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READING MATERIAL

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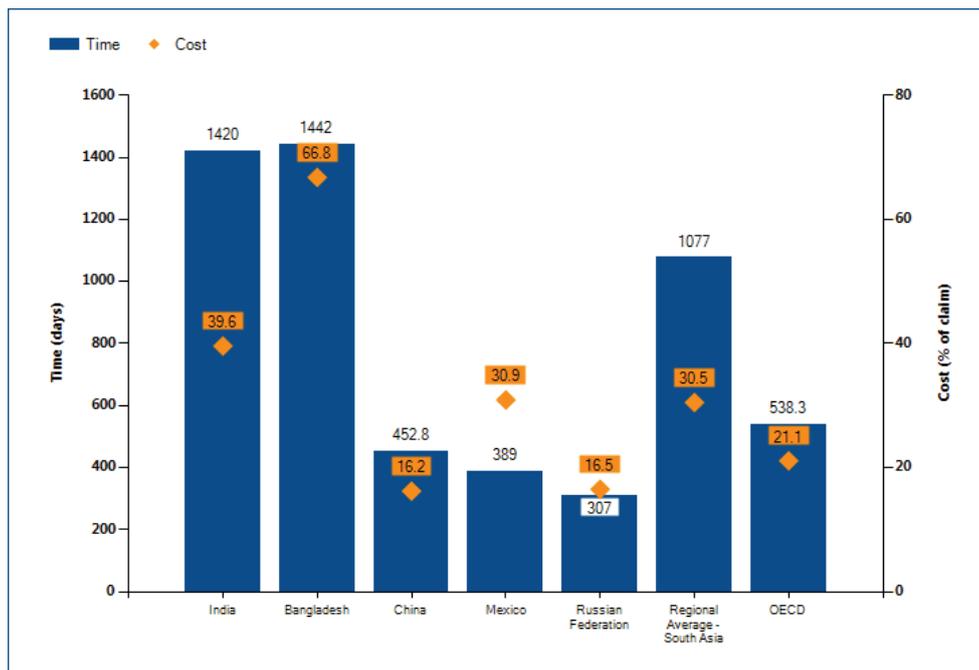
Strengthening Arbitration and its Enforcement in India – Resolve in India

Bibek Debroy¹ and Suparna Jain²

Background on Dispute Resolution in India

India has an estimated 31 million cases pending in various courts. As of 31.12.2015 there were 59,272 cases pending in the Supreme Court of India, around 3.8 million cases pending in the High Courts and around 27 million pending before the subordinate judiciary. 26% of cases, more than 8.5 million, are more than 5 years old. It has been estimated that 12 million Indians await trial in criminal cases throughout the country. On an average it takes twenty years for a real estate or land dispute to be resolved.

The dispute resolution process has a huge impact on the Indian economy and global perception on “doing business” in India. This is clearly indicated by World Bank rating on Ease Of Doing Business 2016 which has ranked India 131 out of 189 countries on how easy it is for private companies to follow regulations. The study notes that India takes as much as 1,420 days and 39.6% of the claim value for dispute resolution. The table below shows comparative data on both the time and cost for resolving disputes.

