wide as that of the Court under Section 9 of the Act, cannot extend to directing the provision of security in the form of a bank guarantee in relation to a speculative claim for damages.

21. In **Shin Satellite Public Co. Ltd. v. Jain Studios Ltd.** it was held that the expression "amount in dispute" in Section 9(ii)(b) had different connotation and that it should not be used to enable a person "to recover the sums on account of damages in advance" even if the liabilities are in dispute. It was further observed that "it is probable that the Court alone and not the Arbitrator, has power to make such an order" for providing a bank guarantee. Consequently, even if in the impugned orders the Tribunal has observed that language of Section 17 is wide, it would extend to requiring a party to furnish security for a claim that is yet to be adjudicated. The expression 'any interim measure of protection'

cannot obviously be stretched to include providing security for the entire possible sum of damages that could be awarded even at a stage when there is no reason or determination of what that amount might be.

22. The legal basis for the above conclusion can be traced to the decisions concerning the grant of interim mandatory injunctions that can be ordered by a civil court. In **Jabed Sheikh v. Taher Mallick** AIR 1941 Calcutta 639 it was explained that a claim for money does not per se become "a suit for enforcement of a debt. The Defendant could not be regarded as a debtor either before or after the institution of the suit till a decree is passed against him making him liable for a definite sum".

23. Likewise, in **Iron & Hardware (India) Co. v. Firm Shamlal & Bros.** AIR 1954 Bom 423, Chief Justice Chagla of the Bombay High Court explained as under:

> "Before it could be said of a claim that it, is a debt, the Court must be satisfied that there is a pecuniary liability upon the person against whom the claim is made, and the question is whether in law a person who commits a breach of contract becomes pecuniarily liable to the other, party to the contract. In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party." (Emphasis added)

24. The above legal position was reiterated by the Punjab & Haryana High Court in **S. Milkha Singh v. M/s. N.K. Gopala Krishna Mudaliar** AIR 1956 Punjab 174. In **Union of India v. Raman Iron Foundry** (1974) 2 SCC 231, the Supreme Court cited all the above decisions with approval and held:

> "11...a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach becomes entitled to a debt due from the other party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages.

> That is not an actionable claim and this position is made amply clear by the amendment in Section 6(e) of the Transfer of Property Act, which provies that a mere right to sue for damages cannot be transferred..."

25. The decision in **Raman Iron Foundry** was overruled in **M/s. H.M. Kamaluddin Ansari & Co. v. Union of India** (1983) 4 SCC 417 on another point "that the clause in the contract applied to a claim itself and not only to an amount due". However, on the nature of the claim for damages the decision in **Raman Iron Foundry** has not been overruled and is good law.

26. Reverting to the case on hand, at the stage at which the impugned orders were passed by the Tribunal, it did not have any reasonable basis to conclude that NHAI would somehow succeed entirely in its counter claims as much as the Appellant would in its claim. If as the Tribunal has done in the instant case, security is ordered to be provided by a Claimant even at the interlocutory stage for the amount constituting the difference between the claim and the counter claims, without even a prima facie determination as to the likelihood of success of the counter claims, then it might result in severe prejudice being caused to a Claimant who has a reasonable chance of success in his claim. For instance, a Claimant with a reasonably good prima facie case for a claim of Rs.10 crores, may have been reduced to penury on account of the failure to recover that sum. His claim can be defeated by a Defendant with a counter claims for say Rs.100 crores who is able to obtain an interim order requiring the Claimant to furnish security for the differential amount of Rs. 90 crores. That would cause severe prejudice and have a chilling effect on the ability of the Claimant to pursue his claim.

27. Consequently, in the circumstances of the present case, the Court is unable to sustain the impugned orders with reference even to the principles analogous to those governing the power of the Court under Section 9 of the Act.

Order XXXVIII Rule 5 CPC

28. The impugned orders also do not appear to be supportable on the principles underlying the grant of an order of 'attachment before judgment' under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 ('CPC'). The said provision reads as under:

"5. Where defendant may be called upon to furnish security for production of property.

(1)Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that maybe passed against him,-

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

(4) If an order of attachment is made without complying with the provisions of sub-rule (1) of this rule such attachment shall be void."

29. The essential condition for the party seeking relief under Order XXXVIII Rule 5 CPC is to show that the Defendant is about to dispose of or to remove the whole or any part of his property from the local limits of the Court. In the instant case it is admitted by both parties that the Appellant is impecunious. The question of the Appellant removing any property from the jurisdiction of the Court simply did not arise.

30. In **Raman Tech. & Process Engg. Co. v. Solanki Traders** (2008) 2 SCC 302 the Supreme Court explained why the power of ordering attachment before judgment under Order XXXVIII Rule 5 CPC was 'drastic'. For such an order to be passed the Plaintiff had to satisfy

the Court that it had a prima facie case. It was only thereafter that the Court would proceed to the next stage of examining whether the interests of the Plaintiff should be protected. It was explained as under:

> "5. The power under Order XXXVIII Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order XXXVIII Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order XXXVIII Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realized by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out-of-court settlements under threat of attachment." (Emphasis added)

31. In **Rajender Singh v. Ramdhar Singh** (2001) 6 SCC 213 the requirement of the Plaintiff having to satisfy the conditions of Order XXXVIII Rule 5 was again emphasised. The decisions in **M/s. Global Company v. M/s. National Fertilizers Ltd.** AIR 1998 Delhi 397, **Goel Associates v. Jivan Bima Rashtriya Avas Samiti Ltd.** 114 (2004) DLT 478 (DB), **Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.** (2007) 7 SCC 125 and **Simplex Infrastructures Ltd. v. National Highways Authority of India** (decision dated 14th January 2011 in FAO (OS) No. 200 of 2010) are to the same effect.

32. This Court is not satisfied that the Tribunal in the instant case paid sufficient attention to the requirements of NHAI having to satisfy the conditions for availing of the relief under Order XXXVIII Rule 5 CPC. Where even the Court exercising power under Section 9 of the Act has to be guided by the principles of the CPC then afortiori an interim order by a Tribunal requiring furnishing of security for the monetary amount of claim by one party had to satisfy the requirement of Order XXXVIII Rule 5 CPC.

33. The decisions relied upon by NHAI to the effect that the power under Section 9 is not hedged in by the requirement so of Order XXXVIII Rule 5 CPC are distinguishable in facts. In **National Shipping Company of Saudi Arabia v. Sentrans Industries Ltd.** AIR 2004 Bom 136 the Bombay High Court was dealing with a petition under Section 9 of the

Act and emphasized that the powers of the Court thereunder were not limited by the provisions of the CPC. In that context it was observed that the power under Section 9 (ii) (b) was very wide and had to be guided by the paramount consideration that the party having a claim adjudicated in its favour ultimately by the Tribunal, is in a position to get fruits of such adjudication and on executing the award. In **Delta Construction Systems Ltd., Hyderabad v. Narmada Cement Company Ltd.,** Mumbai 2002 (2) Arb.LR 47 (Bombay), it was stated that the Court would not be bound by the requirement of Order XXXVIII Rule 5 while considering an application under Section 9 of the Act and it would not be necessary for the Court when called upon to secure the amount in dispute to find out whether the Respondent before it is seeking to dispose of the property or taking the property outside the jurisdiction of the Court. It is important to recall that these decisions were in the context of the power of a Court under Section 9 and not of the Tribunal under Section 17 of the Act. The decision of this Court in **Steel Authority of India Ltd. v. AMCI Pty. Ltd.** 2011 (3) Arb.LR 502 (Delhi) was also in the context of Section 9 of the Act. Moreover, it was at the post-Award stage where the claim had already been adjudicated.

Prima Facie Case

34. The grant of interim relief under Section 17 of the Act was required to be preceded by a determination that the party seeking interim relief has a prima facie case. In the context of applications seeking interim injunctions in civil suits, this legal requirement has been underscored by the Supreme Court in **Kashi Math Samsthan v. Shrimad Sudhindra Thirtha Swamy** (2010) 1 SCC 689 and **Ajay Mohan v. H.N. Rai** (2008) 2 SCC 507.

35. In the instant case, the impugned orders do not reveal that the Tribunal satisfied itself that a prima facie case had been made out by NHAI to justify the grant of a 'drastic' interim order requiring the Appellant to furnish security for the counter claims of the NHAI. The bulk of the counter claims of NHAI pertained to damages which were yet to be established. The Tribunal also did not deal with the contention of the Appellant that NHAI's counter claims were time barred; that it was not preceded by a notice from NHAI invoking the arbitration clause; that it was preferred by NHAI on 31st May 2010 long after the arbitration agreement was entered into on 20th November 2008 and that NHAI was

aware of the extent of its counter claims on 15th May 2007 itself when it rejected the Appellant's final bill. Also the fact that NHAI filed the applications under Section 17 on 3rd October 2011, two years after the first hearing in the arbitration proceeding on 12th September 2009 was also not considered by the Tribunal.

Order XXV CPC does not apply

36. Although NHAI sought to support its applications on principles 'analogous' to Order XXV CPC, the Tribunal does not appear to have dealt with the question of the applicability of that provision which deals with providing security for costs. It does not envisage provision of security for counter claims.

37. In **Vinod Seth v. Devinder Bajaj** (2010) 8 SCC 1 the Supreme Court explained that Order XXV Rule 1 CPC "only enables the Court to require the Plaintiff to furnish security for payment of costs incurred or likely to be incurred by the Defendant". This Court in **New Machine Co. Ltd. v. SB Air Controls Pvt. Ltd** (decision dated 13th February 2009 in I.A. No. 6532 of 2006 in CS (OS) No. 493 of 2006) held as under:

> "11. It appears from the provisions of Order XXV that at any stage of the suit, the court after assigning reason may direct any security for payment of costs, if incurred or likely to be incurred by the defendant and pass such order if the plaintiff does not reside and possess any immovable property within India other than the property in the suit. It is clear from the said provision that it is not a mandatory provision that in every case of such a nature the court must direct the plaintiff to furnish security for costs. The mandate of this provision is that in case, the court is satisfied that there is no resource to recover the cost incurred and likely to be incurred by defendant in the facts and circumstances of a particular case, it can pass the orders to the plaintiff for furnishing security. The court has to exercise its discretion as per the merits of each case, depending upon its own circumstances."

Question of financing of litigation

38. The contention of NHAI is that the Appellant is a shell company comprising of Intertoll ICS Pvt. Ltd., and Intertoll (Pty) Ltd., a company registered in South Africa which was fully under the control of another

group called Group Five which was a global multinational corporation ('MNC') and the third entity comprising the JV was CE Constructions Ltd. which subsequently ceased to be part of the JV. The balance sheet of the Appellant showed that it did not have sufficient funds. It was obvious therefore that some other agency was funding the present litigation. The Appellant was "nothing more than a smoke screen created to hedge the losses in case the Appellant loses the litigation". It was suggested that in all probability the Appellant was pursuing the claim on behalf of Intertoll (Pty) Ltd., the parent company. In this context it is urged that NHAI never waived the requirement of the Appellant having to provide a parent performance guarantee under Clause 10.16.5. It is submitted that if an Award is passed in favour of NHAI, the Appellant will not be able to satisfy it as it had no assets. Therefore, the only way NHAI could recover the awarded amount is to seek liquidation of the Appellant. This would be futile since the Appellant's net worth was negative. After dragging NHAI into litigation the Appellant would end up not having even to pay costs.

39. The argument advanced on behalf of NHAI about the Appellant not disclosing its source of funding appears to overlook the fact that a separate application filed by NHAI before the Tribunal to direct the Appellant to disclose its source of fund was in fact rejected by the Tribunal. Secondly, the Appellant is a JV and a separate entity constituted solely for the purposes of executing the contracts in question. With the termination of the contracts, there was no business left for the JV to conduct and, therefore, it obviously lost its substratum. However, there is no case made out at this stage by NHAI for lifting the veil and insisting that security should be furnished either by the Appellant or the parent company only because there is a possibility that it might be financing the litigation.

40. The Court notices that the above submissions do not appear to have been made by NHAI before the Tribunal. In any event it is not noted by the Tribunal in its impugned orders. Normally the Court would not permit such a plea to be advanced for the first time before the Court. The parent company was never called upon by NHAI to furnish a guarantee in terms of Clause 10.16.5 at any time before or after the termination of the contract. With the contract itself having been terminated, the stand of the NHAI that it could still ask for the parent corporate guarantee

appears to be misconceived. There is no privity of contract between the parent company and NHAI. Certainly no arbitration agreement has been entered into with it. Therefore the Tribunal could not have under Section 17 of the Act passed an order binding the parent company or being made enforceable against it.

41. The requirement of the Appellant having to furnish a parent company guarantee was not mandatory. When the bid was submitted without such guarantee it was accepted by the NHAI without objection and, therefore, NHAI is estopped from relying on Clause 10.16.5. Moreover after the contracts themselves were terminated more than seven years ago, there was no question of the Appellant furnishing any parent company guarantee. The failure of the Appellant to furnish a parent company guarantee was not a ground for termination. In any event, relief could not be sought against the South African company, Group Five which is not a party to the arbitration. Reference in this regard could be made to the decision in **Indowind Energy Ltd. v. Wescare (India) Ltd.** (2010) 5 SCC 306. Clause 10.16.5 could not cover the so-called holding company of the Appellant. A subsidiary company could never have been in a position to compel its parent company to do anything. Order XXXIII CPC also has no applicability. There is no question for lifting the corporate veil and passing any liability on to the holding or parent company of the Appellant.

Enforceability of an order under Section 17

42. Another aspect of the matter is that of enforceability of the interim order of the nature passed by the Tribunal. When clearly the Tribunal notes that the Appellant is impecunious, how did the Tribunal accept the Appellant to be able to furnish security for such huge sums? And what is the consequence of the Appellant not being able to furnish security as ordered by the Appellant? There is no provision in the Act which states that above failure by a party to comply with an order of additional security under Section 17 of the Act, its claim would be rejected. Then what would be the purpose of passing such an order at all? In any event once it is obvious that the impecuniousness of the Appellant prevents it from honouring the impugned orders of the Tribunal, it would be beside the scope of the powers of the Tribunal under the Act to reject the claim of the Appellant only on that ground.

No case for remand

43. The Court is satisfied that there was no basis whatsoever for the Tribunal to simply subtract the amount of claim from the amount of the counter claims and to ask the Appellant to furnish the security for the difference. This is pre-judging the whole issue and proceeds on the basis that NHAI is going to entirely succeed in its counter claims. Even on this short ground the impugned orders of the Tribunal requiring the Appellant to furnish security for the sums as ordered cannot be sustained in law.

44. As regards the submissions of Mr. Tripathi that limited to the above aspect the matter should be remanded to the Tribunal, this Court is not inclined to pass such an order for the reasons that even otherwise no prima facie case had been made out by the NHAI for grant of interim relief in the manner prayed for by it under Section 17 of the Act.

Conclusion

45. For the aforementioned reasons, this Court sets aside the impugned orders dated 6th February 2012 passed by the Tribunal and allows Arbitration Appeal Nos. 5 and 6 of 2012 with costs of Rs.20,000 in each appeal which will be paid by the NHAI to the Appellant within four weeks.

46. In view of the above order, Application Nos. 22361 and 22363 of 2012 are rendered infructuous and are disposed of as such.

ILR (2013) II DELHI 1038
COMPANY APPEAL (SB)

SANJAY GAMBHIR & ORS. ....APPELLANTS

VERSUS

D.D. INDUSTRIES LIMITED & ORS. ....RESPONDENTS

(S. MURALIDHAR, J.)

COMPANY APPEAL (SB) NO. : 100/2012 **DATE OF DECISION: 05.02.2013**

Company Law—Companies Act, 1956—Section 10F, Section 169, Section 171 Section 186, Section 189 Section 283(1)(i), Section 295, Section 299, Section 300, Section 397, Section 398, Section 402 and Section 403; Code of Civil Procedure (CPC), 1908—Rule 1, Rule 2 and Section 151. What is the scope of interference by Court in Appeal under Section 10F of the Companies Act, 1956? Held: The scope of interference by the Court in an appeal under Section 10F of the Act is limited to examining substantial questions of law that arise from the order of the CLB. Further, the only other basis on which the appellate Court would interfere under Section 10F was if such conclusion was (a) against law or (b) arose from consideration of irrelevant material or (c) omission to consider relevant materials. Whether the impugned order of the CLB overlooks the mandatory requirement of law under Section 169 and 186 of the Companies Act, 1956? Held-There is nothing to indicate that while exercising the powers under Sections 402 or 403 of the Act, the CLB has to necessarily account for the mandatory requirements or other provisions like Sections 169 or 186 of the Act. The language in fact appears to indicate to the contrary. It permits the CLB to pass orders as long as it is in the interests of the proper conduct of

the affairs of the company and it is "just and equitable" to pass such order. Thus, it is untenable that the requirement of a group of shareholders desiring the convening of an EGM having to first make a requisition to the BOD is mandatory and in circumstance can be dispensed with, even by the CLB while making an order under Section 403 of the Act. Appeal dismissed.

Important Issue Involved: "Scope of interference by the Appellate Court under Section 10F is limited to examination of substantial question of law".

"It is not necessary that while exercising the powers under Sections 402 or 403 of the Act, the CLB has to necessarily account for the mandatory requirements or other provisions like Sections 169 or 186 of the Act."

[As Ma]

APPEARANCES:

FOR THE APPELLANTS : Mr. K. Datta with Mr. Manish Srivastava and Mr. Diggaj Pathak, Advocate.

FOR THE RESPONDENTS : Mr. Vibhu Bakhru, Senior Advocate with Mr. Akshay Makhija and Ms. Liza M. Baruah, Advocates.

CASES REFERRED TO:

1. *V.S. Krishnan* vs. *Westfort Hi-tech Hospital Ltd.* (2008) 3 SCC 363 (SCC p. 374).
2. *PPN Power Generating Co. Ltd.* vs. *PPN (Mauritius) Co.* 2005 (3) Arb.LR 354 (Madras).
3. *Stephen Anthony Monnington* vs. *Easier PLC* (2005) EWHC 2578 (Ch).
4. *Company Law Board in B. Mohandas* vs. *A.K.M.N. Cylinders (P) Ltd.* Vol. 93 (1998) Company Cases 532 (CLB).

5. *Shailesh Harilal Shah* vs. *Matushree Textiles Ltd.* (1995) Vol 82 Company Cases 5 (Bom).
6. *R. Rangachari* vs. *S. Suppiah* AIR 1976 SC 73.
7. *Bengal and Assam Investors Limited* vs. *J.K. Eastern Industries* Private Limited 1956 Calcutta 658.

RESULT: Appeal Dismissed.

S. MURALIDHAR, J.

1. The challenge in this appeal under Section 10 F of the Companies Act, 1956 ('Act') is to an order dated 22nd November 2012 passed by the Company Law Board ('CLB') in Company Application No. 417 of 2012 filed by Respondents 3 & 4 in Company Petition No. 92 (ND) of 2010.

Background facts

2. The background of the present appeal is that Appellant No. 1, Mr. Sanjay Gambhir, Appellant No. 2, Mrs. Reena Gambhir, wife of Appellant No.1, and Appellant No. 3 Mr. Kanish Raaj Gambhir, son of Appellant No. 1, along with Mr. Karan Gambhir, son of Mr. Surinder Kumar Gambhir and brother of Appellant No. 1, held 33% share holding of D.D. Industries Limited ('DDIL'), Respondent No.1. Mr. Karan Gambhir is the Managing Director ('MD') of DDIL since the year 2005.

3. DDIL was initially incorporated under the Act on 30th March 1974 as Daulat Ram Dharam Bir Auto Private Limited. Later it was converted into a public limited company with the changed name of Daulat Ram Dharam Bir Auto Limited. Subsequently, the name was further changed to DDIL with a fresh certificate of incorporation, dated 10th May 1999, issued by the Registrar of Companies ('ROC'), Delhi and Haryana.

4. DDIL is a closely held company. Its entire share holding was initially held by the family members of late Mr. Dharambir Gambhir, late Mr. Subhash Gambhir and Mr. Surinder Gambhir (Respondent No.2). Pursuant to a family settlement Respondent No. 2 and his family became promoters of DDIL from 1993 onwards. Two of the sons of Respondent No.2, viz., Mr. Sanjay Gambhir (Appellant No.1) and Mr. Rajiv Gambhir (Respondent No.3) took over the running of the business. DDIL became a dealer of Maruti Suzuki in the year 1996. It is claimed that it is one

of the successful dealers of Maruti Suzuki and has won awards. In the year 2005, the family decided to venture into real estate. Through a subsidiary company, D.D. Properties Private Limited ('DDPPL'), a large parcel of land was acquired in association with other family owned companies for an amount of approx. Rs.40 crores. It is claimed by the Appellants that the said amount was given as a loan to DDPPL with the understanding that it would be converted into equity and thereby DDPPL would become a subsidiary of DDIL. According to the Appellants, since April 2010 Mr. Rajiv Gambhir, Respondent No.3 in connivance with Respondents 2 (Mr. Surinder Gambhir, father of Appellant No.1 and Respondent No.3) and Mr. Kunal Gambhir, Respondent No.4 (son of Mr. Rajiv Gambhir) started diverting DDIL's business of sale of CNG kits to outsiders upon receiving commission and that this was harming DDIL's business. Allegations of betrayal of trust and faith have been levelled by the Appellants against Respondents 2 to 4. It is alleged that with a view to take illegal control of Board of Directors ('BOD') of DDIL, Respondents 3 and 4 appointed four directors on 12th April 2010 without any prior notice to the Appellants. It is claimed that Respondents 2 to 4 sought to push their agenda of diluting the shareholding of the Appellants from 33% at present to an even smaller minority.

5. The Appellants state that the BOD of DDIL contained an equal number of representatives of the Appellant group ('A group') and of Respondents 2 to 4 ('B group'). Although the A group held only 33% shares they were always in majority in the BOD. On 8th April 2010, the A group appointed four additional directors. On 12th April 2010, the B group appointed four directors.

6. The resultant dispute led to Respondent No.4 filing CS (OS) No. 1158 of 2010 in this Court averring that board meetings of DDIL were held by the B group, including an Extraordinary General Meeting ('EGM') held on 30th March 2010 without notice to the A group. It is stated that Form 32 was unauthorizedly filed with the ROC stating that the directors of the B group had vacated office. The prayer in the suit was to declare the Board Resolutions dated 10th November 2009, 1st March 2010, 8th April 2010 and 21st May 2010 as well as the resolution and minutes of the EGM dated 30th March 2010 null and void, illegal, invalid and malafide. A permanent injunction was sought to restrain the A group or their agents, representatives, servants, or nominees from approaching any statutory authority including the ROC. The additional directors appointed

by the A group was sought to be restrained from representing themselves as directors of DDIL or changing the constitution of the BOD.

7. Mr. Karan Gambhir also filed a suit being CS (OS) No. 1297 of 2010 challenging the action of the BOD in seeking to take control of the management of DDIL by ousting the A group. In the suit it was prayed that the notice dated 6th June 2010 issued by Mr. Surinder Gambhir for the purpose of convening an EGM on 3rd July 2010 was illegal, unauthorized and should not to be given effect. A permanent injunction was also sought to restrain the B group from operating bank accounts or issuing any cheques without the signatures of Mr. Sanjay Gambhir. The A group also filed Company Petition No. 92 (ND) of 2010 in the CLB under Sections 397 and 398 of the Act against the B group. On 26th September 2010, the CLB passed an interim order to the effect that the resolutions passed at the Annual General Meeting ('AGM') dated 28th September 2010 shall be subject to the final outcome of the petition.

8. The Appellants (A group) contend that Mr. Surinder Gambhir, Mrs. Uma Kumari, Mr. Kunal Gambhir and Mr. Anil Bhaskar ceased to be directors of DDIL with effect from 28th March 2012 and that Mr. Rajiv Gambhir ceased to be a director with effect from 3rd July 2012. They contend that there was a deemed vacation of office by the directors representing the B group on the ground that in the Board meeting held on 28th March 2012 attended by Mr. Surinder Gambhir, Mr. Kunal Gambhir, Mrs. Uma Gambhir and Mr. Anil Bhaskar a resolution was passed by giving a corporate guarantee in respect of a loan granted by ICICI Home Finance to DDPPL. It is stated that, inasmuch as, Mr. Anil Kumar Bhaskar was an employee of DDPPL, he and Respondents 2 to 4 were interested in the contract of guarantee and should have, therefore, disclosed their interest in the proposed transaction. Inasmuch as they failed to do so, they were deemed to have vacated the office of directors and should have refrained from discussing and voting on the said resolution. Even when the minutes of meeting of 28th March 2012 were placed before the Board, Respondents 2 to 4 failed to disclose their interest. It is stated that not only were the directors bound to disclose their interest in such transactions under Section 299 of the Act, but were also debarred from discussing or voting under Section 300 of the Act. It is further stated that the resolution passed was in contravention of the provisions of Sections 299 and 300 of the Act. It could not have been passed without prior approval of the Central Government in terms of Section

295 of the Act. It is stated that on the vacation of office by five out of six directors, only one director, Mr. Karan Gambhir, remained and he convened a meeting on 24th July 2012 for the limited purpose of appointing two additional directors so that the quorum was properly constituted to hold further Board Meetings of DDIL.

9. Respondent No.3 filed I.A. No. 14084 of 2012 in CS (OS) No. 1297 of 2010 seeking to restrain the A group directors from entering or interfering in the peaceful possession in respect of various premises including F-1/9, Okhla Industrial Area, Phase-I, New Delhi. A large list of properties was made part of prayer 'a'. It was prayed that Board Resolution passed on 27th July 2012 or any of the earlier meetings concerning the subject matter should not be given effect to. It was prayed that the A group directors should not be permitted to upload any Forms/Resolutions pertaining to DDIL on the websites of the ROC. A direction was sought to restrain Appellant No.1 from using his digital signatures in any manner whatsoever and direct ROC to remove the Form 32 filed by him pursuant to the purported Board meeting and restore the status of the BOD as on 23rd December 2011. On 4th August 2012 Respondent No.2 filed CS (OS) No. 2363 of 2012 seeking similar reliefs. It is stated that the application filed by Respondent No.2 under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure ('CPC') is pending.

Proceedings in the CLB

10. Respondent Nos. 3 and 4 filed an application being C.A. No. 417 of 2012 dated 9th August 2012 in the CLB seeking the holding of an EGM of the shareholders of DDIL in the presence of an observer. They sought waiver of the statutory 21 days' advance notice to hold the EGM. It was prayed that ROC should initiate prosecution proceedings against the A group for filing forms containing information false to their personal knowledge misusing the digital signature.

11. Before the CLB, it was contended by the B group that the A Group was in a minority even with the shareholding of 33% whereas the B group was in the majority with a shareholding of 66%. It was contended that Mr. Karan Gambhir misused the digital signature and filed Form 32 with the ROC showing that Mr. Surinder Gambhir, Mr. Kunal Gambhir, Mrs. Uma Gambhir and Mr. Anil Bhaskar had vacated offices as directors on 28th July 2012. He filed another Form 32 on 22nd August 2012

showing Mr. Rajiv Gambhir as having vacated office as director on 3rd July 2012. Thereafter, Mr. Karan Gambhir appointed Mr. Kanish Raaj Gambhir (Appellant No.3) as additional director by filing Form 32. It was contended that the additional directors appointed by Mr. Karan Gambhir had no right to carry on their functions against the wish of the majority and that the affairs of DDIL were being run prejudicial to the interests of the majority. Therefore, they sought to hold an EGM.

12. The A group contended that in terms of Regulation 75 of Table –A of Schedule 1 of the Act, the BOD had been validly constituted with the additional directors appointed by Mr. Karan Gambhir. It was further contended that since this Court was already seized of the very issues raised in the pending suits, the CLB ought not to entertain the application. It was further submitted that a requisition ought to have been submitted by the A group in the first instance to the BOD under Section 169 of the Act requesting for an EGM. The A group submitted that the CLB could issue a direction for holding an EGM only when it came to the conclusion in terms of Section 186 of the Act that it was otherwise impracticable to hold such meeting.

Impugned order of the CLB

13. Dealing with the above contentions, it was observed by the CLB in the impugned order that the BOD meant "the board running at the wish of majority of the shareholders" and that it was pointless for the majority to have sent any notice to the BOD controlled by the A group under Section 169 of the Act. In such instance, the only hope that the shareholders had was to approach the CLB. As regards Section 186 of the Act, the CLB observed that a holistic approach had to be adopted. In order to restore corporate democracy, an EGM had to be called. The CLB further observed that its jurisdiction under Sections 397 and 398 of the Act was independent of the jurisdiction exercised by this Court in the civil suits. The B group was, therefore, not precluded from seeking reliefs as prayed for. It was observed that since Mr. Karan Gambhir would continue as MD no prejudice would be caused to the A group.

14. Accordingly, by the impugned order dated 22nd November 2012 the CLB allowed the said application and directed DDIL to call an EGM for holding election to the BOD within 15 days. An observer was also appointed to be present at the time of holding the EGM.

Submissions of counsel

15. There were three propositions advanced by Mr. K. Datta, learned counsel for the Appellants. He submitted that if the Act envisaged a certain procedure for performing an act, it had to be performed in that manner or not at all. The requirement of Section 169 of the Act could not have been dispensed with. Secondly, he submitted that Section 186 of the Act was in the nature of a special provision and had to be mandatorily complied with. The general power of the CLB under Section 403 of the Act was hedged in by the specific requirement of Section 186 of the Act. Even Section 151 CPC could not be invoked when there was a specific provision in the CPC itself. Thirdly he submitted that by allowing the application of the B group the CLB granted an interim relief that was outside the scope of the main petition. Further, the CLB had legitimized the appointment of the same persons who had demitted office as directors of DDIL thus rendering the proceedings in the suits in this Court infructuous. Mr. Datta insisted that the CLB should have placed certain safeguards to ensure that power of the majority to bring about the change was not unfettered. Reliance was placed by Mr. Datta on the decision of the Supreme Court in **R. Rangachari v. S. Suppiah** AIR 1976 SC 73, of the Calcutta High Court in **Bengal and Assam Investors Limited v. J.K. Eastern Industries Private Limited** 1956 Calcutta 658, of the High Court of Justice (Chancery Division Companies Court) in **Stephen Anthony Monnington v. Easier** PLC (2005) EWHC 2578 (Ch) and of the **Company Law Board in B. Mohandas v. A.K.M.N. Cylinders (P) Ltd.** Vol. 93 (1998) Company Cases 532 (CLB).

16. Countering the above submissions, Mr. Vibhu Bakhru, learned Senior counsel for the Respondents, submitted that the actions by Mr. Karan Gambhir in declaring on 24th July 2012 that four of the directors had demitted offices was unilateral. This was without any notice to the directors. This was followed by his misusing the facility of digital signature by uploading Form 32. The same device was used when he illegally appointed additional directors and presented the B group with a fait accompli. Mr. Bakhru questioned the veracity of the minutes of the meeting of BOD purportedly held on 24th July 2012. It was virtually a one-man meeting with only Mr. Karan Gambhir, who described himself as 'Director/Chairman', the only person in attendance. There was absolutely no validity to such a meeting. In the circumstances, it was useless to even send a notice under Section 169 of the Act to the BOD

for holding an EGM. The only option available to the B group was to approach the CLB. Referring to Section 299 of the Act, Mr. Bakhru submitted that under Section 283 (1) (i) of the Act, the office of director would become vacant if he acted in contravention of Section 299 of the Act. In the first place there had to be a determination of the violation of Section 299 of the Act. In the facts and circumstances of the case, the said provision was not attracted at all since the interest of the directors had been disclosed at an earlier meeting held on 28th March 2012. In any event there was no provision in the Act that prevented a director who was disqualified under Section 299 read with Section 283 (1) (i) of the Act from being subsequently appointed as such. There was in any event no warrant for the unilateral decision by Mr. Karan Gambhir that four of the directors of the B group had demitted office. Mr. Bakhru also submitted that the nature of the action under Sections 397 and 398 of the Act was derivative. There could be instances where, as in this case, a minority group of shareholders could oppress the majority. The power of the CLB under Section 403 of the Act was wide enough to issue directions for the proper administration of the affairs of DDIL. It was not circumscribed by Section 186 of the Act.

Decision in the appeal

17. The Court proposes first to consider the appeal filed against the impugned order dated 22nd November 2012 of the CLB. At the outset it must be noted that the scope of interference by the Court in an appeal under Section 10 F of the Act is limited to examining substantial questions of law that arise from the order of the CLB. It was explained by the Supreme Court in **V.S. Krishnan v. Westfort Hi-tech Hospital Ltd.** (2008) 3 SCC 363 (SCC p. 374) as under: "It is clear that Section 10-F permits an appeal to the High Court from an order of the Company Law Board only on a question of law i.e. the Company Law Board is the final authority on facts unless such findings are perverse, based on no evidence or are otherwise arbitrary. Therefore, the jurisdiction of the appellate court under Section 10-F is restricted to the question as to whether on the facts as noticed by the Company Law Board and as placed before it, an inference could reasonably be arrived at that such conduct was against probity and good conduct or was mala fide or for a collateral purpose or was burdensome, harsh or wrongful. The only other basis on which the appellate court would interfere under Section 10-F was if such conclusion was (a) against law or (b) arose from

consideration of irrelevant material or (c) omission to consider relevant materials."

18. In **PPN Power Generating Co. Ltd. v. PPN (Mauritius) Co.** 2005 (3) Arb.LR 354 (Madras), a Division Bench of the Madras High Court held that the High Court would interfere with an order of the CLB granting interim relief only where the CLB had acted perversely or had ignored the settled principles of law.

19. The narration of facts reveals that although the A group was in the minority as far as the shareholding of DDIL was concerned, they constituted a majority of the BOD till disputes arose between the parties. The A group in fact filed Company Petition No. 92 (ND) of 2010 under Sections 397 and 398 of the Act before the CLB alleging various acts of oppression and mismanagement. The A group filed an application seeking stay of a meeting of the BOD called by the B group for 29th June 2012. In the said application it was stated by the A group as under:

> "That the control of the Respondent No. 1 company is in the hands of the Respondent and their group of Directors, who are, at present, represented by five Directors on board and thus, in majority. The Petitioners and their group of Directors, at present, have only a single Director on Board and are thus, in minority. The Petitioners and their group of Directors have been slowly removed from the Board illegally, despite the fact that the Petitioners and their group of Directors are still holding 33% shareholding in the Respondent No. 1 Company. It is pertinent to mention that Petitioners Nos. 1, 2 and 3 have been removed illegally by the Respondent No. 1 Company."

20. There was therefore a clear acknowledgment by the A group that by that date their directors had been removed from the BOD of DDIL. Further, in para 9 it was acknowledged that "it is the admitted case of the Respondents that Mr. Karan Gambhir is the Managing Director of the Respondent No. 1 company and is as such fully incharge of the divisions under his control. However, the Respondents and their group of Directors are constantly causing hindrance in his discharging his responsibilities as a Managing Director." Interestingly, in para 12 of the application the A group mentions that a meeting of the BOD had been held on 28th March 2012 but does not state anything about the directors of the B group having failed to disclose their interest.

21. The said application by the A group also mentioned that the B group had filed CS (OS) No. 1158 of 2010 (**Kunal Gambhir v. D.D. Industries**) whereas the A group filed CS (OS) No. 1297 of 2010 (**Karan Gambhir v. D.D. Industries**). In CS (OS) No. 1297 of 2010 two separate applications were filed by both groups. An order had been passed by this Court on 20th January 2012 in the said applications directing the parties to exchange documents.

22. When the said application of the A group was listed before the CLB on 28th June 2012 the following order was passed by the CLB:

> "Petitioner filed an application to stay the Board meeting of the Respondent No. 1 Company scheduled to be held on 29.6.2012 and prays to remove Agenda Item Nos. 2, 3, 4, 5 and 6 from the Agenda of the Board meeting and for further orders as this Board may deem fit in the facts and circumstances of the case.
>
> Grievance of the Petitioner in the application is that company is going to issue Right shares at a price as agreed among Directors and to manage the shortage of funds and also to discuss the working style of Mr. Karan Gambir who is not the Petitioner in the petition.
>
> The Respondent made a submission that Mr. Karan Gambir is not a Petitioner in the Petition and litigation is pending in between Mr. Karan Gambir and Respondents herein before the Hon'ble High Court of Delhi and Mr. Karan Gambir and the Petitioner herein had defaulted in making payments to the company, thereby Respondents placed an agenda to discuss the proposal to augment funds by issue of right shares and to discuss the working style of Karan Gambhir.
>
> In view of the submissions made by both the parties, Respondents are at liberty to hold Board meeting scheduled to be held on 29th June 2012 and the resolution passed at the Board meeting shall be subject to the outcome of the petition.
>
> Accordingly application is disposed of. The matter will come up in the list as fixed earlier."

23. The above order was not appealed against or stayed. In light of the above order, there was no occasion for Mr. Karan Gambhir to

unilaterally hold a meeting of BOD on 24th July 2012 and declare the deemed vacation of office by the directors of the B group with reference to the meeting of the BOD held on 28th March 2012. Even while the CLB was seized of the petition of the A group, and this Court of the suits, there was no occasion to hold such meeting without seeking leave of either. Further it is extraordinary that a 'one-man' meeting was held by Mr. Karan Gambhir designating himself as Director/Chairman, without notice to the B group, declaring in the said meeting that they ceased to be directors. Mr. Karan Gambhir took a risk in proceeding with such unilateral action of doubtful validity. He persisted with it by using the digital signature in his capacity as MD to uphold Form 32 thus purporting to present the CLB and this Court with a *fait accompli*.

24. As rightly pointed out by Mr. Bakhru, the occasion for Mr. Karan Gambhir to invoke Section 283 (1) (i) read with Section 299 did not arise. A perusal of the minutes of the BOD meeting held on 28th March 2012 read with the notes accompanying the agenda for the meeting reveals that the *factum* of the exposure of DDIL to the loans advanced to DDPPL was disclosed. It was in the above circumstances that the B group filed Company Application No. 417 of 2012 seeking an order for convening an EGM of the shareholders of DDIL under the supervision of an Observer.

25. The question of law that arises for consideration in the present appeal is whether the impugned order of the CLB overlooks the mandatory requirement of law under Sections 169 and 186 of the Act as urged by the Appellants? Sections 169, 186 and 403 of the Act read as under:

> **"169. Calling of extraordinary general meeting on requisition.** (1) The Board of directors of a company shall, on the requisition of such number of members of the company as is specified in sub-section (4), forthwith proceed duly to call an extraordinary general meeting of the company.
>
> (2) The requisition shall set out the matters for the consideration of which the meeting is to be called, shall be signed by the requisitionists, and shall be deposited at the registered office of the company.
>
> (3) The requisition may consist of several documents in like form, each signed by one or more requisitionists.

> (4) The number of members entitled to requisition a meeting in regard to any matter shall be -
>
> (a) in the case of a company having a share capital, such number of them as hold at the date of the deposit of the requisition, not less than one-tenth of such of the paid-up capital of the company as at that date carried the right of voting in regard to that matter;
>
> (b) in the case of company not having a share capital, such number of them as have at the date of deposit of the requisition not less than one-tenth of the total voting power of all the members having at the said date a right to vote in regard to that matter.
>
> (5) Where two or more distinct matters are specified in the requisition, the provisions of sub-section (4) shall apply separately in regard to each such matter; and the requisition shall accordingly be valid only in respect of those matters in regard to which the condition specified in that sub-section is fulfilled.
>
> (6) If the Board does not, within twenty-one days from the date of the deposit of a valid requisition in regard to any matters, proceed duly to call a meeting for the consideration of those matters on a day not later than forty-five days from the date of the deposit of the requisition, the meeting may be called -
>
> (a) by the requisitionists themselves;
>
> (b) in the case of a company having a share capital, by such of the requisionists as represent either a majority in value of the paid-up share capital held by all of them or not less than one-tenth of such of the paid-up share capital of the company as is referred to in clause (a) of sub-section (4), whichever is less; or
>
> (c) in the case of a company not having a share capital by such of the requisitionists as represent not less than one-tenth of the total voting power of all the members of the company referred to in clause (b) of sub-section (4).
>
> Explanation. For the purposes of this sub-section, the Board shall, in the case of a meeting at which a resolution is to be proposed as a special resolution, be deemed not

to have duly convened the meeting if they do not give such notice thereof as is required by sub-section (2) of section 189.

(7) A meeting called under sub-section (6) by the requisitionists or any of them -

(a) shall be called in the same manner, as nearly as possible, as that in which meetings are to be called by the Board; but

(b) shall not be held after the expiration of three months from the date of the deposit of the requisition. Explanation. - Nothing in clause (b) shall be deemed to prevent a meeting duly commenced before the expiry of the period of three months, aforesaid, from adjourning to some day after the expiry of that period.

(8) Where two or more persons hold any shares or interest in a company jointly, a requisition, or a notice calling a meeting, signed by one or some only of them shall, for the purposes of this section, have the same force and effect as if it had been signed by all of them.

(9) Any reasonable expenses incurred by the requisitionists by reason of the failure of the Board duly to call a meeting shall be repaid to the requisitionists by the company; and any sum so repaid shall be retained by the company out of any sums due or to become due from the company by way of fees or other remuneration for their services to such of the directors as were in default."

.....

"186. Power of Tribunal to order meeting to be called. (1) If for any reason it is impracticable to call a meeting of a company, other than an annual general meeting, in any manner in which meetings of the company may be called, or to hold or conduct the meeting of the company in the manner prescribed by this Act or the articles, the Tribunal may, either of its own motion or on the application of any director of the company, or of any member of the company who would be entitled to vote at the meeting,-

(a) order a meeting of the company to be called, held and conducted in such manner as the Tribunal thinks fit; and

(b) give such ancillary or consequential directions as the Tribunal thinks expedient, including directions, modifying or supplementing in relation to the calling, holding and conducting of the meeting, the operation of the provisions of this Act and of the company's articles.

Explanation.—The directions that may be given under this sub-section may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

(2) Any meeting called, held and conducted in accordance with any such order shall, for all purposes, be deemed to be a meeting of the company duly called, held and conducted."

.....

"403. Interim order by Tribunal. Pending the making by it of a final order under section 397 or 398, as the case may be, the Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs, upon such terms and conditions as appear to it to be just and equitable."

26. As far as the power of the CLB to grant interim relief under Section 403 is concerned, it is power incidental to the power to order substantial reliefs as set out in Section 402. The width of the power is indicated by the words "any interim order which it thinks fit" and "such terms and conditions as appear to it to be just and equitable." The power is not limited by other provisions of the statute. Section 402 in fact begins with the words "Without prejudice to the generality of the powers of the Tribunal...". There is nothing to indicate that while exercising the powers under Sections 402 or 403 of the Act the CLB has to necessarily account for the mandatory requirements of other provisions like Sections 169 or 186 of the Act. The language in fact appears to indicate to the contrary. It permits the CLB to pass orders as long as it is in the interests of the proper conduct of the affairs of the company and it is "just and equitable" to pass such order. Whether in fact the order is justified will of course depend on the facts of each case.

27. It is not possible to accept the submission of the learned counsel for the Appellants that the requirement of a group of shareholders desiring the convening of an EGM having to first make a requisition to the BOD is mandatory and in circumstance can be dispensed with, even by the CLB while making an order under Section 403 of the Act. That interpretation would in fact be contrary to the legislative intent behind Sections 402 and 403 of the Act and dilute the power of the CLB to pass orders which it thinks to be just and equitable in the facts of a case, particularly when an impasse has been created by one group of shareholders making it pointless for the other group to even make such requisition. In **Bengal and Assam Investors Limited v. J.K. Eastern Industries Private Limited** it was acknowledged by the Calcutta High Court that when a Court directs a meeting to be held under Section 186 of the Act "it must necessarily modify or supplement the Articles or the Act." In similar circumstances, the Bombay High Court while interpreting Section 171 of the Act, held in **Shailesh Harilal Shah v. Matushree Textiles Ltd.** (1995) Vol 82 Company Cases 5 (Bom) that the requiremnent of 21 days' advance notice for holding an AGM was not mandatory notwithstanding the use of the word "shall" in that provision. As regards Section 186 of the Act, the Supreme Court in **R. Rangachari v. S. Suppiah** has explained that before ordering the convening of a meeting the CLB must be satisfied that it is not practicable to (a) call for, (b) hold and (c) conduct such meeting. Therefore it will have to be examined in the facts of each case, whether the three requirements were cumulatively met to justify an order by the CLB.

28. There is thus no difficulty in reconciling the provisions of Section 403 with Sections 186 and 169 of the Act. The facts and circumstances of each case will determine the extent to which it is practicable to hold meetings of a company. Where the unilateral acts of a MD representing a minority group of shareholders result in their capturing the BOD, a situation of a minority oppressing the majority can be said to exist. It would be futile for the majority shareholders to expect a meeting to be convened on their making a request to the BOD under Section 169 of the Act. These factors would weigh with the CLB while exercising its powers under Section 403 of the Act while considering the request to convene an EGM.

29. Turning to the case on hand, the requirement under Section 186 of the Act that it must be impracticable to call, hold and conduct a

meeting of a company, other than an AGM, can be said to be fulfilled in the above facts and circumstances. As rightly observed by the CLB, it was pointless for the B group to send a notice under Section 169 of the Act to the BOD comprised entirely of directors of the A group for convening an EGM. In all probability that request could have been rejected. In the face of the unilateral acts of Mr. Karan Gambhir, the B group was not acting unreasonably in anticipating rejection of their request by the BOD constituted only by the directors of the A group. The CLB in the impugned order has rightly distinguished the decisions relied upon by the Appellants, which were pressed into service in these proceedings as well.

30. As far as the question of the CLB building in safeguards into its decision is concerned, the minutes of the meeting of the EGM held under the supervision of the Observer shows Mr. Karan Gambhir continues as MD of DDIL. Thus the interests of the A group who continue as minority shareholders of DDIL and who are represented by Mr. Karan Gambhir on the BOD are accounted for.

Conclusion

31. Consequently, this Court is satisfied that no ground has been made out for interference with the impugned order dated 22nd November 2012 of the CLB. The appeal is, accordingly, dismissed with costs of Rs. 20,000 which will be paid by the Appellants to Respondents 2 to 4 within four weeks from today.

ILR (2013) II DELHI 1055
W.P. (CRL.)

S. KALYANI **....PETITIONER**

VERSUS

CENTRAL BUREAU OF INVESTIGATION **....RESPONDENT**

(G.P. MITTAL, J.)

W.P. (CRL.) NO. : 1673/2012 **DATE OF DECISION: 08.02.2013**

Constitution of India, 1950—Article 227—Code of Criminal Procedure, 1973—Section 482—Prevention of Corruption Act, 1988—Section 19 (3) (c)—Special Judge framed charges against petitioner—Writ Petition filed praying for quashing of charges—Stay of proceedings before Trial Court also prayed—Plea taken, in several cases which were relied upon by petitioner, proceedings in cases under PC Act were stayed by SC—Per contra plea taken, *Arun Kumar Sharma* is not applicable to facts of instant case as it is not borne out from said case if same was under PC Act—In rest of cases cited by counsel for petitioner, provisions of PC Act which specifically bar Court from staying proceedings before Trial Court were not considered—Held—In *Satya Narayan Sharma* contention raised before SC that bar under Section 19(3) (c) of Act would not exclude inherent power of HC to stay proceedings under PC Act was negated holding if enactment contains a specific bar then inherent jurisdiction cannot be exercised to get over that bar—In *Arun Kumar Jain,* a DB of this Court while analyzing provision of Section 19 about maintainability of a Revision Petition against order of framing charge under PC Act has held that Section 19(3) (c) clearly bars Revision against interlocutory order and framing of charge being

interlocutory order, a Revision will not be maintainable—Even if a Petition under Section 482 of Cr. P.C. or a Writ Petition under Article 227 of Constitution of India is entertained by HC, under no circumstance order of stay should be passed regard being had to prohibition contained in Section 19(3) (c) of PC Act—Petitioner's prayer for stay of proceedings before Trial Court cannot be entertained—Application dismissed.

Important Issue Involved: Petitioner's prayer for stay of proceedings before Special Judge during pendency of a Writ Petition for quashing of order passed by Special Judge framing charges cannot be entertained in view of prohibition contained in Section 19(3) (c) of P.C. Act, 1998.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Vijay Aggarwal, Mr. Gurpreet Singh, Mr. Mudit Jain & Mr. Bakul Jain, Advocates.

FOR THE RESPONDENT : Mr. Gautam Narayan & Mr. Nikhil A. Menon, Advocate.

CASES REFERRED TO:

1. *S.P. Saxena* vs. *CBI,* SLP (Crl.) 5782/2012, decided on 01.06.2012.
2. *Vikas Shukla* vs. *CBI,* Crl.MP No.16893, Crl. RP No.385/2012.
3. *Asia Resurfacing of Road Agency & Anr.* vs. *CBI,* SLP (Crl.) Appeal MP No.18586/2011, decided on 29.03.2011.
4. *Naveen kaushik* vs. *CBI,* SLP (Crl.) MP No.8858 decided on 30.03.2011.
5. *Anur Kumar Jain* vs. *CBI* (2011) 178 DLT 501 (DB).
6. *Abhay Singh Chautala* vs. *CBI,* SLP Appeal (Crl.) 7384/2010 decided on 22.10.2010.

7. *Arun Kumar Sharma & Ors.* vs. *UT Chandigarh & Anr.* 2005 (11) SCC 480.

8. *Satya Narayan Sharma* vs. *State of Rajasthan* (2001) 8 SCC 607.

9. *Indra Sawhney* vs. *Union of India* (2000) 1 SCC 168.

10. *Madhu Limaye* vs. *State of Maharashtra* (1977) 4 SCC 551.

11. *Janata Dal* vs. *H.S. Chowdhary* (1992) 4 SCC 305.

RESULT: Dismissed.

G.P. MITTAL, J. (ORAL)

CRL.MA 1055/2013 (for early hearing)

1. Since Crl.M.A.19331/2012 for stay is taken up for hearing, the application for early hearing is disposed of.

CRL.MA.19331/2012 (stay)

2. It is urged by the learned counsel for the Petitioner that the Petitioner has been falsely implicated in the case and he is innocent. Thus, the impugned order dated 24.04.2012 passed by the learned Special Judge ordering framing of charges against the Petitioner is liable to be set aside.

3. Learned counsel for the Petitioner contends that if the proceedings before the Trial Court are not stayed, his Writ Petition praying for quashing of the charges will become infructuous. In support of his contention, the learned counsel for the Petitioner places reliance on **Arun Kumar Sharma & Ors. v. UT Chandigarh & Anr.** 2005 (11) SCC 480 wherein the proceedings before the Trial Court were ordered to be stayed. The learned counsel for the Petitioner also relies on **Abhay Singh Chautala v. CBI,** SLP Appeal (Crl.) 7384/2010 decided on 22.10.2010; **Asia Resurfacing of Road Agency & Anr. v. CBI,** SLP (Crl.) Appeal MP No.18586/2011, decided on 29.03.2011; **Naveen Kaushik v. CBI,** SLP (Crl.) MP No.8858 decided on 30.03.2011; **S.P. Saxena v. CBI,** SLP (Crl.) 5782/2012, decided on 01.06.2012; and **Vikas Shukla v. CBI,** Crl.MP No.16893, Crl. RP No.385/2012, decided on 03.08.2012 wherein the proceedings in a case under the Prevention of Corruption Act, 1988 (P.C. Act) were stayed by the Hon'ble Supreme Court.

4. On the other hand, learned counsel for the CBI states that Arun Kumar Sharma is not applicable to the facts of the instant case as it is not borne out from the said case if the same was under the PC Act. It is urged that in rest of the cases cited by the learned counsel for the Petitioner, the provisions of Section 19 (3) (c) of the P.C. Act were not considered which specifically bars the Court from staying the proceedings before the Trial Court. The learned counsel for the CBI places reliance on **Satya Narayan Sharma v. State of Rajasthan** (2001) 8 SCC 607 wherein the Supreme Court dealt with the question of grant of stay of the proceedings before the Trial Court in a case under the P.C. Act and also interpreted the provisions of Section 19 (3) (c) of the P.C. Act.

5. The learned counsel for the CBI heavily relies on a Division Bench judgment of this Court in **Arun Kumar Jain v. CBI** (2011) 178 DLT 501 (DB) where also the question of staying proceedings before the Trial Court in a case under the P.C. Act was specifically dealt with and it was laid down that the High Court does not have any power to stay the proceedings.

6. I have given my thoughtful consideration to the respective contentions raised on behalf of the parties.

7. Arun Kumar Sharma did not deal with the question of stay of proceedings in a case under the P.C. Act. There were general observations about the stay of the proceedings when proceedings for quashment of the charges are initiated before the High Court. The question of bar under Section 19 (3) (c) of the P.C. Act was not before the Supreme Court in **Arun Kumar Sharma**.

8. It is true that in rest of the cases, relied upon by the learned counsel for the Petitioner, the proceedings before the Trial Court were stayed. In all these cases, question of bar created under Section 19 (3) (c) of the P.C. Act was neither raised nor decided by the Hon'ble Supreme Court. As against this in Satya Narayan Sharma a contention was raised before the Supreme Court that the bar under Section 19 (3) (c) of the P.C. Act would not exclude the inherent power of the High Court to stay the proceedings under the P.C. Act. The contention was negated by the Supreme Court holding that if the enactment contains a specific bar then inherent jurisdiction cannot be exercised to get over that bar. Paras 15, 17 and 29 of the report in Satya Narayan Sharma are extracted hereunder:-

"15. There is another reason also why the submission that Section 19 of the Prevention of Corruption Act would not apply to the inherent jurisdiction of the High Court, cannot be accepted. Section 482 of the Criminal Procedure Code starts with the words "Nothing in this Code". Thus the inherent power can be exercised even if there was a contrary provision in the Criminal Procedure Code. Section 482 of the Criminal Procedure Code does not provide that inherent jurisdiction can be exercised notwithstanding any other provision contained in any other enactment. Thus if an enactment contains a specific bar then inherent jurisdiction cannot be exercised to get over that bar. As has been pointed out in the cases of **Madhu Limaye v. State of Maharashtra** (1977) 4 SCC 551, **Janata Dal v. H.S. Chowdhary** (1992) 4 SCC 305 and **Indra Sawhney v. Union of India** (2000) 1 SCC 168 the inherent jurisdiction cannot be resorted to if there was a specific provision or there is an express bar of law.

x x x x x x x x x

17. Thus in cases under the Prevention of Corruption Act, there can be no stay of trials. We clarify that we are not saying that proceedings under Section 482 of the Criminal Procedure Code cannot be adapted. In appropriate cases proceedings under Section 482 can be adapted. However, even if petition under Section 482 of the Criminal Procedure Code is entertained, there can be no stay of trials under the said Act. It is then for the party to convince the court concerned to expedite the hearing of that petition. However, merely because the court concerned is not in a position to take up the petition for hearing would be no ground for staying the trial even temporarily.

x x x x x x x x x

29. We are informed that several High Courts, overlooking the said ban, are granting stay of proceedings involving offences under the Act pending before Courts of Special Judges. This might be on account of a possible chance of missing the legislative ban contained in clause (c) of sub-section (3) of Section 19 of the Act because the title to Section 19 is "Previous sanction necessary for prosecution". It would have been more advisable if the prohibition contained in sub-section (3) had been included

in a separate section by providing a separate distinct title. Be that as it may, that is no ground for bypassing the legislative prohibition contained in the sub-section."

9. Similarly, in **Arun Kumar Jain** a Division Bench of this Court while analyzing the provision of Section 19 about the maintainability of a Revision Petition against an order of framing charge under the P.C. Act held that Section 19 (3) (c) clearly bars Revision against an interlocutory order and framing of the charge being interlocutory order, a Revision will not be maintainable. The Division Bench further held that even if a Petition under Section 482 of the Code of Criminal Procedure or a Writ Petition under Article 227 of the Constitution of India is entertained by the High Court, under no circumstance an order of stay should be passed regard being had to the prohibition contained in Section 19 (3) (c) of the P.C. Act.

10. In this view of the matter, the Petitioner's prayer for stay of the proceedings before the Trial Court cannot be entertained. The prayer is accordingly declined. The application is dismissed.

W.P.(CRL) 1673/2012

11. List on 15.03.2013, the date already fixed.

ILR (2013) II DELHI 1060
CRL. M.C.

NARENDRA KESHAVJI SHAH & ORS. ....PETITIONERS

VERSUS

THE STATE NCT OF DELHI ....RESPONDENTS

(G.P. MITTAL, J.)

CRL. M.C. NO. : 3538/2012 DATE OF DECISION: 11.02.2013

Code of Criminal Procedure, 1973—Section 482—Complainants invoked inherent powers of Court to

seek exemption from their personal appearance in the complaint case as they were residents of Mumbai and therefore inconvenient to appear in the Court at Delhi on each and every date of hearing. It was also urged that since they had undertaken to be represented through their counsel and their identity was not in dispute, their request for grant of exemption from personal appearance ought to have been allowed. Held —Relying on the case of *S.V. Muzumdar and Ors. v. Gujarat State Fertilizer Co. Ltd. and Anr.* (2005) 4 SCC 173, wherein the Supreme Court held that the Court must consider whether any useful purpose would be served by requiring personal attendance of the accused or whether progress of the trial was likely to be hampered on account of their absence granted exemption from personal appearance, exemption of the petitioners from attending every hearing was allowed subject to their filing an undertaking that they shall appear before the Trial Court through their counsel duly authorized.

In **S.V. Muzumdar** (supra) the Supreme Court held that the Court must consider whether any useful purpose would be served by requiring personal attendance of the accused or whether progress of the trial was likely to be hampered on account of their absence. The Hon'ble Supreme Court granted exemption from personal appearance with the observation that if the accused persons tried to delay the completion of the trial, the Trial Court shall be at liberty to refuse the prayer for dispensing with personal attendance. Relevant para of the report is reproduced below:-

> "Taking into account the fact that the cases have been pending for nearly a decade, we direct that the matter be taken up on 8th of August, 2005 by the trial Court. If the appellants file applications in terms of Section 205 of the Code for dispensing with their personal attendance, the trial Court will do to take note of the same and dispense with the personal attendance by stipulating conditions in terms of Section 205(2) of the Code. It has to be borne in mind that while dealing with an application in terms of Section 205 of the Code, the Court has to consider whether any useful purpose would be served by requiring the personal attendance of the accused or whether progress of the trial is likely to be hampered on account of his absence. We make it clear that if at any stage the trial Court comes to the conclusion that the accused persons are trying to delay the completion of trial, it shall be free to refuse the prayer for dispensing with personal attendance. The trial Court would do well to complete the trial by the end of November, 2005. The parties shall co-operate in that regard. We make it clear that we have not expressed any opinion on the merits of the case." **(Para 6)**

Important Issue Involved: If the accused person himself does not wish to avail of the right of personal appearance on every date and reposes the fullest confidence in the Court and in his advocate, and is confident that justice will be meted out to him even in his absence, then, provided his absence does not prejudice him in any way or hinder the progress of the trial, it is not necessary for the Trial Court to insist on his presence.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS : Mr. Pradeep Dewan, Senior Advocate with Mr. Sunil Sethi and Ms. Anupam Dhingra, Advocates.

FOR THE RESPONDENTS : Mr. Prabhat K.C. and Mr. Rajpal Singh, Advocates for R-2 with Mr. Harnam Singh, respondent No. 2 in person.

CASES REFERRED TO:

1. *Chandramauli Prasad and Ors*. vs. *State of Delhi* (Crl.M.C.No.1303/2008) decided on 3.7.2008.
2. *S.V. Muzumdar and Ors. vs. Gujarat State Fertilizer Co. Ltd. and Anr.* (2005) 4 SCC 173.
3. *Geeta Sethi* vs. *the State (CBI),* 2001 II A.D. (Cr.) DHC 331.

RESULT: Application allowed.

G.P. MITTAL, J. (ORAL)

1. The Petitioners invoke inherent powers of this Court under Section 482 of the Code of Criminal Procedure and seek exemption from their personal appearance in the complaint case No.415/1/2000 titled **Prakash Kaur v. Everest Construction Company and others.**

2. According to the Petitioners they are permanent residents of Mumbai. A complaint under Sections 197/198/420/467/468/471/474 of the Indian Penal Code was filed against M/s. Everest Construction Company and its partners on the premise that certain sums of money were paid by the respondent No.2 (complainant in the complaint case) for purchase of flat No.606, 6th Floor, Resham Towers at Prabha Devi, Bombay in pursuance of an agreement dated 13.10.1981. A civil suit for declaration being Suit No.82/1989 was filed by the complainant on the original side of Delhi High Court which was subsequently transferred to the District Court. According to the allegations made in the complaint the accused persons forged/fabricated/made a false document dated 30.07.1981 and thereby the Petitioners and other accused persons committed various offences under the IPC. It is stated that an application seeking exemption from personal appearance was moved by the accused persons by an order dated 16.08.2012. The exemption from personal appearance in respect of accused Nos. 2, 4 and 10 was granted on the ground that they (accused Nos. 2 and 10) were of advanced age and accused No.4 was not medically fit. The application for exemption from personal appearance in respect of the other accused persons i.e. the Petitioners herein was rejected by the learned Metropolitan Magistrate ("MM") on the ground that they have not been able to make out their case that they are unable to appear before the Court personally either on account of illness or on account of very old age.

3. The learned counsel for the Petitioners urges that the complaint was filed in the Court of learned "MM" sometime in the year 2000. All the Petitioners are residents of Mumbai and thus it is not practicable and rather it is very inconvenient to the Petitioners to appear in the Court at Delhi on each and every date of hearing. It is urged that since the Petitioners had undertaken to be represented through their counsel and their identity was not in dispute their request for grant of exemption from personal appearance ought to have been allowed. It is contended that an accused is expected to appear in the Court personally so that the proceedings may be conducted in his presence and no prejudice is caused to him. Once the Petitioners themselves gave an undertaking that they will be represented through their counsel there was no question of prejudice to the Petitioners and they should have been granted exemption from personal appearance. The learned senior counsel for the Petitioners places reliance on judgments of this Court in **Chandramauli Prasad and Ors v. State of Delhi** (Crl.M.C.No.1303/2008) decided on 3.7.2008 and **Geeta Sethi v. The State (CBI),** 2001 II A.D. (Cr.) DHC 331 and a report of the Supreme Court in **S.V. Muzumdar and Ors. v. Gujarat State Fertilizer Co. Ltd. and Anr.** (2005) 4 SCC 173.

4. The petition is opposed on behalf of Respondent No.2 (the complainant) on the ground that no special circumstance has been put forth by the Petitioners so as to grant them exemption from personal appearance.

5. It is not in dispute that all the Petitioners are residents of Mumbai. The criminal complaint was instituted sometime in the year 2000 and on filing of a petition under Section 482 of the Code of Criminal Procedure by the Petitioners and their co-accused the criminal complaint was quashed by a learned Single Judge of this Court by an order dated 28.05.2002. The said order was set aside by the Supreme Court by an order dated 17.08.2004 and the case was remanded back to this Court. Thereafter, by an order dated 07.12.2006 the petition under Section 482, CrPC was dismissed for want of prosecution. It is true that the accused persons who were of very advanced age and who was sick were granted exemption from personal appearance by the learned MM by an order dated 16.08.2012 whereas the Petitioners' request for exemption from personal appearance was rejected primarily on the ground that they were neither sick nor very aged.

6. In **S.V. Muzumdar** (supra) the Supreme Court held that the Court must consider whether any useful purpose would be served by requiring personal attendance of the accused or whether progress of the trial was likely to be hampered on account of their absence. The Hon'ble Supreme Court granted exemption from personal appearance with the observation that if the accused persons tried to delay the completion of the trial, the Trial Court shall be at liberty to refuse the prayer for dispensing with personal attendance. Relevant para of the report is reproduced below:-

> "Taking into account the fact that the cases have been pending for nearly a decade, we direct that the matter be taken up on 8th of August, 2005 by the trial Court. If the appellants file applications in terms of Section 205 of the Code for dispensing with their personal attendance, the trial Court will do to take note of the same and dispense with the personal attendance by stipulating conditions in terms of Section 205(2) of the Code. It has to be borne in mind that while dealing with an application in terms of Section 205 of the Code, the Court has to consider whether any useful purpose would be served by requiring the personal attendance of the accused or whether progress of the trial is likely to be hampered on account of his absence. We make it clear that if at any stage the trial Court comes to the conclusion that the accused persons are trying to delay the completion of trial, it shall be free to refuse the prayer for dispensing with personal attendance. The trial Court would do well to complete the trial by the end of November, 2005. The parties shall co-operate in that regard. We make it clear that we have not expressed any opinion on the merits of the case."

7. In **Chandramauli Prasad** (supra) a Coordinate Bench of this Court held that personal appearance of an accused is required in a criminal trial in order to avoid any prejudice to the accused. It was held that if the accused himself did not wish to avail the right of personal appearance on every date and reposed full confidence in the Court and in his advocate it is not necessary for the Trial Court to insist on his presence. Paras 13 and 14 of the report in **Chandramauli Prasad** (supra) are extracted hereunder:-

> "Provisions requiring the presence of the accused which mandate that the trial be held in his presence are enacted for the benefit of the accused and have their genesis in the limited approach of the legal system in England of the late 16th and early 17th Centuries that operated to the prejudice of the accused, such as the court of the Star Chamber. If the accused person himself does not wish to avail of the right of personal appearance on every date; if he reposes the fullest confidence in the court and in his advocate, and is confident that justice will be meted out to him even in his absence, then, provided his absence does not prejudice him in any way or hinder the progress of the trial, it is not necessary for the Trial Court to insist on his presence.
>
> In the case at hand, as already pointed out, the accused have undertaken not to raise any issues with regard to their identification, and also that they will present themselves whenever their personal appearance is required. They have also categorically stated that they have no objection in the court taking evidence in their absence."

8. In view of the above, the petition is allowed. The Petitioners are exempted from their personal appearance subject to their filing an undertaking that they shall appear before the Trial Court through their counsel duly authorized. On this behalf and that they shall appear in the Court at the time of framing of the charges and for recording of their statements under Section 313 of the Code of Criminal Procedure (if required) or on any other date when specifically directed by the Trial Court.

9. Pending applications stand disposed of.

10. A copy of the order be transmitted to the trial court for information and compliance.

ILR (2013) II DELHI 1067
CRL. M.C.

LALIT BHOLA **....PETITIONER**

VERSUS

NIDHI BHOLA & ANR. **....RESPONDENTS**

(G.P. MITTAL, J.)

CRL. M.C. NO. : 75/2012 & 2227/2012 **DATE OF DECISION: 12.02.2013**

Code of Criminal Procedure, 1973—Section 125—Petitions arise out of an order dated 09.12.2011 passed in C.R. No. 43/2011, whereby an interim maintenance of 12,000/- granted in favour of wife and 5,000/- granted in favour of Baby was reduced to 9,500/- and 3,000/- respectively. In Crl. M.C. 75/2012, the husband alleges that the overall maintenance of 12,500/- is excessive and arbitrary whereas the wife and the child in Crl. M.C. 2227/2012 says that the maintenance awarded is on the lower side. Held: There is not strict formula to award a particular percentage of the husband's income towards maintenance of the wife; normally the Courts have been taking 1/3rd of the husband's income towards maintenance of the wife. This may be increased keeping in view the circumstances of each case, like the number of persons to be maintained by the husband and other liabilities. The husband's income is claimed to be from three sources. First, the salary; second rental income from the property; and third, income by way of interest from the FDs left by the mother of the husband. Therefore the interim maintenance awarded can neither be said to be excessive nor on the lower side, and held to be reasonable.

Although, there is no strict formula to award a particular percentage of the husband's income towards maintenance of the wife, normally the Courts have been taking 1/3rd of the husband's income towards maintenance of the wife. This may be increased or decreased keeping in view the circumstances of each case, like the number of persons to be maintained by the husband and other liabilities. In **Sudhir Diwan v. Smt. Tripta Diwan & Anr.,** 147 (2008) DLT 756, 1/3rd of the husband's income was awarded towards the wife's maintenance. In **Jagdish Prasad Sharma v. Smt. Sangeeta Sharma,** 1987(2) Crimes 447, a maintenance of Rs. 225/- per month was awarded in favour of the wife on the husband's income of Rs. 602/- per month. **(Para 8)**

Turning to the facts of the instant case, the husband's income is claimed to be from three sources. First, the salary, second rental income from the property in Naveen Shahdara and third, income by way of interest from the FDs left by the mother of the husband. Admittedly, the marriage between the parties took place on 19.04.2007. The husband was appointed as a senior executive with M/s. I. Energizer on a monthly salary of Rs. 21,515/-. In the absence of any document produced by the wife to controvert the averments, the learned ASJ was right in holding the income from salary to be Rs. 21,515/- per month only. Although, the monthly income in the year 2010 was claimed by the husband to be Rs. 9,100/- per month, it is, however, difficult to believe that a person who was getting a salary of Rs. 21,515/- would leave the job to get a salary of Rs. 9,100/- per month. In any case, the employment with M/s Ken Computers Education loses any significance in view of the fact that during the pendency of this Petition, an application under Section 340 Cr.P.C. was moved by the Petitioner claiming that the husband had joined Genpact India and was getting a very high salary. Although, the husband initially denied his employment with Genpact India but a salary certificate was produced to show that he was getting a gross income of Rs. 24,384/-. The wife has not produced any document to belie

this salary slip for the month of July, 2012. Thus, the husband's salary cannot be taken to be above Rs. 24,384/- per month. **(Para 9)**

Some documents were filed to prove that certain FDs were left by mother of the husband, but it cannot be the exclusive property of the husband. Admittedly, the mother was survived by her husband, one son and four daughters. Thus, the income of the husband at the most could be a few thousand from interest on FDs(pertaining to his share) in addition to the salary of Rs. 24,384/- per month. The rental income of the father cannot be taken into consideration for award of maintenance to the wife. Father has got other responsibilities, including four daughters who are given customary gifts even after their marriage. The maintenance of Rs. 12,500/-(Rs. 9,500/- for the wife and Rs. 3,000/- for the child) is approximately 50% of the husband's income from the salary which seems to be just and reasonable as it is only an interim maintenance. The exact income of the husband from the FDs shall be the subject matter of the trial. **(Para 11)**

Important Issue Involved: What is a proper proportion of the husband's income to be given to the wife as maintenance pendente lite is a question to be determined in the light of all the circumstances of a particular case; the very flexible and wide-ranging powers are vested in Courts to make it possible to do justice.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. K.C. Bajaj with Mr. P.K. Shukla, Advocates.

FOR THE RESPONDENTS : Mr. Puneet Maheshwari, Advocate.

CASES REFERRED TO:

1. *Sudhir Diwan* vs. *Smt. Tripta Diwan & Anr.,* 147 (2008) DLT 756.
2. *Alok Kumar Jain* vs. *Purnima Jain,* 2007(96) DRJ 115.
3. *Jagdish Prasad Sharma* vs. *Smt. Sangeeta Sharma,* 1987(2) Crimes 447.
4. *Dev Dutt Singh* vs. *Smt. Rajni Gandhi,* AIR 1984 Del 320.
5. *Chamberlain* vs. *Chamberlain,* (1974) 1 All ER 33, 38 CA.

RESULT: Petitions dismissed.

G.P. MITTAL, J.

1. These two Petitions arise out of an order dated 09.12.2011 passed in C.R. No.43/2011 by the learned Additional Sessions Judge("ASJ") whereby an interim maintenance of Rs. 12,000/- granted in favour of Nidhi Bhola and Rs. 5,000/- granted in favour of Baby Jhalak was reduced to Rs. 9,500/- and Rs. 3,000/- respectively. Petitioner in Crl.M.C.75/2012 is the husband Lalit Bhola whereas Petitioners in Crl.M.C. 2227/2012 are Nidhi Bhola and Baby Jhalak, that is, wife and the daughter of the of the Petitioner. For the sake of convenience, the parties shall be referred to as husband, wife and the child.

2. In Crl.M.C.75/2012, the husband alleges that the overall maintenance of Rs. 12,500/- is excessive and arbitrary whereas the wife and the child in Crl.M.C. 2227/2012 say that the maintenance awarded is on the lower side.

3. Lalit Bhola got married to Nidhi Bhola on 19.04.2007. A child Jhalak was born to Nidhi out of the wedlock on 10.11.2008. The parties could not pull on together and allegations of cruelty and demand of dowry, etc. were levelled against the husband by the wife which is not very material for disposal of these Petitions. Suffice it to say that on 30.09.2010, an application under Section 125 of the Code of Criminal Procedure(Cr.P.C.) was filed by the wife and the child seeking maintenance of Rs.25,000/- per month from the husband on the ground that he was having a monthly income of Rs.47,000/-. In addition to the income earned by the husband, he was also beneficiary of FDRs of Rs.18-20 Lakhs left by his mother, that is, by husband's deceased mother. The wife claimed that in addition to income from salary, the husband also had

rental income from a property in Naveen Shahdara.

4. The husband denied his income to be Rs.47,000/- per month. He stated that he was appointed as an executive with M/s. I. Energizer at a total monthly salary of Rs.21,515/-. On account of the harassment and the complaint made by the wife, the husband's services were terminated by his employer. He, therefore, had to seek an employment with M/s. Ken Computer Education at a salary of Rs. 9,100/- per month. While disposing of the application for grant of interim maintenance under Section 125 Cr.P.C., the learned Metropolitan Magistrate("M.M.") accepted the husband's income from M/s. I. Energizer to be Rs. 47,000/- per month. The learned M.M. held that the husband possessed all the amenities to life at his house, such as motorbike, AC, Fridge, TV, Electronic gadgets, etc. He was earning interest on the FDRs of Rs. 18-20 Lakhs left by his mother. The learned M.M. disbelieved the husband's version that he was getting a salary of just about Rs. 10,000/- per month from Ken Computers. The learned M.M. observed that the husband's income cannot be presumed to be less than Rs. 45,000/- to Rs.50,000/- per month. Accordingly, the Trial Court awarded a maintenance of Rs.12,000/- in favour of the wife and Rs.5,000/- per month in favour of the child.

5. In the Revision Petition, the learned ASJ in the face of the salary statement which existed on record, assessed the Petitioner's gross salary to be Rs. 21,515/-. The Revisional Court observed that it was difficult to hold that he(the husband) was getting a salary of Rs. 32,000/- or perks worth of Rs. 15,000/-. The learned ASJ further held that the husband had not produced any document to show that the property of Naveen Shahdara was not in his name. The Revisional Court further observed that the Petitioner also had income from interest on the FDs left by the mother of the husband. Taking all the facts into consideration, the learned ASJ reduced the interim maintenance payable to the wife to Rs. 9,500/- and to the child to Rs. 3,000/-.

6. While awarding maintenance under Section 125 Cr.P.C. or maintenance pendente lite under Section 24 of the Hindu Marriage Act or the maintenance under Section 18 of the Hindu Adoption or Maintenance Act, Courts are not only guided by the income of the husband in determining the amount of monthly maintenance. The Higher Courts have held that several factors including the status of the parties, liabilities, if any, of the husband and number of persons to be maintained by the

husband would be some of the factors to be taken into consideration. In **Alok Kumar Jain v. Purnima Jain,** 2007(96) DRJ 115, a co-ordinate Bench of this Court while examining grant of maintenance, pendente lite, observed as under:

> "10. Law under Section 24 of the Hindu Marriage Act is well crystallized. From the judicial precedents, factors which can be culled out as required to be kept in mind while awarding interim maintenance are as under
>
> (i) Status of the parties,
>
> (ii) Reasonable wants of the claimant,
>
> (iii) The income and property of the claimant,
>
> (iv) Number of persons to be maintained by the husband,
>
> (v) Liabilities, if any, of the husband,
>
> (vi) The amount required by the wife to live a similar life style as she enjoyed in the matrimonial home keeping in view food, clothing, shelter, educational and medical needs of the wife and the children, if any, residing with the wife and
>
> (vii) Payment capacity of the husband.
>
> 11. Further, where it is noted that the respective spouses have not come out with a truthful version of their income, some guesswork has to be resorted to by the Court while forming an opinion as to what could possibly be the income of the 2 spouses. This guesswork has to be based on the status of the family, the place where they are residing and the past expenses on the children, if any."

7. In **Dev Dutt Singh v. Smt. Rajni Gandhi,** AIR 1984 Del 320, the learned Single Judge of this Court(Avadh Behari Rohtagi, J.) observed that there cannot be any mathematical formula for award of the maintenance amount such as 1/3rd or any other proportion of the husband's income. It was held that the law has to operate in a flexible and elastic manner to do complete justice between the parties. The factors to be taken into consideration were laid down in paras 12 to 15 of the judgment, which are extracted hereunder:

"12. The substance of these judgments is this. Each case must be determined according to its own circumstances. No two cases arc alike. These cases do not lay down any proposition of law. On the facts of the particular case the Court adjudicated what allowance will be reasonable to award "having regard to the petitioner's own income and the income of the respondent". If the present case illustrates anything it is this that rigid adherence to "one-third" rule may not always be just. Section 24 is not a code of rigid and inflexible rules, arbitrarily ordained, and to be blindly obeyed. It leaves everything to the Judge's discretion. It does not enact any mathematical formulae of one-third or any other proportion. It gives wide power, flexible and elastic, to do justice in a given case.

13. In most cases the standard of living of one or both of the parties will have to suffer because there will be two households to support instead of one. When this occurs, the Court clearly has to decide what the priorities are to be and where the inevitable loss should fall. Generally speaking, wife is the financially dependent spouse. She is potentially likely to suffer greater financial loss from the dissolution of marriage than the husband. For her support the Court has to award a reasonable amount. The cases decided under the Act should not be followed slavishly. In the words of Searman L.J. :

"It would be unfortunate if the very flexible and wide-ranging powers conferred upon the Court should be cut down or forced into this or that line of decisions by the Courts." (**Chamberlain v. Chamberlain,** (1974) 1 All ER 33, 38 CA).

14. What is the right figure of periodical payment is essentially a practical decision on the facts. The ultimate evaluation is left to the adjudicator. On the statutory hypothesis it is an indefensible position to hold that the wife in the present case is not entitled to anything because she is already earning Rs.1,270/- per month which comes to one-third of the husband's income.

15. What is a proper proportion of the husband's income to be given to the wife as maintenance pendente lite is a question to be determined in the light of all the circumstances of a particular case; the very flexible and wide-ranging powers vested in the

Court make it possible to do justice."

8. Although, there is no strict formula to award a particular percentage of the husband's income towards maintenance of the wife, normally the Courts have been taking 1/3rd of the husband's income towards maintenance of the wife. This may be increased or decreased keeping in view the circumstances of each case, like the number of persons to be maintained by the husband and other liabilities. In **Sudhir Diwan v. Smt. Tripta Diwan & Anr.,** 147 (2008) DLT 756, 1/3rd of the husband's income was awarded towards the wife's maintenance. In **Jagdish Prasad Sharma v. Smt. Sangeeta Sharma,** 1987(2) Crimes 447, a maintenance of Rs. 225/- per month was awarded in favour of the wife on the husband's income of Rs. 602/- per month.

9. Turning to the facts of the instant case, the husband's income is claimed to be from three sources. First, the salary, second rental income from the property in Naveen Shahdara and third, income by way of interest from the FDs left by the mother of the husband. Admittedly, the marriage between the parties took place on 19.04.2007. The husband was appointed as a senior executive with M/s. I. Energizer on a monthly salary of Rs. 21,515/-. In the absence of any document produced by the wife to controvert the averments, the learned ASJ was right in holding the income from salary to be Rs. 21,515/- per month only. Although, the monthly income in the year 2010 was claimed by the husband to be Rs. 9,100/- per month, it is, however, difficult to believe that a person who was getting a salary of Rs. 21,515/- would leave the job to get a salary of Rs. 9,100/- per month. In any case, the employment with M/s Ken Computers Education loses any significance in view of the fact that during the pendency of this Petition, an application under Section 340 Cr.P.C. was moved by the Petitioner claiming that the husband had joined Genpact India and was getting a very high salary. Although, the husband initially denied his employment with Genpact India but a salary certificate was produced to show that he was getting a gross income of Rs. 24,384/-. The wife has not produced any document to belie this salary slip for the month of July, 2012. Thus, the husband's salary cannot be taken to be above Rs. 24,384/- per month.

10. As far as the rental income is concerned, the husband has placed on record the property tax receipts in respect of the property No.1586/17C, (C-10) Naveen Shahdara, Delhi-32. On behalf of the wife,

it was urged that the property No.1586/17C, Naveen Shahdara, Delhi-32 and C-10 Naveen Shahdara are different and that he was getting rent from property NO.C-10, Naveen Shahdara. This is not correct as both the numbers have been mentioned on the house tax receipt. The house tax receipt (Annexure P-8) goes to show that the old number of the property 1586/17C, Naveen Shahdara, Delhi-32 was C-10, Naveen Shahdara. The property is admittedly owned by Bal Ram Bhola, the husband's father. For the purpose of assessing the income of the husband, the learned ASJ rightly declined to take into account the rent received by the father on the basis of rent receipts issued in favour of the tenant by the father.

11. Some documents were filed to prove that certain FDs were left by mother of the husband, but it cannot be the exclusive property of the husband. Admittedly, the mother was survived by her husband, one son and four daughters. Thus, the income of the husband at the most could be a few thousand from interest on FDs(pertaining to his share) in addition to the salary of Rs. 24,384/- per month. The rental income of the father cannot be taken into consideration for award of maintenance to the wife. Father has got other responsibilities, including four daughters who are given customary gifts even after their marriage. The maintenance of Rs. 12,500/-(Rs. 9,500/- for the wife and Rs. 3,000/- for the child) is approximately 50% of the husband's income from the salary which seems to be just and reasonable as it is only an interim maintenance. The exact income of the husband from the FDs shall be the subject matter of the trial.

12. The interim maintenance awarded can neither be said to be excessive nor on the lower side. Broadly, it appears to be just and reasonable.

13. Both the Petitions, therefore, have to fail; the same are accordingly dismissed.

14. Pending Applications stand disposed of.

ILR (2013) II DELHI 1076
CRL. M.C.

AMAR NATH MISHRA ....PETITIONER

VERSUS

STATE (C.B.I.) ....RESPONDENTS

(G.P. MITTAL, J.)

CRL. M.C. NO. : 1919/2012 DATE OF DECISION: 12.02.2013

Code of Criminal Procedure, 1973—Section 482—Petitioner seeks quashing of FIR and charge sheet as filed by CBI in the Court of Special Judge, Delhi on the ground that this being the second FIR cannot be given effect to. Held: The first FIR was closed only on the technical ground that the complainant had told the IO that he did not lodge any report with P.S. Hasanganj. The complainant further informed the IO that he was not aware as to who were the culprits, that is, persons responsible for forging his letter head and signatures. The present Petitioner was not an accused in the first FIR, whereas on the basis of the second FIR, the investigation has been completed and a charge sheet has been filed against the Petitioner for forging the letter head and signatures of Mr. Kalraj Mishra. In the instant case it cannot be said that the second FIR and the charge sheet on the basis of the same is an abuse of the process of Court.

As stated above, the first FIR was closed only on the technical ground that the complainant had told the IO that he did not lodge any report with P.S. Hasanganj. He(complainant) further informed the IO that he was not aware as to who were the culprits, that is, persons responsible for forging his letter head and signatures. The present Petitioner was not an accused in the first FIR, whereas on

the basis of the second FIR, the investigation has been completed and a charge sheet has been filed against the Petitioner for forging the letter head and signatures of Mr. Kalraj Mishra, M.P., Rajya Sabha. The powers under Section 482 of the Code of Criminal Procedure has to be exercised to prevent the abuse of the process of the of the Court or otherwise in the interest of justice. In the instant case it cannot be said that the second FIR and the charge sheet on the basis of the same is an abuse of the process of Court. **(Para 8)**

Important Issue Involved: If the closure on the first FIR was merely technical grounds and not on merits, then the investigating agency can proceed on the second FIR, and the same cannot be said to be abuse of process of Court.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. K.G. Bhagat with Ms. Divya Shukla, Advocates.

FOR THE RESPONDENT : Ms. Sonia Mathur, Advocate.

CASES REFERRED TO:

1. *Babubhai* vs. *State of Gujarat,* (2010) 12 SCC 254.
2. *Bank of Rajasthan* vs. *Keshav Bangur & Anr.,* (2007) 13 SCC 145.
3. *T.T. Antony* vs. *State of Kerala,* (2001) 6 SCC 181.

RESULT: Petition dismissed.

G.P. MITTAL, J.

1. The Petitioner seeks quashing of FIR No.RC 14(S) and consequent charge sheet on the basis thereof filed by CBI in the Court of Special Judge, Delhi on the ground that this being the second FIR cannot be given effect to. Reliance is placed on reports of the Supreme Court in **T.T. Antony v. State of Kerala,** (2001) 6 SCC 181 and **Babubhai v. State of Gujarat,** (2010) 12 SCC 254.

2. According to the Petitioner, a complaint dated 10.03.2005 was made by Mr. Kalraj Mishra, M.P., Rajya Sabha to DIG U.P. Police, Lucknow for registration of a case against some unknown person for sending letters to Union Minister and Hon'ble Prime Minister for grant of financial assistance to his institution. The Petitioner says that FIR No.128/2005 was registered in Police Station Hasanganj on 10.05.2005. A final report dated 10.05.2006 was submitted whereby the complainant(Mr. Kalraj Mishra) gave his no objection. Consequently, the final report was accepted and the case was closed. The Petitioner's case is that registration of the second FIR on the same cause of action by the CBI is unwarranted and the FIR is liable to be quashed.

3. On the other hand, Ms. Sonia Mathur, Advocate for the CBI says that the first FIR was closed without any investigation simply on the statement made by the complainant that he has not lodged report with SHO, P.S. Hasanganj, which was factually correct as the complainant in fact in his no objection affidavit had simply stated that he was not aware of the name of the person responsible for forging the letterhead. She urges that the final report was submitted in the first FIR by the IO of P.S. Hasanganj only on the ground that he had not made any complaint to P.S. Hasanganj. She submits that in such cases, the second FIR is not barred. She places reliance on **Bank of Rajasthan v. Keshav Bangur & Anr.,** (2007) 13 SCC 145 where it was held that if an FIR was not closed on merits, the second FIR was not barred.

4. I have given my thoughtful consideration to the contention raised on behalf of the parties. The copy of the final report is placed on page 14 of the paper book, which is extracted hereunder:

"Sir,

After the above mentioned F.I.R. after being registered was investigated by Sh. Anup Kumar Swami and after that investigation was done by me.

When I went to the House No.11, Vikramaditya Marg of informant Sh. Kalraj Mishra, Member, Raj Sabha to enquire about the case, he told that he has not got written any such case with the P.S. Hasanganj. Therefore, the investigation of the case is closed with this F.R.

Sir, this F.R. may kindly be allowed to be accepted."

5. On the basis of the final report, a notice was issued to complainant Mr. Kalraj Mishra who simply stated that he made a complaint to DIG U.P. Police regarding printing of his fake letterhead and forging his signatures thereon. The complainant stated that he was not aware of the name of any accused in the case and he has no objection if the final report submitted by the police was accepted. Thus, it is apparent that the IO of P.S. Hasanganj sought permission to close the case only on the ground that when he went to meet the complainant to make an inquiry about the case, the complainant informed him(the IO) that he had not made any complaint to the SHO, P.S. Hasanganj. Thus, closure of FIR No.143/2005 by the police of P.S. Hasanganj was only on the technical ground that the complainant informed the IO that he(the complainant) did not make any report with the P.S. Hasanganj.

6. There is no dispute about the proposition of law as laid down in T.T. Antony that there cannot be successive FIRs in respect of the same incident because in that event the investigations against an accused would never come to an end. In T.T. Antony, the Supreme Court observed as under:

> "The right of the police to investigate into a cognizable offence is a statutory right over which the court does not possess any supervisory jurisdiction under Cr.P.C. This plenary power of the police to investigate a cognizable offence is, however, not unlimited. It is subject to certain well-recognized limitations.
>
> A just balance between the fundamental rights of the citizens under Articles 19 and 21 of the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court. The sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173(2) Cr.P.C. It would clearly be beyond the purview of Sections 154 and 156 Cr.P.C., nay, a case of abuse of the statutory power of investigation in a given case. A case of fresh investigation based on the second or successive FIRs, not being a counter-case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is under way or final report under Section 173(2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 Cr.P.C. or under Articles 226/227 of the Constitution. Where the police transgresses its statutory power of investigation the High Court under Section 482 Cr.P.C. or Articles 226/227 of the Constitution and the Supreme Court in an appropriate case can interdict the investigation to prevent abuse of the process of the court or otherwise to secure the ends of justice."

7. Similar view was taken by the Supreme Court in Babubhai. In **Keshav Bangur,** the Supreme Court, however, clarified that where the first closure of the first FIR is not on merits, the second FIR can proceed. Para 19 of the report in Keshav Bangur is extracted hereunder:

> "19. Secondly, on 12-7-2002 a closure report in final form was drawn up in connection with FIR No.138/01 inasmuch as CBI had taken up the investigation. The hearing on the final report of closure was concluded before the Sub-Divisional Judicial Magistrate, Alipore. It was allowed by the Sub-Divisional Judicial Magistrate. However, it may be clarified that the said closure was not on merits of the case. The said closure was only on account of the fact that the investigation stood transferred to CBI. Consequently, now Alipore Police Station has no role to play."

8. As stated above, the first FIR was closed only on the technical ground that the complainant had told the IO that he did not lodge any report with P.S. Hasanganj. He(complainant) further informed the IO that he was not aware as to who were the culprits, that is, persons responsible for forging his letter head and signatures. The present Petitioner was not an accused in the first FIR, whereas on the basis of the second FIR, the investigation has been completed and a charge sheet has been filed against the Petitioner for forging the letter head and signatures of Mr. Kalraj Mishra, M.P., Rajya Sabha. The powers under Section 482 of the Code of Criminal Procedure has to be exercised to prevent the abuse of the process of the of the Court or otherwise in the interest of justice. In the instant case it cannot be said that the second FIR and the charge sheet on the basis of the same is an abuse of the process of Court.

9. In the circumstances, it will not be appropriate to quash the FIR and the charge sheet already filed in the Court.

10. The Petition is accordingly dismissed.

11. Pending Applications stand disposed of.

ILR (2013) II DELHI 1081
CRL. A.

HARDAYAL SINGH ....APPELLANT

VERSUS

STATE NCT OF DELHI ....RESPONDENT

(SANJIV KHANNA & SIDDHARTH MRIDUL, JJ.)

CRIMINAL APPEAL NO. : 354/2012 **DATE OF DECISION: 13.02.2013**

(A) Indian Penal Code, 1860—Section 302—Punishment for murder—Convicted for murder by the sessions Court—Sentence challenged—Circumstantial evidence guilt of the accused proved beyond reasonable doubt—Appeal dismissed. Whether the circumstantial evidence in the present case prove the guilt of the accused beyond reasonable doubt?- Held, it stands proved by virtue of three circumstantial evidence namely, last seen evidence, recovery of the dead body effected upon by the disclosure made by the accused and point out memo prepared by the police at the instance of the appellant.

(B) Indian Evidence Act, 1872—Section 27—Relevancy of certain forms of admissions made by the persons accused of offences. Whether the Appellant was in the custody of the police or was he accused of an offence so as to make a disclosure as envisaged under Section 27 of the Evidence Act.?- Held, as a person may not be formally arrested/in custody but if he makes a disclosure before the police officials which eventually leads to recovery, then such a person is deemed to have surrendered before the police and that would tantamount that such a person is in constructive custody of police.

(C) Criminal Code of Procedure, 1983—Section 313 and Indian Evidence Act, 1872—Section 106—Whether recovery of the dead body at the instance of the accused is sufficient to hold that he had concealed the same?- Held, accused has not furnished any explanation whatsoever as regards his knowledge about the place from where the dead body was recovery. Thus, a presumption could be drawn that he concealed such a fact.

Important Issue Involved: "A person may not be in the physical custody but if his disclosure before the police officials eventually leads to recovery, then such a person is deemed to have surrendered before the police and he would be in constructive custody of police."

[As Ma]

APPEARANCES:

FOR THE APPELLANT : Mr. Ajay Verma, Mr. Gaurav Bhattacharya and Mr. Shiv Kumar Dwivedi, Advocates.

FOR THE RESPONDENT : Mr. Sanjay Lao, APP.

CASES REFERRED TO:

1. *Sahadevan* vs. *State of Tamil Nadu,* (2012) 6 SCC 403.
2. *State of U.P.* vs. *Kishanpal,* (2008) 16 SCC 73.

3. *Ramreddy Rajesh Khanna Reddy and Anr.* vs. *State of Andhra Pradesh,* (2006) 10 SCC 172.
4. *State of UP* vs. *Satish,* (2005) 3 SCC 114.
5. *State of Maharashtra* vs. *Suresh,* (2000) 1 SCC 471.
6. *State of Rajasthan* vs. *Bhup Singh,* (1997) 10 SCC 675.
7. *Balwinder Singh* vs. *State of Punjab,* AIR 1996 SC 607.
8. *Sharad Birdhichand Sarda* vs. *State of Maharastra,* (1984) 4 SCC 116).
9. *Aghnoo Nageshia* vs. *State of Bihar,* AIR 1966 SC 119.
10. *UdayBhan* vs. *State of Uttar Pradesh,* AIR 1962 SC 1116).
11. *State of U.P.* vs. *DeomanUpadhyaya* [(1961) 1 SCR 14, 21].
12. *State of Uttar Pradesh* vs. *Deoman Upadhyaya,* AIR 1960 SC 1125.
13. *Pakala Narayan Swamy* vs. *Emperor* AIR 1939 PC 47.

RESULT: Appeal Dismissed.

SIDDHARTH MRIDUL, J.

1. This appeal impugns the judgment dated 22.12.2010 and subsequent order on sentence dated 24.12.2010 delivered by District Judge-VIII, Rohini Courts, Delhi in Sessions Case No.88/2010 whereby the appellant was convicted under Section 302 of the Indian Penal Code, 1860 (for short 'IPC') for having committed murder of his step-son Monu @ Gurpreet Singh aged about 4 years. The conviction arose out of FIR No.835/2006 (Ex.PW-4/A) registered at Police Station-Tilak Nagar under Sections 363/302/201 IPC. Upon conviction under Section 302 IPC, the appellant herein has been sentenced to undergo imprisonment for life.

BRIEF FACTS

2. On 7.11.2006 at about 2:10 pm, a missing complaint vide DD No.15 (Ex.PW-18/A) was registered by the appellant, before the Police Post Khyala, PS Tilak Nagar alleging that his step-son Monu @ Gurpreet Singh, aged 4 years, had been missing from home since 06.11.2006. The said missing report (Ex.PW-18/A) was recorded by PW-5 Ct. Om Prakash

and he proved the same before the Trial Court. The appellant had also furnished to the police, description of his step-son Monu @ Gurpreet Singh.

3. Thereafter, on 08.11.2006, Babli (PW-3), who is the wife of the appellant and mother of the deceased Monu @ Gurpreet Singh, approached the Police Post and gave a statement which is Ex.PW-18/B. Babli (PW-3) stated that she is a house wife and that her son Monu @ Gurpreet Singh aged about 4 years was born out her first marriage with one Gurdev Singh. She further stated that after her divorce with Gurdev Singh, she got married with Hardayal Singh, the appellant herein on 25.06.2006 and then she along with her son Monu came to stay with the appellant in her new matrimonial home located at H. No.59, Vishnu Garden, Delhi. She complained to the police that the appellant was unhappy about the fact of her bringing along her son Monu @ Gurpreet Singh to stay with them. She further stated that the appellant used to beat Monu @ Gurpreet Singh as also pick quarrels with her on account of Monu staying with them. The appellant even told her to send Monu to her parent's house which was opposed by Babli who insisted that Monu would stay with her.

4. Babli further stated that on 06.11.2006 at about 6:30 pm, her husband Hardayal Singh took the child Monu @ Gurpreet Singh on his two wheeler scooter No.DL-4S-1224 for a ride and returned at about 7:00 pm without Monu. On his return, Babli questioned him about Monu @ Gurpreet Singh to which appellant replied that after the ride on the scooter, he had left the child Monu in the gali. Thereafter, she searched for the child. Then she along with the appellant went to PS Khayala and lodged DD No.15 (Ex.PW-18/A) dated 07.11.2006 regarding missing of the child Monu. She further stated that while she was inquiring about Monu, one woman Beero informed her that her child Monu @ Gurpreet Singh was seen by the latter being taken by her husband Hardayal Singh (appellant). She suspected that her child Monu @ Gurpreet Singh was secreted somewhere by her husband, the appellant herein.

5. On the basis of the said statement made by PW-3, Babli, on 08.11.2006, a *ruqqa* (Ex.PW-18/B) vide DD No.23A was prepared at about 7:05 pm, and thereafter, the FIR No.835/2006 (Ex.PW-4/A) was recorded initially under Section 363 IPC at Police Station Tilak Nagar noting that Monu @ Gurpreet Singh had been missing from the evening

of 06.11.2006. After the FIR was registered, the investigation was handed over to PW-18 ASI Subh Ram who tried to search the child but in vain. As suspicion was raised by PW-3 Babli against her husband Hardayal Singh, appellant herein, the investigating officer took him into police custody to carry out his interrogation since there were incriminating circumstances against him.

6. It is further the case of the prosecution that during investigation, on 09.11.2006, the appellant made a disclosure statement Ex.PW-1/A pursuant to which a body of a child wearing a blue shirt and black pant was discovered by the Police from the ganda nala in front of Water Treatment Plant, Vikaspuri, between 1:00 to 1:30 pm in the afternoon. The details relating to the seizure of the dead body is Ex.PW-1/C. The dead body was recovered with the help of PW-14 Kishan, who was employed with the Fire Brigade department who proved seizure memo Ex.PW-1/C. The recovery was made in the presence of PW-3 Babli, PW-1 Sukhwant Singh (father of Babli), PW-6 SI Vijender Singh, PW-7 Ct. Satish Kumar and an independent witness Vijay. The body was identified by PW-3 Babli and PW-1 Sukhwant Singh to be that of Monu @ Gurpreet Singh. Some photographs were also taken. A crime team report was also prepared at the spot which is Ex.PW15/ A. The clothes of the deceased Monu @ Gurpreet Singh were also seized vide Ex.PW-7/A.

7. Subsequently, on 09.11.2006 itself, the appellant was arrested by the police at about 3:00 pm. The arrest memo (Ex.PW-6/A) records that the appellant was arrested from his home by PW-18 ASI Subh Ram. In these circumstances, a charge under Section 302 IPC against the appellant was added to FIR No.835/2006 (Ex.PW-4/A).

HOMICIDAL DEATH

8. After the recovery of the body of the deceased, on 10.11.2006, at about 12:30 pm, the post mortem examination of the body discovered was conducted at DDU Hospital. The post mortem report is Ex.PW-9/A. It delineates following injuries on the body:

a. Deformity of nose with fracture of the underlying bone with localized haematoma at fractured site.

b. Fracture of mandible with loosening of teeth central and lateral incisor tooth both jaws with laceration inner mucosal

aspects of gums and buccalmucuse with localized bloods and clots

c. Both lips contused with effusion of dark redish blood and clots underneath on incision.

9. According to the opinion of PW-9, Dr. Anil Shandil, who conducted the post mortem examination, the death was due to asphyxia as a result of ante mortem closure of external air passage nose, mouth which was sufficient to cause death in ordinary course of nature. Thus, PW-9 Dr. Anil Shandil opined that the death was homicidal in nature. The time of death was ascertained to be 3+ to 4 days before conducting the post-mortem. As the post-mortem was conducted on 10.11.2006, an inference can be drawn that the death occurred on 06.11.2006.

10. The only question which subsists is whether Hardayal Singh, the appellant herein, is responsible for the death of Monu @ Gurpreet Singh?

11. The entire case of the prosecution hinges upon circumstantial evidence as there was no eyewitness to the incident. The prosecution examined as many as 19 witnesses. Three circumstances were relied on by the prosecution against the appellant, namely:-

(i) Deceased Monu @ Gurpreet Singh was last seen alive in the company of the Appellant herein.

(ii) On the basis of disclosure statement made by the appellant (Ex.PW-1/A),body of deceased Monu@ Gurpreet Singh was recovered from ganda nala near Vikaspuri.

(iii) Appellant had pointed out the place of occurrence to the police in the pointing out memo Ex. PW-1/B.

12. As the entire case of the prosecution is based upon circumstantial evidence, in order to sustain a conviction, circumstantial evidence must be complete and incapable of any other explanation or hypothesis, other than the guilt of the accused. The following conditions must be fulfilled before a case against an accused can be said to be fully established on circumstantial evidence:

(1) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established,

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

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

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

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. (**Sharad Birdhichand Sarda v. State of Maharastra,** (1984) 4 SCC 116)

13. In **Balwinder Singh v. State of Punjab,** AIR 1996 SC 607, it has been laid down that the circumstances from which the conclusion of guilt is to be drawn should be fully proved and those circumstances must be conclusive in nature to connect the accused with the crime. All the links in the chain of events must be established beyond reasonable doubt and the established circumstances should be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In a case based on circumstantial evidence, the Court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed by emotional considerations, however strong they may be, to take the place of proof.

14. Keeping in view the aforesaid principles, we now proceed to scrutinize whether the circumstances mentioned above prove the guilt of the accused beyond reasonable doubt.

LAST SEEN EVIDENCE

15. In order to substantiate the allegation that the deceased Monu @ Gurpreet Singh was last seen alive in the company of the appellant, the prosecution had produced two witnesses PW-2 Beero and PW-3 Babli.

16. PW-2 Beero was a neighbour of the appellant. PW-2 Beero, deposed to the effect that on 06.11.2206 at about 6:15 pm she was

standing in the gali in front of her house which is when she saw appellant passing through that gali with one small child sitting on the pillion seat of the scooter. She further deposed that on the same night Babli (PW-3) came looking for her child when she (Beero) told Babli that she had seen the appellant going with the child on a scooter on the above mentioned date and time. PW-2 Beero, when queried by the public prosecutor about the name of the child, stated the name of the child to be Monu @ Gurpreet Singh as was told to her by the mother of the child Babli (PW-3) when she met her. It is relevant to note that on 08.11.2006, PW-2 Beero gave an analogous statement to the police under Section 161 of the Code of Criminal Procedure, 1973('CrPC' for short).

17. PW-3 is Babli who as stated earlier is mother of the deceased child and wife of Hardayal Singh, the appellant herein. She testified that on 06.11.2006 at about 6:30 pm, the appellant took her son Monu @ Gurpreet Singh out on the pretext of giving him a joy ride on the scooter No.DL-4S1224. She further stated that the appellant returned to the house on the scooter alone at about 7:00 pm. She had asked him as to where he left Monu @ Gurpreet Singh, to which the appellant replied that he had left the child Monu in the gali after giving him a ride on the scooter. Next, she searched for her child Monu along with the appellant but could not find him. Thereafter, on the next day i.e. on 07.11.2006, the appellant lodged a missing report (Ex.PW-18/A) at PS Khayala vide DD No.15. PW-3 Babli also stated that on inquiring personally from the persons of the neighbourhood, one Beero (PW-2) who was residing in the gali at the back of her house told her that she (Beero PW-2) had seen the appellant taking her son Monu on the scooter at about 6:15 pm in the evening. On receiving this information, in view of the strong suspicion raised against the appellant, she had lodged a report with the police.

18. PW-18 ASI Subh Ram, the investigating officer deposed that he made inquiries about deceased Monu @ Gurpreet Singh from PW-2 Beero on 08.11.2006. He further deposed that PW-2 Beero informed him that she had seen the appellant giving joy rides to the deceased in the evening of 06.11.2006. PW-18 ASI Subh Ram also deposed that on 08.11.2006 itself he went to search for the appellant but the appellant was not present at his home.