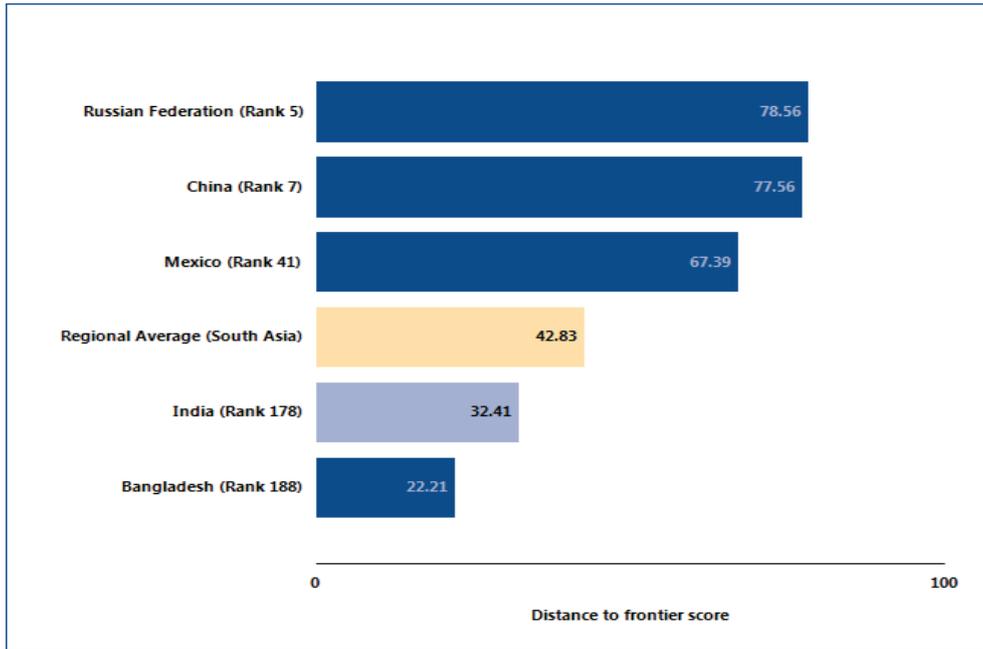


This is higher than that of OECD countries as well as that of South Asia’s regional averages. Globally, India stands at 178 in the ranking of 189 economies on the ease of enforcing contracts (*see table below*)

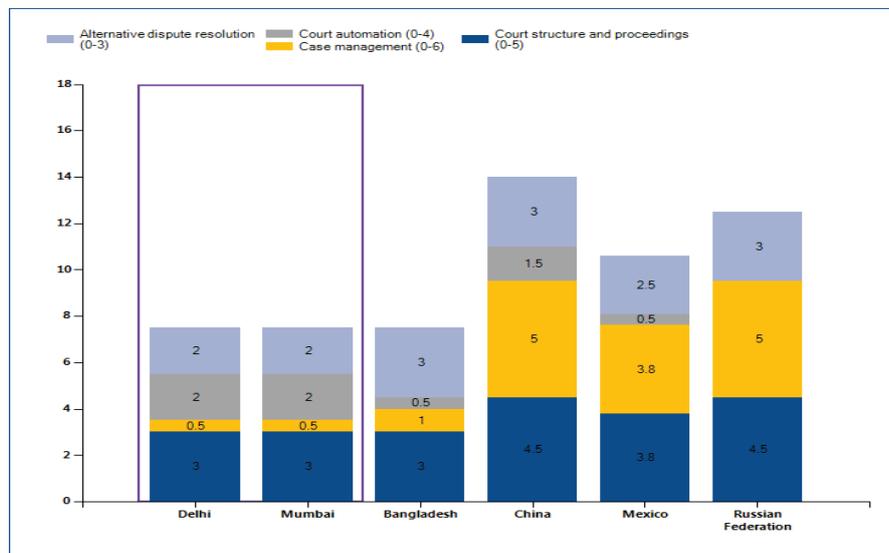
¹ Member, Niti Aayog.

² OSD, Niti Aayog.

How India and comparator economies rank on the ease of enforcing contracts



So far as the quality of judicial processes is concerned (court structure and proceedings, case management, court automation and alternative dispute resolution), once again, India has a poor ranking.



Note: The score on the quality of judicial processes index is the sum of the scores on these 4 sub-components. The index ranges from 0 to 18, with higher values indicating better, more efficient judicial processes.