19. In **State of UP v. Satish,** (2005) 3 SCC 114, the Supreme Court has stated that the principle of last seen comes into play where the

time gap between the point of time when the accused and the deceased were seen last alive and when the deceased was found dead was so small that the possibility of any person other than the accused being the author of the crime becomes impossible. However, even in such cases as pointed out by the Supreme Court in **Ramreddy Rajesh Khanna Reddy and Anr. v. State of Andhra Pradesh,** (2006) 10 SCC 172, the courts should look for some corroboration.

20. In a recent case of **Sahadevan v. State of Tamil Nadu,** (2012) 6 SCC 403, with regard to last seen theory, the Supreme Court has observed as under:

> "28.With the development of law, the theory of last seen has become a definite tool in the hands of the prosecution to establish the guilt of the accused. This concept is also accepted in various judgments of this Court. The Court has taken the consistent view that where the only circumstantial evidence taken resort to by the prosecution is that the accused and deceased were last seen together, it may raise suspicion but it is not independently sufficient to lead to a finding of guilt.
>
> .....
>
> 30. Even in the case of State of Karnataka v. M.V. Mahesh (2003) 3 SCC 353, this Court held that merely being last seen together is not enough. What has to be established in a case of this nature is definite evidence to indicate that the deceased had been done to death of which the Respondent is or must be aware as also proximate to the time of being last seen together. No such clinching evidence is put forth. It is no doubt true that even in the absence corpus delicti it is possible to establish in an appropriate case commission of murder on appropriate material being made available to the Court.
>
> 32. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. But this theory should be applied while taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen."
>
> (underlining added)

21. In the present case, according to the Dr. Anil Sandil, PW-9, the deceased had died 3+ to 4 days before the autopsy was conducted. The postmortem was admittedly conducted on 10.11.2006 at about 12:30 pm in the afternoon which implies that the deceased would have died sometime in the evening on 06.11.2006. Further, as per the statement of PW-2 Beero, it is established beyond doubt that the child Monu was last seen alive in the company of the appellant at about 6:15 pm in the evening of 06.11.2006. It was not suggested that PW-2 Beero had any animosity towards the appellant. PW-2 Beero gave a similar statement to the police after the incident and has stood through the test of cross-examination and therefore, testimony of PW-2 Beero is credible, trustworthy and reliable.

22. PW-3 Babli has also deposed to the effect that the appellant had taken the deceased for a scooter ride in the evening of 06.11.2006. She made a similar statement to the police on the basis of which ruqqa (Ex.PW-18/B) was prepared. In examination in chief before the court she conformed to the statement made by her before the police and no material discrepancy has crept in while she was put to cross-examination. Thus, PW-3 Babli is also a credible and a reliable witness who does not appear to be either doctored or tutored. Her testimony confirms the fact that it was the appellant who took the deceased for a scooter ride on the fateful evening.

RECOVERY OF DEAD BODY

23. One of the formidable incriminating circumstance against the appellant is that the dead body of the child was recovered as pointed out by the appellant. The memo registering pointing out of the spot by the appellant is Ex.PW-1/B. As per prosecution, the statement of appellant which led to the discovery of the body is Ex.PW-1/A and admissible portion of it reads as under:" I can point out that place and can get the body of Monu @ Gurpreet recovered."

24. The said disclosure by the appellant was recorded by PW-18 ASI Subh Ram in the presence PW-3 Babli, PW-1 Sukhwant Singh (father of Babli), PW-6 SI Vijender Singh and PW-7 Ct. Satish Kumar.

25. Pursuant to the said disclosure, on 09.11.2006 at about 1:00 pm, the police recovered the body of the deceased child from the ganda naala in front of Water Treatment Plant, Vikaspuri at the instance of the

appellant and thus, according to the prosecution as the recovery had been effected upon the statement made by appellant, the same is admissible by virtue of Section 27 of the Indian Evidence Act, 1872 (hereinafter referred to as "Evidence Act").

26. It is urged by the learned counsel appearing for the appellant that the contents of the disclosure statement are inadmissible under Section 27 of the Evidence Act in as much as on 09.11.2006, the appellant was arrested by the police at about 3:00 pm (Ex.PW-6/A) whereas the body of the deceased was recovered at about 1:00 pm in the afternoon of the same day which is indicated by the crime team report (Ex.PW-15/A). Therefore, the appellant was neither in the custody of the police nor accused of an offence so as to make a disclosure as envisaged under Section 27 of the Evidence Act.

27. In our considered view, there is no substance in the contention advanced by the counsel for the appellant. We say so for the following reasons.

28. Section 27 of the Evidence Act provides that provided when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

29. Section 25 to 26 of the Evidence Act prohibits the admissibility in evidence of a confession made to the police by accused. However, a confession leading to discovery of fact which is dealt with under Section 27 is an exception to the rule of exclusion of confession made by an accused in the custody of a police officer. Section 27, which unusually starts with a proviso, lifts the ban against the admissibility of the confession/statement made to the police to a limited extent by allowing proof of information of specified nature furnished by the accused in police custody. In that sense Section 27 is considered to be an exception to the rules embodied in Sections 25 and 26 (**UdayBhan v. State of Uttar Pradesh,** AIR 1962 SC 1116).

30. In **State of Rajasthan v. Bhup Singh,** (1997) 10 SCC 675, the Supreme Court observed the following as the conditions prescribed in Section 27 of the Evidence Act for removing the cover of ban against

admissibility of statement of accused to police, (1) a fact should have been discovered in consequence of the information received from the accused; (2) he should have been accused of an offence; (3) he should have been in the custody of a police officer when he supplied the information; (4) the fact so discovered should have been deposed to by the witness. The Court observed that if these conditions are satisfied, that part of the information given by the accused which led to such recovery come out of the purview of prohibition laid down under Section 25 and 26 of the Evidence Act and it becomes admissible in evidence.

31. The words "from a person accused of any offence" and "in the custody of the police officer when information is supplied" have been interpreted by the Supreme Court in decision of **State of Uttar Pradesh v. Deoman Upadhyaya,** AIR 1960 SC 1125. In the said decision, it has been held as under:

> "7. Section 27 of the Indian Evidence Act is one of a group of sections relating to the relevancy of certain forms of admissions made by persons accused of offences. Sections 24 to 30 of the Act deal with admissibility of confessions, i.e., of statements made by a person stating or suggesting that he has committed a crime. By s. 24, in a criminal proceeding against a person, a confession made by him is inadmissible if it appears to the court to have been caused by inducement, threat or promise having reference to the charge and proceeding from a person in authority. By s. 25, there is an absolute ban against proof at the trial of a person accused of an offence, of a confession made to a police officer. The ban which is partial under s. 24 and complete under s. 25 applies equally whether or not the person against whom evidence is sought to be led in a criminal trial was at the time of making the confession in custody. For the ban to be effective the person need not have been accused of an offence when he made the confession. The expression, "accused person" in s. 24 and the expression "a person accused of any offence" have the same connotation, and describe the person against whom evidence is sought to be led in a criminal proceeding. As observed in **Pakala Narayan Swamy v. Emperor** AIR 1939 PC 47 by the Judicial Committee of the Privy Council, "s. 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation". The

adjectival clause "accused of any offence" is therefore descriptive of the person against whom a confessional statement made by him is declared not provable, and does not predicate a condition of that person at the time of making the statement for the applicability of the ban.

XXXX XXXX

12. There is nothing in the Evidence Act which precludes proof of information given by a person not in custody, which relates to the facts thereby discovered; it is by virtue of the ban imposed by s. 162 of the Code of Criminal Procedure, that a statement made to a police officer in the course of the investigation of an offence under Ch. XIV by a person not in police custody at the time it was made even if it leads to the discovery of a fact is not provable against him at the trial for that offence. But the distinction which it may be remembered does not proceed on the same lines as under the Evidence Act, arising in the matter of admissibility of such statements made to the police officer in the course of an investigation between persons in custody and persons not in custody, has little practical significance.When a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him he may appropriately be deemed to have surrendered himself to the police.

18. Counsel for the defence contended that in any eventwas not at the time when he made the statement, attributed to him, accused of any offence and on that account also apart from the constitutional plea the statement was not provable. This contention is unsound. As we have already observed, the expression "accused of any offence" is descriptive of the person against whom evidence relating to information alleged to be given by him is made provable by s. 27 of the Evidence Act. It does not predicate a formal accusation against him at the time of making the statement sought to be proved, as a condition of its applicability.

(underlining added)

32. In **Aghnoo Nageshia v. State of Bihar,** AIR 1966 SC 119, the accused came to the police station and informed that police that he had

committed the murder of certain persons and that he can get their bodies recovered. FIR was lodged on basis of information given by the accused. Pursuant thereto, the accused got recovered the bodies of the deceased person(s) and the weapon of offence. One of the question which arose before the Supreme Court was whether the accused was in the "custody" of a police officer within the meaning of Section 27 of the Evidence Act at the time when he gave the aforesaid information to police. The Supreme Court proceeded on the premise that the accused was in constructive custody of the police at time of furnishing the relevant information. The relevant portion is extracted below:

> "21. Section 27 applies only to information received from a person accused of an offence in the custody of a police officer. Now, the Sub-Inspector stated he arrested the appellant after he gave the first information report leading to the discovery. Prima facie therefore, the appellant was not in the custody of a police officer when he gave the report, unless it can be said that he was then in constructive custody. On the question whether a person directly giving to police officer information which may be used as evidence against him may be deemed to have submitted himself to the custody of the police officer within the meaning of Section 27, there is conflict of opinion. See the observations of Shah, J. and Subba Rao, J. in **State of U.P. v.DeomanUpadhyaya** [(1961) 1 SCR 14, 21]. For the purposes of the case, we shall assume that the appellant was constructively in police custody and therefore the information contained in the first information report leading to the discovery of the dead bodies and the tangi is admissible in evidence. The entire evidence against the appellant then consists of the fact that the appellant gave information as to the place where the dead bodies were lying and as to the place where he concealed the *tangi*, the discovery of the dead bodies and the *tangi* in consequence of the information, the discovery of a blood-stained chadar from the appellant's house and the fact that he had gone to DungiJharan Hills on the morning of August 11, 1963. This evidence is not sufficient to convict the appellant of the offences under Section 302 of the Indian Penal Code."

(underlining added)

33. In **Deoman Upadhyaya** (supra), the Supreme Court has held

that a person may not be accused of the offence at the time when the disclosure is made. The Supreme Court has held that when a person not in custody approaches a police officer investigating an offence and offers information leading to the discovery of a fact, having a bearing on the charge which may be made against him he may appropriately be deemed to have surrendered himself to the police. Thus, in **Deoman Upadhyaya** (supra), the Supreme Court has noticed that if a person not in custody of the police walks into a police station and makes a disclosure before the police officials which eventually leads to recovery, then such a person is deemed to have surrendered before the police. Hence, the statement made by the accused in such circumstances would be admissible as per the mandate of Section 27 of the Evidence Act.

34. In the present case, on 9.11.2006, appellant was being interrogated by the PW-18 ASI Subh Ram at his home when he made the said disclosure and therefore, though the appellant was not formally arrested by the police, he was in constructive custody of the police at that time when he made the disclosure statement (Ex.PW-1/A). The disclosure statement Ex.PW-1/A as noted above was recorded by PW-18 ASI Subh Ram and that to in the presence of PW-3 Babli, PW-1 Sukhwant Singh (father of Babli), PW-6 SI Vijender Singh and PW-7 Ct. Satish Kumar all of whom deposed to the effect that the disclosure statement was made in their presence. Therefore, in view of reasoning of the Supreme Court in **Deoman Upadhaya** (supra) it can be established that the disclosure statement (Ex.PW-1/A) by the appellant was made in the custody of police and therefore, the same falls under the purview of Section 27 of the Evidence Act and any discovery made pursuant to said disclosure statement would also be relevant if the fact discovered distinctly relates to the information supplied.

35. Therefore, the recovery of the dead body of the child Monu @ Gurpreet Singh pursuant to the disclosure statement (Ex.PW-1/A) made by the appellant is admissible under Section 27 of the Evidence Act and clearly stands as a strong incriminating circumstance against the appellant.

POINTING OUT MEMO (EX.PW-1/B)

36. Counsel for the appellant submitted that the appellant was never taken to place of occurrence and therefore the pointing out memo (Ex.PW-1/B) prepared by the prosecution is false.

37. In this regard, it is sufficient to note that the appellant pointed at the spot in the attendance of PW-18 ASI Subh Ram, PW-7 Ct. Satish Kumar and PW-6 SI Vijender Singh who are official witnesses.

38. PW-18 ASI Subh Ram testified that the accused Hardayal Singh pointed out the place of occurrence i.e. Najafgarh Drain in front of Keshopur Depot at a distance of one kilometre from the depot. He further deposed that the pointing out memo Ex.PW-1/B was prepared by him and thereafter, the crime team and divers from the fire brigade were called on the spot for locating the body of the deceased.

39. PW-7 Ct. Satish Kumar in his deposition before the Court stated that the appellant led them to the place where he had thrown the deceased in the drain and pointed out the same which was recorded by memo Ex.PW-1/B. PW-7 Satish Kumar was not cross examined by the appellant in this behalf despite opportunity been given and therefore, his testimony can be relied upon. PW-18 ASI Subh Ram was not cross examined as to the aspect of pointing out memo (Ex.PW-1/B) and therefore, his testimony is worthy of credence and is rightly relied upon by the Trial Court.

40. PW-6 SI Vijender Singh also deposed to the effect that he reached the nala Najafgarh at about 11:00 am on the appellant taking him to the spot. Thereafter, the appellant pointed out the site of occurrence which was Ex.PW-1/B. He further deposed that the dead body was recovered at the instance of the appellant in his presence. PW-6 SI Vijender Singh on cross-examination stated that the dead body was recovered by the fire department who reached the spot between 12 to 12:20 pm in the afternoon. During cross-examination as well, no material discrepancies have occurred in the testimony of PW-6 SI Vijender Singh.

41. Therefore, the evidence of PW-18 ASI Subh Ram, PW-6 SI Vijender Singh and PW-7 Satish Kumar establishes beyond doubt that the appellant himself pointed out towards the place from where dead body could be recovered.

EXAMINATION OF THE ACCUSED UNDER SECTION 313 CrPC

42. This brings us to the next question that whether the recovery of the dead body at instance of the appellant is sufficient to hold that he had himself concealed the same. Under Section 313 CrPC, the incriminating circumstances which point towards the guilt of the appellant had been

put to him but he did not give any explanation except choosing the mode of denial. In **State of Maharashtra v. Suresh,** (2000) 1 SCC 471, the Supreme Court discussed three possibilities when the dead body is recovered at the instance of the accused. It was held as under:-

> "26. We too countenance three possibilities when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there.But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the criminal court that the concealment was made by himself. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act."
>
> (underlining added)

43. Section 106 casts a burden to prove a fact especially within special knowledge of any person upon such persons themselves. In the instant case, the appellant in his statement under Section 313 CrPC has not furnished any explanation whatsoever as regards his knowledge about the place from which the dead body was recovered Therefore, in view of the mandate of the Supreme Court in **Suresh's** case (supra) a presumption could be drawn against the appellant that it was he who concealed the dead body of the deceased child.

MOTIVE

44. In criminal cases based on circumstantial evidence, motive assumes significant importance. This proposition is set out in the Supreme Court decision in **State of U.P. v. Kishanpal,** (2008) 16 SCC 73, where it is held that motive assumes great importance in a case of circumstantial evidence and the absence of motive would definitely inure to the benefit

of the accused. In the present case, motive behind the alleged crime has been set up to be the fact that the deceased was the step-son of the appellant and on account of that the appellant was not happy to keep the child with him. In order to establish the motive, prosecution examined PW-3 Babli. PW-3 Babli who is the mother of the deceased had stated both in her complaint (Ex.PW18/ B) and her testimony before the court that the appellant was not happy with deceased child Monu @ Gurpreet Singh, residing with them in their matrimonial home. She has also stated that the appellant used to misbehave with Monu @ Gurpreet Singh. In her cross examination, PW-3 Babli stated that the appellant used to take her son (deceased) out on earlier occasion as well. However, PW-3 Babli was not cross examined on the aspect ill treatment meted out by the appellant towards the deceased and therefore her testimony to that effect is credible and reliable. Thus, it can be inferred from the testimony of PW-3 Babli that accused did have a motive which becomes relevant under Section 8 of the Evidence Act.

45. From the aforesaid analysis, we are of the considered opinion that all the three circumstances which have been established by the prosecution complete the chain and irresistibly point towards the guilt of the appellant. There can be no shadow of doubt that the circumstances have been proven beyond reasonable doubt.

46. In view of the aforesaid premised reasons, we do not find any infirmity in the judgment of conviction and order of sentence recorded by the learned trial Judge and, accordingly, the appeal, being devoid of substance, stands dismissed.

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W.P. (C)

DEV DUTT **....PETITIONER**

VERSUS

UNION OF INDIA & ORS. **....RESPONDENTS**

(GITA MITTAL & J.R. MIDHA, JJ.)

W.P. (C) NO. : 2801/2010 **DATE OF DECISION: 13.02.2013**

Constitution of India, 1950—Article 227, Service Matter—Border Roads Engineering Service Group 'A' Rules—Whether disallowing promotion to an official citing that he does not meet the required benchmark and citing a Court of Inquiry matter against him, which was not instituted in the year for which promotion is applicable, be held valid?- Held, that not allowing the petitioner a chance for representation for reviewing his performance by a higher authority than his senior is an unjustified act of the respondents. Also held, that due to the non-availability of any records of the relevant year for which promotion was to be granted, the petitioner shall not be granted any benefit of that fact and shall not be allowed any pay/salary retrospectively as he has not worked in that post, but only pension and other retiral benefits shall be given with retrospective effect.

Important Issue Involved: "In the absence of any information/records for which the performance has to be gauged, the whole benefit of that fact shall not go to the person applying for such benefit had the information been available. He may only be granted some advantage out of it."

[As Ma]

APPEARANCES:

FOR THE PETITIONER : Mr. Yogender Mishra, Advocate with Mr. Rajesh Kumar Katiyar, Advocate.

FOR THE RESPONDENTS : Mr. Janendra, Advocate with Mr. V.C. Jha, Advocate.

CASE REFERRED TO:

1. *Abhijit Ghosh Dastidar* vs. *Union of India & Ors.* SLP (C) No.26556/2004.

RESULT: Writ Petition allowed.

GITA MITTAL, J. (Oral)

1. By this writ petition, the petitioner assails an order dated 9th November, 2009 passed by the respondents rejecting the petitioner's representation dated 13th May, 2009 against the adverse entries in his ACR for the period 1993-94 as well as the communication dated 7th December, 2009 whereby the respondents communicated the reasons on which the previous rejection was based.

2. The facts giving rise to the instant petition are within the narrow compass and to the extent necessary, are briefly noted hereafter.

3. The petitioner was in the service of the Border Roads Engineering Service which was governed by the Border Roads Engineering Service Group 'A' Rules as amended. The admitted position is that on 22nd February, 1988, the appellant was promoted as an Executive Engineer and became eligible for consideration for promotion to the post of Superintending Engineer on 21st February, 1993 on completion of five years in the grade of Executive Engineer. The name of the petitioner was included in the list of candidates who were considered eligible for promotion.

4. Unfortunately, in the Departmental Promotion Committee meeting held on 16th December, 1994, the appellant was found not eligible for promotion while his juniors were considered and promoted to the rank of Superintending Engineering. The petitioner assailed the action of the respondents before the Guwahati High Court by way of a petition being Civil Rule No.5307/1995 which was rejected by an order passed on 21st August, 2001. The petitioner's challenge against this judgment before the Division Bench was also rejected. The petitioner assailed the action of the

respondents against him, by way of a special leave petition which was registered as Civil Appeal Case No.7631/2002 before the Supreme Court of India.

5. We may note the primary ground of challenge of the petitioner. It was pointed out by the respondents that the petitioner did not meet the bench mark grade of 'very good' for the last five years before the Departmental Promotion Committee and, therefore, could not be considered for promotion to the post of Superintending Engineer. The petitioner made a grievance that the 'good' entry in his ACR for the year 1993-94 was not communicated to him and if the same had been communicated, he would have had the opportunity of making a representation for upgrading that entry to 'very good'. If that representation was allowed, the petitioner would have become eligible for consideration for promotion to the post of Superintending Engineer. The appeal of the petitioner before the Supreme Court was allowed by a landmark judgment dated 12th May, 2008 whereby the Supreme Court held as follows:-

> "xxx fairness and transparency in the public administration requires that all entries (whether poor, fair, average, good or very good) in the Annual Confidential Report of a public servant, whether in civil, judicial, police or any other state service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its upgradation".

It was further held as follows:-

> "40. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the concerned authority, and the concerned authority must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar."

6. After clear enunciation of the applicable legal principles, so far as the present petitioner was concerned, the court issued the following directions:-

> "46. In view of the above, we are of the opinion that both the learned Single Judge as well as the learned Division Bench erred in law. Hence, we set aside the judgment of the Learned Single Judge as well as the impugned judgment of the learned Division Bench.
>
> 47. We are informed that the appellant has already retired from service. However, if his representation for upgradation of the 'good' entry is allowed, he may benefit in his pension and get some arrears. Hence we direct that the 'good' entry of 1993-94 be communicated to the appellant forthwith and he should be permitted to make a representation against the same praying for its upgradation. If the upgradation is allowed, the appellant should be considered forthwith for promotion as Superintending Engineer retrospectively and if he is promoted, he will get the benefit of higher pension and the balance of arrears of pay along with 8% per annum interest.
>
> 48. We, therefore, direct that the 'good' entry be communicated to the appellant within a period of two months from the date of receipt of the copy of this judgment. On being communicated, the appellant may make the representation, if he so chooses, against the said entry within two months thereafter and the said representation will be decided within two months thereafter. If his entry is upgraded the appellant shall be considered for promotion retrospectively by the Departmental Promotion Committee (DPC) within three months thereafter and if the appellant gets selected for promotion retrospectively, he should be given higher pension with arrears of pay and interest @ 8% per annum till the date of payment."

7. The above directions mandated that the respondents, therefore, should have communicated the 'good' entry to the petitioner within a period of two months from the date of receipt of the copy of the judgment. Liberty was given to the petitioner to make a representation which was to be decided by the authority 'higher than the one who gave the entry'. If the entry was upgraded, the appellant was required to be considered for promotion retrospectively by the Departmental Promotion Committee.

8. We may briefly look at the manner in which the respondents have proceeded in purported compliance of the clear directions of the

Supreme Court. The petitioner has placed before us a copy of the letter dated 28th November, 2008 wherein the respondents have simply reproduced the directions of the Supreme Court stating that "You have been graded 'Good' during the year 1993-94". The petitioner has assailed this communication as being violative of the clear mandate of the directions of the Supreme Court complaining that the actual entry has not been communicated. The respondents have responded to the objection stating that the ACR dossier of the petitioner had been destroyed on completion of its prescribed retention period after disposal of Civil Rule No.5307/ 1995 which was the writ petition filed by the petitioner in the Guwahati High Court. Unfortunately, this position was never disclosed before the Supreme Court of India which adjudicated on the claims of the petitioner. The directions given to the respondents by the Supreme Court may have been different then and the present writ petition may not have been necessitated.

9. The petitioner appears to have submitted a representation dated 13th May, 2009 to the respondents against the grading granted to the petitioner in the ACR for the year 1993-94. The petitioner's representation was rejected by an order dated 9th November, 2009 by the respondents giving two reasons. The respondents firstly stated that the petitioner had replied to their communication after a delay of more than three months wherein he had stated that he had been under assessed by the initiating officer during the year 1993-94. The respondents have secondly clearly stated that "your ACR cannot be upgraded being devoid of merit". This communication clearly suggests that it was because of the delay from 1993-94 till 2009 when the petitioner's representation was being considered that the respondents were unable to consider the petitioner's representation for upgrading of the ACR.

10. The petitioner, however, did not rest on receipt of this communication. He challenged the rejection by the respondents by way of representations dated 20th November, 2009 and 30th November, 2009 pointing out that the respondents had passed an unreasoned order. The respondents responded to these representations rejecting the petitioner's contention by the letter dated 7th December, 2009 giving the following reasons for rejection of the petitioner's representation which deserves to be considered in extenso and reads as follows:-

"However, with reference to your letter dated 11.11.2009, 20.11.2009 and 30.11.2009, it has been ascertained from the available records, that you had been issued a non-recordable warning by Commander 13 BRTF on 07 Oct 95 as per the order of DGBR on a Court of Inquiry regarding a case pertaining to year 1993. You were also involved in a Court of Inquiry regarding loss of Govt. property (15 Nos of chequred steel plates) on Dhar-Udampur road Unit line and for not making proper security arrangement to safeguard the Govt. property for which a disciplinary action under CCS (CC&A) Rules 1965 was also held and accordingly displeasure of the Govt. was communicated vide Sectt BRDB Order No.BRDB/02(138)/2000-GE.II dated 02 Feb 2001."

11. We may note that these very reasons have been cited by the respondents in opposition to the present writ petition both in the counter affidavit which has been filed before us and in the submission made by learned counsel for the respondents.

12. We have given our considered thought to both the reasons which have been cited by the respondents to support the rejection of the petitioner's claim. The letter dated 7th December, 2009 refers to the fact that the respondents have *"ascertained from the available records"* that the petitioner had been issued a non-recordable warning by the Commander 13 BRTF on 7th October, 1995 as per the order of DGBR on a court of inquiry regarding a case pertaining to the year 1993. It is noteworthy that before this court, the respondents have taken a stand that the ACR dossier of the petitioner stands destroyed. The respondents have explained that their communication of the ACR as 'good' for the year 1993-94 is based on the extracts of the ACR dossier which are contained in the judgment dated 21st August, 2001 passed by the learned Single Judge of the Guwahati High Court which reads as follows:-

"xxx The petitioner got only 'good' and as such he was not eligible for promotion to the rank of Superintending Engineer on the basis of ACRs of the last 5 years which were placed and considered by the DPC.

xxx xxx xxx

That was done in the instant case in as much as there is an entry in the year i.e. 1.4.93 to 31.3.94 which reads as follows:-

Guidelines for improvement communicated To the officer reported upon:

"Yes, verbally on a few occasions"

(The reporting officer reported as above) And the accepting officer written as follows:

"I partially agree with the resume in that There has been shorfall in the achievement of the officer"

13. This extract does not refer to any court of inquiry or non-recordable warning by the Commander as stated by the respondents. Another important aspect of the matter is that reference has been made by the respondents to a case which pertains to the year 1993. However, the non-recordable warning stated to have been issued by the Commander was issued only on 7th October, 1995 which was beyond the period of 1993-94 for which the ACR had been recorded. Therefore, the non-recordable warnings may have impacted the petitioner's ACR for the year 1994-95 but could not have been a consideration for recording of the ACR for the year 1993-94. On this issue, on a query by the court, we are informed that the non-recordable warning related to an alleged incident of 6th/7th January, 1993. Therefore, the respondents' contention that the non-recordable warning was relevant for the year 1993-94 is also devoid of any merit inasmuch as incident could have been considered while recording the ACR for the year 1992-93 and not the next year with which we are concerned herein.

14. The second reason cited by the respondents in their communication dated 7th December, 2009 relates to the petitioner's implication in a court of inquiry regarding which displeasure of the Government was allegedly communicated to the petitioner vide an order dated 2nd February, 2001. This displeasure on the face of the record, could not have been an input for recording the ACR for the year 1993-94.

15. We may note that given the admitted position noted above and the submissions of the respondents that they have destroyed the record and do not have available with them even the ACR for the period of 1993-94, the respondents clearly had no relevant material available to them for meaningfully considering the representation of the petitioner which was made pursuant to the judgment dated 12th May, 2008.

16. The above narration would also show that the respondents have, therefore, neither communicated the ACR entry in terms of the mandate of the Supreme Court in para 47 of the said judgment nor have placed the same on record. They are admittedly not in a position to do so.

17. Our attention has been drawn to the directions by the Supreme Court in para 40 that an authority higher than the authority which initiated the ACR of the petitioner, is required to consider the petitioner's representation.

18. The petitioner has complained that the original ACR for the year 1993-94 was settled by the Director General, Border Roads (DGBR). It is pointed out that the petitioner's representation dated 13th May, 2009 was rejected by an order dated 9th November, 2009 passed by the same authority i.e. Director General, Border Roads. The petitioner's subsequent representations dated 20th & 30th November, 2009 were also rejected by the very same authority by the communication dated 7th December, 2009. This submission is manifested from a perusal of the letters dated 9th November, 2009 and 7th December, 2009 both of which have been issued by the Director General, Border Roads. There is, therefore, also substance in the petitioner's grievance that the representations of the petitioner have not been considered by an authority higher than the authority which settled the petitioner's ACR initially as mandated by the Supreme Court in their order dated 12th May, 2008.

19. We may note that learned counsel for the respondents submits that so far as the channel for recording of the ACRs of the Executive Engineer is concerned, the same is recorded by the Superintending Engineer and reviewed by the Chief Engineer. It is an admitted position that the second review is by the Director General, Border Roads. The petitioner's representation deserved to be considered by an authority higher than the Director General, Border Roads.

20. In view of the above discussion, it has to be held that the impugned order dated 9th November, 2009 rejecting the petitioner's representation and the communication dated 7th December, 2009 communicating the reasons thereof are based on no material and have been passed in violation of the clear mandate of the judgment of the Supreme Court.

21. In view of the above principles laid down by the Supreme

Court, the action of the respondents denies fairness to the petitioner and that the respondents have failed to give consideration to the petitioner's representations which it was legally required to accord. The order dated 9th November, 2009 and the communication dated 7th December, 2009 are accordingly hereby set aside and quashed. It becomes necessary to consider the appropriate relief to which the petitioner may be entitled. The same would require to be guided by the fact that the respondents have clearly stated that the relevant records relating to the petitioner stand destroyed. We also need to bear in mind that the petitioner has admittedly retired on 31st October, 2000. He has been litigating qua his rights. A challenge to the action of the respondents commenced in the year 1995 when the petitioner had filed Civil Rule No.5307/1995 in the Guwahati High court.

22. The respondents admit that persons junior to the petitioner were promoted on the 16th December, 1994 in the Departmental Promotion Committee. The petitioner was denied the promotion on the ground that he did not meet the bench mark and that he had a 'good' entry in the year 1993-94. Despite redressal of his grievance by the Supreme Court by the judgment dated 12th May, 2008, the petitioner has been deprived of the fair opportunity to claim the benefits of the relief granted to him.

23. Given the status of non-availability of record with the respondents, no fresh consideration of the petitioner's representations can be directed at this stage.

24. Mr.Yogender Mishra, learned counsel for the petitioner has drawn our attention to the order dated 22nd October, 2008 (page 89) passed by the Supreme Court in SLP (C) No.26556/2004 **Abhijit Ghosh Dastidar Vs. Union of India & Ors.** wherein in similar circumstances, the court issued the following directions:-

> "5. Learned counsel appearing for the appellant has pointed out that the officer who was immediately junior in service to the appellant was given promotion on 28.08.2000. therefore, the appellant also be deemed to have been given promotion from 28.08.2000. Since the appellant had retired from service, we make it clear that he is not entitled to any pay or allowances for the period for which he had not worked in the Higher Administrative Grade Group-A, but his retrospective promotion from 28.08.2000 shall be considered for the benefit of re-fixation

> of his pension and other retiral benefits as per rules."

25. In the given facts, interests of justice merit that a similar direction is issued in the case of the petitioner. In view of the above, it is directed as follows:-

(i) The order dated 9th November, 2009 and the communication dated 7th December, 2009 are hereby set aside and quashed.

(ii) The petitioner shall be deemed to have been given promotion w.e.f. 16th December, 1994, the date on which the officer immediately junior to the petitioner was granted promotion.

(iii) Inasmuch as the petitioner has retired from service, he would not be entitled to pay and allowance for the period for which he has not worked in the post of Superintending Engineer.

(iv) However, the petitioner would be entitled to consideration of his retrospective promotion w.e.f. 16th December, 1994 for the benefit of re-fixation of his pension and other retiral benefits in accordance with the rules applied to the petitioner. Appropriate orders shall be passed by the respondents within two months.

(v) The petitioner shall be entitled to costs which are quantified at Rs.10,000/- and shall be paid to the petitioner along with the pension within a period of twelve weeks from today.

(vi) This writ petition is allowed in the above terms.

ILR (2013) II DELHI 1109
CRL.A.

VIJAY BAHADUR ....APPELLANT

VERSUS

STATE (NCT) OF DELHI ....RESPONDENT

(GITA MITTAL & J.R. MIDHA, JJ.)

CRL.A. NO. : 826/2010 & CRL.M.B. NO. : 1005/2012 **DATE OF DECISION: 14.02.2013**

Indian Penal Code, 1860—Section 302—Intention to cause the death—Act committed without any pre-mediation and in a certain fight, in the heat of passion – lack of evidence – conviction not sustainable – commission of offence would fall under Section 304 Part-II, IPC.

Appellant convicted under Section 302 IPC – sentenced to rigorous imprisonment for life with fine of Rs. 3000/- – accused indulging in a drinking session with the deceased – MLC noted one punctured wound over the left lateral side (Ant Part) of chest – death caused due to cardiogenic shock as a result of stab injury – sufficient to cause death in the ordinary course of nature – Lack of evidence to establish intention – offence to fall under Section 304 Part-II, IPC.

In view of the above discussion, it would appear that learned trial judge has overlooked the aspect of the lack of evidence to establish the intention to cause the death of the deceased on the part of the appellant. For this reason, the conviction of the appellant for commission of the offence under Section 302 of the IPC is not sustainable. However, in the light of the above discussion, it has to be held that the appellant was

guilty of commission of offence which would fall under Section 304 Part II of the IPC. **(Para 29)**

Indian Penal Code, 1860 – Section 302 – Reaction to a situation of violence – PW-2 brother-in-law of the deceased left the injured and unconscious relative without taking steps for removing him to the hospital and instantly rushed to the house of the brother of the injured instead of proceeding for instantaneous medical assistance. HELD: Reaction to a situation of violence varies from person to person. It is conceivable that a person would get so shocked and traumatized that he may not look for medical assistance in a condition of violence but may reach out to a relative. Testimony of such witness believed.

It is trite that the reaction to a situation of violence varies from person to person. It is conceivable that a person would get so shocked and traumatized that he may not first look for medical assistance in a condition of violence but may reach out to a relative. We are not inclined to disbelieve the testimony of PW-2 – Prem Singh on the sole ground that he did not report the incident immediately or that he did not rush with the appellant to the hospital. The evidence on record would show that the brother of the deceased was residing in the immediate vicinity of the place of occurrence and was at the spot within a short period of the occurrence and information was given to the police immediately thereafter. **(Para 12)**

Ms. Charu Verma, learned counsel for the appellant has pointed out that both the recoveries are shrouded in doubt inasmuch as Inspector Ramesh Chander has claimed that the knife was seized from an open room. The police witness has stated that the wife of the appellant as well as his children were present. **(Para 13)**

[Lo Ba]

APPEARANCES:

FOR THE PETITIONER : Ms. Charu Verma, Advocate.

FOR THE RESPONDENTS : Ms. Ritu Gauba, APP.

CASES REFERRED TO:

1. *Laxmichand @ Balbutya* vs. *State of Maharashtra,* 2012 (5) SCALE 357.
2. *Laxman Kalu* vs. *State of Maharashtra,* 2011 (1) SCALE 120
3. *Tholan* vs. *State of Tamil Nadu,* 1984 SCC (Crl.) 164.
4. *Abdul Nawaz* vs. *State of West Bengal,* (1983) 2 SCC 342.
5. *Kundan Singh* vs. *Delhi Administration,* (1975) 3 SCC 822.

RESULT: Rigorous imprisonment for life with fine of Rs.3000/- was changed to rigorous imprisonment for eight years.

GITA MITTAL, J. (Oral)

Crl.M.(Bail)No.1005/2012

We are of the view that the appeal deserves to be taken up for consideration.

Accordingly, the appeal is taken up for consideration and this application is dismissed.

CRL.A.No.826/2010

1. The appellant before us has challenged the judgment dated 15th February, 2010 whereby the appellant was convicted for commission of offence under Section 302 of the Indian Penal Code and the order of sentence dated 18th February, 2010 whereby the appellant was sentenced to undergo a rigorous imprisonment for life with fine of Rs.3,000/-in default of payment of which, he was required to undergo six months rigorous imprisonment. The case of the prosecution before the trial court was that on the night intervening 10th/11th September, 2005 at about 12:00 am, the accused Vijay Bahadur was indulging in a drinking session with the deceased – Dalip in his tenanted room at C-102/103, J.J. Colony,

Madipur, Delhi. He was joined in this bout of drinking by his father-in-law – Shri Lal Bahadur.

2. It is in evidence that the accused was residing in the said premises along with his wife and children.

3. As per the prosecution, at about 10:30 pm, PW-2 – Prem Singh, brother-in-law of the deceased went to call him to eat his dinner. PW-2 – Prem Singh has stated in the witness box that the deceased told him that he would eat later. About one and a half hours later, PW-2 – Prem Singh heard three persons fighting with each other and that they proceeded to the terrace from the room where they were drinking. PW-2 has claimed that he heard noise and shout of the accused. When he came out of the room, he saw the accused coming from the roof and the accused stated to him *"maine Dalip ka kaam tamam kar diya hai aur ek or karoonga"*. PW-2 has stated that when he proceeded to the roof, he saw the deceased lying in a bloodied condition on the roof of the premises.

4. The police has claimed to have recovered a blood stained dagger on 11th November, 2005 from the *"taand"* from the room of the appellant -Vijay Bahadur. As per PW-13 -Inspector Ramesh Chander, a sketch – Ex.PW2/C was prepared of the dagger which was seized vide seizure memo – Ex.PW2/D.

5. The appellant was arrested on 11th November, 2005. It is claimed that he made a disclosure statement – Ex.PW5/C and got recovered his blood stained shirt from a yellow colour polythene bag which was kept in a hollow in the stem of a tree near house no.C-102/103, J.J. Colony, Madipur.

6. A chargesheet was filed by the police on completion of the investigation on 9th December, 2005 and vide the order passed on 25th September, 2006, the appellant was arrayed to stand trial for commission of an offence under Section 302 of the IPC. The prosecution examined 16 witnesses in support of their case. Before this court, both the parties have drawn our attention to the testimony of PW-1 – Dr. Binay Kumar who recorded the MLC; PW-2 – Prem Singh (brother-in-law of the deceased); PW-3 – Dr. Manoj Dhingra who had conducted the post-mortem on the dead body of the deceased; PW-4 – Lal Singh (brother of the deceased); PW-13 -Inspector Ramesh Chander (Investigating Officer); PW15 –Shashi Bala, Sr. Scientific Assistant who has proved the forensic examination from the samples; PW-16 – S.I. Jai Narain who

was assigned the investigation of the case originally.

7. PW-2 has explained that he got so flustered when he saw the condition of the deceased that he immediately ran to the house of PW-4 – Lal Singh (brother of the deceased) to inform him about the incident and returned with him to the spot. The deceased is stated to have been in an unconscious condition when PW-2 left him on the roof and found him in the same condition when he returned with his brother. It is in evidence that PW-4 – Lal Singh had made the call to the Police Control Room.

8. The prosecution has contended that at about 12:45 am on the 11th of September 2005, a call was received by the Police Control Room with regard to the fight. The said information was recorded as DD No.3 (Ex.PW8/A) by the police station Punjabi Bagh, Delhi. A perusal thereof would show that the police was informed of an accident of knife stabbing in a fight as taken place in the house no.C-102, J.J. Colony, Madipur (near Shiv Mandir). The police proceeded to the spot.

9. So far as the fate of the deceased – Dalip is concerned, we find that the prosecution did not examine ASI R.P. Shukla who as per the MLC No.003156 – Ex.PW1/A of the deceased took the deceased to the Sanjay Gandhi Memorial Hospital, Mangol Puri, Delhi. As per this MLC, the deceased was examined in the hospital at about 2:30 am when the deceased was declared brought dead. The MLC has noted one injury on the deceased which was one "punctured wound over the left lateral side (Ant part) of chest". The post-mortem – Ex.PW3/A was conducted on the body of the deceased on the 12th of September 2005 which confirmed the same injury. The doctor who conducted the post-mortem on the body of the deceased opined the cause of death as cardiogenic shock as a result of stab injury. It was also opined that the injury was sufficient to cause death in the ordinary course of nature.

10. The seized knife and recovered clothes were sent for forensic examination to the Forensic Science Laboratory, Sector-14, Madhuban Chown, Rohini, Delhi-110085. As per the forensic 31st report dated May, 2006 – Ex.PW13/E, the laboratory had confirmed human blood of 'O' Group on the shirt and human blood of 'O' Group on the knife. Unfortunately, the prosecution failed to lead any evidence with regard to the blood group of the deceased to connect the blood stains on the knife or the shirt with the blood of the deceased.

11. Be that as it may, so far as the challenge to the judgment of the trial court is concerned, the same rests primarily on the submission by learned counsel for the appellant to the effect that PW-2 – Prem Singh is not reliable given the manner in which he has acted himself after he saw the condition of his deceased brother-in-law. It is submitted at great length that the conduct of the PW-2 was most unnatural and it is unbelievable that he was ready to leave his injured and unconscious relative without taking steps for removing him to the hospital and instantly rushed to the house of the brother of the injured instead of proceeding for instantaneous medical assistance.

12. It is trite that the reaction to a situation of violence varies from person to person. It is conceivable that a person would get so shocked and traumatized that he may not first look for medical assistance in a condition of violence but may reach out to a relative. We are not inclined to disbelieve the testimony of PW-2 – Prem Singh on the sole ground that he did not report the incident immediately or that he did not rush with the appellant to the hospital. The evidence on record would show that the brother of the deceased was residing in the immediate vicinity of the place of occurrence and was at the spot within a short period of the occurrence and information was given to the police immediately thereafter.

13. Ms. Charu Verma, learned counsel for the appellant has pointed out that both the recoveries are shrouded in doubt inasmuch as Inspector Ramesh Chander has claimed that the knife was seized from an open room. The police witness has stated that the wife of the appellant as well as his children were present.

14. Ms. Charu Verma, learned counsel for the appellant has also challenged the recovery of the knife for the reason that the recovery was from an open room and that the signatures of the wife or any other public person had not been taken thereon. The recovery is challenged on the ground that the knife was recovered two days after the occurrence and it is impossible that the blood stained knife could have been got remained in open place for such period and more so, in the house of the accused. This objection is also to be noted for the sake of rejection alone. The recovery is stated to have been effected in search in the room of the appellant. It was recovered from a 'taand' which would be near the roof of the room and not from an open place. There is nothing to show

that the placement of the knife was such that it was beyond reach but was such that it was visible to all. For this reason, it is not possible to disbelieve the seizure of the knife from the place in question for the reason that it was from an open place. There is however, no public witness to the said seizure.

15. However, the police has also not lifted any finger prints from the dagger. It is in the testimony of the witness that there were no blood stains even on the 'taand' from where the dagger was recovered.

16. Learned counsel has also drawn our attention to the report from the Forensic Science Laboratory which though has reported that there was human blood on the knife, but has failed to connect the blood to the blood of the deceased.

17. So far as the recovery of the blood stained clothes is concerned, Ms. Charu Verma, learned counsel for the appellant has pointed out that the approach to the tree wherefrom the yellow colour polythene bag and blood stained shirt are claimed to have been recovered, was through the roof of a nearby tailor's shop. No other access to the said hole has been stated by any of the witnesses.

18. It is submitted that the alleged incident is stated to have been taken place at about 12:00 am on the night intervening 10th/11th September, 2005. PW-2 – Prem Singh has stated that he had seen the appellant coming down from the staircase and running away from the premises. The tailor's shop would not have been open in the middle of the night. There is no evidence at all as to how and when the accused could have accessed hollow of the tree to hide the blood stained shirt.

19. So far as the recovery of the shirt is concerned, there thus appears to be some merit in the objection raised by learned counsel for the appellant to the effect that in case the testimony of PW-2 is accepted, there was no occasion for the accused to have reached the hollow of the tree to hide the blood stained shirt. Given the case of the prosecution that the appellant was seen running away from the spot and there was no evidence that he returned to the spot coupled with the fact that the access to the said hollow was only through the tailor's shop in the area, it is difficult to accept the claim by the prosecution that it was the disclosure by the appellant which led to the recovery of a blood stained shirt.

20. The above narration shows that even though we were to disbelieve the recovery of the shirt at the instance of the appellant, given the testimony of the PW-2 – Prem Singh, there is still enough evidence with regard to the involvement of the appellant in the incident for which he was tried.

21. It is noteworthy that there is no evidence on record at all as to the whereabouts of or what happened to the father-in-law – Shri Lal Bahadur who was drinking with the deceased and also present on the roof at the time of the incident. None of the witness including PW-2 has made any statement with regard to the whereabouts of the father-in-law. The prosecution has failed to record his statement or to produce him as a witness even though he was a material and crucial witness so far as the commission of the offence is concerned. Learned counsel for the appellant has contended that the prosecution has withheld this important evidence which would have established the innocence of the appellant.

22. Ms. Charu Verma, learned counsel for the appellant has also submitted that entire incident as deposed by PW-2 – Prem Singh is shrouded in doubt inasmuch as the police has not recovered any alcohol bottles or glasses either from the room of the appellant or the roof where, as per Prem Singh, the drinking session was held.

23. Given the fact that there was no eye-witness to the said incident, the prosecution has attempted to build a case of motive on the part of the appellant. PW-2 has suggested that the deceased had given a loan of Rs.100/-to the accused over which there was acrimony between the two persons. If this was the case, the prosecution has rendered no explanation as to how the two were drinking together, along with PW-4 – Shri Lal Singh, first in the room of the appellant and then they proceeded to the roof to continue with their drinking session. If there was acrimony between the parties, certainly there would be no question of such a session together. Bonhomie between the accused and the deceased is also apparent from the statement of PW-2 – Prem Singh that when he called deceased – Dalip for dinner, he was told by the deceased that he would eat later.

24. The very fact that the three persons were drinking together would suggest that there was no animosity or ill-will and that the same is further manifested from the evidence of PW-2 – Shri Prem Singh who has stated that the deceased refused to come away and had told him that

he would eat later. This fact by itself suggest that even at that point of time, there was no ill-will among the three persons and they were enjoying their bout of drinking together.

25. Ms. Charu Verma, learned counsel for the appellant has submitted that even if it were to be held that the appellant was responsible for the stab wound on the body of the deceased, there was no evidence at all to show that he had any intention to cause such an injury which would result in death of the appellant. It is submitted that for this reason, the conviction of the appellant for the commission of offence under Section 302 of the IPC is not justified and that the appellant at best could have been held guilty for commission of offence under Section 304 Part II of the IPC. It is further submitted that the appellant along with his father-in-law and the deceased – Dalip were enjoying a drinking session together manifesting the good spirits when the unfortunate incident is alleged to have taken place and that there is nothing on record to establish that the appellant intended to kill the deceased. In support of her submission, reliance is placed on the pronouncement of the Supreme Court reported at AIR 1968 SC 1390, **Laxman Kalu v. State of Maharashtra;** 2011 (1) SCALE 120, **Laxmichand @ Balbutya v. State of Maharashtra;** 2012 (5) SCALE 357, **Abdul Nawaz v. State of West Bengal;** (1983) 2 SCC 342, **Jagtar Singh v. State of Punjab;** and 1984 SCC (Crl.) 164, **Tholan v. State of Tamil Nadu**.

26. Learned counsel for the appellant submits that in the given facts, the appellant has at the worst to be held guilty for commission of offence under Section 304 Part II of the IPC and the sentence is required to be reduced to the period already undergone. In this regard, learned counsel for the appellant has placed reliance on the pronouncement of the Supreme Court reported at (1975) 3 SCC 822, **Kundan Singh v. Delhi Administration**.

A perusal of this pronouncement would show that it was the case of the prosecution that the accused persons had caused blows on the head of the deceased. The cause of death was opined by the doctor to be a result of rupture of the spleen as well as of one of the blows on the head. It could not be determined as to which of the accused had caused such injuries on the head. Consequently, the Supreme Court had held that all the accused could not be held liable for the blow. Because of this doubt, though the appellants were convicted for commission of

offence under Section 304 Part II of the IPC, the sentence was reduced to the undergone period of five years.

27. In the present case, this court is left completely in a dark as to how a drinking session resulted in a homicidal attack on the deceased. There is no evidence of the nature of the event which resulted in a single stab injury on the person of Dalip. There is not an iota of evidence which would show the appellant intended to cause a fatal stab injury on the deceased – Dalip. Though given the nature of the weapon and the injury which resulted, it has to be held that the appellant would have the knowledge that the injury could result in the death of Dalip.

28. In similar facts, in the judgment of the Supreme Court in **Laxmichand @ Balbutya** (supra), the Supreme Court held that the commission of the offence attributed to the accused – appellant would come under Section 304 Part II of the IPC. The other judicial pronouncements cited by learned counsel for the appellant noted hereinbefore, are to the same effect. It has been repeatedly held that *"the act of the appellant which tantamount to commission of culpable homicide would not amount to murder if the same is committed without any pre-meditation and in a sudden fight, in the heat of passion, in the course of sudden quarrel without the offender taking undue advantage or acting in a cruel or in an unusual manner"*. Reference in this regard may be made to **Abdul Nawaz** (supra).

29. In view of the above discussion, it would appear that learned trial judge has overlooked the aspect of the lack of evidence to establish the intention to cause the death of the deceased on the part of the appellant. For this reason, the conviction of the appellant for commission of the offence under Section 302 of the IPC is not sustainable. However, in the light of the above discussion, it has to be held that the appellant was guilty of commission of offence which would fall under Section 304 Part II of the IPC.

30. So far as the appropriate sentence is concerned, considering the nature of the injuries and the conviction of the appellant for commission of offence under Section 304 Part II of the IPC, we are of the view that the rigorous imprisonment of eight years would meet the ends of justice. It is ordered accordingly.

This appeal is disposed of in the above terms.

ILR (2013) II DELHI 1119
W.P. (C)

COL. T.S. SACHDEVA ....PETITIONER

VERSUS

UNION OF INDIA & OTHERS ....RESPONDENTS

(GITA MITTAL & J.R. MIDHA, JJ.)

WP(C) NO. : 8729/2011 DATE OF DECISION: 18.02.2013

Constitution of India, 1950—Article 227—Service Matter—Armed Forces Tribunal—Whether the Petitioner be empanelled for the post of Brigadier by the Selection Board and whether his batch of 1979 requires consideration for promotion without being clubbed with persons belonging to 1982 batch? Held- That normal review cases cannot be considered in isolation but have to be considered along with fresh cases of the next available batch who would be otherwise deprived of being considered. The review cases were already considered as fresh cases for vacancies available, but could not be empanelled based on quantified merit.

Important Issue Involved: "Review cases cannot be considered alone as the available vacancy will be of the fresh batch and if that batch is not considered, it will be deprived of legitimate and fair consideration".

[As Ma]

APPEARANCES:

FOR THE PETITIONER : Mr. S.S. Pandy, Advocate.

FOR THE RESPONDENTS : Mr. Ankur Chhibber, Advocate.

CASE REFERRED TO:

1. *Tej Ram & Anr.* vs. *Union of India* O.A.No.115/2011.

RESULT: Writ Petition Dismissed.

GITA MITTAL, J. (Oral)

1. The petitioner assails an order dated 22nd September, 2011 passed in OA No.115/2011 passed by the Armed Forces Tribunal.

2. The petitioner was recruited on 3rd September, 1979 in the Indian Army in Remount Veterinary Corps (for brevity 'RVC') in 1979 batch. He was similarly placed as one Tej Ram. They were promoted to the rank of Lieutenant Colonel but could not be empanelled by the Selection Board for the post of Brigadier. As they had grievance with regard to the ACRs which had been recorded, non-statutory complaints were filed in respect thereof. Redressal was given to both of them on their complaints by expunging the adverse portion of the ACRs.

3. In view of the adverse remarks having been expunged from the ACRs, the respondents held a Special Selection Board in September, 2010 for consideration of the petitioner along with Colonel Tej Ram. These two officers, however, could not be selected even in this consideration.

4. The respondents have contended before us that the stage of fresh consideration of these officers was consequently over and they were subsequently required to be considered as review cases.

5. The respondents pointed out that during 1980-81, there was no batch available for consideration. When a vacancy arose on 23rd February, 2011, the batch of 1982 was eligible for its first consideration as the next available batch, with the petitioner and Col. Tej Ram being case of the first review. These two officers were considered as first review cases by the Selection Board No.2 held in April, 2011 along with fresh cases by the 1982 batch in accordance with the afore noticed policy.

6. For the said vacancy in the post of Brigadier (which had arisen on 23rd February, 2011), Colonel Tej Ram and Col. Sachdeva (the present petitioner) contended that since they belonged to the 1979 batch, their cases were required to be considered for promotion without being clubbed with persons belonging to the 1982 batch. As this was not being done,

the petitioner and Col Tej Ram approached the Armed Forces Tribunal by way of O.A.No.115/2011 seeking a direction to the respondents to accord them such consideration. They also prayed for striking down of para 6 of the relevant policy letter for calculation of pro-rata vacancies.

7. Our attention has been drawn to the counter affidavit filed by the respondent no.1 in O.A.No.115/2011, **Tej Ram & Anr. v. Union of India** filed by the petitioner jointly with Col. Tej Ram challenging their separate non-consideration. In this counter affidavit, the respondent no.1 stated as follows:

> "In terms of **MS Branch policy** letters No. 37417/QSIR/MS-5 dated 22 Aug 1986, "Sequence of Selection Review Cases", Para 9(a) of letter No 04579/MS **(Policy) dated 11 Dec 1991,** 'Sequence of Selection to Select Ranks' and letter No 04477/MS **Policy dated 07 Oct 2002 'Consideration of CRs for SBs'** in Army, officers are considered batch-wise to draw a panel to fill likely vacancies, **alongwith a fresh batch, officers belonging to the previous two batches are given review consideration.** These policy letters are attached as **Annexure "R-1"** to **R-3** respectively.
>
> There was no commissioning and there are no officers in 1980 and 1981 batches of RVC. Col Tej Ram and Col T S Sachdeva, who were **not approved as Special Review (Fresh) cases of their own batch 1979 were thus logically required to the considered as normal review cases alongwith Fresh Cases of the next available batch,** which is the 1982 batch, which has three Cols, by No 2 Selection Board for one vacancy. **The plea of being considered as part of the 1980 batch is not tenable since there was no commissioning in RVC in that year. Normal review cases cannot be considered in isolation but have to be considered alongwith Fresh Cases of the next available batch who would otherwise be deprived of being considered equitably for the available vacancy.** The **Special Review (Fresh)** cases are considered afresh based on redressal granted consequent to a **complaint or for any other reason.** The officers are considered as per the policy in vogue at the time of consideration of his original batch and with comparative merit of his batch mates. The policy letter No 04502/MS Policy dated 27 July 1995 is attached as Annexure "R-4".
>
> 4.8 That the contents of Para 4.8 are denied being false, misleading and perceptions of the Applicants. It is submitted that the **review cases cannot be considered alone as the available vacancy will be of the fresh batch and if that batch is not considered, it will be deprived of legitimate and fair consideration.** The review cases were already considered as fresh cases for vacancies available to the said (original) batch but they were not empanelled based on quantified merit and value judgment marks. **In case logic of the Applicants is accepted that would mean that officer who is not approved as Fresh batch with his batch mates will be considered without a Fresh batch for a vacancy which should logically go to Fresh batch and those review cases officers should be empanelled, even though, below the comparative merit of their batch and that cycle should continue until Fresh batch comes up for consideration, does not stand to logic, otherwise, there may not be any supersession in the Minor Corps.**"
>
> (Emphasis Supplied)

8. We find that by the order dated 22nd September, 2011 which has been assailed by the petitioner herein, the Armed Forces Tribunal negated the claim of the petitioner who had filed OA No.115/2011 along with Col. Tej Ram and held that they were not entitled to the stand alone consideration as review cases de hors the next available batch. This petition was therefore dismissed by the impugned order.

9. It is noteworthy that another officer of the RVC namely Major General Shrikant Sharma was aggrieved by the action of the respondents in acting diametrically opposite as in the case of the petitioner. Major General Shrikant Sharma was aggrieved by the act of the respondents in giving stand alone consideration to the review case of Major General S.S. Thakral as a first review case for the post of Major General and thereafter considering him alone as a fresh case for promotion to the rank of Lieutenant General. Major General Shrikant Sharma had filed OA No.161/2011 which came to be listed with the petitioner's OA No.115/2011 before the Armed Forces Tribunal on 22nd September, 2011. The petition filed by Major General Shrikant Sharma was dismissed by the Armed Forces Tribunal by an order passed on 22nd September, 2011 and the

Tribunal returned a finding which was diametrically opposite to that in the case of the petitioner and Col. Tej Ram. Major General Shrikant Sharma assailed the order passed in his case by way of Writ Petition (Civil) No.7208/2011 which has been allowed by us by the judgment passed on 11th January, 2013.

10. It is pointed out that this Court has considered the view taken by the Armed Forces Tribunal in the order passed on 22nd September, 2011 in OA No.115/2011 in paragraph Nos.61 to 72 of the judgment in Writ Petition (Civil) No.7208/2011. It is not disputed before us that the challenge by the petitioner is covered by the reasons recorded by us in our decision on 11th January, 2013 in Writ Petition (Civil) No.7208/2011.

11. In view of the above, for the detailed reasons recorded in our decision dated 11th January, 2013 in Writ Petition (Civil) No.7208/2011, the present writ petition must fail. This writ petition is accordingly dismissed.

ILR (2013) II DELHI 1123
CRL. A.

CHAND BABU **....APPELLANT**

VERSUS

THE STATE (GOVT. OF NCT OF DELHI) **....RESPONDENT**

(G.P. MITTAL, J.)

CRL.A. NO. : 778/2009 **DATE OF DECISION: 20.02.2013**

Indian Penal Code, 1860—Section 366 and 376—Juvenile Justice (Care and Protection of Children) Act, 2000—Section 7A, 15 & 16—Juvenile Justice (Care and Protection of Children) Rules, 2007—Rule 12—Plea of Juvenility—Accused charged for offences u/s

366 & 376—Plea of Juvenility raised before ASJ—Despite report with regard to DOB certificate issued by Panchayat vide which accused juvenile, ASJ got ossification test done and on basis thereof without enquiry held accused not juvenile and convicted post trial—Held, under Rule 12 (3) certificates as mentioned, have to be relied in order of precedent—Clause B of Rule 12 (3) regarding medical evidence comes into operation only when three certificates mentioned in Rule 12 (3) (a) not available—Trial Court should not have got ossification test done when Panchayat certificate produced, without first holding enquiry—As per Panchayat certificate accused Juvenile on date of commission of offence—Accused already in custody for five years and nine months which is in excess of maximum period of three years under JJ Act—Accused directed to be released forthwith—Appeal allowed.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Mr. M.M. Rahman, Advocate Appellant produced from JC.

FOR THE RESPONDENT : Ms. Rajdipa Behura, APP for the State.

CASES REFERRED TO:

1. *Ashwani Kumar Saxena* vs. *State of M.P.* (2012) 9 SCC 750.
2. *Raju* vs. *State (Govt. of NCT) of Delhi,* 184 (2011) DLT 100 (DB).
3. *Amit Singh* vs. *State of Maharashtra & Anr.* (2011) 13 SCC 744.
4. *Satish @ Dhanna* vs. *State of Madhya Pradesh & Ors.* (2009) 14 SCC 187.
5. *Bhola Bhagat* vs. *State of Bihar* (1997) 8 SCC 720.
6. *Bhoop Ram* vs. *State of U.P.* (1989) 3 SCC 1.

7. *Gopinath Ghosh* vs. *State of W.B.* 1984 Supp SCC 228.

RESULT: Appeal allowed.

G.P. MITTAL, J. (ORAL)

1. The Appeal is directed against a judgment dated 07.09.2009 and order on sentence dated 08.09.2009 whereby the Appellant was convicted for the offences punishable under Sections 366 and 376 of the Indian Penal Code (IPC). He was sentenced to undergo rigorous imprisonment for seven years and to pay fine of Rs. 3,000/- or in default to undergo simple imprisonment for three months for the offence punishable under Section 366 IPC. He was further sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs. 3,000/- or in default to undergo simple imprisonment for three months for the offence punishable under Section 376 IPC.

2. The main ground of challenge raised by the Appellant in the instant Appeal is that on the date of the commission of the offence, the Appellant was a juvenile. A plea with regard to juvenility was raised by the Appellant before the learned Additional Sessions Judge ('ASJ'). A report with regard to the date of birth certificate issued by the Panchyat was also obtained by the Court, in spite of this, the learned 'ASJ' preferred to get an ossification test done and relied thereon to hold that the Appellant was not a juvenile.

3. It is not in dispute that a plea of juvenility was raised by the Appellant on at least 24.01.2008. Orders dated 24.01.2008 and 18.02.2008 passed by the learned 'ASJ' are extracted hereunder for ready reference:-

"24.1.2008

PW2 has been partly cross examined. Her further cross examination is deferred as she is not feeling well. On her request, case is adjourned for her further cross examination. She is bound down for the next date. Now to come up for PE for 18.2.08.

The accused has also filed an application along with affidavit of his father and age certificate claimed to be issued by Gaon Panchyat. Let the IO verify the date of birth of the accused and submit the report on or before the next date. The advocate for the accused will supply the complete set of the affidavit of the certificate to the IO. Notice be sent to the IO for this purpose for 30.1.08."

"18.02.2008

PW2 and PW3 have been examined and discharged. Now to come up for evidence of remaining public witnesses on 31.03.2008.

A report regarding date of birth of the accused has also been received from his village Nyaya Panchayat. The claim of the accused is that he was juvenile at the time of commission of the crime. Therefore, this case be transferred to Juvenile Court. Before deciding this application, the ossification test of the accused should be conducted. Accordingly, IO is directed to get the ossification test conducted of the accused and file the report on or before next date..."

4. Since as per the ossification test, the Appellant was found to be more than 20 years it seems that no inquiry was conducted nor any finding was given by the learned 'ASJ' with regard to the Appellant's age. However, when this plea was again raised on behalf of the Appellant at the time of final arguments, it was simply rejected on the ground that the Appellant's bone age had been found to be more than 20 years. Para 40 of the impugned judgment which dealt with this contention is extracted hereunder:-

"40. The next contention of Ld. Counsel for accused that the accused was a minor on the date of offence is rejected as IO had filed the bone age report of accused according to which the age of accused was more than 20 years."

5. At this juncture, I would like to note that ASI Dayanand of PS Nabi Karim verified the date of birth from the Panchayat Register and by his report dated 18.02.2008 he reported the Appellant's date of birth to be 20.05.1990. The name of the Appellant in the Panchayat Register was recorded as Shameem Ahmed. ASI Dayanand recorded the statements of Pradhan, Gram Panchayat (Ms. Aslam Bano), Aziz Ahmed, Maksood Ahmed and Irsad Ali that Shameem Ahmed was nick named as Chand Babu. A perusal of the family Register obtained from the Panchayat and verified by the IO from the Panchayat reveals that Mohd. Shammi had just one son by the name of Shameem Ahmed. IO did not find anything suspicious about the date of birth certificate produced by the Appellant

before the learned 'ASJ'.

6. Thus, from the Panchayat Register coupled with the statements of the Pradhan of the Panchayat and neighbours it was established that the Appellant's date of birth was 20.05.1990.

7. The question for consideration is whether the age determined in the ossification test can be taken into consideration when the age is established from the certificate issued by the Panchayat.

8. In **Ashwani Kumar Saxena v. State of M.P.** (2012) 9 SCC 750, the Hon'ble Supreme Court deprecated the practice of converting an inquiry as envisaged under Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (Act of 2000) into a full-fledged trial under the Code of Criminal Procedure. The Supreme Court explained the scope of Section 7A of the Act of 2000 and Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (Rules of 2007). Paras 24 to 26 and 42 to 43 of the report are extracted hereunder:-

> "24. We may, however, point out that none of the abovementioned judgments referred to earlier had examined the scope, meaning and content of Section 7-A of the Act, Rule 12 of the 2007 Rules and the nature of the inquiry contemplated in those provisions. For easy reference, let us extract Section 7-A of the Act and Rule 12 of the 2007 Rules:
>
> **"7-A. Procedure to be followed when claim of juvenility is raised before any court.ù**(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an enquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:
>
> Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the Rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

> (2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be deemed to have no effect." (emphasis supplied)
>
> **"12. Procedure to be followed in determination of age.** - (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be the Committee referred to in Rule 19 of these Rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.
>
> (2) The court or the Board or as the case may be the Committee shall decide the juvenility or otherwise of the juvenile or the child or as the case may be the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.
>
> (3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining -
>
> (a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;
>
> (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
>
> (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;
>
> **(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child.** In case exact assessment of the age cannot be done, the court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one

year. **(emphasis supplied)**

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or as the case may be the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these Rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these Rules, no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this Rule.

(6) The provisions contained in this Rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law." (emphasis added)

25 Section 7-A, obliges the court only to make an inquiry, not an investigation or a trial, an inquiry not under the Code of Criminal Procedure, but under the JJ Act. The criminal courts, Juvenile Justice Board, committees, etc. we have noticed, proceed as if they are conducting a trial, inquiry, enquiry or investigation as per the Code. The statute requires the court or the Board only to make an "inquiry" and in what manner that inquiry has to be conducted is provided in the JJ Rules. Few of the expressions

used in Section 7-A and Rule 12 are of considerable importance and a reference to them is necessary to understand the true scope and content of those provisions. Section 7-A has used the expressions "court shall make an inquiry", "take such evidence as may be necessary" and "but not an affidavit". The Court or the Board can accept as evidence something more than an affidavit i.e. the Court or the Board can accept documents, certificates, etc. as evidence, need not be oral evidence.

26. Rule 12 which has to be read along with Section 7-A has also used certain expressions which are also to be borne in mind. Rule 12(2) uses the expression "prima facie" and "on the basis of physical appearance" or "documents, if available". Rule 12(3) uses the expression "by seeking evidence by obtaining". These expressions in our view re-emphasise the fact that what is contemplated in Section 7-A and Rule 12 is only an inquiry. Further, the age determination inquiry has to be completed and age be determined within thirty days from the date of making the application; which is also an indication of the manner in which the inquiry has to be conducted and completed. The word "inquiry" has not been defined under the JJ Act, but Section 2(y) of the JJ Act says that all words and expressions used and not defined in the JJ Act but defined in the Code of Criminal Procedure, 1973 (2 of 1974), shall have the meanings respectively assigned to them in that Code.

xxxx xxxx xxxx xxxx

42. In **Shah Nawaz v. State of U.P.** (2011) 13 SCC 751 the Court while examining the scope of Rule 12, has reiterated that medical opinion from the Medical Board should be sought only when matriculation certificate or equivalent certificate or the date of birth certificate from the school first attended or any birth certificate issued by a corporation or a municipal authority or a panchayat or municipality is not available. The Court had held that entry related to date of birth entered in the marksheet is a valid evidence for determining the age of the accused person so also the school leaving certificate for determining the age of the appellant.

43. We are of the view that admission register in the school in

which the candidate first attended is a relevant piece of evidence of the date of birth. The reasoning that the parents could have entered a wrong date of birth in the admission register hence not a correct date of birth is equal to thinking that parents would do so in anticipation that child would commit a crime in future and, in that situation, they could successfully raise a claim of juvenility."

9. Thus, from the perusal of Rule 12 (3) of the Rules of 2007 it is evident that the certificates as mentioned in this Rule have to be relied in order of precedence. Thus, if a Matriculation certificate is available the date of birth mentioned in any other certificate cannot be gone into. If a Matriculation certificate is not available then date of birth as mentioned in the birth certificate from the school first attended is to be taken into consideration. If the said certificate is also not available then the date of birth certificate given by the Corporation or a Municipal Authority or Panchayat has to be considered. Clause (b) of Rule 12 (3) of the Rules of 2007 regarding medical evidence comes into operation only when the three certificates as mentioned in Rule 12 (3)(a) are not available.

10. Since the genuineness of the certificate issued by the Panchayat was not disputed by the prosecution, rather the same was duly verified and found to be genuine, the ossification test conducted to determine Appellant's age in pursuance of the order dated 18.02.2008 passed by learned 'ASJ' was wholly irrelevant. In fact, the learned ASJ ought not to have ventured to order to get the ossification test done when the date of birth certificate had been produced without first holding an inquiry whether the same was genuine or not. If the learned 'ASJ' would not have passed such an order he would not have lost track of the case that an application claiming juvenility has been moved by the Appellant and the plea of juvenility has to be inquired into and determined by the Court.

11. As per the date of birth certificate issued by the Panchayat, the Appellant was born on 20.05.1990. The alleged offence was committed on 08.05.2007. Thus, it is evident that the Appellant was a few days less than 17 years on the date of commission of the offence and was thus a juvenile.

12. The Appellant was in custody since 09.05.2007 till date. Thus, he has already served sentence of five years and more than eight months till now without any remission.

13. As per provisions of Sections 15 and 16 of the Act of 2000, a juvenile can be sent to a special home for a period of three years. Moreover, as per section 7-A (2) of the Act of 2000, the sentence, if any, passed by a Court shall be deemed to have no effect with regard to a juvenile. Thus, normally when a convict is held to be a juvenile, the case has to be remitted to the Juvenile Justice Board (JJB) for an inquiry whether the juvenile has committed any offence and for passing appropriate orders. However, in this case the Appellant has already remained in custody as stated earlier for five years and nine months. Thus, no fruitful purpose would be served by sending the Appellant to the JJB for an inquiry into the offence.

14. A similar view was taken by a Division Bench of this Court in **Raju v. State (Govt. of NCT) of Delhi,** 184 (2011) DLT 100 (DB). Para 10 of the report is extracted hereunder:-

10. The fact that the petitioner had not raised the plea of juvenility before the trial court or before the Division Bench at the stage of the appeal or even before the Supreme Court would not come in his way of seeking the remedy and relief that is sought by virtue of this petition in view of the clear and express provisions of Section 7-A of the said Act. Once we have determined that the petitioner was a 'juvenile' as on the date of the incident, he has to be given the benefit thereof under the said Act. Sections 15 and 16 of the said Act clearly indicate that no juvenile can be kept in custody or detained for a period in excess of 3 years. In the present case, the appellant has already been in custody for over 10 years and 4 months as per the nominal roll on record. Therefore, it is clear that the petitioner has been in custody for a period far in excess of the maximum period of 3 years that is contemplated under the said Act. In these circumstances, he is eligible to be released forthwith. Insofar as the sentence is concerned, the same is deemed to have no effect in view of the provision of Section 7-A(2) of the said Act."

15. The Supreme Court took a similar view in **Satish @ Dhanna v. State of Madhya Pradesh & Ors.** (2009) 14 SCC 187. Paras 5 and 6 of the report are extracted hereunder:-

"5. In **Bhola Bhagat v. State of Bihar** (1997) 8 SCC 720 this Court after referring to the decision in **Gopinath Ghosh v. State**

of W.B. 1984 Supp SCC 228 and **Bhoop Ram v. State of U.P.** (1989) 3 SCC 1 held that an accused who was a juvenile cannot be denied the benefit of provisions of the 2000 Act. The course this Court adopted in Gopinath and Bhola Bhagat cases was to sustain the conviction, but at the same time modify the sentence awarded to the convict.

6. At this distant point of time to refer the appellant to the Juvenile Board would not be proper. Therefore, while sustaining the conviction for the offence for which he has been found guilty, the sentence awarded is restricted to the period already undergone. The appellant be released from custody forthwith unless required to be in custody in connection with any other case."

16. The Supreme Court has reiterated the same view in its later judgments in **Amit Singh v. State of Maharashtra & Anr.** (2011) 13 SCC 744 and **Ashwani Kumar Saxena v. State of M.P.** (2012) 9 SCC 750.

17. In view of the above discussion, the Appellant is directed to be released forthwith, if not, required in any other case.

18. Copy of the order be sent to the Superintendent Jail for compliance.

ILR (2013) II DELHI 1134
CO. PET.

PHENIL SUGARS PRIVATE LTD. ….PETITIONER

VERSUS

BASTI SUGAR MILLS COMPANY LTD. …PETITIONER

(S. MURALIDHAR, J.)

CO. PET. NO. : 275/2011, 276/2011 **DATE OF DECISION: 20.02.2013**

Companies Act, 1956—Section 391 & Section 394: Both petitions have been filed as second motion petitions seeking sanction to the Scheme of Arrangement involving amalgamation of BSMCL ('Transferor company') with PSPL ('Transferee company') with effect from 1st April 2010. Held: Apart from the objections of a minority share-holder, whose objections have been found to be without merit, there is no other objection to the sanctioning of the Scheme. Consequently Scheme sanctioned and upon the sanctioning of the Scheme, all the properties, rights and powers of BSMCL will be transferred to and will vest in PSPL without any further act or deed. BSMCL will be taken to be dissolved without winding up and without any formal petition being filed for that purposes.

In light of the above principles, this Court finds that apart from the objections of Mr. H.K. Chadha, the holder of 8 equity shares, which objections have been found to be without merit, there is no other objection to the sanctioning of the Scheme. Consequently this Court accords its sanction to the Scheme which is at Annexure V to the petition. As pointed out by the RD, upon the sanctioning of the Scheme, in terms of Sections 391 and 394 of the Act, all the properties, rights and powers of BSMCL will be transferred

to and will vest in PSPL without any further act or deed. BSMCL will be taken to be dissolved without winding up and without any formal petition being filed for that purpose. The necessary intimation will be filed with the ROC within 21 days. However, this order will not be construed as an order from making exemption from payment of stamp duty or taxes or any charges, if payable in accordance with law or any permission required under any other law, or permission/ compliance with any other requirement which may be specifically required under any law. **(Para 32)**

Important Issue Involved: Once the broad parameters about the requirements of a scheme for getting sanction of the Court are found to have beenmet, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed.

[Sa Gh]

FOR THE PETITIONER : Mr. Amit S. Chadha, Senior Advocate with Mr. Uday Kumar, Mr. Mayank Bhughana, Mr. Upendra Prasad, Mr. Sanjay K. Singh and Mr. Naveen Chawla, Advocates. For Intervenors: Dr. Manmohan Sharma, Advocate. For Official Liquidators. Mr. Rajiv Bahl, Advocate. Dy. Registrar of Companies : Mr. K.S. Pradhan.

FOR THE RESPONDENT : Mr. Amit S. Chadha, Senior Advocate with Mr. Uday Kumar, Mr. Mayank Bhupana, Mr. Upendra Prasad, Mr. Sanjay K. Singh and Mr. Naveen Chawla, Advocates. For Intervenors: Dr. Manmohan Sharma, Advocate.

For Official Liquidators. Mr. Rajiv Bahl, Advocate. Dy. Registrar of Companies : Mr. K.S. Pradhan,

CASES REFERRED TO:

1. *Compact Power Sources P. Ltd* vs. *HBL Nife Power Systems Ltd.* (2005) 125 Company Cases 289 (AP).
2. *Miheer H. Mafatlal* vs. *Mafatlal Industries Ltd.* (1997) 1 SCC 579.

RESULT: Application allowed.

S. MURALIDHAR, J.

1. Company Petition No. 275 of 2011 is by Phenil Sugars Pvt. Ltd ('PSPL') and Company Petition No. 276 of 2011 is by Basti Sugar Mills Co. Ltd ('BSMCL').

2. Both petitions have been filed as second motion petitions under Sections 391 and 394 of the Companies Act, 1956 ('Act') seeking sanction to the Scheme of Arrangement ('Scheme') involving amalgamation of BSMCL ('Transferor company') with PSPL ('Transferee company') with effect from 1st April 2010.

3. Earlier BSMCL had filed Co. Appl (M) No. 71 of 2011 and PSPL had filed Co. Appl (M) No. 67 of 2011 as first motion applications regarding convening of meetings of all the shareholders and creditors of both the Transferor and Transferee companies. By an order dated 5th April 2011 the Court had directed the convening of meetings of the shareholders and the Transferor company, the secured creditors and the Transferee company, the unsecured creditors and the Transferee company. It dispensed with the holding of the meetings of the shareholders and unsecured creditors of the Transferee company as they had given their consent to the Scheme. There was no secured creditor of the Transferee company. The Court, however, clarified that "the issues of conversion of loan given by Bajaj Hindusthan Limited as well as the approval/No Objection certificate by the Delhi Stock Exchange ('DSE') are left open to be considered at the second motion stage."

4. Pursuant to the above directions, the meetings of the shareholders, secured creditors and unsecured creditors of the Transferor company were held on 12th May 2011 wherein approval was granted to the Scheme.

5. After the meetings were held, an application CA No. 909 of 2011 was filed in CA (M) No. 71 of 2011 by Mr. Harinder Kumar Chadha ('H.K. Chadha') for impleadment as well as for stay or the cancellation of the meetings of the shareholders. By an order dated 18th May 2011 the said application was disposed of noting that the meetings of the shareholders had already been held on 12th May 2011. Mr. H.K. Chadha was given the opportunity to raise objections at the second motion stage and also forward his objections to the Regional Director ('RD') as well as the Registrar of Companies ('ROC') so that they could consider his objections while filing their replies at the second motion stage.

6. The present petitions at the second motion stage were filed by BSMCL and PSPL on 4th July 2011. In both the petitions, notice was directed to issue on 12th July 2011 to the RD and the Official Liquidator ('OL'). Soon thereafter Mr. H.K. Chadha filed CA No. 2168 of 2011 in Co. Pet. No. 276 of 2011 seeking to be impleaded as Respondent and also for a direction to the parties to supply him the full set of applications and replies so that he could file his objections. Notice was issued in the said application on 9th November 2011.

7. The RD filed an affidavit/representation on 18th August 2011 where in para 5 it was indicated that till that date the RD had not received any objection from Mr. H.K. Chadha as directed by the Company Court in its order dated 18th May 2011 except a copy of the Company Application No.909 of 2011. In para 5.1 of the affidavit it was mentioned that inspection of the books of account and record of both companies had been conducted in 2008 and various violations of the Act were observed. It was further stated that pursuant to applications made by both the companies, the offences had been compounded by the competent authority. Both the companies had since filed E-Form 21 along with the said orders under Section 621A of the Act.

8. On 23rd November 2011, the RD was directed by the Court "to file a supplementary affidavit within four weeks clearly dealing with the objections raised by Mr. H.K. Chadha in his impleadment application bearing CA No.2168 of 2011." On 4th January 2012, the RD filed a further affidavit stating that the copies received on 31st May 2011 from Mr. H.K. Chadha had been examined. It was mentioned in the said representation/affidavit that the RD and the ROC had been receiving complaints from Mr. H.K. Chadha against BSMCL from time to time. It

was stated that Mr. H.K. Chadha was a partner of M/s. Basant Ram & Sons ('BRS') who had been appointed as statutory auditors of BSMCL during the years 2003-2004 and 2004-2005. In view of the frequent complaints from investors and others, the Ministry of Corporate Affairs ('MCA') had by letter dated 12th January 2007 ordered an inspection of the books of accounts and statutory records of BSMCL under Section 209 A of the Act. The inspection was carried out by Mr. R.V. Dani, the then Deputy Director, during March and April 2007. It was stated that according to the annual returns filed with the ROC by BSMCL on 27th October 2005, it was noted that the Annual General Meetings ('AGMs') of BSMCL for the financial year 2003-2004 and 2004-2005 were held on 29th September 2004 and 30th September 2005 respectively. Since the inspection report dated 15th June 2007 did not refer to the holding of the said AGMs it was stated by the RD that BSMCL should clarify by filing an affidavit before the Court. It was pointed out that even if the AGMs had not been concluded then BRS would continue as statutory auditors. For removal of the statutory auditors, approval of the Central Government under Section 224 (7) of the Act was required. It was stated that BSMCL should clarify this and produce a copy of the approval under Section 224 (7) of the Act.

9. The RD termed the allegations made by Mr. H.K. Chadha as "very-very serious and the matter is not free from doubt" and prayed that "BSMCL may be directed to file an affidavit with details and reply to each of the points as alleged by the applicant in para 9 thereof". The same was said of the allegations made in para 14 of the objections.

10. On 10th April 2012, this Court disposed of Co. Appl. No. 2168 of 2011 impleading Mr. H.K. Chadha as a Respondent. It was noticed that in Co.A. (SB) No. 74 of 2011, the Court had already held Mr. H.K. Chadha to be a shareholder of BSMCL. Accordingly, the Court directed Mr. H.K. Chadha to file his objections to the Scheme in a concise manner within four weeks. The RD was directed to place on record in a sealed cover a photocopy of the inspection report dated 15th June 2007 by Mr. Dani. BSMCL filed an affidavit on 21st November 2011 in response to the report of the OL filed on 24th October 2011. In particular it is pointed out that Bajaj Hindusthan Ltd. ('BHL') was a secured creditor who had appeared in the Court convened meeting on 12th May 2011 and approved the Scheme. It was left open to BHL to opt for the Zero Coupon Optionally Convertible Preference Shares ('OCPS'). Another

affidavit was filed on the same date by BSMCL dealing with the objections raised by Mr. H.K.Chadha. This will be discussed hereafter while dealing with the objections of Mr. H.K. Chadha. Enclosed with the affidavit was an order dated 3rd August 2011 of the Company Law Board ('CLB') in Co. Pet. No. 9/111/2007-CLB which had been filed by Mr. Raman Chadha son of Mr. H.K. Chadha against BSMCL under Section 111A of the Act praying that the register of members be got rectified by registering him as a shareholder in place of his father.

11. BSMCL filed a further affidavit on 31st March 2012 in response to the affidavit dated 3rd January 2012 of the RD. In this affidavit it is pointed out that BRS had been an auditor of BSMCL till 30th December 2006. However, Mr. H.K. Chadha had been holding for more than 10 years, eight equity shares of BSMCL of the face value of Rs.100 each. BSMCL was owned, managed and controlled by one Narang Group till 31st October 2005 on which date 99.04% shares of BSMCL were purchased by PSPL and a new management came into existence. The new management had examined the records and found that Mr. H.K. Chadha was prone to filing cases against companies where he was an auditor. Reference was made to the decision of this Court in **Basant Ram & Sons v. Union of India** 2002 (110) Company Cases 38. The actions of BRS had resulted in it being disqualified to act as an auditor. It was also pointed out that Mr. H.K. Chadha had deliberately not completed the audit for the years 2003-2004 and 2004-2005. Consequently on 30th December 2006, 99% of the shareholders of BSMCL appointed a new auditor in place of Mr. H.K. Chadha.

12. It was pointed out by BSMCL that by an order dated 16th May 2007 in RFA (OS) No. 133 of 2006, this Court disposed of the appeal filed by BRS against an order passed by the learned Single Judge in CS (OS) No. 2369 of 2006 filed by one Mr. Madhu Sudan Ladha, shareholder of BSMCL against the re-appointment of BRS as statutory auditors. That suit had been disposed of by order dated 19th December 2006 by the learned Single Judge recording the statement of BSMCL that it had no intention to re-appoint BRS as a statutory auditor. The allegation in the appeal by BRS was that the suit was a collusive one and an attempt to oust BRS as statutory auditors could not be done except under Section 224 (7) of the Act. The Division Bench which heard the appeal noted that the AGM was to be held on 30th December 2006 and that it was "open to the members voting in the AGM to appoint any statutory auditor in

accordance with law". In its order dated 16th May 2007, the Division Bench noted that in the said AGM, the members appointed M/s Vinod Kumar and Associates ('VKA'), Chartered Accountants as statutory auditors for the financial year 2007-2008. When BRS raised an objection that the said meeting was not held in accordance with the Act, the Division Bench observed that it would be a fresh cause of action for the Appellant to challenge the resolution passed in the AGM. Accordingly, the appeal was disposed of as having become infructuous.

13. By a subsequent order dated 5th October 2007, the words "financial year 2007-2008" occurring in two places in the order dated 16th May 2007 were substituted by the Division Bench with the words "till the conclusion of the next AGM".

14. It was submitted further by BSMCL in its affidavit that Mr. H.K. Chadha was engaged in litigation without any bonafide cause and was acting prejudicially to the affairs of BSMCL. Being a shareholder with only 8 shares he could not stall the proceedings for approval of the Scheme under Sections 391 and 394 of the Act. The plea of Mr. H.K. Chadha that he was not a shareholder of BSMCL on account of having sold his shares on 9th April 2001 was denied by referring to the order of the CLB dated 9th September 2011 holding him to be a shareholder which was upheld by the Company Court with the dismissal of Co.A. (SB) No. 74 of 2011 on 2nd February 2012 which was filed by Mr. Raman Chadha, son of Mr. H.K. Chadha. Mr. Raman Chadha had claimed that Mr. H.K. Chadha had transferred his shares to him. This was disbelieved both by the CLB as well as by this Court, thus confirming that Mr. H.K. Chadha continued to remain a shareholder of BSMCL. It was pointed out that BSMCL is a subsidiary of PSPL which held 99.04% shares of BSMCL. The affidavit also dealt with other specific allegations of Mr. H.K. Chadha which will be discussed hereafter.

15. The RD filed a third affidavit dated 7th December 2012. Along with the said affidavit, the RD enclosed the report dated 30th November 2012 of the ROC. The ROC also gave its comments in CA No. 2168 of 2011 filed by Mr. H.K. Chadha. It was stated that the said objections were similar to the objections raised in CA No.909 of 2011 and termed it as a dispute between the management and the ex-statutory auditor and except the said complaint, the ROC had not received any complaint from any shareholder or creditor of the company to the Scheme. The ROC

enclosed with the said report an earlier report dated 8th December 2011 sent to the RD. This will also be referred to in due course while dealing with the objections of Mr. H.K. Chadha.

16. This Court has heard the submissions of Mr. Amit S. Chadha, learned Senior counsel appearing for the Transferor and Transferee companies i.e., BSMCL & PSPL, respectively. The submissions of Dr. Manmohan Sharma, learned counsel appearing for Mr. H.K. Chadha, have been heard. Mr. K.S. Pradhan, Deputy Registrar of Companies appeared on behalf of the ROC and Mr. Rajiv Bahl, learned counsel appeared for the OL.

17. Dr. Sharma submitted that BRS had in the qualified audit report dated 9th October 2006 of the accounts of BSMCL for the financial year ending 31st March 2004 stated that they did not give a true and fair view of the statement of affairs of BSMCL. Consequently the statement of accounts for the years 31st March 2004 and 31st March 2005 could not be taken as correct unless the corrective adjustment entries were recorded in the books of accounts "in respect of the fraudulent acts of misfeasance of the funds of the company by its directors which are disclosed by the Statutory Auditor in its aforesaid qualified audit report." He submitted that only then would the latest financial position of BSMCL be able to be determined and it is only then that sanction of the Scheme can be granted under Section 391(2) of the Act. It is submitted that the inspection report dated 15th June 2007 does not term the objections raised in the report dated 9th October 2006 to be baseless. Dr. Sharma alleged that in spite of incorporating the necessary adjustment entries, BSMCL got its accounts audited illegally by another auditor ignoring the binding directions of the Division Bench in its orders dated 16th May 2007 and 5th October 2007.

18. The Court is not impressed with the above submissions of Dr. Sharma. They overlook the fact that BRS was removed as auditor and a new auditor, VKA was appointed at the AGM held on 30th December 2006 as recorded by the Court in its order dated 16th May 2007. BRS, therefore, could not have continued as a statutory auditor of BSMCL. As regards the comments made by the RD in the earlier affidavit dated 17th August 2011, the position stands clarified by the ROC in its report which has been enclosed with the RD's affidavit dated 7th December 2012. Therein the ROC has extracted its earlier report dated 8th December 2011. In its inspection report dated 15th June 2007, the ROC has observed

as under:

> "As regards the allegations made in the complaints from time to time and the impleadment applications that the AGMs held on 29.09.2004 and 30.09.2005 were adjourned, it is stated as under:
>
> a. As per Annual returns filed with this office on 27.10.2005, the AGMs of the company for the financial year 2003-04 & 2004-05 were held on 29.09.2004 and 30.09.2005.
>
> b. In para 51 of the Inspection report, it has been pointed out *inter alia* that "the company did not transact the business relating the adoption of accounts in the 3 AGMs held for financial years 2003-04, 2004-05 and 2005-06. The company appointed the auditors even though the accounts were not audited. Strictly speaking this is an irregularity and is not in the spirit of the Act. In the absence of not transacting the normal business, the company cannot be held to have complied with the provisions of section 166 of the Act. As such the company has violated the provisions of section 166 r/w section 173(1)(a) by way of not conducting the AGMs as contemplated and is liable for prosecutions under Section 168 of the Act."
>
> c. The company has moved compounding application under Section 621A of the Act for composition of default committed under Section 166 r/w 173(1)(a) of the Act mentioning therein that the offence was committed due to the fact that the then M/s. Basant Ram & Sons did not submit their Auditors Report in time and as a consequence, the Board of Directors of the company was constrained to place the unaudited accounts before the AGMs of the company held on 29.09.2004, 30.09.2005 and 30.12.2006 respectively. In the 80th AGM of the company held on 30.07.2007, the company placed audited accounts for the financial year ended on 31.03.2004, 31.03.2005, 31.03.2006 & 31.03.2006 thereby making the default good regarding unaudited balance sheet. Copy of Hon'ble CLB order dated 31.03.2010 compounding the offence u/s 216 read with sec.220 of the Companies Act, 1956 is attached."

19. It has further been stated in para 8 as under:

> "As regards the facts raised in para 5, 6 & 7 of the Directorate's

letter, it is submitted that the Hon'ble High Court in its order dated 16.05.2007 clearly mentioned interalia that "it was for the members to exercise their right and to decide as to who should be appointed as the statutory auditors in the said AGM. We are informed that the said AGM was held on 30.12.2006 as scheduled. However, in that meeting the members chose to appoint M/s. Vinod Kumar and Associates, Chartered Accounts as the statutory auditors for the financial year 2007-08. The learned counsel for the appellant states that the meeting was not held and/or the business was not conducted in accordance with the provisions of the Companies Act, if that is so, it would be a fresh cause of action to the appellant to challenge the Resolution passed in the said AGM in so far as the appointment of statutory auditors is concerned. It is clear from the aforesaid that in so far as the present appeal is concerned, it has become inficituous (sic. infructuous) in as much as order dated 19.12.2006 passed by the learned single Judge was not given the effect to in view of the order dated 27.12.2006 passed by the Division Bench in this appeal". In this regard, it is not clear as to whether the complainant has taken fresh cause of action in view of the orders of the Hon'ble High Court. It is also not clear by the complainant that what would be the affect of the above allegations in the proposed Scheme of Amalgamation. Further, the complainant had filed writ petition as petitioner against M/s Basti Sugar Mills Ltd, the details of prayers made in this petition or at Annexure-D."

20. The above report has been adopted in toto by the RD and, therefore, the objection as regards holding of the AGMs held on 29th September 2004, 30th September 2005 and 30th December 2006 does not survive. In other words, the fact that in the 80th AGM held on 30th July 2007, the audited accounts for the financial years ended 31st March 2004, 31st March 2005 and 31st March 2006 were placed and adopted makes it clear that any default in that regard by BSMCL stands condoned. No other shareholder has objected to those accounts. They are taken to be the audited accounts. Neither the ROC nor the RD, nor the OL raised any objection. The objection of Mr. H.K. Chadha that adjustment entries have to be made in the accounts prepared by BRS for an earlier period to arrive at the correct picture cannot, in the above circumstances, be countenanced. No material has been placed on record by Mr. H.K. Chadha

to substantiate the plea of non-preparation of the audited accounts of the above financial years.

21. As pointed out in the report of the ROC, Mr. H.K. Chadha either by himself or as representing BRS appears to be a chronic litigant. Earlier BRS had filed Civil Writ Petition No. 3141 of 1999 in this Court assailing the order of the Central Government dated 12th April 1999 under Section 224 (7) of the Act granting approval to the removal of BRS as statutory auditor of Gangeshwar Ltd. The ROC has noted that similar complaints were repeatedly made by Mr. H.K. Chadha.

22. There is also no merit in the contention that the orders dated 16th May 2007 and 5th October 2007 of the Court have not been complied with. Those orders in fact only permitted Mr. H.K. Chadha to raise objections to the Scheme while not interfering with his removal as auditor. In any event, since it is stated that there is a writ petition filed by him challenging his removal, the said issue will be decided in those proceedings in accordance with law. For the purpose of the present proceedings, the Court has to proceed on the basis that neither BRS nor Mr. H.K. Chadha is any longer the statutory auditor of BSMCL.

23. The next allegation is that the property of BSMCL located in Civil Lines, Delhi is worth more than Rs. 250 crores and has been transferred for an unrealistically paltry consideration of Rs. 9 crores in favour of a private company owned/controlled by a promoter. BSMCL has vehemently denied the allegation. The Court notes that the transaction took place way back in 2005. There is absolutely no material produced by Mr. H.K. Chadha to show that the value of the property on the date of its sale was more than Rs. 250 crores. No shareholder or creditor has ever objected to the above sale. Even the allegation that two sets of books of accounts were maintained; one maintained for cash facility with Central Bank of India ('Central Bank') for filing fabricated balance sheets and forged signatures of the auditor is unsubstantiated. The Central Bank has not made any such allegations. There is no objection raised in that behalf by either the ROC or the RD.

24. It is then alleged that shares of certain shareholders holding 32% shares in BSMCL were illegally shown as having been transferred to PSPL. This included 9.56% shares held by one Mr. Sudhir Avdhoot who expired on 31st March 2002. It is stated that the wife of Mr. Sudhir Avdhoot had filed a criminal complaint in this regard. Further it is stated

that 5.61% of the total equity share capital held by Mr. Vivek Sahgal and Mrs. Usha Sahgal were also fraudulently transferred in the name of PSPL and that an FIR has been lodged in that regard. It is also the allegation made by Mr. H.K. Chadha that contrary to the assertion of BSMCL, none of the shares held by Systems Investments Pvt. Ltd ('SIPL') were transferred to Goyal Capital Ltd. ('GCL') on 31st October 2005. It is stated that 40773 "A" class shares belonging to SIPL were never sold/ transferred. The original share transfer deed is also not produced. According to Mr. H.K. Chadha, SIPL still held 16.93% shares of the equity capital of BSMCL as on 30th September 2005. It is accordingly submitted that the claim of PSPL that it held 99.04% shares of BSMCL is false.

25. The affidavit of BSMCL shows that by an agreement dated 28th October 2005, the erstwhile share holders of BSMCL sold their shares to PSPL. The 32% share holders have not come forward to complain about any alleged illegal transfer of their shares to PSPL. The annual returns of BSMCL for the last seven years show that 99.04% shares of BSMCL is held by PSPL. Neither the wife of Mr. Sudhir Avdhoot nor Mr. Vivek Sahgal or Mrs. Usha Sahgal have come forward to make any complaint of illegal transfer of their shares. The allegation by Mr. H.K. Chadha that the Scheme raises a strong apprehension that the Sahgals were paid consideration illegally is not substantiated by any material whatsoever. Consequently this Court is unable to find any merit in this objection. Similar complaints made earlier by Mr. H.K. Chadha have been examined by the ROC and found to be without any basis.

26. It is next contended by Dr. Sharma on behalf of Mr. H.K. Chadha that BHL has siphoned off funds of Rs.500 crores whereas it had given a loan of only Rs.250 crores. It must be recalled that BSMCL gave its approval to the Scheme as a secured creditor. The RD has carried out the inspection of the statutory accounts and records. Nothing objectionable has been found in any of these transactions. The allegations of Mr. H.K. Chadha are thus unsubstantiated.

27. Mr. H.K. Chadha relies on a letter dated 3rd October 2005 to urge that BSMCL has admitted that the AGMs held on 29th September 2004 and 30th September 2005 were adjourned. BSMCL has denied the said letter as being a forged one. In any event, the report of the ROC is clear that there is no basis in these allegations. The minutes of the

AGM have been placed on record.

28. As regards the no objection certificate ('NOC') from the DSE, Mr. Amit S. Chadha, learned Senior counsel has pointed out that despite several reminders sent to DSE, they have not responded. He points out that all that Clause 24 (f) of the listing agreement requires is that an NOC is to be obtained from the DSE. Apart from the requirement being only directory, in the facts of the present case where DSE was not responding to the notices, it was not practically possible to obtain an NOC.

29. The above submission of Mr. Amit S. Chadha merits consideration. In **Compact Power Sources P. Ltd v. HBL Nife Power Systems Ltd.** (2005) 125 Company Cases 289 (AP), in similar circumstances it was held that the requirement of obtaining the NOC from the stock exchange in terms of the listing agreement was not mandatory. All that the listed company was to do was to give a scheme/ petition to the stock exchange at least one month before presenting the scheme under Sections 391 and 394 of the Act. As long as that was done, the fact that the stock exchange did not give its no objection, will not prevent the Scheme from being approved. The following observations of the Court in this regard are relevant:

> "Inasmuch as the Transferee Company under Sub-clause (f) had merely agreed to file scheme/petition for approval before the Stock Exchange at least a month before the same is presented before the Court or Tribunal, and had, in fact, filed the scheme/ petition for approval before the Stock Exchange one month before it presented before this Court, as is required under Sub-clause (f) of Clause 24 of the Listing Agreement, I am of the considered opinion that the consent of the Stock Exchange is not compulsorily required to be obtained, and it would suffice if the company files the scheme/petition before the Stock Exchange a month before it presents the scheme/petition before the Court or Tribunal for its approval, and more so when the company under Sub-clauses (g) and (h) of Clause 24 of the Listing Agreement, had agreed that the Scheme of arrangement/amalgamation/merger/ reconstruction/ reduction of capital etc., to be presented to any Court or Tribunal does not violate, override or circumscribe the provisions of securities laws (as mentioned in the explanation appended thereto) or the stock exchange requirements, and also

agreed to disclose the pre and post-arrangement or amalgamation (expected), capital structure and shareholding pattern....."

30. Consequently, both the issues referred to by the Court in its order dated 5th April 2011 in the first motion petition have been accounted for.

31. It is repeatedly urged by Dr. Sharma on behalf of Mr. H.K. Chadha that the matter required investigation by the Central Government under Section 237 of the Act and by the Serious Fraud Investigation Office. This Court does not find any material placed on record by Mr. H.K. Chadha to substantiate the above plea. In **Miheer H. Mafatlal v. Mafatlal Industries Ltd.** (1997) 1 SCC 579, the Supreme Court explained the basic requirements that have to be satisfied before a scheme presented under Sections 391 and 394 of the Act can be approved by the Company Court as under:

"In view of the aforesaid settled legal position, therefore, the scope and ambit of the jurisdiction of the Company Court has clearly got earmarked. The following broad contours of such jurisdiction have emerged:

1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.

2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 Sub-Section (2).

3. That the meetings concerned of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

4. That all necessary material indicated by Section 393(1)(a) is placed before the voters at the meetings concerned as contemplated by Section 391 Sub-section (1).

5. That all the requisite material contemplated by the proviso of Sub-section (2) of Section 391 of the Act is placed before the Court by the applicant concerned seeking sanction for such a scheme and the Court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the Scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.

7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction.

The aforesaid parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction a Scheme of Compromise and Arrangement are not exhaustive but only broadly illustrative of the contours of the Court's jurisdiction."

32. In light of the above principles, this Court finds that apart from the objections of Mr. H.K. Chadha, the holder of 8 equity shares, which objections have been found to be without merit, there is no other objection to the sanctioning of the Scheme. Consequently this Court accords its sanction to the Scheme which is at Annexure V to the petition. As pointed out by the RD, upon the sanctioning of the Scheme, in terms of Sections 391 and 394 of the Act, all the properties, rights and powers of BSMCL will be transferred to and will vest in PSPL without any further act or deed. BSMCL will be taken to be dissolved without winding up and without any formal petition being filed for that purpose. The necessary intimation will be filed with the ROC within 21 days. However, this order will not be construed as an order from making exemption from payment of stamp duty or taxes or any charges, if payable in accordance with law or any permission required under any other law, or permission/ compliance with any other requirement which may be specifically required under any law.

33. The learned Senior counsel for BSMCL has stated voluntarily that upon the Scheme being sanctioned, it would deposit a sum of Rs. 1 lakh with the Common Pool Fund of the OL. The said statement is taken on record. The amount be deposited with the said fund of the OL within three weeks.

34. The petitions are allowed in the above terms, but in the circumstances, with no order as to costs.

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W.P. (C)

SUNIL BHARDWAJ AND ORS. ….PETITIONER

VERSUS

UOI AND ORS. …RESPONDENTS

(GITA MITTAL & J.R. MIDHA, JJ.)

W.P.(C) NO. : 2274/2012, 2276/2012, 2277/2012, 2278/2012, 2279/2012, CM NO. : 4873/2012, 4875/2012, 4876/2012, 4877/2012, 4878/2012

DATE OF DECISION: 21.02.2013

Constitution of India, 1950—Article 227, Armed Forces Tribunal Whether admission of all the candidates, to a Post-Graduate Medical course, who have cleared the eligibility criteria be held compulsory, according to the vacancies announced by the governing body?-Held, that admission shall be granted according to the student-teacher ratio only. Hence, if fewer faculties are employed, then the proportional number of candidates shall be admitted, as has been clearly mentioned in the course brochure. The petitioner-candidates cannot contend that they were not aware of such terms, which had been laid down in the brochure and communicated to them. Whether the application for condonation of delay holds any merit and to rectify this, should any admission be made to future batch?-Held, that scheme of admissions has been completely revamped and a centralized examination is conducted, the same has already been conducted for 2013-14 batch. Also, Supreme Court in many rulings has prohibited admissions to future courses based on entrance examinations conducted

for a particular academic year. Petition Dismissed.

Important Issue Involved: "Admissions to a course which are strictly in conformity with the terms and conditions laid down in the admission notice/brochure. There can be no departure from such clearly mentioned terms.

[As Ma]

APPEARANCES:

FOR THE PETITIONER : Mr. Major K. Ramesh and Ms. Archana Ramesh, Advocates.

FOR THE RESPONDENTS : Mr. Ankur Chhiber, Advocate for UOI. Mr. Ashish Kumar, Advocate for Medical Council of India.

RESULT: Petition Dismissed.

GITA MITTAL, J. (Oral)

1. These writ petitioners assail the common judgment dated 23rd September, 2011 passed by the Armed Forces Tribunal, New Delhi dismissing five petitions being O.A.Nos.262, 257, 258, 259 and 260 of 2011 filed by Maj. Brijpal Upadhyay, Ex.Major Ranjit Pal Singh Bhogal, Ex. Major (Mrs.) Amrita Datla, Ex.Major Sunil Bhardwaj, Ex. Major Lt.Col.(Mrs.) Seema Prasad Pandey v. Union of India & Ors. respectively. The petitioners have separately assailed this common judgment by way of the above five writ petitions. Inasmuch as these writ petitions raise similar questions of facts and identical questions of law, the same are taken up together for consideration and adjudication.

2. Inasmuch as, the order of the Armed Forces Tribunal takes into consideration the facts in the case of Major Brijpal Upadhyay, we are also noticing the facts of the same petition hereafter. On 18th February, 2003, this petitioner was granted Short Service Commission as a doctor in the Army Medical Corps. His initial appointment was for a period of five years, extendable initially for five years with an option for a further extension of four years. Major Brijpal Upadhyay applied for release from the Army on the 20th of February 2011.

3. Just as the other four petitioners, this petitioner applied to the

R&R Medical Hospital at Delhi for undergoing the post-graduate medical course for the Academic Session 2011. The grievance of the petitioner is that the respondents had notified a merit list of 56 doctors as having qualified for the post-graduate course being conducted by the R&R Hospital but gave admission to only 42 doctors. It is contended that the respondents took the illegal stand that the remaining 14 doctors, though in the merit list, could not be granted admission for the reason that the hospital did not have sufficient teaching faculty which was recognized by the University of Delhi.