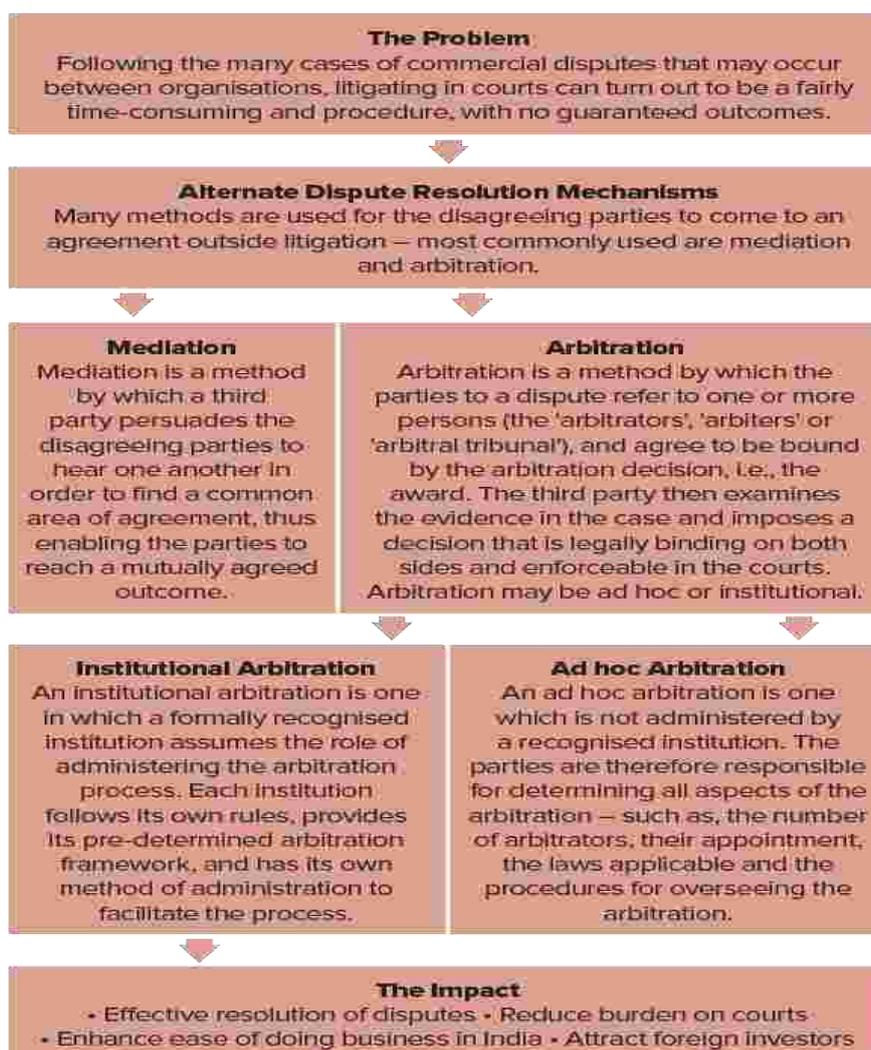
Glimmer of Hope: Various Forms of Alternate Dispute Resolution

The above statistics reiterate the need for reforms not only in speeding up dispute resolution, but also having a strong in-country mechanism for out of court dispute resolution. Legally, this process is known and is practiced in the forms of arbitration, negotiation conciliation and mediation.

The difference between all these “alternate dispute resolution mechanisms” lies in the process and mode of resolving the dispute. Broadly, in arbitration, the arbitrator hears evidence and makes a decision. Arbitration is like the court process, where parties provide testimony and give evidence, as in a trial. However, it is usually less formal. In mediation, on the other hand, the process is a negotiation with the assistance of a neutral third party where mediators do not issue orders. Instead they help parties reach a shared opinion and reach settlement. Conciliation is another dispute resolution process that involves building a positive relationship between the parties to the dispute. Conciliation tries to individualize the optimal solution and direct parties towards a satisfactory common agreement. As per the Merriam Legal Dictionary, conciliation is “the settlement of a dispute by mutual and friendly agreement with a view to avoid litigation”. Although this sounds strikingly similar to mediation, the conciliator plays a relatively direct role in the actual resolution of a dispute and even advises the parties on certain solutions by making proposals for settlement. The fourth mode of ADR, i.e negotiation, is a process where parties (or their attorneys) can try to work out a solution that they are both satisfied with, often giving offers and counter-offers without legal counsel.

The present paper focuses on the first and internationally the largest mode of dispute resolution, that is, Arbitration. However, prior to looking at how arbitration functions in the country, it would be useful to understand the process of arbitration.