4. The petitioners before us was amongst 14 doctors who were not granted admission despite their names existing on the merit list of 56 doctors. The petitioners assailed the action of the respondents in denying admission by way of the said application before the Armed Forces Tribunal contending that the respondents had sufficient teachers for teaching students of post graduate and diploma courses. Reliance was placed on the sanction accorded by the Medical Council of India for 70 vacancies of which 56 were intended for MD/MS candidates as well as balance were for diploma and DNB courses.

5. There was no dispute before the Tribunal or before this court that 56 doctors who were qualified were in the order of merit and the 42 doctors who were admitted were higher in merit than the petitioners. The case of the petitioner rests on the plea that given the declaration of the merit list of 56 doctors, the petitioners had a legitimate expectation to be admitted against the 56 vacancies for the post graduate course of MD/MS.

6. At this stage, we may briefly notice a few essential facts. It is an undisputed position that applications were invited for pursuing post graduate degree/diploma courses in institutions run by the Armed Forces for the 2011 session vide a prospectus and application form on terms detailed in the brochure. The respondents have pointed out the priorities and categorization of admission mentioned in the brochure. We may notice the following stipulation by the respondents in the brochure:-

"PRIORITY/CATEGORY FOR ADMISSION

4. Admissions for PG studies are governed by Govt. of India, Ministry of Defence letter No.FPC8510/ DGAFMS/DG-1D/2273/ 2001/D(Med) dated 05 Nov 2001, FPC-8510/DGAFMS/DG-1D/

2556/D (Med) dt 02 Sep 2004, 8510/DGAFMS/DG-1D/3018/D (Med) dt 15 Oct 2004, 8510/DGAFMS/DG-1D/277/D (Medical) dt 14 Feb 2008. The admission and training are controlled by the Office of the DGAFMS in accordance with prevalent rules. The priority for admission of candidates is as follows:

xxx

(d) **Priority – IV** – Ex SSC AMC Officers released from the service after completion of contractual service within three years after their release from service.

(i) The date of release should not be before 01 May 2008 or after 30 Apr 2011 for the session starting in May 2011.

(ii) SSC AMC Officers in their last year of contractual service are also eligible to apply for this category. They will be permitted to appear in the entrance test only with the permission of DGAFMS. They will apply through proper channel through their units and respective DGsMS for the above permission. However, on the date of counseling, they should produce documentary proof of their attaining Ex-SSC status by 30 Apr 11 without which they will not be considered for counseling.

(iii) Officers who have resigned their commission or not completed their contractual service are not eligible to appear under this category.

(iv) The upper age limit for this category shall remain 40 years as on 30 Apr 2011. (e) Priority – V – Civilian candidates willing to serve in the Armed Forces Medical Services (AFMS) subject to their fulfilling the eligibility criteria mentioned in para 8 below. Civilian candidates will have to submit a bond agreement of '5 lacs at the time of admission and have to be medically fit to the standards required for commission in the AFMS. Officers of the AFMS who have resigned their commission or not completed contractual service as SSC officers are not eligible to be considered as Priority-V candidates even though they may be below 35 years of age."

It is admitted that the petitioners fall under the Priority –IV and V notified in the brochure.

7. The petitioners have placed heavy reliance on the following stipulation in the brochure:

> "NOTE : Candidate can apply only to ANY one institution for a particular session"

It is urged as a result of the stipulation above, the respondents deprived the candidates opportunity of applying in any other institution being run by the Armed Forces.

8. The respondents have also pointed out that in the said brochure, the candidates were duly notified that the Army Hospital (R&R), Delhi Cantt. is affiliated with the Delhi University. The details of the courses being conducted in the hospital were also duly notified. As a result of the said affiliation, the Army Hospital (R&R) was bound to comply with the stipulations made by the Delhi University in exercise of powers under the Delhi University Act as well as the statutes and ordinances framed in exercise of statutory power. The entire case of the respondents rests on the stand of the Delhi University with regard to the requirement of the teaching faculties in an institution affiliated to it, being recognized by the Delhi University.

9. The petitioners have pitched their case of legitimate expectation on the sole factor that the respondents had notified the eligibility list of 56 persons. In this regard, so far as number of seats for which admissions were effected is concerned, our attention has been drawn to Clause 7 of the brochure which reads as follows:-

> "7. The actual number of seats available in each subject shall be subject to vacancies available after fulfilling the training requirements of AFMS and sponsored candidates subject to MCI and relevant University regulations. The number of seats available for non-service candidates, after approval of DGSFMS, shall be displayed by Army Hospital (R&R) Delhi Cantt before commencement of counseling."

10. Our attention has been drawn further to the following eligibility criteria on which reliance has been placed by the respondents:-

> **"ELIGIBILITY CRITERIA**
>
> 8. The following eligibility criteria shall be applicable:xxx

(g) The number of candidates to be admitted in any discipline during a particular session will be determined by the number of post-graduate teachers available, the student-teacher ratio and any other criteria laid down by the Medical Council of India and Delhi University from time to time. However, the exact number of available seats, after approval of the DGAFMS, will be displayed on the notice board of the institution only before the start of counselling session."

11. The above extracts of the brochure show that all candidates were put to notice with regard to the requirements of the Delhi University. The respondents had also clearly informed all applicants that the exact available number of seats to which admission could be accorded to would be displayed on the notice board of the institution only before the start of the counselling session. There was never any declaration that the respondents were effecting 56 admissions.

Therefore, the petitioners cannot contend that they were not aware of the requirement of maintenance of a student-teacher ratio in terms of the criteria laid down by Medical Council of India (MCI) as well as by Delhi University or claim any right based on the declared merit list.

12. So far as the admission to the 2010 post graduate MD/MS courses which was to be conducted by the Army Hospital (R&R) is concerned, it is an admitted position before us that the respondents had notified that admissions were effected to only 42 seats on the 19th of April 2011 depending on available faculty for the course which commenced on 18th May, 2011. This position has been confirmed to Amrita Datla, one of the petitioners who had made an application under the Right to Information Act, 2005 to the Army Hospital (R&R). Thus, the position which emerges is that though the MCI had accorded recognition to 56 seats for post graduate MD/MS courses to be conducted by the Army Hospital (R&R), on account of want of recognised faculty position by the Delhi University, the respondents offered admission for only 42 seats to candidates out of a merit list of 56 in the order of merit.

13. Mr. Ankur Chhibber, learned counsel appearing for the Army Hospital (R&R) has also drawn our attention to the communication dated 11th April, 2011 annexed by the writ petitioner wherein the Directorate General of Medical Services had further informed the hospital to the effect that *"in view of the scarcity of resources, it has been decided that a maximum of nine seats will be offered to priority III, IV and V candidates subject to availability of teaching faculty and teaching beds"*. Therefore, .even out of the 42 seats to which admissions have been made, only nine seats were available for admission to the priority III, IV & V candidates. As noticed above, the petitioners fall in priority IV & V.

14. It is urged by learned counsel for the respondents that there is neither injustice nor error in not according admissions to the petitioners who would not have fallen in the 42 candidates who had been given admission.

15. In view of the above factual position, the tribunal considered the matter at length and by a judgment dated 23rd September, 2011 rejected the challenge laid by the petitioner. The tribunal has returned the finding that the action of the respondents was neither arbitrary nor malafide. The ground urged by the petitioners with regard to there being sufficient funds as well as facilities was considered irrelevant for the sole reason that lack of teaching faculty could not be compromised.

We are in respectful agreement with the findings of the tribunal on these issues.

16. We further find that the Armed Forces Tribunal has concluded that being the affiliating institution, the Delhi University alone was competent to certify the teaching positions as qualified supervisors within the meaning of the expression in the appropriate statutes. This finding has not been challenged before us.

17. Mr. K. Ramesh, learned counsel for the petitioner has urged that the petitioner had sought further information under Right to Information Act, 2005 from the MCI, Delhi University as well as Army Hospital (R&R) and had received information with regard to the recognition accorded by the Delhi University to several teaching faculty of the Army Hospital (R&R). Based on this information, the petitioners had filed a review petition being R.A.No.59/2011 on the 10th of October 2011. This review petition was rejected by the tribunal again after detailed consideration on the 17th of November 2011. The learned tribunal was of the view that the recognition as good supervisor or supervisor was accorded after the cut-off date of 19th April, 2011.

18. As noted above, the Army Hospital (R&R) had conducted counselling of the successful candidates on the 19th of April 2011. We

are informed that the course in question commenced on 18th May, 2011. A perusal of the order dated 17th November, 2011 on the R.A.No.59/ 2011 as well as response received by the petitioner from the Delhi University (under the Right to Information Act) with regard to the dates of the faculty recognition would show that none of the faculty had been recognized as teaching faculty prior to the commencement of the course even.

In this background, no benefit would enure to the petitioners based on the recognitions accorded by the Delhi University after the commencement of the course.

19. The matter did not end here. The petitioners before us filed further review petitions being R.A.Nos.10, 06, 07, 08 and 09 of 2012 with applications for condonation of delay. These review petitions were based on the action of the respondents with regard to admissions for the academic session which commenced in 2010. It was pointed out by the petitioner that while admitting candidates pursuant to the examination held on 17th January, 2010 and counselling held on 25th and 26th March, 2010, the respondents admitted candidates even though the teaching faculty had not been recognized. It is urged that based on the action of the respondents for the year 2010, the present petitioners were entitled to admissions in the 2011 course. This submission did not find favour with the tribunal and the review petitions came to the rejected summarily by an order passed on 22nd February, 2012. We are also unable to agree with the challenge of the petitioners to the position taken by the tribunal so far as this ground is concerned. The course to which the petitioners sought admission was being conducted by a recognized institution and the courses were affiliated to the Delhi University and the norms laid down by the University of Delhi in exercise of statutory power had to be complied with. Even if we accept the contention of the petitioner that the respondents violated the norms or deviated from the same for the year 2010 however, it is well settled that a plea of discrimination would not rest on an illegality.

20. Learned counsel for the petitioner has urged at some length that these petitioners cannot be made to suffer for the faults of the respondents and that they must be considered for admission to the future courses. It is urged that the petitioners are in court since July, 2011 after they learnt of the aforesaid illegality in the actions of the respondents and therefore, must be accommodated against seats in the future academic courses.

21. In this regard our attention has been drawn by the respondents to several judicial pronouncements of the Supreme Court wherein the Court has prohibited admissions to future courses based on entrance examination conducted for a particular academic year. So far as admissions to medical courses are concerned, the position is even stricter.

22. There is yet another reason why it would not be possible to accept this request. We are informed by Mr. Ashish Kumar, learned counsel appearing for Medical Council of India to the effect that the Medical Council of India has completely revamped the scheme of admissions to medical courses and that a centralized medical examination has been conducted this year for effecting admissions to all institutions and courses. It is urged that based thereon, an examination for the academic session 2013-14 has already been held. It is also pointed out that this scheme of Medical Council of India has been challenged by various institutions and the matter is presently before the Supreme Court of India and there is stay so far as publication of the result is concerned. It is however, pointed out that in view of the scheme notified by the Medical Council of India, the Directorate General of Medial Services of the Army has not conducted any entrance examination and that admissions would be effected based on the common entrance exam directed by the Medical Council of India which has been conducted by the National Board of Examinations subject to the adjudication by the Supreme Court. In this regard, copy of the order dated 13th December, 2012 passed in Transfer Case (C) No.101/2012, A.P. Pvt. Medical & Dental College MGT Association v. Dr. N.T.R. University of Health Sciences and Anr. along with connected writ petitions has been paced before us.

23. In view of the above discussion, we see no reason to differ with the view taken by the Armed Forces Tribunal in the judgment dated 23rd September, 2011 and the orders dated 17th November, 2011 and 22nd February, 2012 dismissing the review petitions filed by the petitioners.

We find no merit in these writ petitions which are hereby dismissed.

For the same reasons, the pending applications do not survive for adjudication and are also dismissed.

There shall be no order as to costs.

ILR (2013) II DELHI 1159
CRL. A.

MOHD. KALLU ….APPELLANT

VERSUS

STATE ….RESPONDENT

(G.P. MITTAL, J.)

CRL. A. NO. : 214/2010 DATE OF DECISION: 21.02.2013

Indian Penal Code, 1860—Section 376, 342 & 506—As per prosecution, 'R' playing outside her house at about 3-4 p.m. when appellant asked her to get food for him—When 'R' went inside appellant's jhuggi, he took her to a vacant jhuggi, threatened to kill her and raped her—Her mother (PW1) reached there and appellant escaped—Trial Court convicted appellant u/s 376, 342 and 506 IPC—Held, testimony of 'R' duly corroborated by her mother PW1—Delay of three days in lodging FIR in rape case in view of reluctance of the mother to report incident is not material—Absence of external injury in circumstances where prosecutrix did not allege violent or forced sexual intercourse would not negate allegations or rape—No evidence to prove defence of false implication taken by accused—Testimony of 'R' sufficient to prove rape, corroborated by PW1 and MLC—Appeal dismissed.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Mr. Thakur Virender Pratap Singh Charak, Advocate.

FOR THE RESPONDENT : Ms. Jasbir Kaur, App for the State.

CASES REFERRED TO:

1. *Satyapal* vs. *State of Haryana,* AIR 2009 SC 2190.
2. *State of Rajasthan* vs. *N.K.,* (2000) 5 SCC 30.
3. *State of Punjab* vs. *Gurmit Singh & Ors.,* (1996) 2 SCC 384.
4. *Karnel Singh* vs. *State of M.P.,* (1995) 5 SCC 518 : 1995 SCC (Cri) 977.
5. *Balwant Singh* vs. *State of Punjab,* (1987) 2 SCC 27 : 1987 SCC (Cri) 249 : 1987 Cri LJ 971.
6. *Sk. Zakir* vs. *State of Bihar,* (1983) 4 SCC 10 : 1983 SCC (Cri) 76 : 1983 Cri LJ 1285.

RESULT: Appeal dismissed.

G.P. MITTAL, J.

1. This Appeal is directed against a judgment dated 25.09.2009 and an order on sentence dated 29.09.2009 passed by the learned Additional Sessions Judge("ASJ") in Sessions Case No.351/2007 FIR No.186/2007 P.S. Jahangir Puri whereby the Appellant was held guilty for the offences punishable under Sections 376, 342 and 506 IPC. He was sentenced to undergo RI for 10 years and to pay a fine of Rs. 7,000/- or in default to undergo SI for five months for the offence punishable under Section 376 IPC; he was sentenced to undergo RI for six months for the offence punishable under Section 342 IPC; he was further sentenced to undergo RI for two years and to pay a fine of Rs. 3,000/- or in default to undergo SI for two months for the offence punishable under Section 506 IPC.

2. In nutshell, the case of the prosecution is that on 10.03.2007 a call was made to the PCR(No.100) and a DD No.21B was recorded at P.S. Jahangir Puri, ASI Vinod Kumar reached Jhuggi Shah Alam Bandh. He came to know that a girl aged about 11 years had been raped by his neighbour. W/ASI Renu Bala was summoned to the spot for further investigation. W/ASI Renu Bala reached the spot. She reached the spot and recorded statement of the prosecutrix. The prosecutrix R(name withheld to conceal her identity) disclosed to the ASI that on 07.03.2007 at about 3-4 pm, she was playing outside her house; Kallu(the Appellant) called her and asked her to get food for him from the house of his sister. When the prosecutrix went inside his jhuggi, the Appellant caught hold

of her and took her to a nearby vacant jhuggi. When she tried to raise an alarm, the Appellant threatened to kill her. The Appellant pushed her on the ground, removed her salwar and his pant and committed rape on her. The prosecutrix further informed the IO that her mother Rashida also reached there. The Appellant threatened her(the prosecutrix) and her mother not to disclose the incident to anyone or to the police, otherwise they will be killed. The Appellant escaped from the spot. The prosecutrix was brought back to her house by her mother (PW1).

3. According to the prosecution version, the matter was not reported to the police or to anybody else out of fear. The prosecutrix had continued to have pain in her stomach and bleeding in her private parts. Rashida(PW1) was initially reluctant to get her daughter medically examined. Thus, the prosecutrix and her mother Rashida were brought to the Police Station. Since the prosecutrix was of tender age, PW1 had to be convinced about the necessary medical examination. The prosecutrix who was accompanied by her mother PW1 was again taken to Babu Jagjivan Ram Memorial Hospital (BJRM Hospital) where she (the prosecutrix) was medically examined. The prosecutrix was found to be conscious and oriented. There was no external injury to be found. The hymen was found to be torn. As per report of the doctor, vagina admitted 1 finger.

4. The Appellant was arrested. He was also medically examined and found to be fit to perform sexual intercourse.

5. On completion of investigation, a report under Section 173 of the Code of Criminal Procedure(Cr.P.C.) was presented against the Appellant to the Court of Metropolitan Magistrate.

6. In order to establish its case, the prosecution examined 16 witnesses. Rashida(PW1), PW2 prosecutrix (R), PW6 Dr. Sanjay Kumar, CMO, BJRM Hospital, PW7 Satish Kumar Goyal, Principal, MCD Primary School are the important witnesses examined by the prosecution. Smt. Rashida (PW1), mother of the prosecutrix testified as under:

> "I have four children, two daughters and two sons. Reshma @ Roshini @ Bholu is my eldest daughter. She is aged about 11 years. She is studying in 3rd class in Nagar Nigam School in Adarsh Nagar. In School she was got admitted by me by the name of Roshini. I am working as house maid in houses in Shalimar Bagh.

> On 7.3.2007 when I returned from my work at about 4.00 p.m. I found my daughter Reshma @ Roshini missing from the house. I started searching for her. When I reached in front of the house of accused Kallu I saw accused had put off the clothes of my daughter and he was sitting on her and he was doing galat kam with her. By galat kam I mean rape. I saved my daughter from the accused and asked the accused what he was doing. I put the salwar of my daughter on her and when I was taking my daughter back to the home accused threatened me that if I would tell anything about the incident, he would kill me and my family. I took my daughter to my house. For two days I did not tell anything to anyone out of fear. When the condition of my daughter became worse as she was bleeding and was having pain in her stomach, I informed the police at number 100..."

7. In cross-examination, she denied the suggestion that no incident had taken place as it was a crowded area. She also denied the suggestion that her family was at loggerheads with the accused's family.

8. To the same effect is the testimony of the prosecutrix R(PW2). PW2's testimony is extracted hereunder:

> "On 7.3.2007 at about 3.00- 4.00 p.m. I was playing outside my house after coming from school. Accused Kallu lives opposite to my house. At this stage accused was taken out from the curtain and witness has correctly identified the accused Kallu. Accused Kallu called me to his house and told me to take the utensil to fetch food for him from the house of his sister. On the request of the accused I went to his house. Accused took me to inside his jhuggi and accused pushed me on the ground. Accused removed my salwar and he also removed his pant. He did galat kam with me.
>
> C.Q. How do you specify galat kam?
>
> Ans. Balatkar (rape).
>
> He had put his urinating part in my urinating part against my wishes forcibly and without my consent. Accused shut my mouth with the help of his right hand and due to this reason I could not raise alarm at that time. In the meantime my mother also reached there as she was searching me. When my mother reached at the

house of the accused he was committing rape upon me. My mother asked accused *"Kallu tu Ne yai kay kiya chhor meri bati ko"*. Thereafter accused ran away from the spot. I worn my salwar with the help of my mother. Accused Kallu threatened my mother and myself if we inform anyone about the incident, he will kill our family...."

9. Dr. Sanjay Kumar (PW6) proved the MLC of the prosecutrix as Ex.PW9/A, whereas Satish Kumar(PW7) proved the prosecutrix's date of birth as 05.02.1995.

10. On closing of the prosecution evidence, the Appellant was examined under Section 313 Cr.P.C. to afford him an opportunity to explain the prosecution evidence appearing against him. He denied the prosecution's allegation and pleaded false implication on ground of enmity with the prosecutrix's family. The Appellant examined Smt. Shakti (DW1). She deposed that she did not notice Kallu in her house between 3:00 to 5:00 pm. She, however, stated that there was no quarrel between the families of the prosecutrix and the Appellant.

11. On appreciation of the evidence, the learned ASJ found that the prosecutrix's testimony was duly corroborated by her mother. He negated the plea of false implication on account of any enmity between the Appellant and the prosecutrix's family and thus held the Appellant guilty and convicted him as stated earlier.

12. It is urged by Thakur Virender Pratap Singh Charak, the learned counsel for the Appellant that there was delay of three days in lodging the FIR with the police; it is highly improbable that an act of rape will be committed by a person in broad daylight in a crowded area and that too in presence of the mother of girl child. It is urged that the MLC Ex.PW9/A rules out the possibility of any forcible sexual intercourse with the small child. Thus, the prosecution had failed to establish its case against the Appellant beyond reasonable doubt. The learned ASJ erred in returning the verdict of guilt for a heinous offence like rape.

13. On the other hand, Ms. Jasbir Kaur, the learned APP for the State supports the impugned judgment. She urges that the Appellant failed to prove his defence of enmity between his(the Appellant) and prosecutrix's family by leading any evidence. Rather, the evidence produced by the Appellant in this regard was to the contrary. She urges that a mother would never level false allegation of rape of her minor daughter

to settle personal score with a neighbour.

14. I shall deal with the contentions one by one.

DELAY:

15. It is true that there is a delay of three days in lodging the FIR against the Appellant. The prosecution has given an explanation with regard to delay through PW1 and PW2's testimony. PW1 testified that while she was taking her daughter (the prosecutrix) back to the home, the accused threatened her that if she would tell anything about the incident he would kill her and her family. She deposed that for two days, she did not tell anything to anyone out of fear. When her daughter's condition became worse and she continued to bleed and have pain, she informed the police. To the same effect is the testimony of PW2(the prosecutrix).

16. In several cases, the Supreme Court noticed the delay in lodging FIR in rape cases and took a view that delay in lodging FIR in such cases is a normal phenomena. A reference may be fruitfully made to **Satyapal v. State of Haryana,** AIR 2009 SC 2190, wherein the Supreme Court echoed similar sentiments. Para 20 of the report is extracted hereunder:

> "20. This Court can take judicial notice of the fact that ordinarily the family of the victim would not intend to get a stigma attached to the victim. Delay in lodging the First Information Report in a case of this nature is a normal phenomenon....."

17. In view of the explanation given by PWs 1 and 2 and the fact that the family of victim in such cases is initially reluctant to lodge an FIR, delay of two-three days in lodging the FIR is not material and this delay does not affect the case of the prosecution.

ABSENCE OF MEDICAL EVIDENCE TO CORROBORATE FORCED SEXUAL INTERCOURSE:

18. The learned counsel for the Appellant drew my attention to the MLC Ex.PW9/A which shows that the doctor did not notice any external or internal injury. I have the MLC before me. It shows that that the hymen was torn and the vagina admitted 1 finger easily. It may be noticed that the incident of rape occurred on 07.03.2007 at about 3:00 - 4:00 pm. The prosecutrix was medically examined in the afternoon of 10.03.2007. The fact that the hymen was found torn corroborates that

sexual intercourse was committed on the prosecutrix. It is true that the doctor did not notice any external injury. It is important to note that in this case, the prosecutrix did not allege any violent act of forced sexual intercourse. What she stated was that she was made to lie on the floor in the jhuggi and the Appellant put his male organ in her female organ without her consent. Thus, the absence of any external injury in such circumstances would not negate the allegations of sexual intercourse with the prosecutrix against her consent, particularly when she was medically examined after three days of the incident. In **State of Rajasthan v. N.K.,** (2000) 5 SCC 30, the Supreme Court held as under:

> "18. .....The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had offered no resistance at the time of commission of the crime. Absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. It will all depend on the facts and circumstances of each case. In Sk. Zakir [**Sk. Zakir v. State of Bihar,** (1983) 4 SCC 10 : 1983 SCC (Cri) 76 : 1983 Cri LJ 1285] absence of any injuries on the person of the prosecutrix, who was the helpless victim of rape, belonging to a backward community, living in a remote area not knowing the need of rushing to a doctor after the occurrence of the incident, was held not enough for discrediting the statement of the prosecutrix if the other evidence was believable. In Balwant Singh [**Balwant Singh v. State of Punjab,** (1987) 2 SCC 27 : 1987 SCC (Cri) 249 : 1987 Cri LJ 971] this Court held that every resistance need not necessarily be accompanied by some injury on the body of the victim; the prosecutrix being a girl of 19/20 years of age was not in the facts and circumstances of the case expected to offer such resistance as would cause injuries to her body. In Karnel Singh[**Karnel Singh v. State of M.P.,** (1995) 5 SCC 518 : 1995 SCC (Cri) 977] the prosecutrix was made to lie down on a pile of sand. This Court held that absence of marks of external injuries on the person of the prosecutrix cannot be adopted as a formula for inferring consent on the part of the prosecutrix and holding that she was a willing party to the act of sexual intercourse...."

19. Thus, the absence of any external injury in the circumstance of the case would not belie the case of the prosecution. Moreover, the age of the prosecutrix was just about 12 years. Even if it is assumed that there was consent on the part of the prosecutrix for the sexual act committed by the Appellant, the consent was immaterial as the prosecutrix was incapable of giving any consent or even understanding the act committed by the Appellant. As per the case of the prosecution because of the threat the prosecutrix did not offer any resistance. Otherwise, also a girl of 12 years can hardly offer any resistance to a fully grown male.

FALSE IMPLICATION ON ACCOUNT OF ENMITY:

20. No specific defence of false implication was taken by the Appellant. In cross-examination of PW1 (the prosecutrix's mother), it was suggested to her that the families of the prosecutrix and the Appellant were at loggerheads being neighbours which suggestion was denied by PW1. When the Appellant was examined under Section 313 Cr.P.C., he(the Appellant) stated that there was strained relations between the two families. The Appellant did not come forward with any reason for the enmity or strained relationship between the prosecutrix's and Appellant's family. Smt. Shakti(DW1) the solitary witness examined by the Appellant who was staying in the nearby Jhuggi falsified the defence version when she deposed that there was no quarrel between the families of the prosecutrix and the Appellant.

21. The Appellant was required to prove his defence at least by preponderance of probability which he has utterly failed to prove. The Appellant has, therefore, failed to show that he was falsely implicated because of enmity between the two families. Otherwise also, it is unbelievable that a mother of a girl aged 12 years would level false allegations of rape against a neighbour simply to settle scores with him. It is also difficult to believe that a mother would make false allegation of sexual assault involving her own daughter and thereby putting at stake the reputation of the family and also affecting the chances of her marriage.

22. Similarly, the contention that the offence of sexual intercourse against a child cannot be done in a Jhuggi Cluster or during day time is without any substance and is liable to be rejected.

23. In my view, the evidence of the prosecutrix(PW2) is duly corroborated by PW1's testimony as also by the MLC Ex.PW9/A. It is no longer res integra that testimony of a victim of sexual assault cannot

be put on par with the testimony of an accomplice. It can very well be relied upon without any corroboration if the same is found to be consistent and convincing. In **State of Punjab v. Gurmit Singh & Ors.,** (1996) 2 SCC 384, the Supreme Court laid down that normally no self respecting woman would come forward to make false allegation of rape. Relevant portion of the report is extracted hereunder:

> "8....The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable...."

24. In the instant case, the testimony of the prosecutrix(PW2) was, by itself, sufficient to prove that the Appellant committed sexual intercourse with her without her consent. Moreover, her testimony, as stated above, is duly corroborated by the testimony of PW1 and the MLC Ex.PW9/A. There is no illegality in the Trial Court judgment holding the Appellant guilty of the offences with which he was charged. Keeping in view the fact that the Appellant committed rape on a female child aged just about 12 years, sentence imposed was the minimum which should have been awarded.

25. The Appeal is devoid of any merit; the same is accordingly dismissed.

26. Pending Applications stand disposed of.

ILR (2013) II DELHI 1168
DEATH SENTENCE

STATE ....PETITIONER

VERSUS

JITENDER ....RESPONDENT

(S. RAVINDRA BHAT AND PRATIBHA RANI, JJ.)

DEATH SENTENCE REF. NO. : 1/2011 & CRL. A. NO. : 912/2011 **DATE OF DECISION: 21.02.2013**

Constitution of India, 1950—Articles 21 & 39A—Rights to legal-aid and fair trial—Code of Criminal Procedure, 1973—Section 366—Indian Penal Code, 1860—Section 302—Death Reference—Appeal against conviction—Circumstantial evidence—Sentencing—As per prosecution, accused strangulated his 70 years old father, severed his head and removed entrails and some organs from body—Relying on testimony of his mother (PW3), sister (PW4) and brother (PW16), trial Court convicted u/s 302 and sentenced him to death—Held, circumstances prove guilt of accused beyond reasonable doubt—Rarest of rare principle is an attempt to streamline sentencing and bring uniformity in judicial approach—When drawing a balance sheet of aggravating and mitigating circumstances for sentencing, full weight had to be given to mitigating circumstances—State of mind of accused at the relevant time, his capacity to realize consequences of crime are relevant—Although accused did not take plea of insanity, circumstances point to his alienation from surroundings, family, near relatives and others—If unusual or peculier features there in allegations which excite suspicion of judge at preliminary stage, that there is possibility of accused laboring under

mental disorder, Court bound under Article 21 and 39A to record so and send accused for psychiatric or mental evaluation—Accused indulged in ritual human sacrifice of father—Unusual nature of facts relevant to making sentencing choice—Aggravating circumstancing of killing an aged defenceless person coupled with mutilation of body and its beheading has to be balanced with factors like his social alienation, no known record of violent behavior, young age (25 years)—Accused not beyond pale of reformation—Death sentence not confirmed and substituted with life imprisonment—Direction that in cases of serious crimes where accused indulged in unusual behaviour indicative of mental disorder (specially ritual or sacrifice killing), magistrate taking cognizance of offence shall refer accused for medical check-up to evaluate if mental condition might entitle him to defence of insanity—This procedure integral part of legal aid and right to fair trial under Article 21—Death Reference No. 1/2011 not confirmed—Criminal Appeal 912/2011 partly allowed.

Important Issue Involved: If unusual or peculiar features are there in allegations which excite suspicion of the judge at a preliminary stage, that there is possibility of accused laboring under mental disorder, Court bound by virtue of Article 21 and 39A to record so and send accused for psychiatric or mental evaluation.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Sh. Trideep Pais and Sh. Shivam Sharma, Advocates on behalf of Jitender.

FOR THE RESPONDENT : Sh. Rajesh Mahajan, ASC (Crl), for the State.

CASES REFERRED TO:

1. *Sangeet* vs. *State of Haryana* 2012 (11) SCALE 140.
2. *Sandesh @ Sainath Kailash Abhang* vs. *State of Maharashtra* Cr. A. No. 1973/2011.
3. *Mohandas Rajput* vs. *State of Maharastra* 2011 (12) SCC 56.
4. *Ajitsingh Harnam Singh* vs. *State of Maharashtra* 2011 (4) JCC 2482.
5. *Mohinder Singh* vs. *State of Punjab* Crl. Appeal Nos. 1278-79/2010.
6. *Mohd. Farooq Abdul Ghafur* vs. *State of Maharastra* 2010 (14) SCC 641).
7. *State of Maharashtra* vs. *Prakash Sakha Vasave and others,* [2009 (1) SCALE 713].
8. *Swamy Shraddananda @ Murali Manohar Mishra* vs. *State of Karnataka,* 2008 (13) SCC 767.
9. *Dost Mohammed.* vs. *State* Crl.A.385/2008.
10. *Bishnu Prasad Sinha and Anr.* vs. *State of Assam* [2007 (2) SCALE 4].
11. *Sushil Murmu* vs. *State of Jharkhand* 2004 (2) SCC338.
12. *Rajpara* vs. *State of Gujarat,* (2002) 9 SCC 18.
13. *Ram Anup Singh* vs. *State of Bihar* AIR 2002 SC 3006.
14. *Kalpana Mazumdar* vs. *State of Orissa* (2002) 6 SCC 536.
15. *State of Maharashtra* vs. *Damu S/o Gopinath Shinde and Ors.* 2000 (6) SCC 269.
16. *Sheikh Ayub* vs. *State of Maharashtra,* 1998 SCC (Cri) 1055.
17. *Panchhi* vs. *State of Uttar Pradesh* 1998 (7) SCC 177.
18. *Anshad* vs. *State of Karnataka* (1994 (4) SCC 381.
19. *Shriram* vs. *The State of Maharashtra,* 1991 Cri LJ 1631.
20. *Elkari Shankari* vs. *State of Andhra Pradesh,* 1990 Cri LJ 97.

21. *Sharad Birdhichand Sarda* vs. *State of Maharastra,* 1984 (4) SCC 116.
22. *Machhi Singh* vs. *State of Punjab* 1983 (3) SCC 470.
23. *Ram and Ors.* vs. *State of Punjab,* (1981) 2 SCC 508.
24. *Bachan Singh* vs. *State of Punjab* 1980 (2) SCC 684.
25. *morally-mentally retarded or disordered (Cf. Rajendra Prasad* vs. *State of UP* AIR 1979 SC 916).
26. *Rajendra Prasad Singh* vs. *State of UP* AIR 1979 SC 916.
27. *Shivaji Sahebrao Bobade* vs. *State of Maharashtra* 1973 Cri LJ 1783.
28. *Ramgopal* vs. *State of Maharashtra,* AIR 1972 SC 656.
29. *Tufail* vs. *State of Uttar Pradesh,* (1969) 3 SCC 198.
30. *Dihyabhal* vs. *State of Gujarat* A.I.R 1964 S.C. 1563.
31. *Hanumant* vs. *State of Madhya Pradesh,* AIR 1953 SC 343.
32. *Ashiruddin Ahmed* vs. *The King* (1949 CriLJ 255).
33. *Pulukuri Kottaya* vs. *Emperor,* AIR 1947 PC 67.
34. *Karma Urang* vs. *Emperor,* AIR 1928 Cal 238.

RESULT: Death Reference No. 1/2011 not confirmed.

Criminal Appeal 912/2011 partly allowed.

S. RAVINDRA BHAT, J.

1. The present judgment will dispose of Death Reference No. 1/2011 under Section 366 of the Code of Criminal Procedure, and the accused's appeal, being Crl.A. 912/2011 impugning his conviction, and the imposition of death penalty, by the judgment and order of the learned Addl. Sessions Judge-01 (Central), Delhi, dated 24.12.2010 and 10.01.2011 respectively, in S.C. No. 69/2009.

2. The appellant (Jitender, referred to variously by his name, or as "the Appellant"), was convicted for the offence under Section 302, Indian Penal Code (IPC) for the murder of his father. It was alleged that on the morning of 13.03.2008, he strangulated his father, aged about 70 years

("the deceased") to death, in the first floor of his own house at No. 6270, Gali Ravi Dass, Nabi Karim, Delhi, within the jurisdiction of the Nabi Karim Police Station. Thereafter, it was alleged that he severed the head from the body, removed the entrails and some organs from the body.

3. The facts of the case are that two temples (the Baalmiki Mandir, and the *Kaali Mata Mandir*) are situated opposite each other, in the vicinity of the appellant's house. At about 2.00 PM, on 13.03.2008, the appellant was seen coming out of his house, his face and clothes smeared with dust, carrying with him something wrapped in black cloth, and running in the direction of the temples. It is alleged that he found that the temples were closed when he reached them. He found the priest of the *Baalmiki Mandir,* Madan Lal PW-2 (who was resting nearby) and demanded the keys of the *Kaali Mata Mandir*. When Madan Lal told him that he did not have the keys, the Appellant began to shout and break articles in the temple, and tried to force open the Almirah. PW-2 went outside to seek help and the Appellant was taken away by the Police, for breaching the peace, to the Police Station at 2.25 PM. He was arrested under Sections 107/151 Cr.PC. He was released by the Executive Magistrate in the forenoon of 14.03.2008.

4. The Appellant lived in 6270, Gali Ravi Das, Nabi Karim ("the premises") with his father (the deceased) and his mother Kamla, PW-3. His brother, Rakesh PW-16 resided separately in a *jhuggi* in Roop Nagar, and his married sister, Guddo PW-4, lived with her husband in Shastri Nagar, Delhi. Suresh Kumar PW-5, Jitender's cousin, lived in the abutting portion of the appellant's house. The appellant had been married, but his wife had deserted him, and he was unemployed. On 12.03.2008, the appellant's mother PW-3 had gone to her other son Rakesh's house for two days. On the day of the murder, the deceased and the appellant were the only people residing in his house.

5. The prosecution case is that Guddo PW-4, who would visit her parents every day in the morning after finishing her work, which was that of cleaning Marwadi Basti, Nabi Karim, on 14.03.2008 also, as usual, came to the appellant's house, at about 7.15/7.30 AM, to meet her parents. When she went inside, she found the headless and naked body of her father on the floor. She raised an alarm, which alerted Ajay @ Bunty PW-22, who went inside the house, saw the body and informed the police. Another neighbour, Sri Chand, informed the deceased's other

son Mahesh PW-16, who was at work, at around 8.30 AM. The Police recorded the information in a PCR Form (Ex. PW14/A), the PCR van recorded the information as DD No. 8-A (Ex. PW18/A) at 7.25 AM.

6. The Police reached the crime scene. SI Rajni Kant PW-24 and Constable Dharamveer saw that the headless body was lying in a pool of blood in front of a small wooden temple of the Goddess *Durga* (*Sherawali*). Earlier, the same day, at about 6.00 AM, Nanhe Ram PW-1 a priest of the Baalmiki Mandir, on opening the almirah inside the temple, found a parcel wrapped in black cloth, in which upon unwrapping the cloth, he found a human head. He immediately informed Suresh Chand PW-9, of the managing committee of the temple, who on seeing the head, along with some other local residents, including Rajender PW-15, informed the police. Rakesh PW-16 (the son of the deceased) was also informed. Both PW-15 and 16 identified the severed head to be that of Kartar Singh. This information was immediately conveyed to SI Rajni Kant PW-24 who was present at the house of the appellant (the headless body had been discovered by such time). Madan Lal PW-2 then told him about the appellant's strange conduct the previous day at the *mandir*. On the basis of the identification of the body and the severed head and all the above mentioned facts, a *rukka* was prepared (Ex. PW-24/A) on the basis of which an FIR (Ex. PW 17/A) for the offences under Section 302/201 IPC, was registered at 8.40 AM. The Crime Team investigated the scene of offence, photographs were taken and necessary physical evidence was recovered from the spot. The Appellant was arrested at around 5.30 PM in the same evening. He allegedly made a disclosure statement to the effect that he had killed his father, and pursuant to his disclosures, his blood stained shirt and the knife/ churri used in the crime were recovered.

7. After conclusion of the investigation, the Police filed a final report, indicting the Appellant for the commission of offences under Section 302 IPC. The Appellant pleaded not guilty and claimed trial. The Prosecution examined 25 witnesses. On conclusion of the Prosecution evidence, the Appellant's statement was recorded under Section 313 Cr. P.C. wherein he claimed his innocence, and denied all recoveries allegedly made at his behest. After considering the evidence on record, and hearing submissions, the Trial Court found the Appellant guilty of the charge under Section 302 IPC. On the point of sentence, for the reasons given in its order (Paras 21- 25) the Trial Court found that the murder of the septuagenarian father, by the son, as human sacrifice, constituted the

'rarest of rare' case and sentenced him to death.

Trial Court's findings:

8. On appreciation of the evidence, the Trial Court was of the opinion that the prosecution had established, on the basis of testimonies of Jitender's mother, PW-3; his sister, PW-4 and his brother, PW-16-Rakesh that the allegations regarding his living with his parents and his unemployment, were proved. The Trial Court also relied on the testimony of PW-3 and the statement of the appellant under Section 313 Cr.PC, to hold that he was engaged in *Devi Pooja* and had previously spoken of his desire to offer sacrifice pursuant to such worship. The Court was satisfied that at the time of the commission of the offence, there was no one except the appellant in the premises. In reaching this conclusion, the Court relied on the testimony of PW-3, his mother and PW-16, his brother. On the crucial aspect that the appellant had beheaded his father, the Court relied on the testimony of PW-15 Rajender who said that he had seen the appellant on 13.03.2008 running out of his house, carrying something wrapped in a black cloth to the Baalmiki Temple. The witness had also identified the cloth.

9. The Trial Court relied on the testimony of PW-2, who stated that on 13.03.2008, the appellant had gone to the Baalmiki Temple, created a commotion, tried to open the almirah; and broke glasses kept in front of the idol. The testimony of PW-23, the policeman on duty, who arrested the appellant on 13.03.2008, on being informed that a person was causing destruction of temple property, was relied upon. The Trial Court accepted all the other evidence pertaining to the discovery of the body and severed head, its identification etc. The post mortem which was conducted on 15.03.2008 at 01.00 PM led to the report (Ex.PW-21/A), which fixed the probable time of occurrence of death at 07.00 AM, on 13.03.2008. This and the other material and circumstantial evidence were held to be sufficient to prove beyond reasonable doubt that it was the appellant alone and no one else who committed the murder and that every hypothesis of his innocence was ruled out.

Analysis of evidence:

10. PW-1 Nanhe Ram deposed to working as *pujari* at the *Baalmiki Mandir* and that Madan Lal was also a pujari there. According to him, there was a *Kaali* Temple in front of *Baalmiki Mandir*. On 14.03.2008, at 06.00 AM, when he went to the temple (Baalmiki Temple), and opened

the cupboard to take-out a cassette deck, to play the Arti (devotional songs), one old black coloured *'potli'* (cloth wrapped package) fell on the ground. On unwrapping, he found that it contained a human head. He immediately alerted the President of the Temple Trust – Suresh Rukhal, who reached there and checked the head. Both went to the Police Station and reported the matter. The police visited the temple and conducted proceedings. He became aware that a headless body was found in House No. 6270. He stated that it was also informed that the previous day, Jitender created a scene in the temple and tried to open the almirah and was arrested by the police. In cross-examination, he said that he went to Suresh Rukhal's house at 06.05 AM and within 5 mintues, reached the temple with him. He went to the police station with Chaudhary Keher Singh, Kishan Lal and Suresh Chand Mukharji and many others and remained there for 5-10 minutes, and then they returned to the temple with the policemen. He stated that information that a headless body was lying in House No. 6270 was circulated in the area. He clarified that on 13.03.2008, he had reached the temple and found Jitender had created a scene there.

11. PW-2, Madan Lal, the other *pujari* in the *Baalmiki* Temple deposed that on 13.03.2008, the Kali Temple was closed and he was lying near the *Baalmiki* Temple. At around 02.00 PM, Jitender went there and started making noise; he had a black colored cloth package (*potli*) and demanded keys of *Kaali* Temple from him. The witness stated that he did not have the keys of *Kaali* Temple, upon which the accused created a commotion and started breaking articles at the temple. He informed some people sitting outside the temple. Jitender tried to open the almirah in the temple; he had also broken the glasses kept in the front of the idol. He went outside the temple and created a scene. The police reached there and took him into custody. He further deposed that on 14.03.2008, when Nanhe Ram and other *pujari* opened the almirah, a human head severed from the body, kept in a black colored cloth fell down. The police and others reached there. In the cross-examination, he could not state what colored clothes were worn by Jitender on 13.03.2008. He also stated that Jitender did not make any noise in his presence and that 4-5 people had gone inside the temple. They were at a distance of 15-20 steps from the temple. He could not say when Jitender was arrested and that he admitted that Nanhe Ram told him that a severed head of some man was recovered from the temple. He said that he reached the temple at 04.00 AM and remained there till 06.00 AM; left it at 06.00

AM. He returned there after 15 minutes and he remained in the temple the entire day.

12. PW-3 Kamla, deposed that Jitender was her younger son and that her elder son – Rakesh resided at Roop Nagar. Jitender's father, the deceased Kartar Singh, and the witness, used to live in the premises; Jitender was unemployed and idle. His wife had deserted him and was living with her parents. She stated that on 12.03.2008, she had gone to stay with the elder son, Rakesh and that 2-3 days later, at around 09.00 AM, there was police all around her house and a crowd gathered there. She was not allowed to enter the house and she remained outside. She later identified the body of the husband on the basis of severed head shown to her. That severed head was brought from the temple. She deposed that Jitender used to say that he was doing *devi pooja* for which he would indulge in sacrifice. She stated that the police had interrogated her when the body was brought down from the second floor and that Jitender used to frequently tell her that he used to do *pooja of deities*.

13. PW-4 Guddo - Jitender's sister deposed that she used to do cleaning work in Marwadi Basti, Nabi Karim and that the appellant and father used to reside in the premises. Her elder brother used to live in Roop Nagar. She deposed to visiting the said premises daily after finishing her work. One day when she visited the premises of her father, she found his headless body without any clothes. Thereafter, she raised an alarm which attracted neighbors who reached there. She went down and informed the neighbors. In the meantime, the police reached the spot. She stated in the cross-examination that she went to her father's house at 07.30 AM and that after seeing the condition of the body, she went down. She had not informed the Police Control Room (PCR) and she could not say who had informed the police. She also stated that the accused did not tell her that he was indulging in Devi worship.

14. PW-5, Suresh deposed that he was Jitender's cousin. He stated that Jitender was unemployed and used to remain idle at home. He used to keep his room shut. He stated that accused had not told him about any *pooja* or that he would give sacrifice and that on 13.03.2008, he received a telephonic call about dead body in the accused's house. He went to the spot and found the headless body of Kartar Singh. He could not say from where the severed head was recovered. The witness was declared hostile and permitted to be cross-examined. In the cross-examination, he was confronted with his previous statement where he had stated that Jitender

used to practice *devi pooja* and that he claimed he would be blessed with divine powers. Upon being confronted with his Section 161 statement, (Ex.PW-5/DA), he admitted to identifying the head of the deceased. In the cross-examination, he mentioned that the incident took place on 12.03.2008 and further deposed that he received call on 13.03.2008. PW-6, Sri Chand who used to reside at 6236, Gali Gurudwarewali, Nabi Karim deposed that on 14.03.2008 at 08.00 AM, he was in his house when he was informed that a headless body was found in the premises of the deceased. He went to *Kaali* Temple and gave the information and brought Rakesh, the accused's brother to his house.

15. PW-7, Dinesh Kumar, a Constable, stated that on 14.03.2008, at the request of SI Rajni Kant, he accompanied the Crime Team to the premises and found a *Chhuri* lying on the slab in the house. He took the photographs (exhibited as Ex.PW-7/7 – Ex.PW-7/5). He also produced the negatives. He deposed to reaching the house at 08.45 AM, and remaining there till 09.20 AM. PW-8, Constable Dharmveer deposed to having, with SI Rajni Kant, reached the premises and seeing the headless body of the deceased. He stated that the head was wrapped in black coloured cloth and was in the *Baalmiki* Temple. He took the information to the Police Station where the FIR (Ex.PW-17/A) was recorded. A copy was handed-over to SI Rajni Kant, at whose instructions he took the body to JPN Hospital for postmortem. The body was thereafter handed-over to the family members of the deceased. In cross-examination he stated that he reached the House No. 6270 at about 07.25 AM and that his movement was recorded in D.D. No. 8A. He went to the police station with the *rukka* at 08.00 AM and reached the police station at 08.15 AM. He remained at the spot for 20-25 minutes.

16. PW-9 stated that he headed the Committee which managed the *Baalmiki* Temple and that at 06.15 AM, Nanhe Ram went to his house and asked him to accompany him to the temple, where on the floor, lay a severed human head wrapped in black coloured cloth. He collected people from the locality and went to the Police Station. He also deposed that someone from the family of the accused telephoned the police that the deceased's headless body was lying in the house. He deposed in the cross-examination that he reached the temple within five minutes of being informed, at 06.15 AM and that he reached Police Station Pahar Ganj and that the police accompanied them within 15 minutes. They remained there for 15 minutes and afterwards went to the house of the deceased.

17. PW-10 was the photographer who deposed to having taken 11 photographs in the house of the deceased. The photographs of the body, from different angles and that of the head, at the *Baalmiki* Temple, were taken. They were produced in Court. He deposed to having left for the spot at 08.30 AM and remained at the spot for + an hour. No public witnesses were present. PW-11 was posted in the Mobile Crime Team and stated that on receipt of information, at around 08.30 AM, he and his team went to House No. 6270, Gali Ravi Dass, and found the headless male body lying in a room. He lifted the chance prints. In cross-examination, he stated that 3-4 policemen and 5-7 members of the public were there and that several photographs were collected by the photographer. PW-12 was in-charge of the Crime Team and he deposed to having reached the spot at 08.45 AM with members of his team. He deposed that he was there was a blood-stained knife lying on a slab in a room.

18. PW-14 deposed that at about 07.18 AM, on the day of the incident, he received information that a dead body was lying in 6239, Gali Guru Ravi Dass, near Baalmiki Temple, which was reduced to writing and further passed on to the PCR. The PCR Form was exhibit PW-14/A.

19. PW-15 Rajender deposed that he was an employee of the Delhi Jal Board and that Jitender was his neighbor. He stated that on 13.03.2008, at about 02.00 PM, while reporting for duty, he saw Jitender leaving his house and holding something wrapped in black cloth in his hand. He was running towards the *Baalmiki* Temple fast and his clothes were dust-smeared. Upon being asked, Jitender did not respond and continued to run towards the temple. He returned from duty at 09.30 PM. The next day, i.e. on 14.03.2008, at 06.30-07.30 AM, while leaving home, he came to know that a human head without the body was lying in the *Baalmiki* Temple, where he went. A large number of policemen were present there. He discovered that the head without the body was that of Kartar Singh @ Jhhunna. It was also stated that the black cloth *potli* carried by the accused and which he had seen the previous day was lying near the head. He stated that the accused used to stay back at home after consuming liquor. He identified the black colored cloth, Ex.P-1 upon its production in Court. In cross-examination, he stated that he used to work and his duty hours were between 02.00 PM and 10.00 PM and that he proceeded from his house on 13.03.2008 at about 02.00 PM. He had seen the accused when he was running towards his house and that at

that time, the witness was reporting for duty. There was no specific mark on the black cloth which was used to wrap something. He could not remember the color of the dress which the accused wore. He stated that:

> "On 13.03.2008, I came back from duty at 10.00 PM. There was a hue and cry by the members of the temple that one head was lying in the temple but I did not go to the temple and on the return at my house. My statement was recorded by the police."

20. PW-16 deposed that he was living in Roop Nagar in a Jhuggi and that his parents and Jitender lived in 6270 Gali Ravi Dass. He left the parental home due to the accused's behavior. 2-3 days prior to 14.03.2008, his mother had gone to his house at Roop Nagar. The deceased and Jitender continued to live in 6270, Gali Ravi Dass, Nabi Karim. He stated that on 14.03.2008, Billu and Raju went to him at his workplace near *Kaali* Temple, between 08.30 AM and 09.00 AM, and asked him to reach his parental house. He found a crowd along with police officials there. He saw a headless body in a room in front of a wooden mandir *"shrine"*. Different parts of the body had been cut. He was told that a human head was lying in the *Baalmiki* Temple. He went there and saw that it was his father's head in a black cloth on the temple floor. He identified the head as that of his father. The police brought that head to the house where he identified the body of that of his father. His father's name was engraved (tattooed) on his hand. The identification memo, PW-16/A bears his signatures. He deposed that around 100 people were at the spot when he reached home and that 20-30 policemen were also present. He deposed that the distance between his workplace and his house was about 30 minutes. His neighbors had told him about the head lying in the *Baalmiki* Temple where he reached between 10.30 AM and 11.00 AM. He remained in the temple for about 30 minutes. He could not recollect the number of documents he signed and stated that he reached the spot where he remained from 01.30 to 02.30 PM. He stated that he had not given any statement to the police.

21. PW-22 Ajay @ Bunty lived in 6239, Gali Gurudwarewali, Nabi Karim. He was a Network Engineer employed in the Customs Department on contract basis. He deposed that on 14.03.2008, in the early morning, around 07.15-07.30 AM, he heard cries of Guddo, PW-4, saying that she had discovered a headless body in her house. He informed the police on telephone No. 100. He went inside the house to the room on the first

floor near the wooden shrine. After some time, the police reached the spot and lifted blood, soil and earth control and put them in a separate glass. The police also took into custody blood-stained clothes and sealed these articles. The scene of occurrence was photographed. He says that he joined the investigation again at 06.00 PM when the accused was arrested by Memo Ex. PW-22/H and his personal search was made. His disclosure statement, Ex.PW-22/K was recorded and he led the police to the place of occurrence and pointed to the left of the room where he had thrown a knife, the weapon of offence after the crime. The crime team, it is stated, took the photographs of the knife. The IO prepared a sketch of the knife, Ex.PW-22/L and sealed the knife. At the time of arrest, the accused was wearing blood-stained clothes which he changed at the spot of occurrence. The blood stained clothes were seized by the police. He also stated – in the cross-examination, with permission of the Court, that the accused led the police party to the *Baalmiki* Temple and pointed-out the place where he kept the severed head of his father.

22. In the cross-examination, he mentioned that his working hours were between 08.00 AM and 04.00 PM and that he normally left home at 07.30 AM. The accused's house was located near the back of his house; one could reach there from the rooftop of his house, in addition to circling the gali. It took less than two minutes to reach the accused's house. He made the PCR call at 07.00-07.15 AM. He stated that the Crime Team reached at 08.00-08.30 AM and that he had signed 4-5 papers. He also stated that he took leave from office on that day. He deposed that his statement was recorded at 08.15 AM but he did not remember when the second statement was recorded though it was recorded in the morning. He could not remember if the accused was arrested on 13.03.2008 but he was aware of that. He stated that the accused probably wore a single-lining shirt and grey-colored pants but was not sure. He also deposed that his statement was recorded by police after 13.03.2008 and that 6-7 parcels were prepared in his presence. PW-23 was the Sub-Inspector who received the report, DD-13A on 13.03.2008. That report was exhibited as Ex.23/A. He stated that he went to the temple where he found a big crowd and also saw the accused. He was threatening others present there and demanding offerings given by the devotees to the temple. At that time, his face was soiled with ashes and he had smeared a red-colored *tika* on forehead. The witness saw broken glass of the idol and also saw blood-stained clothes of the accused. He thought that the blood-stains could have been result

of the breaking of glasses. The accused, upon enquiry, told him *"mujhe devi ki shakti aati hai"* - that he derived strength from Goddess Shakti, attributing his conduct to divine power. Jitender kept threatening those persons; as a result the witness arrested him under Sections 107/Section 151 Cr.PC, got him medically examined and took him to the lock-up at Police Station Pahar Ganj. He made an arrival entry, Ex.PW-23/B and filed intimation in the Court of Special Magistrate, Central District, where the accused was produced on 14.03.2008 and later released from custody. The witness stated that he came to know that Jitender murdered his father as a sacrifice. In cross-examination, he admitted that he did not record details, such as smearing of ash and blood-stained tika on the forehead of the accused or that his clothes were stained with blood. He stated that he deposed to having arrested Jitender at 03.30 PM on 13.03.2008 but did not obtain signatures of any public person on the arrest memo. He said that he informed the accused's mother of his arrest on telephone but did not record any statement to the IO about such information given to the accused's mother. He also admitted having caught the appellant with the help of Constable Krishan Pal who was present there, and that he did not record in his statement that he had the services of Krishan Pal. The witness stated that *"the accused was produced before the Special Executive Magistrate on 14.03.2008 at about 12.00-12.30 o'clock in the day time."*

23. PW-24, SI Rajni Kant corroborated the statement of other police officials with regard to the reporting of the incident through DD-8A (Ex.PW-17/A), his reaching the premises, discovering the headless body and being told by Madan Mohan Chauhan from *Baalmiki* Temple that a head wrapped in black-colored cloth was lying there. He went to that spot and saw the head. This was later identified by Rakesh, Jitender's elder brother, to be that of the deceased. He stated that Madan Lal, the priest voiced his suspicion about Jitender and informed him about the incident of 13.03.2008. He also deposed about the Crime Team's proceedings, seizure of clothes after taking them into custody in a parcel from the premises, seizure of blood and blood-stained earth etc. He mentioned having joined the investigation at 06.00 PM on 14.03.2008 when the IO arrested the accused through Memo PW-22/H. The interrogation and disclosure statement by the accused, his leading the police party to the house and the recovery of a knife (which was 31 cms. long with a blade of 21 cms). and its being taken into possession by Memo, Ex.22/M, were also deposed to. The knife was produced as

Ex.P-5. In the cross-examination, the witness admitted that when he reached the temple premises, i.e. 6239, he was informed that PCR call was with regard to House no. 6270 and that this fact was not recorded in his statement under Section 161. He went immediately after receiving DD-8A at around 07.30 AM from Police Station Nabi Karim to 6239 where he reached around 07.40 AM. He stayed there for 1-2 minutes. He went to House No. 6270 at about 07.45 AM and left immediately thereafter and went to *Baalmiki* Temple. He was accompanied by the priest from the *Baalmiki* Temple; he stayed in the temple for about 10 minutes. Rakesh reached the *Baalmiki* Temple and identified his father's head. He deposed that when he reached the house, the investigating Inspector also reached the spot half-an-hour later after Rakesh was sent for. The Crime Team was called to the spot which remained for about 30 minutes at the place of incident. He confirmed that the accused was arrested under Section 107/151 Cr.PC on 13.03.2008. He stated that arrest was made by PW-23. He also mentioned about recovery and seizure of bamboo stick, Ex.6 which was measured. He stated that *"the accused was arrested near Neem Wala Chowk, Nabi Karim by the IO at about 06.00 PM. His disclosure statement was also recorded near Neem Wala Chowk after sitting there, by the IO."*

24. PW-25, IO corroborated the particulars of deposition of PW-24 and stated that he went to the spot after receiving information from the DO, PS Nabi Karim. He received information about the headless body in the premises. He was about to leave the Police Station when some people reached that place and told him about a male human body lying in the *Baalmiki* Temple. He first went to the house, noticed the headless body of a male which was mutilated and dismembered. He informed the Crime Team which reached the spot and conducted the proceedings. From the house, he went to *Baalmiki* Temple; *rukka* (Ex.PW-24/A) was prepared in his presence and the case was registered. He made various seizures, including that of a wooden stick, *danda* and recorded statements of various witnesses. He stated that on the same day, i.e. on 14.03.2008, he arrested the accused at 05.30 PM by Memo, Ex.22/H and conducted his personal search. He also recorded his disclosure statement in which he mentioned having kept a knife, with which he had murdered his father, concealed on a slab. He stated that at the time of arrest, the accused was wearing blood-stained white-lined shirt, which was seized, *chhuri* (knife), which too was seized, and its sketch, Ex.PW-22/L was prepared. He also mentioned having prepared a scaled site plan, Ex.PW20/

A and a rough site plan Ex.25/C. He confirmed that Jitender had been arrested by PW-23 on 13.03.2008 in another case.

Arguments on behalf of the Appellant/accused

25. It is argued by Jitender's counsel that the prosecution was unable to prove its case beyond reasonable doubt. Learned counsel highlighted the fact that the prosecution case entirely hinged on circumstantial evidence. In such matters unless the prosecution was able to prove conclusively each link in the chain and also prove the link conclusively and further establish beyond any doubt that it was the accused and no one else who committed the crime, a finding of guilt would be unwarranted. It is argued that the postmortem report, Ex.PW-21/A states that the time of death is about 54 hours from the time of commencement (of the postmortem), i.e. 01.00 PM, on 15.03.2008. This meant that the time of death was approximately 07.00 AM on 13.03.2008. The testimonies of none of the witnesses, i.e. PWs-3, 4, 5 or 16 was categorical that apart from the accused - Jitender, there was no one with the deceased at or around that time. On the other hand, the testimony of PW-3 that she used to visit her parental home each day after completing work in the *Marwadi Basti* coupled with the fact that she in fact visited her father's home around 07.30-07.45 AM the next day when she discovered his headless body showed that she was a daily visitor. Strangely, in her evidence, she did not depose to visiting her father's premises on 13.03.2008 and if she did, if her father was alive. Thus, the possibility of PW-4 or even PW-5, who lived in the same premises, being present at the time of the death along with the appellant Jitender could not be conclusively ruled-out. In these circumstances, the Trial Court could not have held that it was the appellant and none else who committed the crime. Learned counsel underlined the fact that the seizure of clothes, such as *salwar, dupatta* and lady's shirt with blood stains on them certainly established the presence of a woman in the victim's house. It was also argued that the Forensic Science Laboratory (FSL) report showed that blood grouping of the stains found on the accused's clothes or on the knife or *danda* or in the black cloth in which the victim's head was wrapped, was inconclusive whereas the blood found on the woman's clothes matches with that of the victim. These clearly establish that the articles did not connect the accused with the crime.

26. Counsel submitted that the evidence about the previous days,

incident and reliance on the deposition of PW-15 was not justified. The prosecution case that PW-15 saw the accused coming out of his house with a black colored *potli* and the accused was running towards the *Baalmiki* Mandir. The testimony of PW-15 suffers from contradictions and could not be believed as it appeared from his evidence that he is a witness sponsored by the police to complete their missing link in their story. Contradictions in the evidence of PW-15 were highlighted. It was submitted that the witness contradicted himself in cross-examination by stating that the accused was *'going towards his house'* and that he knew that the *"head was found at the temple at 06.30 – 07.00 AM"* itself, when in his examination-in-chief itself he had stated that the accused *"was going towards Baalmiki Temple"*. PW-15 stated in his examination-in-chief that he had gone to the Temple when in his cross he stated that he did not go to the temple. It was submitted that PW-15's statement that accused was going towards *'Baalmiki Temple*' itself was fallacious in the absence of the direction from the house to the temple being established through a Map or through independent evidence of a witness.

27. It was argued that the fact that there was a hue and cry by the priest is not spoken of or corroborated by either of the two priests. That apart, there is an improvement in the examination-in-chief of PW-1. Counsel submitted that in the sequence of the events, according to the prosecution case the accused went to the *Baalmiki Mandir* where he met PW-2 and asked for keys to *Kaali Mata Mandir* from him. That the accused was carrying a black colored *potli* stated by PW-15 is no doubt corroborated by PW-2 but the latter's evidence is contradictory and sequence of events as disclosed by him does not match the prosecution story. It is stated that PW-2 did not say that he told the police about his suspecting Jitender whereas both Rajni Kant and the *rukka* claim so. PW-2 further deposed that he did not hear the accused making noise in cross-examination. In examination-in-chief he stated that accused was making noise. Though he spoke of the black coloured *potli* yet the cloth piece is not identified by him. Counsel also argued that the witness did not say that he went to the accused's house the morning of the 14th of March 2008, whereas the IO Rajni Kant, PW-23 claimed that he learnt of the head lying in the temple from Madan Lal Chauhan by name; similarly, he did not say that the head was kept in the almirah by the accused. PW-2 did not corroborate that the face and clothes of the accused was smeared with dust. These inconsistencies and contradiction, said counsel for accused, discredit the witness.

28. Counsel submitted that further according to the story of the prosecution the accused was arrested by PW-23 under Section 107/151 Cr.PC. The entire evidence-in-chief of PW-23 was ignored by the impugned judgment. The facts stated by PW-2, PW-15 and PW-23 are not consistent making the chain of events improbable.

29. Arguing further counsel stated that it was claimed by the prosecution that the information of a head lying in *Baalmiki* Temple was disclosed by PW-9. It is submitted in this respect that PW-9 reached Paharganj Police Station when Nabi Karim Police Station was next door and was *en route* at around 06.45 AM on 14.03.2008, on being informed of the head being found by PW-1. He insisted that information was not given to the police by telephone. There is no DD entry of Paharganj that such a complaint was made. He did not disclose which officers he came with, to the spot. Even the testimonies of PW-24 and PW-25 do not speak of this. So the identities of police officers who went to the temple at 07.20 or so with Rukhal is not known. It was submitted that PW-9 deposed that neither he nor anyone called the police on the telephone and that they went on foot to the Police Station Pahar Ganj which took them half an hour and came back with police which process could have brought them back to the police station only by about 07.20 AM on the 14th of March, 2008. He claims to have come to the *Baalmiki* Mandir with the police. Rajni Kant, PW-24, Joginder, PW-25 and Dharamveer, PW-8, all clearly say that they went to the house of the deceased. Only PW-24 Rajni Kant went to the *Baalmiki* Mandir on being informed of the head being found in the Mandir by Madan Lal Chauhan and went back to the house from where he sent the *rukka* to the police station with Dharamveer. PW-9 clearly contradicted three police witnesses. Counsel also questioned how PW-9 came to know that someone from the house of the deceased had called the police already when he has not even identified the deceased. This showed that he is a motivated/sponsored witness.

30. It was next submitted that PW-24 Rajni Kant in his statement and *rukka* claimed that Madan Lal suspected Jitender but the latter did not say so. This showed that they had decided to implicate Jitender right from the start. According to the statement, Rajni Kant reached the house at 07.45 and Joginder reached half an hour later. Joginder himself claimed that he left immediately after D.D. Entry 8-A and reached the house at 07.40 AM. Joginder also spoke about 4-5 persons who came to the police station but did not name or identify them. He insisted that he went only to the house and not to the temple. PW-24 deposed to reaching the

Baalmiki Mandir from the deceased's house around 08.00 AM on Madan Lal's information and meeting PW-16 who identified his father's severed head. There is no explanation why Madan Lal went to the deceased's house instead of the police station. On the contrary he stated in the examination that he stayed put in the temple through the day. Even if he meant the 13th, he did not say that he went to the house of the deceased on the 14th March 2008.

31. It was next urged that Rakesh, PW-16 deposed that he was informed by others at 08.30 AM to go to his house. After seeing the headless body he then went to the temple to identify the head at 10.30 to 11.00 AM. At best he would have been at the temple at 09.00 AM. His working hours are from 06.30 AM to 02.30 PM and distance from his work place to his house is 30 minutes. What is important here is that by then the identification by Rakesh was complete and the FIR registered. Thus Rakesh does not corroborate the story of the police with regard to the identification of the head of the deceased but the police had in any event registered the case and named Jitender as the accused. It was submitted that the witness claimed that the death was a sacrifice to god and was conjecture even before knowing that the head was at *Baalmiki Mandir*. Elaborating, it was submitted that if PW-24 knew that the perpetrator was Jitender who, was to his knowledge in custody of his own police station, there is no explanation why he was arrested only at 06.00 PM after being released in the afternoon. This, submitted counsel, established the police had decided to arraign Jitender as the accused right in the beginning. The *rukka* was sent at 08.25 and the FIR registered at 08.40 AM. The *rukka* and FIR and the PCR call details mentioned Jitender's name. All events took place by about 08.40 AM yet statements of witnesses were drawn up to suit the story of the prosecution. Counsel emphasized that there was no question of releasing Jitender from police custody from the Special Executive Magistrate's Court and he could have been arrested right away, that the police clearly had first decided to arraign him as accused and thereafter created paper work to suit that story. The call records to the PCR supported this view. Counsel further urged that it is probable that Jitender was not released at all from the previous custody and his arrest at 06.00 PM was shown in this case without him being released. The lack of any physical evidence and the recovery of the knife at the instance of the accused are two factors which show that he did not commit the crime and was falsely implicated. Counsel stated that Ex. PW-14/A (PCR Information) shows that all information was with police at 07.33 AM including the fact that Jitender

was in custody.

32. Counsel argued that the forensic evidence in the form of depositions of PW-11 and PW-12 and the FSL reports do not support the prosecution story. It was submitted that the witnesses. depositions clearly state that there were no finger prints in either of the crime scenes or on the knife. Similarly, the FSL report stated that the blood group on the clothes of the accused or on the knife or *danda* did not match with that of deceased.

33. On the question of sentence, learned counsel submitted that the death sentence imposed was not warranted in the circumstances of the case. It was submitted that even according to the prosecution case the appellant was abnormal and acted in a strange and weird manner. His strange ways, alleged the prosecution, drove away his brother from the parental home and apparently alienated him from the rest of the family and society. In view of this abnormality, which was allegedly delusional, the Court owed a greater duty to examine whether the appellant was normal within the meaning of that expression. His actions alienated his wife, who left the matrimonial home; it drove away the brother and even the mother appears to have forsaken him. The Trial Court should have explored whether the appellant was mentally capable of facing trial, and entering a plea in the defense.

34. It was next submitted that even if the court were to uphold the conviction, the Trial Court ought not to have imposed the death sentence. It was submitted that mere brutality of the murder was not an overwhelming criteria; for this purpose, reliance was placed on the decision in **Panchhi v State of U.P.** (1998) 7 SCC 177 and **Vashram Narshibhai Rajpara v. State of Gujarat** (2002) 9 SCC 168. In Panchhi it was held that:

> "Brutality of the manner in which a murder was perpetrated may be a ground but not the sole criterion for judging whether the case is one of the "rarest of rare cases" as indicated in Bachan Singh case. In a way, every murder is brutal, and the difference between one from the other may be on account of mitigating or aggravating features surrounding the murder."

Learned counsel relied on the decisions reported as **State of Maharashtra v. Prakash Sakha Vasave and others,** [2009 (1) SCALE 713] and **Bishnu Prasad Sinha and Anr. v. State of Assam** [2007 (2) SCALE

4] and argued that in the totality of circumstances having regard to the fact that the appellant did not have a criminal record and he was not known to indulge in violence, the imposition of capital punishment was not justified, since the case did not fall in the *"rarest of rare" category.*

Submissions on behalf of the State

35. Mr. Rajesh Mahajan, learned Additional Standing counsel for the State highlighted that the events of 13.03.2008 can be divided into two parts, i.e. the accused being seen rushing towards the temple and second, the commotion created by him, and his arrest. It was submitted that for the first part, PW-15 Rajender saw the appellant carrying something wrapped in black cloth. The witness saw him coming out from his house and running towards Baalmiki Temple. The witness further stated that the appellant had a dust smeared face and dusty clothes. When PW-15 asked about his condition the accused did not answer and rushed towards the temple. Counsel highlighted that no question was put to the witness in the cross-examinati on pertaining to his state and conduct as deposed in the examination-in-chief. PW-15 identified the black cloth which he had seen the accused carrying the previous day as Ex P-1. It was also submitted that the so-called contradictions pointed out in his evidence are not such that they would strike the root of the matter; they are only minor in nature. If the witness gave contradictory versions with regard to going 'towards house' or 'towards temple' or going or not to the temple, that may be in a stray sentence in an unguarded moment but cannot be said to demolish his entire testimony. Under such circumstances, after weighing the material value of the contradiction, the Court ought to look at other evidence to see which of the two versions is corroborated through other evidence. The evidence is to be viewed in its entirety and not in piece meal. On an overall assessment of the testimony, it cannot be said that PW-15 is not a witness of credibility, more so when he had no animus to depose falsely against the appellant.

36. Dealing with the second part of the incident of 13.03.2008, Counsel stated that PW-2 Madan Lal deposed that at about 02.00 PM on 13.08.2008, while he was lying near the *Dhuna* of *Baalmiki Mandir*, the accused came there and started making noise. The witness further deposed that the accused had a black colored cloth potli and that he demanded keys to the *Kaali Mata Mandir* from him. When the witness told the accused that he did not have the keys, he started making more noises and started breaking objects of the temple. The witness informed people outside the *mandir* and also stated that the accused tried to pull open the

almirah in the mandir and was also breaking the glasses kept in front of the idol. Minor variations in his statement, would not shake the underlying veracity of the said witnesses. testimony.

37. It was submitted that the police was informed, upon which SI Surya Prakash, PW-23 reached there pursuant to DD No. 13 A (Ex.PW-23/A). The *Kalandra* proceeding under Section 107/151 Cr.PC followed, which record the manner in which the accused was behaving, and have been exhibited as Ex.PW-13/B. PW-23 SI Surya Prakash, while deposing in Court, apart from proving the *kalandra* proceedings also deposed that the face of the accused was laced with ash and that he had put red colored *tika* on his forehead. He admitted in his cross-examination that these facts were not mentioned in the *kalandra* Ex. 23/B. The explanation for this omission is that when the proceedings on 13.08.2008 were recorded, he did not know that it was a case of human sacrifice where ash smeared face and red tika would have significance. Moreover, he was concentrating on preventing breach of peace for which he was called. On hind sight, after he came to know that the accused had indulged in human sacrifice that he could co-relate the condition/state of the accused with the *post facto* knowledge of sacrifice. This is explainable on normal human behavior where the mind starts recollecting details subsequently on being told of an alarming incident, which details may have been ignored earlier as innocuous trivialities. This improvement thus has a valid explanation and has wrongly been discarded by the Trial Court. Counsel further stated that PW-23 explained that though he had noticed blood stains on the clothes of the accused, yet he thought that he might have received the stains while breaking the glasses in the temple, which explanation could not be termed unreasonable. In this context, reliance was placed on the MLC dated 13.03.2008 which also shows incise wound on right little finger of the accused. PW-23 further stated that on enquiry, accused told him that *"Mujhe devi ki shakti aati hai"* and thus explained his conduct as attributable to divine powers. No cross-examination was directed against this part of the deposition.

38. Dealing next with the incidents of the next day, it was submitted that in the morning of 14.03.2008, Guddo, PW-4 noticed the headless dead body of her father lying on the floor of the house and raised an alarm attracting the neighbours. PW-22 Ajay @ Bunty, heard PW-4 crying out that a headless body was lying in her house, informed the police on number 100. His house address (No. 6239) is mentioned in the PCR form, Ex.PW-14/A. PW-22 is also a witness of seizures made at

the spot and subsequently to the arrest, disclosure and recovery of the knife by the accused. It was stated that the PCR form was proved by PW-14 Constable Kishan Singh and the information was conveyed to the concerned police station, where it was recorded as DD no. 8A, Police Station Nabi Karim. The DD was entrusted to PW-24, who went to the spot with Dharamvir (PW-8). PW-2 deposed to finding the dead body in the house and contemporaneously was informed of the recovery of head from *Baalmiki Mandir* by Madan Lal (PW-2). Leaving behind PW-8 at the house, PW-24 reached the temple. Thereafter Rakesh, PW-16, another son of the deceased joined the proceedings, identified the head and the body, whereafter *rukka* was sent at 08.25 AM on 14.03.2008 by SI Rajni Kant. PW-25, the IO – Inspector Joginder Singh was informed by the duty officer at PS Nabi Karim about the recovery of dead body lying in house no. 6270. When he was about to leave PS Nabi Karim, 4-5 persons went to the police station and informed him about the male human head lying in the *Baalmiki* Temple. PW-9 Suresh Chand corroborated this version of the IO when he stated that there were 4 persons who went to the police station and informed the police about the episode. PW-1 Nanhe Ram also corroborated PW-25 and PW-9 on this aspect. Thus all these witnesses are consistent with one another on the reporting of the matter to the police. In this light, even if PW-2 Madan Lal did not state in his testimony about going to the house and informing police regarding recovery of the head, the omission would be insignificant as the fact remains that the police came to know through other witnesses (PW-9 and PW-1) about recovery of the head almost simultaneously with the recovery of the body.

39. Dealing with the argument about PW-9's statement in cross-examination that he went to Police Station Paharganj, it was submitted (on behalf of the State) that at the relevant time, Police Station Nabi Karim was functioning and operating from PS Paharganj as its building was under construction. Therefore, not much significance can be attached to this aspect. It was submitted that the IO, PW-25 deposed that further steps were taken in the investigation of the case. Counsel submitted further that the contradictions cited between statements of PW-24 and PW-25 were minor and not at all significant so as to effect the sub-stratum of the case.

40. In reply to the argument that since the involvement of the accused in question was already in the knowledge of the police in the morning of 14.03.2008, he could not have been allowed to be released

from custody on 14.03.2008 from the Court of SEM on bail, the prosecution stated that to elicit this explanation, appropriate questions should have been put to the witness or the IO. But no such question was asked. Under such circumstances, the Court has to look into the case diary of the relevant date to find the answer. That document revealed that the IO was aware that the suspect was in the lock-up on allegations of breach of peace, and he informed SI Surya Prakash that the accused be brought to the spot after release on bail from SEM Court. The case diary further shows that the suspect was brought to the scene of crime by SI Surya Prakash at about 5:30 PM in compliance of the directions. In the cross-examination, PW-24 stated that the accused was produced before the SEM on 14.03.2008 at about 12:00 noon-12:30 PM. The records of the proceedings under Section 107/151 CrPC show that Rakesh, Jitender's brother, stood surety for (the accused) in that case. Thus, the accused was released from custody in the case for Section 107/151 CrPC but remained with SI Surya Prakash who brought him to the IO at about 5:30 PM, after which he was arrested in the present case. When read with the contents of the case diary, the words "released from the custody" in the testimony of PW 23 meant custody in the case under Section 107/151 CrPC or his notional release and not that the accused was set at liberty. It is reiterated that the accused did not put any relevant questions in the cross examination to PW-24 in this regard. It was argued that without prejudice, even if it were assumed that there was delay in making arrest in the present case, it would be a lapse in the investigation which cannot falsify the entire prosecution case, more so when there exists sufficient credible evidence on record.

41. It was emphasized that several witnesses i.e. PW-1, PW-2, PW-9, PW-16, PW-22 apart from police witnesses PW-8 Ct Dharamveer, PW-24 SI Rajni Kant and IO PW-25 Insp Joginder Singh joined the proceedings on 14.3.2008, some discrepancies are bound to appear in the narration of different witnesses when they speak on details; but the test to be applied is as to whether the said discrepancies go to the root of the matter or are of material dimension, which it is humbly submitted is not the case in the facts of the present case. Reliance in this regard is placed on **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat** (1983) SCC 217 **State of Himachal Pradesh vs. Lekh Raj** (1983) 3 SCC 147 and **Sukhdev Yadav vs. State of Bihar** (2001) 8 SCC 86. It is submitted that some variation in the timings deposed by the witnesses are bound to happen as (a) they were not timing each step, (b) the watches of all

the witnesses are not synchronized so that each would give the same and exact timing of each movement or action and (c) witnesses are deposing in court after a lapse of some time since the incident for which too some allowance needs to be given. The timings given by the witnesses do broadly match and there is not much discrepancy to that effect.

42. The prosecution highlighted the fact that the near relatives of the accused, i.e. mother, brother and sister fully supported the prosecution. Being immediate family members, they were unlikely to falsely implicate the accused. It is also argued that apart from the circumstances enumerated by the Trial Court, there is another very vital circumstance proved on record though not taken into consideration by the Trial Court. This is the discovery of a fact pursuant to a disclosure, which is admissible under Section 27 Evidence Act. It was the Appellant who disclosed on 14.3.2008 that (a) the time of killing/death of his father was around 8 am on 13.3.2008 and (b) that the death had taken place by pressing the throat of his father and decapitation and chopping of the organs was done after the death. Both these facts were subsequently confirmed through the post mortem, which was conducted on 15.3.2008. This information would thus be admissible as it has led to discovery of facts, within the meaning of Section 27 of the Evidence Act, which were not in the knowledge of the police till disclosed by the Appellant and till subsequently confirmed by the post mortem report. Reliance in this regard is placed on **Pulukuri Kottaya vs. Emperor,** AIR 1947 PC 67 and **Dost Mohammed. v. State** Crl.A.385/2008 decided on 01.02.10 (by a Division Bench, of this Court). The prosecution also relied on the answer given the Appellant to the first two questions asked under Section 313, CrPC. The appellant admitted that there were three persons residing in the house in question; and further, that that he was unemployed, habitually remained idle at home, his wife had deserted him, he used to engage in Devi Pooja and for that he would have to give sacrifice. The mother and sister's depositions were lethal; the Appellant also admitted these aspects, conclusively proving all links in the chain of circumstances beyond reasonable doubt.

43. Learned counsel argued that in the facts of the case, Section106 Evidence Act applies since it has emerged from the evidence that the Appellant and the deceased were the only persons in the house at the relevant time, and one of them was found dead. In the absence of any other evidence to the contrary, the onus shifted on the Appellant to explain under what circumstances his father died. His silence cannot be

considered as discharge of the said onus. To argue that the Appellant and the deceased were not the only two persons in the house, would be reading against the evidence led on record particularly of the mother and siblings of the accused. Counsel also relied on the scientific evidence in the form of FSL reports which duly corroborated that the appellant's clothes had human blood, the knife recovered pursuant to his disclosure too had human blood, though the grouping on the same could not be ascertained. These were highly incriminating. The danda (stick) seized from the spot also contained human blood. The Post mortem report shows fracture in the skull. It was thus, urged that the chain of circumstances is complete in the facts of the present case which unerringly points only towards the guilt of the accused. The tests for basing conviction on circumstantial evidence have been duly fulfilled in the present case. The circumstances were correctly enumerated in the impugned judgment.

44. On the question of sentence, it was argued that applying the rule enunciated in **Bachan Singh v. State of Punjab** [(1980) 2 SCC 684], the Supreme Court had, in **Machhi Singh v State of Punjab** AIR 1983 SC 957, held that Courts should, whenever the question of imposition of capital punishment arises, draw a balance sheet,

> "...of aggravating and mitigating circumstances ....and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

Here, argued the prosecution, the offender was in a dominating position vis-a-vis the victim. The deceased was an old man aged 70 years and was sleeping;

a) The act is anti-social and the crime of socially abhorrent nature.

b) Some degree of pre-meditation has gone into the act.

c) It is a case of no provocation and an act of deliberate killing.

d) The brutal, grotesque, diabolical and dastardly manner of crime arouses intense and extreme indignation. The manner in which organs have been cut out is revolting.

e) There was complete lack of remorse after the killing. For

half a day, the Appellant played havoc with the body of his victim/father.

f) It is a crime against the society and the society itself in endangered. This is also because the mother, real brother and real sister have in a rare situation in unison deposed against their own blood relation. If the immediate family feels insecure by his act, his being at large in the society is not at all called for. If he can do such an act to his father, there is no assurance that on his release he would not commit the same act with another victim. His previous behaviour with wife and brother, would also be of relevance, as their acts of moving away from the; Appellant appear to be justified.

45. Reliance was placed on the decision reported as **Sushil Murmu vs. State of Jharkhand** 2004 (2) SCC 338 and **Ajitsingh Harnam Singh vs. State of Maharashtra** 2011 (4) JCC 2482. The prosecution urges that there is absolutely no mitigating circumstances which can aid the appellant and the overall conspectus of facts reveals that death sentence is the only punishment that would be adequate and just.

Analysis of Evidence

46. The Trial Court relied on the deposition of Kamla (PW-3), the accused's mother to hold that the accused used to reside with his parents (the deceased Kartar Singh and PW-3) at 6270 Nabi Karim, Gali Ravidass, Nabi Karim, Delhi. This witness also testified that the accused's wife had deserted him and that he was unemployed and habitually remained idle at home. This was corroborated by Guddo, PW-4, the accused's sister; she stated that the accused used to live with his parents at their residence in Nabi Karim. PW-16, the accused's brother too deposed similarly. When queried under Section 313, Cr. PC, the accused admitted to this fact. Therefore, the Trial Court, in the opinion of the Court, correctly found that the accused used to live with his parents, was unemployed and remained idle. He had been abandoned by his wife.

47. The prosecution had alleged that the accused was engaged in Devi Pooja and had previously spoken of his desire to offer a sacrifice in pursuance of the practice. Smt. Kamla PW-3, in her examination in chief, stated that the accused had told her several times that he was engaged in the worship of deities, and that for that purpose he was required to perform a sacrifice. She reiterated this fact in her cross

examination by the Learned Amicus Curiae appointed on behalf of the accused-appellant in the Trial Court. Suresh Kumar, PW-5, the cousin of the accused, had also stated in his statement under Section 161, that the accused was engaged in Devi Pooja and that he wanted to perform a sacrifice in furtherance of the same. However, in his examination in chief, he resiled from this statement. In the cross-examination by the Learned Addl. PP, when confronted with his statement under Section 161 (Ex. PW-5/DA) he denied that he had stated any such thing to the Police. The Trial Court, in its query under Section 313, put a compound question to the accused to seek his answer on the evidence on record. The question was, which elicited from the accused, his answer on the evidence on record (according to the Court) *"that you were unemployed and habitually remained ideal (sic idle) at home while your wife had deserted you and was residing at her parental home and you would tell your family that you were engaged in Devi Puja and for that you would have to give sacrifice"*. Such a query, in the opinion of this Court, was impermissible. PW-3's deposition that the accused remained at home, idle, and indulged in Devi worship and that he had expressed the desire to give sacrifice was partially contradicted by the testimony of PW-4 and PW-5. The Trial Court overlooked PW-4's evidence that *"Accused had not talked to me that he was practicing some Pooja of Devi Devta."* This evidence by a family member contradicted the deposition of the mother, PW-3. PW-5's deposition too undermined the mother's evidence. Besides, the Trial Court's approach in putting what are known as compound questions (or *"double barreled"* questions which *touches upon more than one issue, yet allows only for one answer* and is unfair to an accused) was incorrect. Dealing with the manner in which the Section 313 statement should be recorded, in **Ajay Singh vs. State of Maharashtra** [AIR 2007 SC 2188], the Supreme Court directed as under:

> "It is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material substance which is intended to be used against him. The questionings must be fair and couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. Fairness, therefore, requires that each material circumstance should be put simply and separately

> in a way that an illiterate mind, or one which perturbed or confused, can readily appreciate and understand."

In view of the above discussion, it is held that the prosecution was able to prove that the accused used to tell his mother that he indulged in *Devi pooja*; however, it cannot be said to have proved that he had expressed any desire to give a sacrifice.

48. The next circumstance is the prosecution allegation that on 13th March, 2008, Jitender was alone with his father. Here, reliance is placed on the testimonies of PW-3, PW16 and to an extent, on that of PW-4. In her examination in chief, the appellant's mother (PW-3) stated that on 12.3.2008, she had gone to her younger son Rakesh's house and was there for 2-3 days. Rakesh, PW-16, also stated that 2-3 days prior to 14.03.2008, his mother had come to his house at Roop Nagar and that on these days the appellant and his father were residing in Nabi Karim. The versions of these two witnesses have to be seen in the context of the other evidence. PW-4 Guddo, is the deceased's daughter and the accused's sister. She deposed that every day, she used to visit her parental home after finishing her work (she worked as a *safai karamchari* at Marwadi basti, Nabi Karim). She is the one who saw the headless torso of her father on 14-3-2008. She did not mention if her father had been left alone with the accused for the two previous days, as deposed by her mother. She did not depose anything about having visited the deceased's premises on 13th March, 2008, when the killing actually took place. This is possibly an innocuous omission, or might also mean that she visited the premises on that day, but found nothing remiss. According to the medical evidence, i.e. the Post mortem report (Ex. PW-21/A) indicates that the post-mortem was conducted on 15.3.2008 at 1.00 PM. It gives the probable time since death as 54 hours. This puts the probable time of occurrence of death at 7.00 AM, on 13.3.2008. Even if there is a margin of a couple of hours, the time of death would in all probability be around 8-9 AM. If indeed she did visit her father, at around 7-30 AM or even around 8 AM, she did not find anything remiss, enough for her to not mention in her deposition in court. The overall testimony of these witnesses, i.e. PW-3, PW-4 and PW-16 (the brother, Rakesh, who received news about his father's death at around 8:30 AM on 14-03-2008, and identified the body thereafter) reveal that a couple of days before the body was discovered, the deceased's wife had gone to live with PW-16. The accused was alone with the deceased from that time onwards. The prosecution therefore established that the accused was the only person

in the premises with the deceased, at and around the likely time of death.

49. The next circumstance alleged against the accused is that he killed and beheaded his father. There is concededly no direct evidence. A series of circumstances are relied on to say that it is only the accused, and no one else who could have committed that act. The first in this series of facts is that the accused was allegedly seen on 13.03.2008 carrying something wrapped in a black cloth and running towards Baalmiki Mandir. PW-15, Rajender, is the relevant witness with regard to this circumstance. In the examination in chief, he stated that on 13.03.2008, at about 2 PM when he was going to work, he saw the appellant running out of his house, carrying something wrapped in a black cloth, towards the *Baalmiki Mandir*. He states that his face and clothes were smeared with dust. He claimed that he had enquired about his condition but received no reply as the appellant was rushing towards the temple. He stated that on 14.03.2008, i.e., the next day, at about 6.30-7.00AM, when he was on his way to buy breakfast; he found out (was told) that a human head had been found in the *Baalmiki Mandir*. On hearing this, he went to the temple. On seeing the head, he identified it as that of his uncle, Kartar Singh. He states that he also saw the black cloth that the appellant had been carrying the previous day, lying near the head. He identified the black cloth in Court on 10.12.2009, nearly one year after his examination in chief which was on 5.12.2008. In his cross examination by the Counsel for the accused, he made several statements that were inconsistent with his examination in chief. He stated that, at 2 PM,on 13.03.2008, when he was going to work, he saw the accused Jitender running towards his house (and not the temple as he had earlier stated); he stated that the black cloth had no identifying mark (this throws into doubt his identification of the cloth in Court, a year later); he also stated that he could not recall the clothes that the accused was wearing; he stated that when he returned at around 10 PM, on that same day, there was a hue and cry about a head lying in the temple, but that he did not go there and instead, returned to his house (whereas in his examination in chief he states that the head was found the next day in the temple, that he went there, and identified the head). The Trial Court dealt with these inconsistencies in Paras 91 to 93 of the impugned judgment and further held that the attention of witnesses was not drawn to those; the court also observed that PW-15 had been cross examined over 16 months after the incident, and his confusion about the commotion regarding the date of discovery of the deceased's severed head, could be reasonably put

down to the time interval and lapse in memory. This court does not discern any infirmity with the reasoning of the Trial Court on this aspect.

50. The next in the series of circumstances alleged to establish the accused's role as the perpetrator of the crime is that on 13-3-2008, he created a ruckus (commotion) at Baalmiki Mandir that day, on being refused entry, following which, he was arrested. Shri Madan Lal, PW-2 was the pujari at Baalmiki Mandir. In his examination in chief, he stated that on 13.03.2008, he was lying down, near the Dhuna. At about 2 PM, the accused, carrying a package wrapped in black cloth, went near the temple and started making some noise. He demanded the keys of Kaali Mata Mandir from PW-2 and on being told that he did not have it, he started breaking articles inside the temple, tried to open the almirah inside the temple and broke the glasses kept in front of the idol. He stated that he informed a person sitting outside the temple of the accused's behaviour. He states that the accused then went outside and created a scene there. The Police officials, who had been informed, came to the temple, arrested the accused and took him away. In the cross examination, PW-2 stated that he could not remember the clothes worn by the accused at that time, as he had been sleeping. He contradicted his earlier statement in his examination in chief, as he stated that the accused made no noise in his presence. The appellant argues that this witness did not make any mention of the fact that the appellant's clothes were blood stained, needs to be considered; as also his contradictions with respect to the version of events.

51. Nanhe Ram, PW-1, the other priest of the Mandir, in his cross examination by the counsel for the accused sought to corroborate PW-1's statement. He deposed that on 13.03.2008, when he reached the Mandir, he found a crowd gathered there, as the accused had created a scene at the spot. He had made a statement to the Police to the effect that the accused had broken the windows (*khirkees*) of the *almirah*; he clarified that he had meant the doors of the *almirah*. SI Surya Prakash, PW-23, was the police man on duty, who arrested the appellant at *Baalmiki Mandir* on 14.03.2008, on being informed that a person was causing the destruction of temple property. (DD. No. 13A recorded at 2.25 PM. Ex. PW- 23/A). He stated that pursuant to the recording of the DD, he went to the temple, and found a crowd gathered there. He saw the appellant threatening the people there and demanding a share of the money offered by the devotees, to the temple. He says that the appellant's face was smeared with ash and he had smeared red tika on his forehead.

He noticed shards of glass, and blood stains on the shirt of the accused which he attributed to his having received injuries while breaking the glass in the temple. He stated that when he questioned the appellant about his conduct, he said *"Mujhe Devi ki Shakti aati hai"*, thus attributing his conduct to divine power. The accused apparently continued to threaten those present, and this witness arrested him under Section 107/151 CrPC. This witness then lodged the accused in lock up in PS Pahar Ganj. He made an arrival report, DD No. 20A dated 13.03.2008 (Ex. PW-23/B) in which it was stated that the appellant had been demanding money from the persons gathered around the temple, that he was in a fit of rage and despite the inspector trying to reason with him, he did not mend his ways. Apprehending a possible breach of peace in the area, the Inspector arrested him, and informed his mother Smt Kamla, PW-3 of his arrest.

52. In his cross examination the witness admitted that he did not mention the fact of the red blood *tika* on the forehead, or the fact that the appellant's face was smeared with ash, or that his clothes were blood stained. He stated that the IO had recorded his statement on 23.3.2008, and in this statement he did not mention that he had informed the mother of the appellant about his arrest. He deposed that when he apprehended the appellant Const. Krishan Pal was already present there. This court had, to satisfy itself about the true state of affairs, called for the proceedings under Section 107 Cr. PC. The relevant records reveal that PW-23 actually arrested the accused at 04:55 PM on 13-3-2008. The arrest memo clearly mentioned PW-3 as the relative who had to be informed (about the accused's arrest).

53. The Trial Court held that the fact of the accused's clothes being blood stained, and his having smeared *tika* on his forehead cannot be taken into consideration since this witness did not record these facts in the DD. However, it did take into consideration the fact of his face being smeared with ash, since it found corroboration in the testimony of PW-15. The argument on behalf of the Appellant, that PW-15's testimony is suspect and the entire narrative about the previous incident of 13-3-2008 not inspiring confidence as to amount to proof beyond reasonable doubt, may now be analyzed. It is a fact that none of the witnesses deposed that the accused in fact opened the *almirah* and kept the black coloured *potli*. The Trial Court has reasoned that this detail is irrelevant, because no one deposed that the *almirah* was locked; it may well have been latched. The other fact which emerges from the testimonies of PW-1 and PW-2, who saw the accused at different times, but in the same

incident, when he reached the temple and started making demands, was that he wanted a share of the offerings (made to the deity). PW-2 clearly deposed that he saw the accused with the black coloured cloth *potli* and that he created a commotion. This fact, i.e. previous day's commotion, and that he was arrested is corroborated by PW-23. PW-1 is not really a witness to what happened on 13-3-2008; he was told about it. PW-23 and PW-2 are witnesses who establish that the accused was arrested, after he created commotion in the temple. PW-2 mentioned that the accused had broken some glass items (or idols) in the temple. Although not part of the trial, there is some kind of corroboration about this, because after arrest, on 13-3-2008, the accused was medically examined around 08:00 PM. The doctor noticed a cut injury on his finger. If for argument's sake, the deposition of PW-15 were to be excluded, the depositions of PW-2 and PW-23 as well as DD 13-A dated 13-03-2008 clearly establish, beyond any doubt that the accused was seen going to the temple, with a black coloured packet/ *potli*. He created a ruckus, or commotion, which led to arrest for breaching the peace under Section 107 Cr. PC, by PW-23 and his being taken into custody. Taken together, the Court does not find any infirmity in the approach and findings of the Trial Court regarding the previous day's incident.

54. The next circumstance is the discovery of the headless torso of the accused's father, on the morning of the 14th March, 2008. PW-4 Guddo, the accused's sister (and daughter of the deceased), was the first to discover the body of her father. She used to visit her parents daily after finishing her work of cleaning Nabi Karim. She did not remember the day or date on which the incident took place, but that morning when she went inside the house, she found the naked headless torso of her father, lying on the floor. She raised an alarm and cried loudly which drew the attention of her neighbours. She went downstairs, and informed the neighbours of what she had seen. She stated that the accused had not told her that he was engaged in Devi Pooja. In her cross examination by the Counsel for the defendant, she states that she had gone to her parent's house at 7.30 AM in the morning. The discovery of the body by PW-4 and her raising an alarm were corroborated by PW-22. Ajay@ Bunty, the deceased's neighbour. He deposed at about 7.15/7.30 AM, on 14.03.2008, he was at home, when he heard the cries of Guddo, that a headless body was lying in her house. He informed the Police of this fact on the number 100. He went inside the house to a room on the first floor near a wooden alter where the body was lying. Sri Chand, PW-6, is the

witness who informed the deceased's other son Rakesh about the death of his father and the discovery of the beheaded body and brought him back to his house. Rakesh, PW-16 is the son of the deceased. He states that on 12.03.2008, while he was at work near the *Kaali Mandir*, between 8.30 AM and 9.30 AM, two persons, namely Billu and Raju told him that he should go to his house. There, he saw a headless body lying in the room of his parents. house, in front of the *Mandir* and that different parts of the body were cut down. He identified the mutilated torso of his father, and stated that his name had been tattooed on his father's arm. In his cross examination, he has stated that it took him thirty minutes to get to his house from his work place on foot. The combined testimonies of PW-4, PW-22, PW-6 and PW-16 in the opinion of the Court, proved the prosecution's case about the circumstances under which the headless torso was discovered.

55. The discovery of the severed head is the next circumstance which has to be considered. PW-1 Nanhe Ram, worked as a priest in the *Baalmiki Mandir*. On 14.03.2008, at about 6.00 AM, he opened the almirah to take out the sound system to play some music, when a tied up a black cloth bundle (*potli*) fell out of the *almirah* onto the floor. He found that the bundle contained a severed human head. He rushed to inform the President of the Mandir Trust. Shri Suresh Rukhal, PW-9, came back to the temple with him and checked it. Thereafter, they went to the Police Station and reported the matter. He stated that the Police then visited the temple and took the head. He apparently also came to know then of the fact that a headless body had been discovered in H. No. 6270, Gali Ravidass.

56. In his cross examination by the counsel for the accused, the witness stated that he went to Suresh Rukhal PW-9 at about 6.05 AM, and returned within five minutes with him, From there, he along with Chaudhary Kehar Singh, Kishan Lal, Suresh Chand Mukherji and many other people went to the Police Station, where they remained for about 5-10 minutes and returned to the *Mandir* with 4-5 police persons. He could not recall the time at which they returned to the Mandir. But he states that by such time, rumours of a headless body having been discovered in House No 6270 had been circulating in the neighbourhood. Madan Lal, PW-2, the other priest of the Mandir reiterates this version of events, but it is unclear if he was witness to all of it, or whether he was narrating something that he had been told. In his cross examination, he has stated that Nanhe PW-1 had told him on 14.03.2008 of the

discovery of the head. He says that though he had left the temple at 6.00AM, he had returned within fifteen minutes and had then stayed at the temple the whole day. Suresh Chand, PW-9, corroborated PW-1's version. He stated that he was Head of the Managing Committee of the temple and that on that day, at about 6.15 AM, Nanhe Ram, the priest of the temple asked him to accompany him to *Baalmiki Mandir*. On reaching there, he went inside and found a severed human head, wrapped in a black cloth, lying on the floor. He gathered people from the locality. Four of them went to the Police Station and informed them about the incident. Somebody had called the police and told them that a headless body was lying in their house. In the cross examination, he stated that they reached the temple in five minutes, and that they gave the information to the police in person and not on the phone, and that the concerned Police Station was P.S Paharganj, which they reached within half an hour. The police accompanied them within fifteen minutes, and they remained at the *Mandir* for about fifteen minutes and then went to the house where the body was and remained there for about one and a half hours.

57. Ct. Kishan Singh PW-14 first received the information about this incident in the PCR. According to him, when he was on duty on the morning of 14.3.2008, at about 7.18 AM in the morning, he received information from the mobile no. 9250585591 that a dead body was lying in House No. 6239, Nabi Karim. The PCR Form, Exhibit PW-14/A confirms his statement. In the cross-examination, he reiterated that the informant had said that the incident had taken place in House No. 6239 and the informant's name had not been taken down as it was not required. This information was conveyed to PS. Nabi Karim by DD. No. 8A (Ex. PW-18/A) which was verified by PW-18, who stated that this DD was recorded by HC Jagbir Singh. SI Rajni Kant, PW-24 stated that on receipt of DD. No. 8A, he and Ct. Dharambir, went to the spot, i.e., H. No 6270, Nabi Karim, where in a room on the first floor of the house, he saw a headless body lying in a pool of blood. The finger, toes, penis, heart and kidney had been removed from the body and the body was lying in front of a photo of Goddess Durga. He observed that this seemed to have been some kind of sacrifice. In the meantime, the priest of *Baalmiki Mandir*, Madan Mohan, PW-2, went and informed him about the head that had been found in the temple. He left the spot in the care of the Constable and went to the temple, where he saw the head in a black cloth. He says that Rakesh, the son of the deceased had reached

the temple, by then and identified the head as belonging to his father. Then, he and Rakesh went back to the latter's house, where Rakesh identified his father's body. He stated that Madan Mohan, the priest, raised suspicions that this murder could have been committed by Jitender, and told him that on 13.3.2008, the accused had gone to the *Baalmiki Mandir* and broken glasses and other things in the temple. This witness states that he prepared the rukka and sent it to PS Nabi Karim for the registration of the case. In his cross examination by the counsel for the accused on this aspect, he stated that he received the DD 8/A at 7.30 AM and left immediately. When he reached House No. 6239 at about 7.40 AM, he was informed that the incident had taken place at House No. 6270. He did not record the name of the person who told him where the incident had taken place (These facts are not mentioned in his Section 161 statement) He stated that they reached House 6270 at about 7.45 AM. The priest from the Mandir had gone to the house almost immediately after his arrival and he left the house immediately, with the priest and went to *Baalmiki Mandir*, where he stayed for about 10 minutes. Rakesh also immediately reached the Mandir and when he identified the head of his father, he sent the *Rukka* from House No 6270, at about 8.25 AM. Constable Dharamveer, PW-8, in his examination in chief has supported the version of PW-24. In his cross examination by the Counsel for the accused, he stated first that he went to the Police Station with the *Rukka* at about 10 AM, and the second time that he had taken the Rukka to the Police Station at 8.00 AM and reached the Police Station at 8.15 A.M.

58. PW-25, Inspector Joginder Singh, the IO, stated that just as he was about to leave for House No. 6270 in Nabi Karim, on being informed of the discovery of the headless body, 4-5 persons came to the Police Station and told him that a male human head was lying in *Baalmiki Mandir*. He went to the house, and saw the beheaded and mutilated torso lying in front of a photo of Goddess Durga, the fingers, toes, penis and heart had been cut out and removed from the body. He informed the crime team. In his cross-examination by the counsel for the accused, he stated that the information about the incident was received at the station at about 7.30 AM. He clarified that the information recorded did state House No. 6239 as being the place of incident, but it was later found out that it had taken place in House No. 6270 and 6239 was the house number of the Complainant. He was informed of the presence of the head, by four or five persons near the police station gates. He stated that he reached the House at about 7.40 AM. He called the crime team about

half an hour later, they reached the spot at 8.45 AM and left at about 9.45 AM. The IO stated that he lifted one sweater, one lady's blue shirt/ jumper, one light blue *chunni*, all blood stained (memo Ex. PW-22/D); he also seized one blood stained pant, panty, muffler, towel, an orange colour cloth and one lady's trouser/*shalwar* (Ex PW-22/E); blood stained samples (memo Ex. PW-22/A); blood stained floor (memo Ex. PW-22/ B,); earth control/ floor (memo Ex. 22/C,); one blood stained bamboo *danda* (memo Ex. PW-22/G); wooden temple with photograph of Goddess Durga (memo Ex. PW- 22/F) The IO identified these case properties in Court. All these recoveries were corroborated by PW-24, who too identified them in court. The head was brought back to the house, the inquest proceedings were done (Ex. PW-25/A) and the body was sent for Post-mortem. This was corroborated by Ct. Dharamveer and Rajni Kant (PW-24).