The Knots of Dispute Resolution



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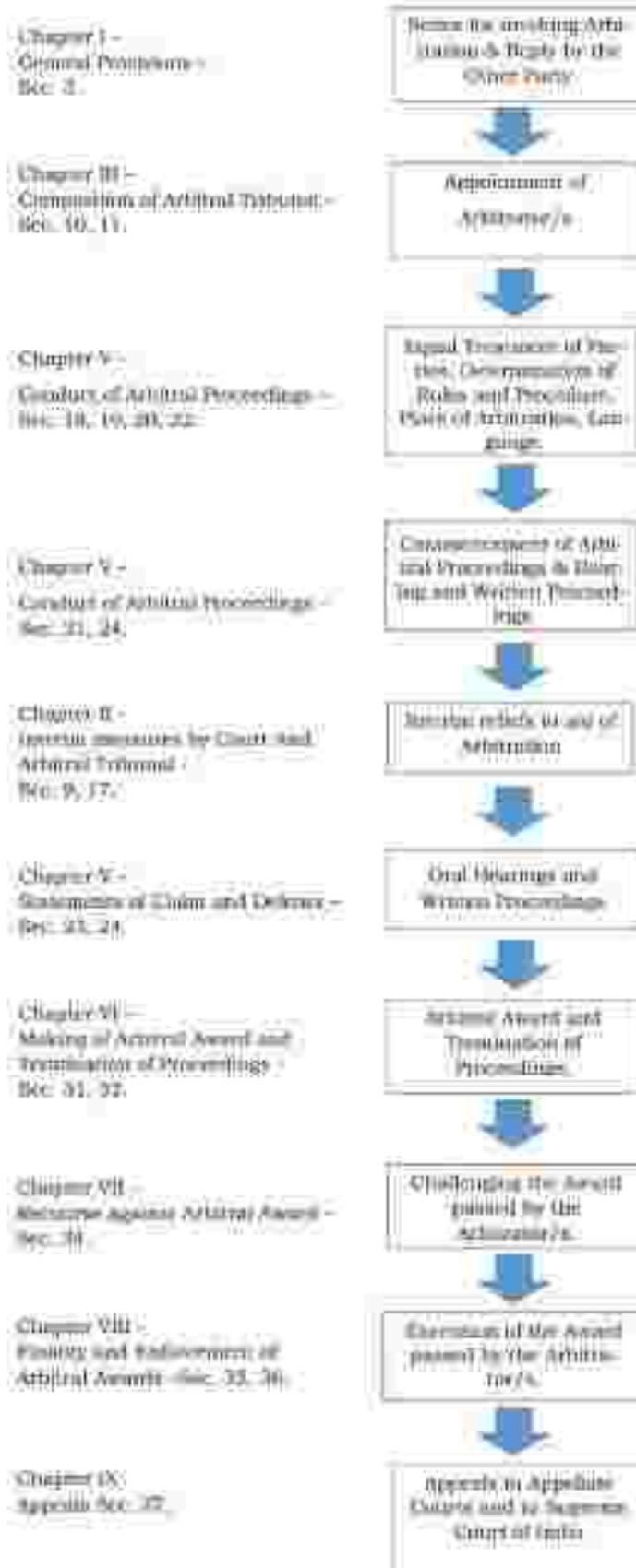
Process of Arbitration

Arbitration works as under: while entering into a contract, parties agree that in case of a conflict the matter would be sought to be resolved by an arbitrator. Often the name of the potential arbitrator, agreed upon by both the parties, is mentioned in the contract itself. In case a dispute arises, the first step is issuing of an arbitration notice by either of the parties. This is followed by response by the other party and subsequently appointment of an arbitrator, decision on rules and procedures, place of arbitration and language. Once the arbitration proceedings commence, there are formal hearings and written proceedings. The arbitrator, if the matter so requires, issues interim reliefs followed by a final award which is binding on both parties. The tricky part arises if either of the parties, unhappy with the award, challenges it before the court. This can be before the appellate court or the Supreme Court depending upon the matter.