59. The Appellant's attempt to argue that there is a disconnect between the testimonies of various witnesses, by highlighting discrepancies in time and also contending that the entire prosecution effort was to frame the accused, does not persuade this Court. This argument is based upon a de-construction of the sequence of events which occurred on 14-3-2008, as it were, and at the same highlighting individual events. Such a contention in the opinion of this court, is fallacious. The Court has to consider that two events took place in a narrow time band separating each other. The first, chronologically, was the discovery of the head in the temple; it was early, around 6:00- 6:15 AM. This was followed by PW-1 rushing to PW-9, his reaching the temple, and collecting a few people, and then proceeding on foot to the police station. Even before the reporting was done- or perhaps during the process, PW-4 apparently went to her parents, house, and discovered her father's mutilated and headless torso; she raised an alarm. PW-22 reported the matter to the police. This is also testified by PW-6. The testimony of PW-25 clarifies that the first intimation received was about the headless torso and even as he was about to leave some people reached the police station, and reported the discovery of the head. At the stage of recording the first information report, these two events were known to the police. They also were apparently aware that Jitender had been taken into custody the previous day. Therefore, his name finds mention in the FIR. This Court does not find anything startling or out of the common in these events, which have also been corroborated by documentary evidence, in the form of the *rukka*, the PCR form and the FIR. Besides, PW-10 and PW-

11 – as well as PW-16's versions corroborate these events, especially the sequence, propounded by the police. Along the process, the prosecution has also, in the opinion of the Court, proved conclusively that the head as well as the torso were identified. These were testified separately by PW-15 and PW-16. Though the deposition of PW-15 about his return home on 13-3-2008 and being told that the murder was discovered that day, injects an element of confusion, as observed earlier, even if the testimony of this witness is ignored, the basic version about discovery of the torso by PW-4 and the head by PW-1 is independently corroborated by other witnesses. The discovery of the head is spoken to by PW-9; the discovery of the torso was deposed to by PW-22.

60. The prosecution case, accepted by the Trial Court, is that at about 5.30 PM, the accused Jitender was arrested (arrest memo Ex. PW-22/H personal search memo Ex. PW- 22/J), and thereafter made a disclosure statement (Ex. PW- 22/K,) in which he had disclosed that the knife/churri used by him to behead his father had been kept under a slab in the room on the first floor of the house. At the time of arrest, he was still wearing his blood stained clothes, which were taken into possession by the Police. (Ex. PW-22/N). The knife was recovered, and a rough sketch was made of it. (Ex. PW-22/LT). Ajay @ Bunty, PW-22, who was the public witness to these seizures, recoveries and the arrest of the accused has supported PW-25's version in full, as well as identified all the recovered items in court. The scaled site plan of the house and a rough site plan of the temple were prepared (Ex. PW- 20/A Ex. PW-25/D). The inspector also collected other relevant evidence such as the black cloth (Ex. PW-25/E), the FSL reports(Ex. PX, PY) and the finger prints report (Ex. PW-25/G).

61. Now, this part of the prosecution version, in this Court's opinion, is the strangest and least credible. PW-23 deposed that he informed about Jitender's arrest on 13-03-2008 to his mother, PW-3. The latter however, does not depose about it. Nor does PW-16 depose prior knowledge about Jitender's arrest. By the time the police came to know about the discovery of the head, and the mutilated torso, they too were aware that Jitender was in police custody from the previous afternoon; in fact PW-23 is from the same police station. Yet, the proceedings of Section 107 reveal that the accused was released, and PW-16 his brother, stood surety for a bond in the sum of Rs. 5000/-. Neither PW-16 (who posted the bond before the Executive Magistrate) nor does any witness, save PW-23 mention this. This release –of Jitender is inexplicable, to say the least.

Knowing fully well that there was a strong suspicion of his involvement in the beheading of his father, the police acted rather strangely, in not arresting him immediately. Instead, it is their case that he was arrested later in the evening. Jitender himself denied this version (accepted by the Trial Court) and stated, in his Section 313 Cr. PC statement, that he was never released.

62. The omissions and silence of PW-3 and PW-16 on the one hand, and the palpably unacceptable version of the prosecution regarding the arrest of the accused, were highlighted by his counsel. This court is of the opinion that to put it mildly, these point to glaring lapses of the prosecution. Yet, they are not of a kind which would fatally undermine the police version altogether. The essential and crucial factual circumstances- the accused being the only individual present with his father in the premises at around the time of the latter's death; his going to the temple and creating a commotion on 13-3-2008, some time after the beheading of his father; his arrest, and the discovery of the head in the temple, as well as the torso, have, in the opinion of the court been proved by the prosecution beyond reasonable doubt. Although the prosecution could not establish that he had expressed the desire to sacrifice something, yet two witnesses have stated that he used to indulge in Devi worship, and was apparently socially isolated, as his wife had left him and was also unemployed. His behavior also led his brother to leave the parental home. All these facts have been established by the prosecution, beyond reasonable doubt. That the police chose to show that the arrest was actually made at 5:30 in the evening even though he was in their custody (as it appears to have happened according to the accused) immediately after his release by the Executive Magistrate, points to a lapse. But that would not upset the prosecution altogether.

63. The Post Mortem was conducted on 15.3.2008 at 1.00 PM (according to the report Ex. PW-21/A). It gives the probable time since death as 54 Hours. This puts the probable time of occurrence of death at 7.00 AM, on 13.3.2008. The report lists various injuries on the body of the deceased. It shows that the accused received two ante mortem injuries on his neck, in the form of crescentic abrasions at the right and left side of his neck. It records a lacerated wound on the forehead; a chop wound separating the neck from the body at the C-6 vertebra; and several other injuries as post mortem in nature. The cause of death is asphyxia consequent to compression of neck by manual strangulation, and that all other injuries on the body were received post mortem. This

is an important fact, because the disclosure statement of the accused was recorded on 14-3-2008; it states that the accused mentioned that he killed his father by strangulation. Now, under Section 161 Cr. PC, the statement cannot be read; however, that part of the statement which results in discovery of an article or a fact, is admissible, by virtue of Section 27 of the Evidence Act. (Ref. Pulukuri Kottayya v. Emperor AIR 1947 PC 67). The prosecution is right in contending that this is a strong circumstance, pointing to the accused's culpability for the crime. As far as the churri, said to have been recovered pursuant to the accused's statement is concerned, the Crime team report, prepared in the morning (Ex PW-12/A) notes that a blood stained knife was on a slab. In these circumstances, the recovery memo (Ex. PW-22/M) pursuant to the disclosure statement, or that part of the disclosure statement, loses its significance. The police cannot be said to have "discovered" the knife, pursuant to the accused's statement, when they had knowledge of it.

64. In **Hanumant v. State of Madhya Pradesh,** AIR 1953 SC 343, the Supreme Court indicated the correct approach of the Courts, in the following words:

> "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

This approach has been consistently followed and applied in several other judgments, notable among them being **Tufail v. State of Uttar Pradesh,** (1969) 3 SCC 198; **Ramgopal v. State of Maharashtra,** AIR 1972 SC 656 and in **Sharad Birdhichand Sarda v. State of Maharastra,** 1984 (4) SCC 116. Sarda an authority on this and other important aspects of criminal justice/law, put the matter in a lucid terms:

> "152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an

> accused can be said to be fully established:
>
> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved as was held by this Court in **Shivaji Sahebrao Bobade v. State of Maharashtra** 1973 Cri LJ 1783 where the following observations were made:
>
> "certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
>
> (3) the circumstances should be of a conclusive nature and tendency.
>
> (4) they should exclude every possible hypothesis except the one to be proved, and
>
> (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.
>
> 153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

65. Having taken into consideration the totality of the evidence and circumstances alleged and proved, this court has no doubt that the prosecution was able to bring home the guilt of the accused, with respect to the beheading of the deceased, and the disembowlment as well as consequent mutilation of the victim's body. The most incriminating circumstances, alleged against Jitender were conclusively proved; each

link in the chain alleged too, was proved conclusively. The prosecution also eliminated the possibility of anyone else being guilty and at the same time, established that the circumstances proved are such that every hypothesis consistent with the appellant's innocence has been ruled out. As a consequence, this court affirms the findings and conviction of the Trial Court, in the impugned judgment.

Sentence

66. The Court now has to consider the rival contentions of the parties on the question of the appropriate sentence to be awarded. The guiding principle which courts in India have to look at, for deciding whether to impose capital punishment in the facts of a given case is if the circumstances are in the opinion of the court, such that they fall in the "rarest of rare" category warranting the award of that punishment, after the decision in **Bachan Singh Vs. State of Punjab** 1980 (2) SCC 684. Over the last 32 years, the Courts, notably the Supreme Court have dealt with several cases where the factors which weigh with courts have been discussed. **Machhi Singh v State of Punjab** 1983 (3) SCC 470 is a three judge Bench decision of the Supreme Court which mentioned the need for courts to draw a *"balance sheet of aggravating and mitigating circumstances.."* and grant full weight to mitigating circumstances, to strike a *"just balance"* before the option to award the death penalty is exercised. **Anshad v. State of Karnataka** (1994 (4) SCC 381 addressed the issue of subjective sentencing in matters involving death penalty. The manner in which the crime was committed, the weapons used and the brutality or the lack of it are some of the considerations which must be present in the mind of the court. It was further stated that the Court while taking into account the aggravating circumstances should not overlook or ignore the mitigating circumstances. In **Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka,** 2008 (13) SCC 767 the Court noticed that there was lack of evenness in the sentencing process. The later decision in **Sangeet v State of Haryana** 2012 (11) SCALE 140 doubted the *"aggravating-mitigating balance sheet"* approach commended in **Macchi Singh** (supra). Sangeet noted, pertinently, that in Bachhan Singh, the Constitution Bench refrained from enumerating circumstances relating to the crime or the criminal and merely noticed submissions made with regard to weighing the factors in each case. Sangeet held that:

"32. It does appear that in view of the inherent multitude of

possibilities, the aggravating and mitigating circumstances approach has not been effectively implemented.

33. Therefore, in our respectful opinion, not only does the aggravating and mitigating circumstances approach need a fresh look but the necessity of adopting this approach also needs a fresh look in light of the conclusions in Bachan Singh. It appears to us that even though Bachan Singh intended "principled sentencing", sentencing has now really become judge-centric as highlighted in Swamy Shraddananda and Bariyar. This aspect of the sentencing policy in Phase II as introduced by the Constitution Bench in Bachan Singh seems to have been lost in transition."

67. Courts have to recognize that the "rarest of rare" principle is an attempt to streamline sentencing, and instruct a certain uniformity in judicial approach towards a task which is extremely sensitive and difficult. When a judge exercises a choice either way, she or he assumes a serious responsibility which has to be lived with for the rest of one's life. In **Panchhi v. State of Uttar Pradesh** 1998 (7) SCC 177, the Supreme Court held that brutality is not the sole criterion of determining whether a case falls under the "rarest of rare" categories, thereby justifying the commutation of a death sentence to life imprisonment. The Court observed:

"No doubt brutality looms large in the murders in this case particularly of the old and also the tender age child. It may be that the manner in which a murder was perpetrated may be a ground but not the sole criterion for judging whether the case is one of the 'rarest of rare cases' as indicated in Bachan Singh's case."

The Court court's task of making the right choice in sentence cannot be blinded by noticing the brutality of the crime, because focusing solely on that aspect obscures all other features, some of which might be mitigative in character. This Court recollects, in this context, the following poignant statement from **Rajendra Prasad Singh v State of UP** AIR 1979 SC 916 (that was a case leading to the reference to Bachan Singh) where the Supreme Court held that "...If we go only by the nature of the crime we get derailed by subjective paroxysm."

68. It has been held that imposition of the death sentence is an exception, and the courts bear an onerous responsibility in administering the "rarest of rare" test. The decision making process of the Court in

arriving at the conclusion – of the appropriateness of the death sentence – should not be perfunctory and has to fulfill the rigors of procedural justice (**Mohd. Farooq Abdul Ghafur v State of Maharastra** 2010 (14) SCC 641). Furthermore, it has been held that death penalty would be warranted where the court concludes that the convict would be a menace and threat to the harmonious and peaceful existence of society; the possibility of reformation and rehabilitation of the convict should be absent (**Mohandas Rajput v. State of Maharastra** 2011 (12) SCC 56; **Mohinder Singh v State of Punjab** Crl. Appeal Nos. 1278-79/2010, decided by the Supreme Court on 28-01-2013).

69. There are several decisions, which, depending on the way the judge choses to look, would be determinative of the fate of the accused. In **Rajpara v. State of Gujarat,** (2002) 9 SCC 18; **Sheikh Ayub v. State of Maharashtra,** 1998 SCC (Cri) 1055 and **Ram Anup Singh v. State of Bihar** AIR 2002 SC 3006 death sentence imposed for brutal murders of family members were commuted by the Supreme Court. In **Rajpara** (supra) the accused was convicted for murder of wife and four daughters by pouring petrol on them and setting them on fire when they were asleep. But the Court commuted the death penalty to life imprisonment. In **Sheikh Ayub** (supra) the accused murdered his wife and five children, but again the death penalty was not awarded. **Ram Anup Singh** (supra) was a case of murder of four persons including the accused's brother and family members; yet death penalty was not awarded. To seek uniformity in precedents, in an area such as this, can be difficult. It would here be apt to recollect Benjamin Cardozo's observation that judicial objectivity is an illusion:

> "I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. . .Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge."

70. It would now be appropriate to discuss the decisions cited by the counsel for parties. The prosecution had relied on **Sushil Murmu v State of Jharkhand** 2004 (2) SCC338, a case where the accused had decapitated a child for the purpose of sacrifice. The Court upheld the

death penalty, observing that:

> "The appellant was not possessed of the basic humanness and he completely lacks the psyche or mind set which can be amenable for any reformation. He had, at the time of occurrence, a child of same age as the victim and yet he diabolically designed in a most dastardly and revolting manner to sacrifice a very hapless and helpless child of another for personal gain and to promote his fortunes by pretending to appease the deity.
>
> The brutality of the act is amplified by the grotesque and revolting manner in which the helpless child's head was severed . Even if the helpless and imploring face and voice of the innocent child did not arouse any trace of kindness in the heart of the accused, the nonchalant way in which he carried the severed head in a gunny bag and threw it in the pond unerringly shows that the act was diabolic of most superlative degree in conception and cruel in execution.
>
> The tendency in the accused and for that matter in any one who entertains such revolting ideas cannot be placed on par with even an intention to kill some but really borders on a crime against humanity indicative of greatest depravity shocking the conscience of not only any right thinking person but of the Courts of law, as well.
>
> The socially abhorrent nature of the crime committed also ought not to be ignored in this case. If this act is not revolting or dastardly, it is beyond comprehension as to what other act can be so described is the question. Superstition is a belief or notion, not based on reason or knowledge, in or of the ominous significance of a particular thing or circumstance, occurrence or the like but mainly triggered by thoughts of self aggrandizement and barbaric at times as in the present case. Superstition cannot and does not provide justification for any killing, much less a planned and deliberate one. No amount of superstitious colour can wash away the sin and offence of an unprovoked killing, more so in the case of an innocent and defenceless child."

In an earlier decision, i.e. **State of Maharashtra v. Damu S/o Gopinath Shinde and Ors.** 2000 (6) SCC 269 four children between the ages of 4 to 8 were kidnapped. Three were killed as sacrifice, by first mutilating

their genitalia and then throttling them. One child escaped on the basis of whose testimony, and the judicial confession of one of the accused, the accused persons were convicted. It came to light that the conspiracy had been hatched to sacrifice 5 infants to enable the recovery of a treasure from one of the accused 's land. The Supreme Court, even while convicting the accused, did not award capital punishment, holding that:

> "The question is whether this case can be regarded as rarest of rare cases in which the lesser alternative is unquestionably foreclosed. Looking at the horrendous acts committed by the accused, it can doubtlessly be said that this is an extremely rare case. Nonetheless, a factor which looms large in this case is that the accused genuinely believed that a hidden treasure trove could be winched to the surface by infantile sacrifice ceremoniously performed. It is germane to note that none of the children were abducted or killed for ransom or for vengeance or for committing robbery. It was due to utter ignorance that these accused became so gullible to such superstitious thinking. Of course, such thinking was also motivated by greed for gold. Even so, we persuade ourselves to choose the normal punishment prescribed for murder as for these accused. Accordingly, while restoring the sentence passed by the trial court in respect of other counts of offences, we order that the accused shall undergo imprisonment for life for the offence under Section 302 read with Section 34 of the I.P.C."
>
> (emphasis supplied)

Kalpana Mazumdar v. State of Orissa (2002) 6 SCC 536 was a case where the accused had kidnapped and murdered a 4 year old child to offer as human sacrifice to appease the deities. The nails, the hair, and tongue of the child had been cut and offered as sacrifice. The prosecution case was that one Simanchal Padhi, a "tantrik" had told the other accused persons that if they sacrificed a child they would get a pot of gold and one of the appellants would get a son. The tantric died during the trial. The Supreme Court upheld the conviction of one of the accused, but held that the case did not fall within the "rarest of rare" category to justify imposition of death sentence.

71. It would therefore, be apparent that the question of imposition of death sentence, even in cases where homicidal death, or murder, is

motivated by the desire to propitiate the gods or a deity, there is no symmetrical approach; **Sushil Murmu** (supra), emphasizing the brutality of the crime, resulted in capital punishment to the accused, whereas in **Damu S/o Gopinath Shinde** (supra) and **Kalpana Mazumdar** (supra) a contrarian approach was adopted. In any event, the Court, in **Sushil Murmu** did not take into consideration any mitigating factor, such as the possibility of reformation of the accused. On the other hand, it appears to have taken into consideration allegations in some other case, for which the accused had not been convicted.

72. This court is mindful of the decision in **Sandesh @ Sainath Kailash Abhang v State of Maharashtra** (Cr. A. No. 1973/2011 decided by Supreme Court on 13-12-2012) that the *"state of mind of the accused at the relevant time, his capacity to realize the consequences of his crime he was committing"* is a very relevant factor, in exercising sentencing choice. It is in this context that the Court in the light of the evidence brought on the record, would hereafter deal with the question whether death sentence is warranted.

73. Several previous decisions of the Courts, notably rendered during the pre-Independence era, dealt with in some detail the question of the correct judicial approach to cases where accused were alleged to have indulged in human sacrifice. In **Ashiruddin Ahmed vs The King** (1949 CriLJ 255) the accused was convicted under Section 302, Penal Code, for the murder of his five-year old son. He dreamt at night that he had been in heaven and he heard a voice saying *"Your sacrifice (korbani) was of no use; you will have to sacrifice your own son";* following that direction the accused sacrificed his son as korbani in the mosque and having done so went straight and informed his uncle Mafizuddin. The police were duly informed and the accused was taken into custody, and confessed. During the trial he retracted from the confession. The Court addressed the question whether the accused was entitled to the protection of the provisions of Section 84, Penal Code. It held that, the whole point of accused's confession and the facts show that he thought that what he was doing was right, that he was commanded by someone in paradise and because his previous korbani had been "no good". The Court was of opinion that the accused was clearly of unsound mind and that acting under the delusion of his dream he made this sacrifice believing it to be right. Similarly, in **Karma Urang v. Emperor,** AIR 1928 Cal 238 the accused/Appellant had a dream in which goddess Kali appeared and told him that either he would have to kill his father or his father would kill

him. The dream, it appeared, contained other elements; in particular, that his father was a descendant of the goddess Kali and also that his father's tongue was black and that he was to take the head to the Court at Silchar. The next morning, the appellant woke up and with a dao (sword), cut his father's head. He thereupon picked up the head wrapped it in something and was proceeding along the road to Silchar Court.

74. It is of some interest that the Court sought medical opinion during the trial; the Civil Surgeon's opinion was that the appellant had definite delusion (which though passed off after two months), that he could not tell right from wrong, and that he was insane and said that he wanted to dedicate his father's head to the goddess Kali. The Civil Surgeon said that from the story told to him he got the impression that the accused thought that he was ordered by Kali to kill his father. The Court's reasoning, holding that the defence under Section 84 applied, is as follows:

> "7. A very common way of applying that test is to ask, in the circumstances, whether the man would have committed the act if a policeman had been at his elbow. Examining this case from that point of view I think it is very noticeable that this man having committed the deed, immediately picked up the head of his father and was proceeding to Silchar Court. The witness Saiyad Ali, who saw him first, said that he was not running. He did not proceed to run, but when the constables overtook him he came quietly back to the thana. He explained that Ibe was going to Silchar Court and why he was going to Silchar Court, namely because of a dream which he had on the previous night. That seems to me to be the best evidence in this case upon the question whether he knew that what he was doing was "wrong or contrary to law"; and in view of that evidence, which is supported by other evidence in the case, particularly by the very strong evidence of the Civil Surgeon who is not only more competent to give but had far more opportunity than anyone else of forming a correct opinion, in my judgment this appeal should be allowed, the conviction and sentence should be set aside"

75. In **Elkari Shankari vs. State of Andhra Pradesh,** 1990 Cri LJ 97 the accused took his son into the paddy fields and killed him by stabbing him with a knife on the chest. During the trial, the court called for a medical report regarding the mental condition of the accused. The report dated stated that the accused was suffering from major mental

illness for which he needed treatment and care for 4-6 weeks. In Paras **Ram and Ors. Vs. State of Punjab,** (1981) 2 SCC 508, the Supreme Court held that the beheading of a four-year by his father and relative is sufficient proof of defence under Section 84 of IPC. Therefore, the court dismissed the appeal. In **Shriram v The State of Maharashtra,** 1991 Cri LJ 1631 the appellant was convicted of murder by the Additional Sessions Judge, Buldana, for committing the murder of his two grand-daughters and one grand-niece. On 18th October 1985, the appellant seeing that no adult was in the house closed the door from inside and killed one child on the spot while other two succumbed to the injuries in hospital. The door of the house was then opened and the appellant ran out of the house while dropping the handle in the house itself. It was contended, on behalf of the accused, that there is sufficient material on record to come to the conclusion that the appellant killed the three kids in the fit of lunacy and, therefore, he was entitled to the benefit of Section 84, IPC.

76. The leading decision of the Supreme Court on the aspect of the defence of insanity is **Dihyabhal v. State of Gujarat** A.I.R 1964 S.C. 1563. The Court observed as follows:

> "The accused has to satisfy the standard of a 'prudent man'. If the material placed before the Court, such as, oral and documentary evidence, presumptions, admissions or even the prosecution evidence, satisfies the test of 'prudent man' the accused will have discharged his burden. The evidence so placed may not be sufficient to discharge the burden under S.105 of the Evident Act, but it may raise a reasonable doubt in the mind of a judge as regards one or other of the necessary ingredients of the offence itself. It may, for instance, raise a reasonable doubt in the mind of the Judge whether the accused had the requisite intention laid down in S.299 of the I.P.C. If the Judge has such reasonable doubt, he has to acquit the accused, for in that event the Judge has such reasonable doubt, he has to acquit the accused, for in that event the prosecution will have failed to prove conclusively the guilt of the accused. There is no conflict between the general burden, which is always on the prosecution and which never shifts, and the special burden that rests on the accused to make out his defence of insanity."

Later, the Court ruled thus:

"The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions: (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the I.P.C.; the accused may rebut it by placing before the court all the relevant evidence—oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings. (3) Even if the accused was notable to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged."

The Court further stated that *"Whether the accused was in such a state of mind as to be entitled to the benefit of Section 84 of the I.P.C., can only be established from the circumstances which preceded, attended and followed the crime."*

77. The Court is aware that in this case accused, Jitender did not enter the plea of insanity anytime during the trial. Yet, it cannot help noticing that all circumstances point to his alienation from his surroundings, his family, near relatives and others. The first thing that strikes one about the incident is not only the gory nature of the sacrifice, (which incidentally appears to have horrified and perhaps even overwhelmed the Trial Court – evident from the first sentence of the impugned judgment, which refers to "patricide") but also that the accused had to depend on legal aid. The Trial Court proceedings are testimony to the fact that he was virtually abandoned by members of his family- perhaps because of the crime. The prosecution insisted right through that he was practicing *Devi pooja*, and had committed the crime to propitiate the Goddess. However, the Trial Court did not deem it appropriate to have the appellant evaluated psychiatrically to determine whether he was in control of his senses, and could determine right from wrong. The authorities cited previously point

to the Court, in such cases, undertaking such a responsibility. This court underscores this fact because penury, destitution, poverty and illiteracy are barriers which accused often have to face, when confronted with serious and often capital charges. When the crime is a ghastly one, the motive for which is based on superstitious belief in occult or black magic or the like, and the accused is disempowered for any such reason, the Court has to discharge a greater responsibility. Article 39A of the Constitution of India, and the accused's right to life under Article 21 in a sense impose an obligation upon the concerned judge, when such allegations are leveled, to *prima facie* satisfy herself (or himself) that the accused was in a sound state of mind, or is in a position to distinguish between right and wrong. This is not to say that the Court should embark upon an elaborate inquiry into the mental state of the accused; what is being stated is that if there are such unusual or peculiar features in the allegations leveled which excite the suspicions of the judge at a preliminary stage that there is a possibility of the accused labouring under some mental disorder, the court should record so, and send the accused for psychiatric or mental evaluation. Disempowerment on account of multiple and sometime intersecting conditions such as poverty, illiteracy, illnesses – be they mental or other disabilities and other such factors would act as double barriers for such a class of accused, who would be unaware of the right to take the pleas available to them, under the law.

78. Not much literature has been shown to the court with regard to psychology or the mental profile of perpetrators of ritual crimes, such as sacrifices. It appears, however that in other countries, such as the United States, there is a wealth of information and the accused is not just viewed as a psycosociopath. This aspect relates to behaviour science and not just mental illness. As early as in 1974, the Federal Bureau of Investigation (FBI) set up its Behavioral Sciences Unit. In the illuminating article titled "The Forensics of Sacrifice: A Symbolic Analysis of Ritualistic Crime" (2003), Dawn Perlmutter (http://www.anthropoetics.ucla.edu/ap0902/sacrifice.htm accessed at 15:18 hours on 17-2-2013) states that:

"In the law enforcement community, illegal ritual activities are typically referred to as "occult crimes." However, "occult crime" is an inaccurate and pejorative designation; the term "occult" is applicable to many religions and practices that are fundamentally nonviolent. Furthermore, not all violent ritual acts are committed in the worship of a religion. A more objective and accurate expression is "ritualistic crime," because it encompasses crimes

that may entail ritualistic behavior completely unrelated to the occult or any religious tradition. Similar to the term occult, there is no agreed upon definition of ritualistic crimes. Building upon a 1989 California Law Enforcement study of occult crime, ritualistic crime is most precisely defined as any act of violence characterized by a series of repeated physical, sexual, and/or psychological actions/assaults combined with a systematic use of symbols, ceremonies, and/or machinations. The need to repeat such acts can be cultural, sexual, economic, psychological, and/or spiritual.

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The interpretation of the aforementioned ritualistic crimes obviously depends on one's theoretical and theological perspectives. From a psychological viewpoint, violent rituals are all forms of psychopathology regardless of their religious intent because the discipline of psychology is based on Western secular scientific traditions. From an extreme fundamentalist perspective, a dualistic worldview that separates the world into good versus evil, all occult practices inclusive of nonviolent beliefs are indicative of Satanism regardless of individual traditions. From a sociological perspective, ritualistic crimes are a form of social deviance shaped by environmental factors. Ironically, the only people who seem to recognize ritualistic crime as a religious rite in the belief of specific traditions are the practitioners themselves, and their opinions are invalidated because they have been designated as psychopaths. The fundamental problem when researching, investigating, or analyzing ritualistic crime is that the crimes evoke such strong emotions that tap into our deepest beliefs about human nature and spirituality."

79. A rational individual's sensibilities are revolted when confronted with sacrifices and horrific practices- such as mutilation of body parts, etc. which may go with it. Yet, these are to be seen from the behavioral analyst's point of view, to discern the rationale for such ritual crimes and ritual homicides. James Gilligan, MD, in his Violence, Our Deadly Epidemic and Its Causes (New York: G.P. Putnam's Sons Publishers, 1996) pp. 59, 60 –again quoted in Dawn Perlmutter's article, says that:

"The rituals surrounding violence, then, like all rituals, are profoundly symbolic and hence profoundly meaningful (that is,

they express many highly specific and closely related meanings, which cannot be translated into a consistent set of propositions). In fact they are more symbolic, and hence more meaningful, the more "senseless" they appear to the rational mind, because they follow laws of magical thinking rather than rational thinking.

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the mutilation served as a magical means of accomplishing something that even killing one's victim cannot do, namely, that of destroying the feeling of shame itself . . . So an intensification of the whole project through the introduction of magic, by means of ritual, is necessary, if it is to be powerful enough to enable the murderer to stave off the tidal wave of shame that threatens to engulf him and bring about the death of the self."

80. This Court would not speculate about the motivations of those who practice ritual sacrifices in India. In most cases this are animal sacrifices. What cannot be lost sight of is that apart from superstitions, there are belief systems which recommend – for personal gain, health or well-being of the individual or his family, sacrifices and rituals at certain places, and at certain times. Black magic (*tona, kala jadu or Vashikaran*) as it is known in some part of the country, or other forms of occult practices elsewhere in the country, and their adherents claim to provide holistic remedies or solutions for problems ranging from health to career advancement, education, longevity, or family well-being and increase in material wealth. In a country where illiteracy is above 300 million, the prevalence of these beliefs (based often on mere superstition and without any theological basis) can delude some into believing, irrationally that ritual sacrifices are essential. A large number of people certainly believe in appeasement rituals, wearing of amulets, charms etc. The ubiquity and wide spread acceptance of such beliefs is testified by the fact that in the search engine Google, keying in *"black magic india"* brought forth as many as 20,100,000 results – a large number of which provided links to various healers, occult specialists, tantriks, etc. To rational minds, rooted in value systems which underscore the need to maintain order, familial and social bonds, such practices would not appeal and would be abhorent. They are however, real, and offer the promise of benefits to those who believe in them. To rational minds and human beings, ritual sacrifices cannot be justified. In any event, killing a human being can never be an accepted practice under any value system.

81. In the present case, the proven facts show that the accused used to be engaged – perhaps obsessed with Devi worship. Whether he saw visions of the Goddess is unclear; the prosecution story is that he claimed that he would gain power if he indulged in human sacrifice. The evidence on record clearly suggests that his practices led to his wife deserting him, his brother leaving the family home; even the mother apparently left the home – at least at the time when the crime took place. PW-5, besides other family members, corroborates this in his deposition. The deposition of witnesses also suggests that the deceased himself was a *sewadar* in the temple. These facts establish that the accused was a strong believer in Goddess Devi, - a fact admitted to by him, in his statement under Section 313, Cr. PC. Apart from facts, the evidence on record also points to gory details, such as mutilation of the body, after the beheading of the deceased, and the accused placing the severed head in the temple. According to some versions, he was clad in black clothes and had smeared himself with dust. These surrounding circumstances, in the opinion of the Court conclusively prove that the accused had indulged in ritual, human sacrifice of his father.

82. This Court is of the opinion that even though in the present case, it cannot second guess that the accused (did or did not) labour from a mental condition or disorder at the time of commission of the crime, the unusual nature of facts would be relevant to making an appropriate sentencing choice. This is perhaps the kind of crime which the Supreme Court referred to as having been committed by one **"morally-mentally retarded or disordered" (Cf. Rajendra Prasad v State of UP** AIR 1979 SC 916). An application of the Machhi Singh ordained aggravation-mitigation test would reveal that the ghastly nature of the crime, focusing on the fact that he killed an aged and defenseless individual – his father, no less- coupled with the mutilation of the body, and its beheading, has to be balanced with factors such as his social alienation, no known record of violent behavior, relative young age (he was around 25 at the time of his trial). Taking these into consideration he cannot be termed as an "irredeemable murderer" who is beyond the pale of reformation. Consequently, the Court does not confirm the sentence of death imposed upon him; it however substitutes it with life imprisonment. The conviction is however, affirmed.

83. Before parting, this Court hereby directs that in all such cases of serious crimes, especially homicides, where the accused are alleged to have indulged in unusual behavior, indicative of mental disorder or disturbance, (and especially in cases involving ritual killing or human sacrifice allegations) which emerge from a reading of the FIR or statement of material witnesses, the Magistrate taking cognizance of the offence alleged shall refer the accused for suitable medical check-up to evaluate the possibility of his (or her) being, or having been of a mental condition which might entitle her or him to avail the defence of insanity. This procedure is an integral component of legal aid, which every such (potentially) capitally charged accused is entitled to avail of. Such assistance and evaluation would also further the right to a fair trial under Article 21, of that class of accused who have no access to quality legal assistance or have no information of their entitlement to various defences available in law.

84. Death Reference No.1/2011 is answered in the above terms; the accused's appeal (Crl. A. 912/2011 is partly allowed; the sentence is converted to rigorous imprisonment for life. The Registry shall forward copies of the judgment to all the District Judges within the territorial limits of this Court; a copy shall also be made available to the Registrar General to be placed before the Chief Justice of the Court.

ILR (2013) II DELHI 1222
CO. APPEAL

REAL LIFESTYLE BROADCASTING PVT. LTD. ....PETITIONER

VERSUS

TURNER ASIA PACIFIC VENTURES INC. & ANR. ....RESPONDENTS

(S. MURALIDHAR, J.)

C. APPEAL. NO. 2076/2012 IN CO. PET. NO. 20/2011 DATE OF DECISION: 22.02.2013

Companies Act, 1956—Sections 391 and 394—Scheme of arrangement—Section 392—Company (Court) Rules 1959—Rule 9—Sanction and modification of scheme—

Real Lifestyle Broadcasting Pvt. Ltd. (RLB) and Real Global Broadcasting Pvt. Ltd. (RGB) whose 50% shares held by Turner Asia Pacific Ventures Inc. (Turner), entered into a Scheme of Arrangement on 01st July 2010—Jointly filed petition for sanction of the scheme on 10th January 2011—Joint affidavit filed by RLB and RGB—Scheme sanctioned vide order dated 29th March, 2011—Contempt application Cony. case (C) no. 230/ 2012 filed by Turner alleged RGB failed to comply with obligation under Scheme—Full payment not made—RLB directed to deposit the balance amount payable to Turner vide order dated 24th September 2012—Present application seeking cancellation of scheme filed on 30.10.2012—Also filed LPA No. 748/2012 against the order dated 24th September issued—Held—Proper forum is the company judge seized of present application directions issued—The Co. application no. 2076/2012 alleged—Turner acted malafide in failling transfer or activate STBs—Turner willfully cheated RLB/ ABE by not transferring decryption key and the commercial viability of a channel—Contempt application filed by Turner is an abuse of process of law—Turner contended the application to be an after thought filed after ordered to pay the balance amount under the Scheme—All properties and assets required to be transferred by Turner already transferred to RGB—No dispute ever raised by RLB the present application is malafide—STBs are properties of RGB now belonging to RLB—No assurance given for transfer of decryption code notice demanding outstanding amount was served and signal switched off after about three months—Held no time limit prescribed for moving application for modification—Modification as are necessary for proper working of the scheme can be made seven months had elapsed between entering of the scheme and moving of petition for sanction no allegation of facing difficulties in getting Turner to comply no explanation for not stating non compliance of obligation by Turner while seeking sanction of the scheme not development subsequent to sanctioning

of the scheme—No specific mention of transfer of the distribution network in the list of assets—No specific statement for providing decryption code/key by Turner—No agreement on providing decryption code/ key by Turner no agreement on providing decryption keys to RLB—The scheme has to be read as commercial document—Company Court not permitted do modify the basic fabric of the scheme—Accepting the prayer of RLB would amount to ordering specific performance of agreement that has already worked itself out and reading into the scheme clauses and obligation which did not exist when the scheme was sanctioned—Prayer for winding up required detailed examination of several factors which are not before the Court—application dismissed with cost of Rs. 20,000/-.

Important Issue Involved: (A) Under Section 392(2) of the Companies Act, 1956, the Court can be approached by "any person interested in the affairs of the company" with an application stating the Scheme that has been sanctioned under Section 391 of the Act cannot be worked out satisfactorily "with or without modifications.

(B) If the Court is satisfied that in fact the Scheme sanctioned under section 391 of the Act cannot be worked satisfactorily, it can make an order for winding up of the company and such an order shall be deemed to be an order under Section 433 of the Act.

(C) Under Section 392(1)(b) of the Act, the Company Court can, even after the sanctioning of the Scheme, "give such directions in regard to any matter or make such modifications" in the Scheme as it may consider necessary for its proper working.

(D) There is no time limit prescribed as to when an application seeking modifications in the scheme can be filed.

(E) The Scheme has to be read as a commercial document, i.e., in the sense in which businessmen conducting such an establishment would understand.

(F) Although Section 392 of the Act dealt with post sanction supervision, the Court could not undertake the exercise of scrutinising the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties. This exercise remains only for the parties and is in the realm of commercial democracy permeating the activities of the creditors concerned and members of the company who in their best commercial and economic interest by majority agree to give green signal to such a compromise or arrangement.

(G) The Company Judge has the power under Section 392 of the Act to make modifications but only for the proper working of the scheme and not for any other purpose. It does nor permit the Company Court to so modify a scheme as to change its basic fabric.

(H) The Company Court is not powerless and can never become functus officio", it cannot rewrite a scheme in any manner, even at the post sanction stage. The Court has to ensure that the basic nature of the arrangement remains and whatever modification is made "should be necessary for the working arrangement.

(I) The scope of the powers of the Company Court under Section 392 of the Act, as explained by the majority opinion of the Supreme Court in RNRL case, does not permit rewriting of the scheme or introducing into it clauses that plainly do not exist.

[Vi Gu]

APPEARANCES:

FOR THE PETITIONER : Mr. Nitin Rai, Mr. S. Sanatanam Swaminadhan, Ms. Kartika Shama & Mr. Ajay Goswami, Advocates.

FOR THE RESPONDENTS : Mr. Rajiv Nayar, Senior Advocate with Mr. Rishi Aggrawal and Ms. Malavika Lal, Advocates for respondents no.1.

CASES REFERRED TO:

1. *Reliance Natural Resources Ltd. vs. Reliance Industries Limited* (2010) 7 SCC 1.
2. *Miheer H. Mafatlal* vs. *Mafatlal Industries Limited* (1997) 1 SCC 579.
3. *S.K. Gupta* vs. *K.P. Jain* (1979) 3 SCC 54.
4. *J.K. (Bombay) (P) Ltd.* vs. *New Kaiser-I-Hind Spg. & Wvg. Co. Ltd.* [1969] 2 SCR 866.

RESULT: Application dismissed.

S. MURALIDHAR, J.

1. Real Lifestyle Broadcasting Pvt. Ltd. ('RLB') has filed this application under Sections 391 to 394 of the Companies Act, 1956 ('Act') and Rule 9 of the Companies (Court) Rules, 1959 ('Rules') praying that the Court may pass necessary orders and directions to ensure that the Scheme of Arrangement ('Scheme') is workable and, in the alternative, to declare the Scheme sanctioned by the Company Court by order dated 29th March 2011 as unworkable and cancelled. Consequently, ordering the winding up of Real Global Broadcasting Pvt. Ltd. ('RGB').

Background Facts

2. The background to this application is that Co. Pet. 20 of 2011 was filed jointly by RGB [describing itself as Transferor company] and RLB [describing itself as Transferee company] under Sections 391 to 394 of the Act in the Company Court on 10th January 2011 praying that the Court should sanction the Scheme involving RGB and RLB and their respective shareholders and creditors so as to be binding on RLB and RGB and their shareholders and creditors.

3. RGB was a company incorporated under the Act on 11th October 2006 with its registered office at New Delhi. RGB was engaged in the business of broadcasting 24 hour entertainment television programmes. 50% of the shareholding of RGB was held by Turner Asia Pacific Ventures Inc. ('Turner') and 50% was held by Alva Brothers Entertainment Pvt. Ltd. ('ABE'). ABE owned Miditech Pvt. Ltd. ('Miditech'), promoted by Mr. Niret Alva and Mr. Nikhil Alva ('Alva brothers') engaged in the business of television content creation. Initially, the Alva brothers formed a partnership firm, which was later converted into Miditech in 1997. It is stated that ICICI Ventures picked up a 25% stake in Miditech in 2000. In 2003, Turner engaged the services of Miditech to produce television content for various Turner channels.

4. It is stated that Turner is owned entirely by Turner Asia Pacific Investments Inc., which, in turn, is owned by Historic TBS Asia LLC. which, in turn, is owned by Turner Broadcasting System Asia Pacific Inc. ('TBSAP'). 100% of TBSAP is owned by Turner Entertainment Networks, Inc. ('TENI'). Turner Broadcasting System Inc. ('TBSI') owns 100% of TENI. Time Warner Inc. owns 100% of TBSI. The Turner Group is one of the multinational media corporations in the world having major operations in film, television and publishing. The Turner Group includes Time Inc., HBO, The CW television network, CNN, Warner Brothers, Cartoon Network, etc.

5. According to RLB, following the growth of the domestic television broadcast industry, ABE, in 2006, decided to enter the broadcast arena on its own and incorporated RGB as a wholly owned subsidiary of Miditech with an intention of launching a television channel under the brand name REAL.

6. On 12th December 2007, ABE, Miditech and Turner entered into inter related agreements whereby Turner acquired approximately 29.4% stake in Miditech and 50% stake in RGB. According to RLB, the basic arrangement between the parties was that ABE would continue to control Miditech which would generate television content to be supplied to RGB and Turner would control RGB in the administrative, financial and legal spheres. Turner would establish through its contacts and specialization "an asset in the form of a distribution network for Real Global."

7. RLB states that a sound distribution network is the backbone for the success of a television channel. The content made for the channel is

first sent to an uplinker or transmitter service which then beams the channel to a satellite from a base station. The satellite, in turn, relays the signal across the country/region. The signal is then received by cable operators/MSOs by way of Digital Satellite Receivers or Set Top Boxes ("STBs"). The cable operators/MSOs by way of their wired/unwired networks distribute the signal to individual homes. It is stated that when a channel is established and receives high TRP ratings, it is in a position to raise additional revenue through a subscription fee from the viewers. An essential feature for this is the conditional access facility that allows the owner of the channel to control the STBs and decide which STBs to deactivate for non-payment and which STBs to activate/re-activate. Therefore, an integral part of a STB is its software encryption keys ('SEK') which enables the owner of the channel to remotely control the STB even when it is installed in a far-flung area. In other words, the owner can activate/deactivate the frequency of the STB without having physical access to the STB.

8. On 14th July 2008, Turner Entertainment Networks Asia Inc. ('TENA') [now known as TBSAP], a parent company of Turner and RGB entered into a shared services agreement ('SSA') [later known as 'transmission agreement'] ('TA') for uplinking of the REAL channel from Turner's pay out facility at Hong Kong. The SSA contained a separate arbitration clause and was for a period of five years with the consideration for each year being set out in Clause 3 thereof. The SSA was governed by the laws of Hong Kong.

9. It is stated that, on 2nd September 2008, the Foreign Investment Promotion Board ('FIPB'), Government of India, gave its approval to the investment by Turner in RGB. It is stated that RGB purchased about 3000 STBs from Turner through a nominated manufacturer named Conax situated in Hong Kong. Conax manufactures conditional access boxes for Turner. The 3000 Conax boxes were delivered to Turner's own India distribution arm, Zee Turner Ltd. According to RLB, Turner was required to ensure that the 3,000 STBs were distributed across the country through various cable operators/MSOs. It is stated that in May 2010, one year after the launch of the REAL channel, it was being distributed to 13 to 14 million households.

10. In 2009, ABE, Miditech and Turner commenced discussions regarding Turner's exit from RGB and Miditech. A valuation report was commissioned by RGB for the purposes of the Scheme. On 2nd June

2010, Turner, Alva Brothers, ABE, RGB and Miditech entered into a Binding Term Sheet ('BTS') that replaced an earlier BTS dated 18th December 2009. Since much of the arguments in the present application has turned around on these two BTSs, certain relevant clauses of the said documents require to be reproduced as under:

BTS dated 18th December 2009

Sale Transaction

Sale of TAPV. shares in RGB	Subject to the terms of the Definitive Agreements (if any), TAPV agrees to sell and ABE agrees to buy all of TAPV.s 10,000 ordinary shares and 214,990,000 convertible preference shares in RGB for Indian Rupees 77,950,000 ("Sale Transaction").
Service Agreements	The Parties shall procure that simultaneous with the termination of the Real Shareholders. Agreement, the following agreements shall also terminate: . ⇒ the Shared Services Agreement dated 12 December 2007 between Turner International India Private Limited and RGB; and . ⇒ the Email Services Agreement dated 26 August 2008 between Turner Entertainment Networks Asia, Inc. and RGB. • The Parties agree that, notwithstanding the termination of the Real Shareholders. Agreement, the Shared Services Agreement dated 14 July 2008 between Turner Entertainment Networks Asia, Inc. and RGB in

	relation to the transmission of the REAL channel (as defined in the Real Shareholders. Agreement) (the "Transmission Services Agreement") shall continue until at least 31 December 2009, following which RGB shall have the right to terminate the Transmission Services Agreement upon the provision of three months, notice ("Notice") (such that the earliest date on which the provision of services under the Transmission Services Agreement can be terminated is 31 March 2010), unless otherwise agreed by the parties to the Transmission Services Agreement. If RGB wishes TAPV to assist with the transition of satellite uplinking services to a third party, provided it terminates the Transmission Services Agreement in accordance with this clause and advises TAPV, at the same time it provides the Notice, of the identity of a third party that will provide satellite uplinking services to RGB for the REAL Channel, TAPV will use reasonable commercial efforts to assist RGB with the transition of satellite uplinking services to such third party by providing all available and relevant information and materials to such third party.

BTS dated 2nd June 2010

Service Agreements	• The Parties shall procure that with effect from the date of this Term Sheet, the

	following agreements shall also terminate: ⇒ Shared Services Agreement dated 12 December 2007 between Turner International India Private Limited and RGB; and ⇒ Email Services Agreement dated 26 August 2008 between Turner Entertainment Networks Asia, Inc. and RGB.
•	• The Parties agree that notwithstanding the termination of the Real Shareholders. Agreement, the Shared Services Agreement dated 14 July 2008 between Turner Entertainment Networks Asia, Inc. ("TENA") and RGB in relation to the transmission of the REAL Channel (as defined in the Real Shareholders. Agreement) ("Transmission Services Agreement") shall continue until the earlier of the commencement of the relocation of TENA.s transmission facilities (which is expected to take place no earlier than 30 November 2011) and 18 months after the completion of the RGB Transaction ("End Date"), provided the broadcast of the REAL Channel (as defined in the Transmission Services Agreement) is in standard definition and 4x3 format. TENA shall advise RGB, ABE and the Alva Brothers of the proposed date for the relocation of TENA's transmission facilities six months, prior to such date. • If TENA advises RGB, ABE and the Alva Brothers of the proposed relocation of TENA's transmission facilities ("Relocation Notice"), RGB shall have

	the right to extend the End Date until 18 months after the completion of the RGB Transaction, provided that: (a) RGB gives TENA notice of its decision to extend the End Date within one month after the Relocation Notice is given; and (b) RGB pays TENA in advance for all costs and expenses relating to the relocation of TENA's transmission facilities to the extent used for and the continued uplinking of, the REAL Channel, including but not limited to capital expenditure. REAL acknowledges and agrees that it shall have no rights to or claim over any equipment or other resources acquired by Turner using the Relocation Costs or otherwise used by Turner in uplinking the REAL Channel. • RGB shall have the right to terminate the Transmission Services Agreement earlier than the End Date by giving three months; notice, unless otherwise agreed by the parties to the Transmission Services Agreement. • The Parties will procure the amendment of the Transmission Services Agreement to incorporate the above matters and any other amendments agreed between the parties to the Transmission Services Agreement, with effect from the date of this Term Sheet. • If RGB wishes TAPV to assist with the transition of satellite uplinking services to a third party, provided it terminates the Transmission Services Agreement in accordance with this clause and advises TAPV, at the same time it provides the required notice of termination to TENA,

	of the identity of a third party that will provide satellite uplinking services to RGB for the REAL Channel, TAPV will use reasonable commercial efforts to assist RGB with the transition of satellite uplinking services to such third party by providing all available and relevant information and materials to such third party and RGB, as may be required.

11. On 2nd June 2010, the TA of 14th July 2008 was amended, under which, *inter alia,* (a) the transmission fees payable by RGB was reduced; and (b) Turner's right to terminate the contract without cause with 180 days, notice was removed, and only RGB was entitled to terminate the same with 90 days notice. 12. On 25th June 2010, ABE incorporated RLB. On 1st July 2010, RGB and RLB entered into the Scheme under which the appointed date was 1st July 2010 and the effective date was the date of filing of Form-21 with the Registrar of Companies ('ROC'), Delhi. Clause 1.10 of the Scheme reads as under:

"1.10 "Undertaking" shall mean and include the following:

a) All the assets, whether movable or immovable, tangible or intangible, properties, current assets, investments, claims, authorities, allotments, approvals, consents, licenses, registration, contracts, engagements, arrangements, estates, interests, intellectual property rights, power, rights and titles, benefits and advantages of whatsoever nature and wherever situate of every description belonging to or in the ownership, goodwill, power or possession and in the control of or vested in or granted in favour of or enjoyed by the Transferor Company as on the Appointed Date (hereinafter referred to as "the said assets") and;

b) All the present and future liability and debts, duties, liabilities and obligations of every description or pertaining to, the Transferor Company, whether secured or unsecured, as on the Appointed Date (hereinafter referred to as "the said liabilities").

Without prejudice to the generality of the foregoing, the term "Undertaking" shall include the entire business of the Transferor

Company which is being carried out under the trade name of "Real Global Broadcasting Private Limited" and shall include advantages of whatsoever nature, agreements, allotments, approvals, arrangements, authorizations, benefits, capital work-in-progress, concessions, rights and assets, industrial and intellectual property rights of any nature whatsoever and licenses in respect thereof, intangibles, investments, leasehold rights, liberties, patents, permits, powers of every kind, nature and description whatsoever, privileges, provision funds, quota rights, registrations, reserves, and all properties, movable and immovable, real, corporeal or incorporeal, wheresover situated, right to use and avail of telephones, telexes, facsimile connections, installations and other communication facilities and equipments, tenancy rights, titles, trademarks, trade names, all other utilities held by the Transferor Company or to which the Transferor Company is entitled to on the Appointed Date and cash and bank balances, all employees engaged in the Transferor Company at their respective offices, branches at their current terms and conditions, all earnest moneys and/or deposits including security deposits paid by the Transferor Company and all other interests wheresover situate, belonging to or in the ownership, power or possession of or in the control of or vested in or granted in favour of or enjoyed by or arising to the Transferor Company."

13. According to RLB, the central feature of the Scheme was the transfer of the business of RGB to RLB as a 'going concern'. It included transfer of all the movable assets, permits and licences from RGB to RLB. All shares of RGB were to be cancelled and in consideration thereof, Turner was to be paid US $ 1.5 million. RGB would merge into RLB as a wholly owned subsidiary. Payments to Turner were made subject to approvals by Reserve Bank of India ('RBI') and other statutory approvals of the Government. The tax losses, unabsorbed depreciation and Minimum Alternate Tax ('MAT') credit of RGB was not to be available to RLB post-merger under any circumstances. Upon the Scheme being approved by the Court, if any disputes or differences arose as regards its construction or any other matter arising therefrom, it was to be referred to arbitration under the Arbitration and Conciliation Act, 1996 save in respect of the subject matter of the BTS dated 2nd June 2010 which was to be referred

to arbitration as contemplated therein.

14. On 14th November 2010, RGB launched the Food First Channel. RGB ceased with effect from the same date to broadcast Real Channel. According to RLB, even prior to 2nd June 2010 and continuously thereafter, it had requested Turner and Conax to hand over complete control of STBs. Reference is made to emails exchanged between the parties which will be discussed hereafter. According to RLB, with Turner and Conax unjustifiedly failing to part with the encryption code, ABE was compelled to use Turner's Hong Kong transmission services, even though there were cheaper and more efficient alternatives available in India. It is stated that without the encryption code to control STBs, the property in the STBs cannot be said to have passed on to RLB in terms of the Scheme and, therefore, the distribution network was never transferred to RLB. It is further stated that of the 3000 STBs which were to be transferred to RLB, only 922 were distributed in the field. The remaining could not be activated without the encryption code and Turner.s involvement.