³ <http://www.cfo-india.in/article/2015/10/07/case-arbitration>

Stages of Arbitration Proceedings

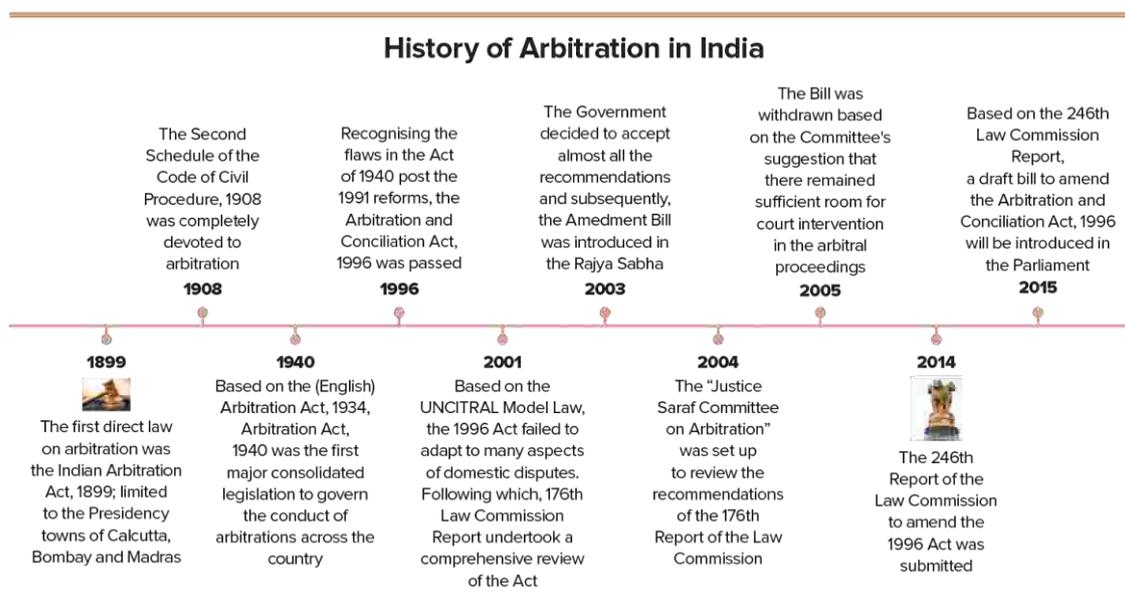
Arbitration and Arbitration Agreements (Sec 2 (a), 8-9Sec 7)



Tracing the History of Arbitration in India

India has had a long tradition of arbitration. The settlement of differences by tribunals chosen by the parties themselves was well known in ancient India. There were in fact, different grades of arbitrators with provisions for appeals in certain cases from the award of a lower grade of arbitrators to arbitrators of the higher grade.

Ancient texts of Yajnavalka and Narada refer to three types of popular courts (Puga, Sreni, Kula). Besides at the village level, Panchayats have also been a prevalent form of alternate dispute resolution.



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In the British era, the Bengal Regulation of 1772, 1780, 1781 and the Cornwallis Regulation of 1787 recognised and encouraged arbitration. Thereafter, the Bengal Regulation of 1793, the Madras Regulation of 1816 and the Bombay Regulation of 1827 provided for arbitration. It was finally in 1859 that the Civil Code of the courts was codified with provisions for arbitration. This was followed by Codes for Civil Procedure of 1877 and 1882. However, there was no notable change in law relating to arbitration in these amendments. Next came the Indian Arbitration Act of 1899. This did not apply to disputes which were subject matters of suits. It dealt with arbitration by agreement without the intervention of the court and that too only in Presidency towns. Further, it did not permit arbitration in disputes which were being adjudicated through a suit. The Civil Procedure Code was later amended in 1908 removed the limit of arbitration to only Presidency Towns. In the mid-1920s, the Civil Justice Committee, appointed to report on the machinery of 'civil justice in the country', also made suggestions for modification of arbitration laws. However, owing to anticipation of taking cues from the British Arbitration Laws which was expected, it was finally in 1938 that the Government of India

⁴ <http://www.cfo-india.in/article/2015/10/07/case-arbitration>

appointed an officer to revise the Arbitration Law. As a result the first Arbitration Act of the country was enacted in 1940.

The 1940 Act however, did not deal with enforcement of foreign awards. In fact a separate law, Foreign Awards (Recognition and Enforcement) Act, 1961 applied to the enforcement of awards under the Geneva Convention, 1927 and New York Conventions to which India was a signatory. Over time, the working of this Act was found to be unsatisfactory due to too much court intervention. In 1977, the functioning of the 1940 Act was questioned and examined by the Law Commission of India on grounds of delay and hardship caused due to clogs that affect smooth arbitral proceedings. The Commission recommended amendment of certain provisions of the Act rather than reworking the entire framework. Consequently, the Arbitration and Conciliation Act, 1996, based on the 1985 United Nations International Commission on International Trade Law (UNCITRAL) model law and rules, was enacted.

However, the working of the 1996 Act also led to various practical problems. Various Committee reports like the 176th report of the Law Commission (2001), Justice B.P. Saraf Committee (2004), the report of the Departmental Related Standing Committee On Personnel, Public Grievances, Law And Justice (2005) and the 246th report of the Law Commission (2014) highlighted these challenges. Ultimately, in December last year, the Arbitration and Conciliation (Amendment) Act, 2015 brought in crucial changes to the 1996 statute to overcome the shortcomings.

Key Highlights of Arbitration and Conciliation (Amendment) Act 2015

The Arbitration and Conciliation (Amendment) Act 2015 brought about certain noteworthy modifications which would be critical in supporting international arbitration in the country. One of these is the provision permitting arbitral institutions to create their own rules consistent with the Act to ensure that arbitrations are swift and effective. Coupled with this is the express inclusion of “communication through electronic means” for formulating the arbitration agreement⁵ and a model fee schedule to curb exorbitant fee of tribunals and arbitrators (however for international commercial arbitration and institutional arbitration, the fee limit is not applicable)⁶. One of the most widely debated amendments is the fixing of a one year time limit for resolving arbitral matters⁷. This timeline may be extended by a period of six months with the consent of the parties. Interestingly, timely disposal within six months is incentivised by increasing the fee of the arbitral tribunal and delay is penalised by up to 5% per month for each month of delay. The amendment also provides for ‘fast track proceedings’ under which parties can consent for resolving the dispute within six months with only written pleadings and without any oral hearing or technical formalities⁸. Further, an arbitrator has to be appointed within six months and a challenge to an award has to be within one year. The costs for the proceedings are to be

⁵ Section 7(4)(b) *ibid*

⁶ See Fourth Schedule *ibid*

⁷ See section 29A *ibid*

⁸ See section 29B *ibid*

determined on the basis of the parties conduct and other facets⁹. This would play an important role in dis-incentivising dilatory tactics. The tribunal has been now empowered to impose a higher rate of post award interest and to hold day to day hearings as far as possible¹⁰. The arbitrator can confer high costs in case a party seeks unreasonable adjournments. With respect to the involvement of courts, the amendment provides that an arbitration tribunal can be constituted within 90 days of interim protection of the court and has limited the powers of the court once the tribunal has been constituted¹¹. Even the tribunal has been given powers similar to those of the court in granting interim protection¹². So far as regulating the arbitrator is concerned, the amendments has built inclusions to ensure that the arbitrator has sufficient time for arbitrations that they take up¹³. Another significant amendment is inclusion of neutrality in promoting proceedings. This has been done through prescribing International Bar Association guidelines (Under fifth and seventh schedule) on conflict of interest as a schedule to the Act. Under this employees of a party to the case cannot be appointed as an arbitrator.

Making India the Global Arbitration Hub

With growing international commercial trade and agreements, international arbitration is growing manifold. One key reason for this is that parties from different jurisdictions and countries are reluctant to subject themselves to jurisdiction of other countries. To develop India as a global hub for international arbitration it is important that we open ourselves to the outside world and incorporate best practices for creating world class Institutional and legal procedure. Recently, NITI Aayog, along with other supporting institutions, organised a three day Global Conference on “National Initiative towards Strengthening Arbitration and Enforcement in India”. The following section on ways to making Indian the Global Arbitration hub draws largely upon the takeaways from this conference.