15. In the meanwhile, an agreement for the sale and purchase of approximately 29.26% of the equity share capital of Miditech was entered into between Turner, Alva Brothers, Miditech and ABE.

Petition seeking sanction of the Scheme

16. As mentioned earlier, RGB and RLB jointly filed Co. Pet. No.20 of 2011 in this Court on 10th January 2011 seeking sanction of the Scheme. There was no mention anywhere in the petition of any of the difficulties faced by RLB, as is now sought to be made out in great detail in Co. Appl. No. 2076 of 2012. On the other hand, what was told to the Court in para 13 of the petition reads as under:

> "13. That the circumstances, reasons and grounds that have necessitated and/or justify the said Scheme of Arrangement, are *inter alia* as follows:
>
> (i) The Transferor and the Transferee Companies are engaged in the business of broadcasting of 24 hour entertainment television programming services. The Transferee Company will benefit from this synergy in the business, professional expertise of the promoters and creative intelligence of the teams and the brand

> name of both the Transferor and Transferee Company and will further enhance the marketability of the services under the name of Transferee Company.
>
> (ii) The Transferee Company will benefit from the management expertise especially in technical areas, which are essential for critical decisions.
>
> (iii) The amalgamation of both the companies will pave the way for better and more efficient utilization of larger resources and funds.
>
> (iv) It would also lead to growth prospects for the personnel and organization connected with both Petitioner Companies and thus, be in the interest of and for the welfare of, the employees of the companies concerned in this Scheme, and will also be in the larger interest of the public."

17. It was further stated that "The Scheme, the cancellation of the shares of the Turner Asia Pacific Ventures, Inc. and consideration payable thereto does not require any prior approval from the Reserve Bank of India (RBI) under the Foreign Exchange Management Act, 1999 ('FEMA')." Reference was made in the petition to an earlier Co. Appl. (M) No. 220 of 2010 which had been disposed of by the Court on 13th December 2010, dispensing with the requirement of holding of meeting of shareholders, creditors of RGB and RLB. It was stated that "it would be just and equitable that the Scheme be sanctioned as the same is bound to benefit the shareholders and the other stake holders of the Petitioner Companies." In other words, this was a petition which was clearly straightforward containing all the general clauses to persuade the Court to sanction the Scheme.

18. On the first hearing of the petition, on 11th January 2011, the Court directed notice to issue to the Regional Director ('RD'), Official Liquidator ('OL') and ROC. The RD filed his representation/affidavit on 11th March 2011, stating that while granting FIPB approval by letter dated 18th February 2008 certain conditions had been imposed which required compliance. The OL filed a report on 9th March 2011, stating, inter alia, that the OL had not received any complaint against the proposed Scheme or any person and that the affairs of the Transferor company,

i.e., RGB, did not appear to have been conducted in any manner prejudicial to the interests of the members or to public interest. In other words, neither the RD nor the OL expressed any reservation whatsoever to the sanctioning of the Scheme. A joint affidavit of compliance by RGB and RLB was filed on 29th March 2011.

19. On 29th March 2011, the said joint affidavit was taken on record. The Court noted:

> "Even today, during the course of hearing both Mr. K.S. Pradhan, Deputy Registrar of Companies and Ms. Purnima Sethi, learned counsel for Official Liquidator have confirmed that the Regional Director (Northern Region) and Official Liquidator have no objection to the present petition being allowed."

20. Consequently, the Court passed an order sanctioning the Scheme with effect from the appointed date.

Turner's contempt petition

21. Turner filed a contempt petition, being Cont. Cas. (C) No. 230 of 2012, stating that RGB had failed to comply with its obligations under the Scheme. Turner states that it had invested Rs. 215 crores in RGB and Rs. 68 crores in Miditech. While US $ 2 million was paid for Turner's share in Miditech after the Scheme was sanctioned, the sum of US $ 1.5 million was yet to be paid. It is stated that in comparison, Alva brothers invested Rs. 1,00,000 in RGB.

22. In reply to the contempt petition, RLB filed an affidavit dated 29th June 2012 in which it stated that although RLB had "in the past been ready and willing to the remittance of USD 1.5 million to Turner", recent developments and acts of maladministration had just come to light in 2012, and that RLB had "genuine bona fide counter claims against each Turner which was both civilly and criminally liable for many of its actions."

23. On 24th September 2012, the learned Single Judge passed an order in Cont. Cas. (C) No. 230 of 2012, stating that the Court was not impressed with the above assertions of RLB and directed, *inter alia,* as under:

> "Suffice it to say that an obligation has been undertaken by the

> respondents before this court, which requires compliance. In the event the petitioners are required to fulfill any reciprocal obligations, as contended by the respondents, the very least that the respondents ought to have done by now, was to take recourse to an appropriate remedy, in accordance with law. Admittedly, no steps have been taken in that behalf, though the direction to deposit flows from a judgment dated 25.03.2011. As regards the submission made by the respondents, qua their purported inability to pay, no demonstrable, legally recognized steps have been taken in that regard. In these circumstances, for the moment, I propose to issue a limited direction, which is, that respondents will deposit US $ 1.5 million, in Indian rupees in court, at the rate of exchange which was prevalent on the date of the judgment, within six weeks from today. On the money being deposited, the same shall be invested in an interest bearing fixed deposit with a nationalized bank, by the registry. The release of the money, if deposited, would await the approval of the RBI and further orders of this court. List on 16.01.2013."

24. It is only after the above order was passed that the present application was filed by RLB on 30th October 2012. Meanwhile, RLB also filed LPA No. 748 of 2012 before the Division Bench ('DB') of this Court. The DB observed that the proper forum for determining whether reciprocal obligations were complied, was the learned Company Judge who was seized of the present application. Consequently, the DB issued the following directions:

> "(1) The operation of the impugned order dated 24.09.2012 shall be kept in abeyance to await the decision of the learned Company Judge in C.A. 2076/2012 (in C.P. 20/2011) filed by the present appellants;
>
> (2) The learned Company Judge seized of the said application (C.A. 2076/2012) is requested to hear the parties and dispose of the said application at her earliest convenience. For this purpose, learned counsel for the parties shall be present before the learned Company Judge on 23.11.2012. Apparently, the said application has been listed for further proceedings on 16.01.2013; the learned Company Judge is requested to take-up the matter according to the Court's earliest convenience and proceed with the application

and decide it as expeditiously as possible, and if possible, within three months from today.

(3) The parties are directed to approach the learned Single Judge seized of CCP 230/2012, immediately after the decision in C.A. 2076/2012."

RLB's contentions

25. It is now sought to be suggested by RLB that it had no option but to go along with Turner and, therefore, was not in a position to raise any objection whatsoever to the sanctioning of the Scheme. RLB now wants the Court to take into account the facts that were not presented to the Court while the Scheme was sanctioned. In particular, the charge now made in several paras of the present application is that Turner acted malafide in failing to transfer or activate the STBs; that the correspondence subsequent to BTS dated 18th December 2009 and prior to 2nd June 2010 and even after the execution of the Scheme on 1st July 2010, showed that there was discussion between the parties on the question of providing STBs encryption code; that Turner "willfully cheated" RLB/ ABE "by not transferring decryption key" and, therefore, "had effectively and retrievably destroyed Real Global.s asset in the Distribution network and wiped out the value of the applicant." RLB contends that Turner, in violation of the TA, sent a notice dated 19th March 2012, calling upon RLB to pay the outstanding amounts. RLB states that Turner's obligations under BTS dated 2nd June 2010 to help RGB to transit to a third party was independent of the other obligations under the Scheme. It is repeatedly urged by RLB that it made no business sense for RLB to have agreed to mere transfer of the STBs without transfer of the decryption key since the real asset was, in fact, the distribution network. RLB avers that by failing to transfer the decryption key i.e. "the true property rights in the distribution network", Turner had "destroyed the commercial viability of the First Food Channel." It is alleged that knowing fully well that it had acted in breach of the Scheme, Turner filed Cont. Cas. (C) No. 230 of 2012, which was in itself an abuse of the process of law.

Turner's contentions

26. Tuner states that the present application is an afterthought. It has been filed only after the order passed in the contempt petition requiring RLB to deposit US $ 1.5 million in the Court. Further, the stand of RLB

that the amount was not yet paid for want of RBI approval is termed by Turner as a bogey. Turner points out that Kotak Mahindra Bank ('KMB') had clarified by email that no such prior RBI approval was required. It is further stated by Turner that RLB never wrote to Turner about the failure by Turner to comply with any of its reciprocal obligations. It is submitted that all assets and properties of RLB were transferred to RGB at the time of sanctioning the Scheme. Even during the course of exchange of correspondence between the parties, subsequent to the sanctioning of the Scheme, no dispute was raised by RLB. Turner, in its reply, states that RLB is guilty of suppression of facts in the present application. It has set out in detail the facts which, according to it, showed that Alva group not only had the upper hand in the running of RGB, but was aware of its functioning. Turner alleges that the filing of the present application by RLB was itself *malafide*.

27. On the question of STBs, it is stated that they were properties of RGB and now belong to RLB. It is stated that the value of the STBs were, as on 30th June 2010, Rs. 96,75,009. It is denied that the real control of RGB was with Turner alone. It is submitted that the TA dated 14th July 2008 was signed with TENA which was separate and distinct from the SSA between Turner and RGB. It is denied that any representation was made by Turner that after the transfer of assets and distribution system to RGB, the Alva group would have to use the Turner facility in Hong Kong. It is also denied that Turner has benefitted, in any way, by availing tax credit for the investment losses in India with the US Tax authorities at the cost of RGB while RGB itself was forced to claim the same tax losses as part of the Scheme. It is specifically denied that any fraud was played by Turner on the Indian and US Tax authorities, as is now being alleged by RLB.

28. Specific to the question of decryption keys, Turner refers to the emails exchanged between Conax and RLB which made it unequivocally clear that the STBs would be unworkable if they were not on the Turner link. It is also denied that the fee levied by Turner was over double the rates in India. It is stated that it was open to either of the parties to terminate the TA on their own will. It is urged that the TA is a separate agreement and has worked itself out. Turner denies that any assurance was given by it to RLB about transferring the decryption code. On the other hand Turner refers to its notice dated 21st December 2011 stating

that if the outstanding amount of US $ 726,025 was not paid, the TA would be terminated. Since this request went unheeded, TBSAP had to switch off the signal after a period of approximately three months thereafter. Therefore, this could not be said to be illegal or malafide. Submissions of counsel for RLB

29. Mr. Nitin Rai, learned counsel for RLB, placed considerable reliance on Clause 1.10 of the Scheme and submitted that the purpose of the Scheme was to transfer the entire business assets of RGB to RLB as a 'going concern'. According to him, the word „undertaking. defined in Clause 1.10 of the Scheme included the distribution network which was the most valuable asset of RGB and without which the entire Scheme would make no business sense. He relied on the decision of the Supreme Court in **J.K. (Bombay) (P) Ltd. v. New Kaiser-I-Hind Spg. & Wvg. Co. Ltd.** [1969] 2 SCR 866 (hereafter 'the J.K. case'). He also referred to the decision of the Supreme Court in **Reliance Natural Resources Ltd. v. Reliance Industries Limited** (2010) 7 SCC 1 (hereafter 'the RNRL case') to urge that the real intention of the parties had to be examined by the Court and that it was well within its powers under Section 392(2) of the Act to issue such directions so as to make the Scheme work, failing which it should order the winding up of RGB.

30. Mr. Rai referred to the correspondence exchanged between the parties which, according to him, showed that the parties intended that the distribution network would stand transferred to RLB. This in turn, meant that Turner was obliged to pass on the decryption code to enable RLB to use the STBs. Without transfer of decryption code, the STBs would be useless and this would completely defeat the Scheme. He reiterated that because of the dominant position of Turner, RLB had no option but to agree to all its terms, including the agreement before sanctioning the Scheme as presented to the Court without insisting on the plea in clauses to ensure for the distribution of the network. According to Mr. Rai, the TA, no doubt, was equivalent of BTS dated 2nd June 2010. However, the clause in BTS dated 2nd June 2010 requiring Turner to assist RLB in transmitting to a third party was part of the Scheme itself and had to be insisted as a casting obligation on Turner. If Turner was to resile from the said obligation, then the Company Court should proceed to wind up RGB.

Submissions of counsel for Turner

31. Countering the above submissions, Mr. Rajiv Nayar, learned Senior counsel for Turner, reiterated the stand taken in its reply that the present application was an afterthought. It was filed by RLB only after an order was passed in the contempt petition requiring RLB to deposit US $ 1.5 million in Court. There was no express or implied obligation on Turner to ensure the availability of the distribution network to RLB after the sanctioning of the Scheme.

32. Mr. Nayar submitted that this Court cannot add to the Scheme any obligation that did not already exist when the Scheme was sanctioned in the first place. He relied on the judgment in **RNRL** to emphasise that the powers of the Court under Section 392 of the Act did not include introducing any new clause in the Scheme. He referred to the correspondence exchanged between the parties which showed that the technical non-feasibility of providing the decryption code to RLB was made explicit even prior to sanctioning the Scheme. Since at no point of time did RLB raise any dispute concerning the distribution network, the present application was only to avoid the consequences of the contempt petition and was, therefore, not *bonafide*.

33. Mr. Nayar submitted that it is only after the repeated defaults by RLB in complying with its obligations under the TA that the signal had to be stopped. He pointed out that pursuant to entering into the Scheme, a separate Deed of Termination, Waiver and Indemnity had been entered into between the parties on 22nd July 2010, in terms of which the SSA stood terminated. Moreover, the TA had worked itself out. He, accordingly, submitted that the present application deserves dismissal with exemplary costs.

Scope of the powers under Section 392

34. The Court would first like to deal with the question of scope of its powers under Section 392 of the Act which reads as under:

> "392. Power of Tribunal to enforce compromise and arrangement.—
>
> (1) Where the Tribunal makes an order under section 391 sanctioning a compromise or an arrangement in respect of a

company, it—

(a) shall have power to supervise the carrying out of the compromise or an arrangement; and

(b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of the compromise or arrangement.

(2) If the Tribunal aforesaid is satisfied that a compromise or an arrangement sanctioned under section 391 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the company, make an order winding up the company, and such an order shall be deemed to be an order made under section 433 of this Act.

(3) The provisions of this section shall, so far as may be, also apply to a company in respect of which an order has been made before the commencement of the Companies (Amendment) Act, 2001 sanctioning a compromise or an arrangement."

35. Under Section 392(2), the Court can be approached by "any person interested in the affairs of the company" with an application stating that the Scheme that has been sanctioned under Section 391 of the Act cannot be worked out satisfactorily "with or without modifications." If the Court is satisfied that in fact the Scheme cannot be worked satisfactorily, it can make an order for winding up of the company and such an order shall be deemed to be an order under Section 433 of the Act. Under Section 392(1)(b) of the Act, the Company Court can, even after the sanctioning of the Scheme, "give such directions in regard to any matter or make such modifications" in the Scheme as it may consider necessary for its proper working. Since there is no time limit prescribed as to when such an application can be filed, there is no difficulty in holding that the present application by RLB is maintainable.

The prayers

36. The prayers made in the present application read as under:

"(a) Pass necessary orders and directions to ensure that the Scheme is workable under Sections 392(1) and Section 394 as referred to in para 11.2.9;

Alternatively,

(b) Declare the impugned Scheme dated 29.03.2011 as sanctioned by this Hon'ble Court in CP/20/2011 as unworkable and cancelled and consequently order the winding up of the Applicant Company under the Companies act, 1956;

(c) Pass such other and further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

37. The above prayers have been elaborated in para 11.2.9 of the application as under:

"11.2.9 It is submitted that even though the Scheme has been completely frustrated, it may still be possible to pass appropriate orders or directions to work out the Scheme if the Distribution Network of the Applicant is restored completely as it ought to have been done and was not done due to Turner. It is submitted that the Scheme may be modified to keep the Applicant a viable commercial entity by:

(a) directing and ordering the Respondent No.1 (at its own cost) to ensure that the Distribution Network as envisaged in the Scheme is restored, i.e. the full ownership of the 3000 boxes is given to the Applicant and they are fully deployed across the country with the minimum viewership of 13-14 million households at the very least (as was there at the time of sanctioning of the Scheme);

(b) Allowing the Applicant to claim the tax losses of Real Global as would have been the ordinary consequence of a complete transfer of an undertaking as a going concern; and

(c) Passing any other further orders as may be deemed appropriate in the facts and circumstances of the present case."

38. On reading both sets of prayers it is plain that RLB is now contending that if the distribution network cannot be restored to it, and

it is not allowed to claim the tax losses of RGB, then the Court should wind up RLB. Therefore, RLB seeks to make the restoration to it of the distribution network central to the Scheme itself.

Analysis of the contentions

39. First, the Court is constrained to note that between the date on which the Scheme was entered into, i.e., 1st July 2010 and the date on which it was accorded sanction by the Court, i.e., 29th March 2011, more than seven months had elapsed. If RLB was already facing difficulties in getting Turner to comply with its obligations under the Scheme, there was absolutely no necessity for it to have sought sanction for the Scheme. On the other hand not only did RLB and RGB jointly present the Scheme to the Court for sanction but they also filed a joint affidavit.

40. Secondly, this Court does not find any satisfactory explanation by RLB for not filing this application earlier to receiving notice in the contempt petition, and, in particular, earlier to the order dated 24th September 2012 passed by the Court in the contempt petition. If, indeed, as suggested now, there was correspondence exchanged between the parties which cast an obligation on Turner to provide RLB encryption code to ensure transfer of the distribution network from RGB to RLB, there is no reason why RLB did not bring this fact to the attention of the Court when it was seized of the Company Petition No. 20 of 2011. In other words, this was not a development subsequent to the sanctioning of the Scheme, even according to RLB. These were facts, even assuming that they were true, which were in the knowledge of RLB, not only during the pendency of Company Petition No.20 of 2011, but even prior to its filing on 10th January 2011. On the contrary, RLB and RGB filed an affidavit of compliance on 29th March 2011 which was acted upon by the Court when it passed an order on that date sanctioning the Scheme.

41. Clause 1.10 of the Scheme defines 'undertaking' to mean all the assets tangible or intangible of whatsoever nature and wherever situate which has been enjoyed by the Transferor company as on the appointed date. However, this has to be read in the context of what has been set out in the Scheme itself. Clause 8 details the mode of transfer of undertaking and describes the transfer of immovables, movables, liabilities, permits, licences, employees, loans and borrowings, profits and reserves,

contracts, legal proceedings and duties. There is no specific mention in the entire Scheme of the transfer of the distribution network as such from RGB to RLB. The omission of „distribution network, in the list of assets cannot be said to be accidental, particularly in the light of the correspondence preceding the execution of the Scheme document by the parties, which will be referred to hereafter. In the circumstances, it is not possible at this stage for the Court to read into the Scheme any obligation on Turner to ensure transfer of the distribution network to RLB by providing the decryption code of the STBs.

42. There is no specific statement made by Turner in any of the emails it sent RLB that it would provide the decryption code/key thus ensuring transfer to it of the distribution network. A perusal of some of the mails, copies of which have been placed on record, show to the contrary. For e.g., Conax in its email dated 25th May 2010 clarified in response to a specific question as under:

> *"Would they duplicate the Turner security key information for use on another non-Turner CA system?*
>
> Conax policies are not allowed to transfer/duplicate the security keys to another Operator system for security issue."

43. On its part Turner was willing to grant time to RLB to find a new service provider but was not agreeable to parting with the encryption codes as is evident from the following exchange of mail between the parties on 1st June 2010:

> (From the agent of Alva Brothers to Turner)
>
> "Dear Michelle,
>
> We can get on a call. The reason we need the 18 month period etc in the first place is because the process to changing to a new transmission services provider is very complex and expensive due to the encoding, box change and so on. This was not clear earlier and we had expected to be able to use the existing decoder boxes that are in the field, even with a new service provider.
>
> Now that its clear from Conex that this is not the case, we need adequate time to make this transition. Therefore, it will be a huge problem if Turner were to decide anytime to terminate services

with 6 months notice as, depending on when the notice is issued, 6 months may not be enough as RGB may not have the resources to buy new boxes, make the change etc. I can understand that Turner needs to terminate early if facilities are being moved and there are capex implications.

We are keen to make the move as soon as possible, which can happen once we have a new investor, fresh funding in place etc. A notice from turner while these things are being put in place will be a huge blow to our plans to keep the channel alive and therefore, is something we cannot take a risk on.

Please give me a call if we need to discuss, but hope you understand the precarious situation this clause potentially puts us in.

Best,
Manas"

(Turner's reply):

"Hi Manas

We've considered your concern and understand that a change to a new services provider may take longer than the Alvas may have originally contemplated, given the confirmation from Conex that they would not be able to use the existing boxes. It seems that your main concern is one of timing. **We are therefore, willing to extend the notice period to 9 months. This should give the Alvas plenty of time to find a new service provider,** funds and put the necessary arrangements in place, should this become necessary.

Regards
Michelle." (emphasis supplied)

44. In a subsequent mail dated 27th July 2010 Conax made it clear that its source operator was Turner and, therefore, there would have been a tripartite agreement or Memorandum of Understanding ('MoU') between Turner, Conax and RLB, if at all the source code had to be transferred. This was reiterated on 5th August 2010 and 8th October 2010. It appears that somehow the draft MoU which was signed by Alva brothers and sent to Conax as an email attachment on 19th August 2010

was never in fact executed by either Conax or Turner. This, in fact, indicates that there was no agreement on providing decryption keys to RLB.

45. A reference can also be made to the attachment sent by Conax with its email dated 11th November 2010 to Alva brothers. These were two proforma letters from RGB to Conax giving clear instructions concerning 'change for key hierarchy'. This obviously did not come through either. Therefore, much prior to the Scheme being presented to this Court for approval on 10th January 2011, the parties were aware that there was no agreement on providing decryption keys to RLB. At this stage for the Court to accept the contention of RLB that the intention of the parties, even prior to the Scheme being presented to the Court, was to enable the transfer of the distribution network to RLB would be contrary to the correspondence exchanged between the parties.

The J.K. Case

46.1 At this juncture, since considerable reliance was placed by Mr. Rai on the decision in the J.K. case, to urge that the Court should view the workability of the Scheme in light of the 'commercial sense', the Court proposes to discuss the said decision in some detail.

46.2 The facts there were that a winding up petition had been filed in respect of the Respondent company in June 1965 and a Provisional Liquidator ('PL') was appointed. The PL took charge of the cotton textile mills of the Respondent company. Thereafter, the group which owned the majority of the equity shares ('S group') entered into an agreement with the group which agreed to buy the shares and take over the management of the Respondent company ('J group'). *Inter alia,* the agreement was that after the J group took over, the company would execute a second legal mortgage of its fixed and other assets in favour of the S group and certain unsecured creditors, in consideration of which those creditors agreed to receive interest at a nominal rate and deferred repayment of their debts. The agreement also contemplated the company obtaining loans from certain financial institutions, the Central and State Governments and other persons and securing them by a prior charge over its fixed and liquid assets.

46.3 The Scheme was approved by a learned Single Judge of the Bombay High Court in February 1966. Alternative to the execution of the

second mortgage, the approved Scheme proposed execution of a Debenture Trust Deed ('DTD') in favour of Schedule B creditors. The J group was to provide the necessary finance for running the mills. On this basis, the winding up petition was withdrawn.

46.4 The mills were restarted in April 1966. The payments to various categories of creditors, other than the Schedule B creditors, were duly made. However, since there were disputes between the two groups, neither the mortgage deed nor the DTD in favour of Schedule B creditors could be executed.

46.5 The mills worked till June 1967 but the management experienced difficulties thereafter and eventually these were closed down in June 1967. The company and others again filed a petition for winding up. This time, the learned Company Judge was of the view that the J group was to bring in the finance to make the mills work and accordingly issued directions to that effect. The company was also directed to execute the DTD in favour of Schedule B creditors. The winding up petition was dismissed.

46.6 In appeal, the DB of the Bombay High Court reversed the order of the learned Company Judge and ordered the winding up of the company. Importantly, the DB held that there was no obligation on the J group to pay anything to the company or compulsorily provide the finance and that the company had become commercially insolvent.

46.7 In the further appeal to the Supreme Court, it was contended by the Appellants that once a Scheme was sanctioned, further arrangement of the company.s affairs had to be on the basis of the rights and obligations thereunder and that the company could be ordered to be wound up only after compelling it to carry out the obligations under the Scheme.

46.8 The Supreme Court dismissed the appeal, agreeing with the DB of the High Court that "the Scheme has to be read as a commercial document, i.e., in the sense in which businessmen conducting such an establishment would understand." It was further held that if it was so read, the relevant clause in the Scheme could not mean that "J group had taken upon themselves the liability to put any monies even if the mills could not be run at reasonable profits."

47. Mr. Rai emphasised the above observations and contended that

even in the present case it made no commercial sense for the Applicant to have agreed to the Scheme without transfer of the distribution network. The facts of the above decision clearly show that the Scheme clearly spelt out the rights and obligations of the different parties. There was no ambiguity in the different clauses of the Scheme. In fact, the Scheme was worked out for some time. Only when it became demonstrably unworkable that the Court intervention was sought. In the present case, however, it is only after the contempt petition was filed by Turner group that RLB has come forth with the plea of unworkability of the Scheme without distribution network. There appears to be no attempt made by RLB to actually work the Scheme. The facts in **J.K. case** being clearly distinguishable, the said decision is not of assistance to RLB in the present case.

The RNRL Case

48.1 The other decision on which considerable reliance is placed by Mr. Rai is **RNRL case**. The facts were that Reliance Industries Ltd. ('RIL') had filed a petition in the High Court of Bombay to obtain sanction for a Scheme of demerger between RIL and the four other companies, including Reliance Natural Resources Ltd. ('RNRL'). Clause 19 of the Scheme, which was sanctioned by the learned Company Judge, required RIL to enter into suitable arrangement with RNRL for supply of gas to the power plants of Reliance Energy Ltd. ('REL'), a group company of RIL and Reliance Patal Ganga Power Ltd. ('RPPL'). Disputes arose out of the wording of the draft Gas Sale and Master Agreement ('GSMA') and Gas Sale and Purchase Agreement ('GSPA') proposed by RIL which had been approved by the Board of RIL prior to the demerger. RNRL, however, raised objections to GSMA. Both RIL and RNRL made separate applications to the Ministry of Petroleum and Natural Gas ('MoPNG'). However, MoPNG rejected the applications.

48.2 On 8th November 2006, RNRL filed an application under Section 392 of the Act seeking directions from the High Court to RIL to change the gas supply agreements in respect of the quantum and price of gas to be supplied on the ground that they were not in compliance with the terms in the demerger scheme as well as a family MoU. RIL resisted the application as not being maintainable.

48.3 The learned Company Judge held that the application was maintainable. It was further held that the Company Court was not

competent to dictate the specific changes sought; that GSMA was in breach of the demerger scheme; that the family MoU was binding on both the parties and that a suitable arrangement had to be read into Clause 19 of the demerger scheme in light of the MoU. The learned Company Judge ordered the parties to renegotiate and held that the Government should normally approve such contract unless clearly in breach of public policy and public interest. 48.4 Both RIL and RNRL filed cross appeals, which were disposed of by the DB of the Bombay High Court by holding that a suitable arrangement under Clause 19 of the demerger scheme was required to be made by engrafting the MoU on GSMA and that although the Government could lay down the gas utilisation policy, such policy would apply only to the balance quantity available after the quantity of gas stood allocated to RNRL as per the family MoU. The DB required a suitable arrangement to be entered into by the parties on the basis of the family MoU. Before the DB, the Union of India („UoI.) was permitted to intervene and put forth its stand. 48.5 RNRL, RIL as well as UOI appealed to the Supreme Court. Relevant to the present case, is the decision of the Supreme Court in relation to the powers of the learned Company Judge under Section 392 of the Act. The majority opinion of Justice P. Sathasivam for the Bench dealt with the question whether the learned Company Judge could have modified the scheme.

48.6 The majority referred to the earlier decision in **Miheer H. Mafatlal v. Mafatlal Industries Limited** (1997) 1 SCC 579 which held that although Section 392 of the Act dealt with post sanction supervision, the Court could not "undertake the exercise of scrutinising the scheme placed for its sanction with a view to finding out whether a better scheme could have been adopted by the parties." The Court explained that "This exercise remains only for the parties and is in the realm of commercial democracy permeating the activities of the creditors concerned and members of the company who in their best commercial and economic interest by majority agree to give green signal to such a compromise or arrangement."

48.7 The majority also referred to the decision in **S.K. Gupta v. K.P. Jain** (1979) 3 SCC 54 which held that the learned Company Judge has the power under Section 392 of the Act to make modifications but only "for the proper working of the scheme and not for any other purpose." The Supreme Court in **RNRL case** understood the said judgment

in **S.K. Gupta** as not permitting "the Company Court to so modify a scheme as to change its basic fabric." Thereafter, in paras 43 and 44 of **RNRL** case, the majority held as under:

> "43. In the light of the stand taken by both parties, this Court in *S.K. Gupta* case analysed the relief sought for in the company application and the relevant materials placed before the Company Judge. Section 392 creates a duty to supervise the carrying out of the compromise or arrangement. This power and duty was created to enable the Court to take steps from time to time to remove all obstacles in the way of enforcement of a sanctioned scheme. While sanctioning, it shall anticipate some hitches and difficulties which it can remove by the order of the sanction itself but clause 1(b) makes it clear that this power can also be exercised after the scheme has once been sanctioned. So long as the basic nature of the arrangement remains the same the power of modification is unlimited, the only limit being that the modification should be necessary for the working arrangement.
>
> 44. In view of the above discussion, this Court holds that Section 392 is applicable to the company application filed by RNRL. This is more so because the Company Court has originally sanctioned the scheme under both Sections 391 and 394. Further, the position derived from *S.K. Gupta* the power of the Court under Section 392 is wide enough to make any changes necessary for the working of the scheme. Therefore, the Court does have jurisdiction over the present matter. However, it is made clear that the power of the Court does not extend to rewriting the Scheme in any manner."

48.8 In his concurrent opinion Justice Sudershan Reddy observed:

> "327. In the instant case by importing the gas supply section into the scheme, in the guise of interpreting it, the phrase "suitable arrangements" was transformed into "suitable arrangements as agreed upon by the promoters in the gas supply section of the MoU". Such a modification necessarily tears apart the basic fabric and cannot be permitted."

49. For the purposes of the present case, it is clear from the law

explained by the Supreme Court in RNRL case that while the Company Court "is not powerless and can never become functus officio", it cannot rewrite a scheme in any manner, even at the post sanction stage. The Court has to ensure that the basic nature of the arrangement remains and whatever modification is made "should be necessary for the working arrangement." Importantly, in RNRL case, the Supreme Court disagreed with the DB of the Bombay High Court that the MoU should be engrafted onto the GSMA. In para 125 of the judgment it was held that the MoU neither having been approved by the shareholders nor attached to the scheme, was not "legally binding." It was nevertheless held that the contents of the Scheme "have to be interpreted in the light of the MoU."

50. The scope of the powers of the Company Court under Section 392 of the Act, as explained by the majority opinion of the Supreme Court in RNRL case, does not permit rewriting of the scheme or introducing into it clauses that plainly do not exist. Consequently, this Court fails to appreciate how on the strength of either J.K. case or RNRL case, RLB can persuade the Court, in exercise of its powers under Section 392 of the Act, to read into the Scheme of binding obligation on Turner to ensure the transfer of the distribution network to RLB by providing the decryption code of the STBs. The pleas of RLB in the present application go far beyond mere modification of the Scheme. The Court is satisfied that accepting the prayer of RLB to restore it the distribution network would be nothing short of ordering specific performance of an agreement that has already worked itself out and would be reading into the Scheme, clauses and obligations which did not exist when the Scheme was accorded sanction. Alternative prayer for winding up declined

51. The alternative prayer that RLB should be directed to be wound up, since its entire substratum has disappeared, will require a detailed examination of several relevant factors, all of which are not before the Court. Nothing precludes RLB from seeking winding up in accordance with law in appropriate proceedings by placing the full facts before the Court which can then be responded to by the OL, the RD and other interested parties including creditors. Given the pleadings in the present application, it is not possible to undertake that exercise at this stage.

52. Therefore, while reserving RLB.s liberty to seek winding up in

accordance with law, the Court dismisses the present application with costs of Rs. 20,000 to be paid by RLB to Turner within four weeks from today.

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STATE **....APPELLANT**

VERSUS

DILBAGH RAI BHOLA AND ORS. **....RESPONDENTS**

(GITA MITTAL & J.R. MIDHA, JJ.)

CRL. L.P. NO. : 47/2011 **DATE OF DECISION: 13.03.2013**

Indian Penal Code, 1860—Sections 304B, 498A, 406, 120B & 34—Criminal Procedure Code, 1973—Section 378—Dying Declaration—As per prosecution, deceased harassed, abused and beaten for dowry since beginning of marriage—Deceased pushed from roof by mother-in-law—Dying declaration of deceased Ex. PW1/B recorded by PW14 in which she implicated husband and in-laws for injuries—Trial Court acquitted all accused of charges u/s 304B, 498A, 406 & 120B—Held, no evidence about mental and physical condition of deceased when statement/dying declaration recorded—No evidence to support claim of prosecution that deceased in fit state of mind to make statement—Despite IO having sufficient time, SDM not called to record Dying Declaration—Language in Dying Declaration not that of deceased but of police authorities—Despite deceased being educated, her thumb impression obtained on Dying Declaration—Dying Declaration only has allegations that mother-in-

law wanted to get husband re-married—Allegations regarding dowry, harassment made in belated complaint—Neither deceased nor her other relatives had any grievance against respondents since no complaint against deceased's husband and in-laws till her death and change of heart occurred subsequently-Statements of material prosecution witnesses suffer from improvements and contradictions in material particulars—Appeal dismissed.

[Ad Ch]

APPEARANCES:

FOR THE APPELLANT : Ms. Richa Kapoor, APP SI Jagdeep Malik, P.S. Feeta Colony.

FOR THE RESPONDENTS : Mr. Dinesh Garg, Advocate for R-1 to R-4 and R-6.

CASES REFERRED TO:

1. *State* vs. *Suraj Mehto* 2011 (30 Crl. Court Cases 432 Delhi.
2. *Amar Singh* vs. *State of Rajasthan* 2010 (4) Crl. Court Cases 234 SC.
3. *Dr. Sunil Kumar Sambhudayal Gupta & Ors.* vs. *State of Mahrashtra* 2010 STPL(Web) 935 SC.

RESULT: Appeal dismissed.

GITA MITTAL, J. (Oral)

1. The record of the lower court has been received. We have heard learned counsel for the parties. The instant petition has been filed under Section 378(1) of the Code of Criminal Procedure by the State seeking leave to appeal against the judgment dated 25th May, 2010 passed by the Ld. Additional Sessions Judge (East) FTC, E-Court Karkardooma Court, Delhi in Sessions Case No.81/09.

2. The case arose from FIR No.167/2002 registered by the police under Sections 304/498A/406/120B/34 of IPC which was registered by the police station Geeta Colony. One Sh. Roshan Lal, resident of Jind,

Haryana had two sons, namely, Dilbagh Rai Bhola and Rajender Kumar @ Nitu and two daughters Suman Rani and Chancal.

3. Sh. Prithviraj Bhola, a resident of Geeta Colony, Delhi has one son Jagmohan Bhola and a daughter Rashmi.

4. We are informed that an exchange marriage was performed on 26th November, 1993 between Rashmi daughter of Prithiviraj Bhola and Dilbagh Rai Bhola, son of Sh. Roshan Lal. While Jagmohan Bhola was married to Chanchal a daughter of Sh. Roshan Lal, resident of Jind, Haryana.

5. It is the case of the prosecution that on receipt of a PCR call (recorded as DD No.3A at the police station on 25th July, 2002 regarding a quarrel at the House No.13/315 Geeta Colony), PW-14 Inspector Harpal Singh, IO of the case reached at the spot and there he found a lady namely Rashmi lying on a stretcher. One ambulance with a Haryana registration number and its driver, PW9 -Ashok Batra was present. Dilbagh Rai, husband of Rashmi as well as his cousin brother Sanjay were also present at the spot. Rashmi was in serious condition and PW-14 Inspector Harpal Singh took Rashmi in the same ambulance to SDN Hospital, Shahdara. The doctor declared Rashmi unfit for statement. She was also shifted to Safdarjung Hospital.

6. It is pointed out that Rashmi was conscious when she was brought to Delhi. However, she made no statement to PW-14 who has conducted the investigation in the case.

7. It has also come in evidence that Rashmi's father Prithviraj Bhola as well as brother Jagmohan Bhola gave statements on 25th July, 2002 in the evening to the effect that they did not want any action regarding the incident. It is also in evidence that the husband of Rashmi, namely Dilbagh Rai Bhola, her other in-laws were looking after her during treatment and were available till the registration of the FIR against them. Dilbagh Rai Bhola had remained at the Safdarjung Hospital.

8. So far as the treatment which was administered to Rashmi is concerned, our attention has been brought to the record of the Safdarjung Hospital available before the Trial Court. The record would show that on 26th July, 2002, a tracheostomy was conducted on the person of Rashmi. We also find on record that the authorization to undertake this procedure on Rashmi was given by not only her husband Dilbagh Rai Bhola but also

her father Privthviraj Bhola.

9. It appears that thereafter, on 27th July, 2002, Privthviraj Bhola made a complaint Ex.PW-1/A mentioning that from the beginning of marriage of Rashmi the accused persons started harassing her for bringing insufficient dowry; that they also used to abuse and beat Rashmi. Due to the behaviour of the accused persons, Rashmi used to remain mentally disturbed and the matter was discussed with the accused persons. The in-laws expressed regret and assured that such behaviour would not repeat in future but the accused again started harassing Rashmi. The complainant has stated that on 20th July, 2002 he had received a telephonic information to the effect that his daughter has fallen from the roof. He had rushed to the Sood Hospital, Jind, Haryana where Rashmi was admitted by the in-laws. He has further stated that on the 25th of July, 2002 at about 2.30 am Dilbagh Rai Bhola and his cousin Sanjay brought Rashmi in Maruti van and left Rashmi outside the house. The complainant doubted the correctness of the reason for Rashmi's injuries and immediately made a call to the police.

10. Based on this complaint, the police registered the FIR No.167/02 under Sections 304/498A/406/120B/34 of the IPC against Rashmi's husband and in-laws including Dilbagh Rai Bhola (husband), Rajender Kumar @ Nitu (brother in law), Chander Mohini (mother in law), Suman Rani (sister in law), Roshan Lal (father in law) and Sanjay.

11. The police conducted investigation into this matter and thereafter filed a chargesheet against the accused persons under Sections 304/406/498A/120B/34 of the IPC. The Trial Court framed charges under Sections 498A/34 IPC against all the six accused persons while a charge under Section 304 of the IPC was framed against Chander Mohini. The accused pleaded not guilty to all the charges and claimed trial.

12. During the trial, the prosecution examined 15 witnesses and the trial court recorded statements of the accused persons under Section 313 of the Cr.P.C. The defence claimed trial and led the testimony of evidence of 4 witnesses in support of their defence.

13. On a close reading of the entire evidence led on record by all sides, the trial court passed a judgment dated 25th May, 2010 and found that the statements of the prosecution witnesses No.1, 2 and 3 were not credible and trustworthy. It was further held that the prosecution had

failed to prove its case beyond the reasonable doubt against the accused persons and they were acquitted from the charges for which they stood trial. Aggrieved thereby the prosecution has filed the present petition seeking leave to appeal against the judgment dated 25th May, 2010.

14. We are informed that Roshan Lal expired during the pendency of the trial as such the proceedings against him abated.

15. The entire case hinges on a statement attributed to injured Rashmi alleged to have been recorded by PW14 the investigating officer. PW-14 has claimed that he made efforts to record the statement of Rashmi on 27th July, 2002, 28th July, 2002, 1st August, 2002 and 2nd August, 2002 but she was declared unfit for statement by the doctors at the Safdarjung Hospital.

16. It is on record that at 2.15 pm on 7th August, 2002 an information of the fitness of the deceased Rashmi to make a statement was conveyed to the Duty Constable at the Safdarjung Hospital. The Duty Constable informed the police station Geeta Colony about such certification only at 4 pm and 7th August, 2002 DD No.19A at 6.35 pm was recorded at police station Geeta Colony on in this regard.

17. PW14 has claimed that he recorded a statement of Rashmi (Ex.PW1/B) on 7th of August, 2002 at 5.00 pm to which she implicated her husband and in-laws for her injuries. Unfortunately, the injured Rashmi succumbed to her injuries on the 24th of August, 2002. The police added commission of an offence under Section 304B of the IPC in the FIR.

18. Mr. Dinesh Garg, learned counsel for the respondents has pointed out that as per the evidence brought on record, Rashmi was unfit to give a statement after 3rd August, 2002. Our attention has also been drawn to an opinion recorded by Dr. Marut Nandan who was her treating doctor in the Safdarjung Hospital to the effect that as Rashmi was known to be taking anti-psychotic drug, the confirmation of her fitness and ability to give a statement was required to be done after taking opinion from a Senior ENT as well as psychiatric experts. As noted above, having undergone a tracheostomy, obviously to facilitate, breathing, Rashmi's ability to breathe would have been strongly impaired. No evidence of any such opinion having been obtained by PW-14 or presence of such experts when PW-14 claims to have recorded a dying declaration of Rashmi is forthcoming on the record.

19. We also find that as per the medical record proved before the trial Judge, on 6th August, 2002, it was recorded that Rashmi was suffering from illusions and hallucinations she even complained of administration of poisons by the doctors who were treating her at the Safdarjung Hospital.

20. PW-14, Inspector Harpal Singh has claimed that he proceeded to record a statement of Rashmi at about 5 pm on 7th August, 2002. The prosecution places reliance on an endorsement purportedly made by Dr. Marut Nandan that her statement had been recorded. Mr. Dinesh Garg, learned counsel for the respondents has drawn our attention to the interpolation and corrections effected so far as recording of the date of such submissions by Dr. Marut Nandan. It is submitted that these interpolations have not been explained by the prosecution and cast substantial doubt on their authenticity.

21. We also find from the record that Dr. Marut Nandan would have been a material witness to support the correctness and authenticity of the statement made by the IO with regard to the fact that he had actually recorded a statement of the deceased. Dr. Marut Nandan was not even cited as a witness let alone examined by the prosecution before the Trial Court.

22. Above narration would show that there is no evidence at all about the mental and physical condition of Rashmi at the time when her claimed statement was recorded. The material on record with regard to the treatment manifests that she had undergone tracheostomy. The medication, including the anti-psychotic drugs, which was being administered to her would clearly suggest that there is a strong possibility that the deceased was not in a fit and able state of mind to make a statement. Therefore it was essential for the prosecution to establish Rashmi's fitness before a statement attributed to Rashmi can be relied upon to base a conviction.

23. So far as the fitness on which strong reliance placed by the prosecution, was allegedly obtained in the morning of the 7th August, 2002. It is pointed out that the same is in the handwriting of one Dr. Afjal. It is in evidence that Dr. Afzal was posted in unit 3.

24. It is also in evidence that Dr. Afzal was a mere junior resident in the orthopedic unit. A challenge has been laid to his very presence in the unit where Rashmi was admitted. We also find from the medical

record placed before us that the patient was admitted to unit 1 and not in unit 3. Certainly Dr. Afzal would have no custody over this patient. There is no evidence at all to show that Dr. Afzal was at all present or at all examined Rashmi or given the opinion which has been endorsed on Ex.PW-15/A.

25. The senior resident of psychiatric even on 5th August, 2002 has recorded notes to the effect that Rashmi was suffering from delusions and hearing religious voices as well as voices of the Goddess.

26. There is no evidence at all to support the claim of the prosecution that Rashmi was in a fit state of mind to make a statement. We also find that on 6th August, 2002 again a recommendation was made for requires a referral to the senior resident psychiatric. This was never undertaken. It is also on record that the deceased received psychiatric treatment even on 13th December 2000 from one Dr. A.K. Sharma at Delhi. None of the doctors who were treating the deceased have been examined.

27. Given the specific recommendations of the senior consultants, an orthopaedician would not have the capacity to comment on the mental fitness of patient Rashmi given the opinion dated 6th August, 2002 as noticed by us. Therefore even if it is accepted that Dr. Afzal actually made the endorsement attributed to him, we are unable to hold that he was competent to make the evaluation of Rashmi's fitness. In any case, we find the same completely unreliable, even if actually given.

28. It is in evidence that the incident occurred on 22nd July, 2002 at Jind, Haryana. Rashmi was treated between the 20th and 25th July, 2002 at the Sood Hospital in Jind, Haryana. She was treated at the instance of her husband and in-laws. The complainant as well as his relatives (Rashmi's maternal side) had full access to the patient while she was being treated in this hospital. Based on medical advice, Rashmi was shifted to the General Hospital, Jind between 21st July to 24th July, 2002. These facts have been proved in the testimony of PW-14 who has also proved as Ex.PW-11/A relating to the treatment administered to Rashmi.

29. There is no evidence that Rashmi was unconscious when her relatives met her in the Jind hospital. It is the case of the prosecution that Rashmi was conscious even when she was brought to Delhi. The above narration would show that Rashmi had adequate opportunity to disclose the circumstances, in which the incident resulting in her injuries occurred,

to her relatives; doctors at Sood Hospital as well as the General Hospital, Jind between 20th July, 2002 till 25th July, 2002 when she was brought at Delhi. It is evident that neither Rashmi nor her other relatives had any grievance against the respondents for the reason that no complaint against Rashmi's husband and in-laws was made. This is manifested from their statement to the police that they want no action even on the 26th of July, 2002. It appears that a change of heart occurred when the complaint was lodged by them on 27th July, 2002.

30. Even though there is strictly no prohibition recording of a dying declaration by IO, however in the instant case, we find not a whit of an explanation as to why the Sub-Divisional Magistrate was not called in accordance with the applicable rules, despite Rashmi being admitted in hospital from 27th July, 2002 till 7th August, 2002. Even on the fateful day on 7th August, 2002, the IO had more than sufficient time inasmuch as it is claimed that fitness of the deceased was obtained early in the morning, the police station informed at 2 pm (as per the DD entry) and the statement came to be recorded only at 5 pm. The time span would show the necessity of the fitness requirement even at 5 pm and the reliance on fitness obtained allegedly in the morning is misconceived.

31. The prosecution has led evidence to show that the patient was tracheostomised and that she was not able to utter words clearly. The doctor had advised PW14 to seek opinion of the ENT psychiatric experts. PW-14 has confirmed that he did not seek the opinion about fitness of Rashmi as advised. We are not informed as to when, if at all, the tracheostomy was removed. There is no evidence that in view of her several injuries, no pain killers or sedatives had been administered to the deceased.

32. At this stage we may also briefly comment on the contents of Ex.PW-1/B the dying declaration. The appearance thereof clearly suggests that the language is not of a housewife (which deceased Rashmi was) but that of the police authorities. The bare reading of the same thereof creates doubt on the authenticity of the document as a statement having been given by the deceased.

33. We are informed that Rashmi was educated and was a graduate. We see no reason as to why her left thumb impressions were obtained or why her signatures appear in Hindi. There is also no allegation that Rashmi was ever tortured or that any dowry demand was made upon her

by husband or any of the in-laws or any other person. In Ex.PW-1/B Rashmi alleged to have stated that her mother in law wanted to get her husband remarriaged. General allegations have been made in the belated complaint (Ex.PW-1/A) on 27th July, 2002 to the effect that Rashmi was troubled for dowry without any specifics. There is therefore no evidence to support the bald allegation made by Rashmi's father in his complaint under Section 498A of the IPC.

34. The sole evidence relied upon by the prosecution to implicate Chander Mohini the mother in-law is Ex.PW-1/B where it is stated that she had pushed Rashmi from the roof of the house. We have disbelieved the authenticity of Ex.PW1/B. We also find that PW-14 Inspector Harpal Singh has stated in his testimony that as per the physical built of Chander Mohini (respondent no. 3 herein), she could not have thrown Rashmi from the roof.

35. PW-14 has noted in Ex.PW-1/B that Rashmi was having difficulty in speaking because of the pain.

36. We may briefly advert to the reference made by the complainant to the conduct of the accused. In this regard, the testimony of PW-9 Ashok Batra as well as PW-14 Inspector Harpal Singh would show that the respondents did not run from the spot when the police reached. There is positive evidence that in-laws of the deceased were regularly visiting the hospital and her husband was available at the hospital where from he was arrested. The statement by the complainant to the contrary are therefore clearly false.

37. Learned counsel for the respondents has placed reliance on the pronouncement reported at 2010 (4) Crl. Court Cases 234 SC, **Amar Singh v. State of Rajasthan** and 2011 (30 Crl. Court Cases 432 Delhi, **State v. Suraj Mehto** in support of his submissions. He states that there is no evidence of harassing for dowry which would support a finding of guilt against respondents for commission of offence under Section 498A having been made out. We also find that there is no complaint of a dowry demand or torture at all at any point of time by Rashmi or any prosecution witness or any of other relatives.

38. In 2010 STPL(Web) 935 SC, **Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Mahrashtra** it is urged that there are material contradictions in the testimony of the witnesses which therefore deserve

to be disbelieved. It is urged that the statements of the material witnesses suffer from improvements and contradictions in material particulars with previous statements. PW-1, 2, 3, and 5 are close relatives of the deceased in the instant case and the improvements and contradictions in all material particulars in the testimony would render the same liable to be rejected.

39. It is pointed out that as in the present case, in **Sunil Kumar Sambhudayal Gupta** (supra), the deceased was suffering from maniac depression and certainly had some mental/epileptic/ psychotic problem. In these circumstances, taking a comprehensive view on the conduct of the close witnesses as well as illness of the deceased, the dying declaration was disbelieved by the court.

40. So far as the instant petition is concerned, we may refer to the scope of consideration by this Court while considering the petition under Section 378(1) of the Cr.P.C. In para 22 of **Sunil Kumar Sambhudayal Gupta** (supra) the Supreme Court has laid down the following principles:

> "22. It is a well-established principle of law, consistently reiterated and followed by this Court is that while dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable. Even though the appellate court is entitled to consider, whether in arriving at a finding of fact, the trial Court had placed the burden of proof incorrectly or failed to take into consideration any admissible evidence and/or had taken into consideration evidence brought on record contrary to law; the appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. The trial court which has the benefit of watching the demeanor of the witness is the best judge of the credibility of the witnesses."

41. In view of the above discussion and in the light of the principles laid down by the Supreme Court, we are unable to find any material to support the challenge led by the prosecution in the instant case. The trial court has carefully considered the entire material and evidence led before it and has rightly disbelieved the prosecution witnesses as well as the statement attributed to the deceased.

42. We may notice one more material factor which has intervened

in the instant case. The judgment dated 25th May, 2010 was also assailed by Jagmohan Bhola, brother of the deceased Rashmi, by way of Criminal Appeal No.793/2010. Unfortunately, not only did Rashmi lose her life, but it appears that matrimonial relations of Jagmohan Bhola and his wife Chanchal also turned sour resulting in Jagmohan Bhola filing a petition under Section 13 of the Hindu Marriage and Divorce Act, 1956 which culminated a decree of divorce dated 31st October, 2009. The same was assailed by Smt. Chanchal before this Court by way of MATA 21/10. During the pendency of this appeal, Jagmohan Bhola entered into a compromise not only with the respondents before us but also with his wife Chanchal and they have drawn up a compromise deed 31st dated March, 2013 which has been placed before us in Criminal Appeal No.793/ 2010. We are informed that all matters including the financial settlement between the parties have been completed and Chanchal has withdrawn MATA 21/10 on 12th March, 2013.

43. In terms of the said settlement, Jagmohan Bhola has separately made a statement seeking leave to withdraw Criminal Appeal No.793/ 2010 which we have accepted and the said appeal has also been dismissed as withdrawn by a separate order.

44. In view of the above, we find no merit in this petition which is hereby dismissed.