In the backdrop of evolution of arbitration along with the present legislative and institutional framework in the country, there are three fronts on which intervention is needed: *first*, streamlining the governance framework for arbitration. Under governance, restructuring would be needed on legislative, executive and judicial fronts. Once the governance related aspects are resolved, the next step would be to create a suitable positive infrastructure to promote arbitration. This would include both physical infrastructure as well as human capital. Having resolved the above, the last step would be promoting both domestic arbitration and making India as preferred international Arbitration venue. Within each of these, measures are needed on several individual fronts. These are discussed in the following sections.

I. RESTRUCTURING ARBITRAL INSTITUTIONS:

⁹ See section 31A ibid

¹⁰ See section 24(1) ibid

¹¹ See section 9(3) ibid

¹² See section 17 ibid

¹³ See Section 12(1)(b), Fourth Schedule and Sixth Schedule ibid

The restructuring of arbitral institutions can be broken down into several steps. Though these are listed step wise, the intent is not to say that one has to precede two.

Step I: Institutional Setup

Setting up of arbitration institutions with international standard with hearing centres on widened jurisdiction of India is one of the foremost challenges. The decision to be made is whether arbitration across the nation has to be governed through a single centre or should there be multiple centres across cities. For instance, China has 230 arbitral institutions while other countries such as Singapore have only one institution. In case having centres across the country are preferred, then choice of cities and the criteria for their selection becomes critical. During the course of above discussed conference, the unanimous suggestion was India needs to have one central arbitral institution with regional offices in key commercial cities such as Mumbai, Delhi, Bangalore, Hyderabad etc.

Further another aspect which needs deliberation is whether the centres should be government funded or be private. The Singapore International Arbitration Centre (SIAC) was set up as a not for profit non-governmental organisation in 1991. Though it was funded by the Singapore government at its inception, SIAC is now entirely financially self-sufficient. The Hong Kong International Arbitration Centre (HKIAC), on the other hand was established in 1985 by a group of leading businesspeople and professionals with funding support from the Hong Kong Government. It now operates as a company limited by guarantee and a non-profit organisation. International Chamber of Commerce (ICC) based in Paris was founded in 1919 and is operating as a non-profit Chamber and the London Court of International Arbitration (LCIA) was set up in 1883. Like all other institutes it is also a private, not-for-profit company not linked to, or associated with, the government of any jurisdiction. In India a number of arbitral institutions are operation. Foremost amongst there is the International Centre for Alternative Dispute Resolution (ICADR) which was founded as a society in 1995. It is an autonomous organization working under the aegis of the Ministry of Law & Justice, Govt. of India. ICADR has its head office in Delhi and two regional offices in Hyderabad and Bangalore. In Southern India, the Nani Palkhiwala Arbitration Centre in Chennai is a private institution incorporated as a Company. Another institution is the Indian Council for Arbitration (ICA) which was set up in 1965 at the national level under the initiatives of the Govt. of India and apex business organizations like FICCI. Recently, the Government of Maharashtra and the domestic and international business and legal communities have set up a non profit centre called the Mumbai Centre for International Arbitration (MCIA). International Institutions, SIAC, LCIA, ICC and KLRCA also have set ups in India. SIAC has a liaison office in Mumbai and ICC in Delhi. LCIA did start a facility in India but recently its closure was announced. There are other micro level institutions as well functioning to promote arbitration. However there is no single arbitral seat or institution in the country which is a centre with global repute.

Step II: Upgrading Institutional Infrastructure

Establishing a stable and vibrant eco-system for the arbitral institution is the next significant consideration. The institutions in themselves should be credible, independent, efficient and transparent which is a challenge in India looking at its diversity. Further, the leadership of the institution should be vibrant and should be supported by well-trained support staff for qualitative arbitration and library apart from physical and technological infrastructure. Effective use of Technology such as e-filing, creating database of cases, big data analytics, Online Dispute Resolution, video conferencing needs to be scaled up and be put to extensive use in the process of arbitration. One example being video conferencing as no adjournment would be required, cases can be registered on line, voluminous papers can be instantly transmitted, and testimony of experts can be recorded through video conferencing.

Having strong and credible arbitral institution is essential since institutes serve as centres of learning for establishing a culture think-tank for discussion. This would be useful for students, professionals and perhaps even for the judiciary to discuss and deliberate on the subject through seminars, journals and case-law. This in turn would help in developing journals on the subject, on creation of a bar, evolution of best practices and honing of rules on the subject –all of which would contribute to the ‘soft law’.

Step II: Scaling Human Capital

Creation of physical infrastructure in itself would be insufficient without a pool of professional arbitrators who are able, conflict free and above all, non-partisan. The arbitrators should be competent, technically sound and specialized in their field. Therefore arbitrators who serve on a tribunal, in effect as a party’s counsel should be avoided and their partial views should be ignored.

As on date, Indians fare extremely poorly in appointment as international arbitrators. As per LCIA data for 2015, out of 449 appointment of arbitrators last year, there were no Indians. Similarly, even though most Indian arbitrations are seated in Singapore, SIAC report for 2015 records that out of 126 arbitrator appointments, only 3% were Indians. This is a clear case in point showing that Indians are excluded from the system of international arbitration

In order to develop a pool of arbitrators focus on five aspects would be crucial: *one*, training of the arbitrators especially for the ones not having any judicial background so that the awards passed by them can withstand judicial scrutiny; *two*, developing a system of blacklisting of arbitrators who try to overstretch the process and delve upon those issues on which they do not have expertise, *three* setting up of dedicated arbitral bar, *four* setting up of designated and specialized Arbitral Tribunals in the same manner as commercial benches and courts, at High Courts and District level and *five* having designated institutions in place to appoint arbitrators as is done in Hong Kong and U.S.A. For instance, in California there is an arrangement where every Court has a panel of Arbitrators attached with it. India can follow the above model or alternatively judicial academies in India can maintain a panel of trained arbitrators that can work at grass root level with the Courts.

Experts of appropriate fields may be made Member of the Arbitral Tribunal besides the Judicial Member. In the context of Singapore the competitive environment that has made the arbitral institution perform even better. There are mostly young lawyers and case managers from different countries who are part of SIAC exposing them to cross cultural inputs and experiences and it is they who are the front line soldiers.

Step III: Institutionalising Arbitration

Presently in the Indian context, arbitrations are not conducted in a structured matter. The Law Commission of India has in its 246th Report has noted that *ad hoc* arbitrations usually devolve into the format of a court hearing with the result that adjournments are granted regularly and lawyers too prefer to appear in court rather than completing the arbitration proceeding. What is therefore recommends is that India needs to promote institutional arbitration where a specialized institution with a permanent character aids and administers the arbitral process. Such institutions may also provide qualified arbitrators empaneled with the institution, lay down the fee payable and the mode of submission of documents. This would entail a perception of autonomy (i.e. freedom from government control) with the end users with sources of income to sustain their autonomy. In all the set ups it is not that the arbitral institution is totally immune from government control and there are government institutions and Boards to be dealt with. However, the institution should enjoy some immunities and privileges. The operational funding is to be provided by an agency at the outset and thereafter, the institution should operate so as to self-generate the development funding.

Another crucial aspect on institutionalizing arbitration is whether one institution or more than one institutions are to be established and with what objective i.e. undertaking domestic arbitration or international arbitration. Looking at the size of the country that is India domestic arbitration in itself would be huge. Apart from this, international arbitration that is going outside India should also be brought to be held in India. For instance, in Hong Kong the arbitral mechanism is installed by the business houses whereas in Singapore it is a government initiative and in Malaysia it is an international body.

Step IV: Setting up a Dedicated Bar

Institutionalising arbitration would also have to be supported by a dedicated bar comprising of professionals competent to conduct arbitration in accordance with the rules of the institutions and provide competent, viable services. Rules of the dedicated arbitration bar would help it adhere to timelines and not mirror court proceedings. The body of qualified arbitrators would also help strengthen the arbitral institutions and help institutionalise arbitration. One example of such a bar is the International Bar Association Arbitration Committee (the IBA Committee) which focuses on laws, practice and procedures relating to arbitration of transnational disputes. In the Indian context, the recently enacted Insolvency and Bankruptcy Code, 2016 also provides for “Insolvency Professionals” and “Insolvency Professional Agencies” who are enrolled with the Board. Taking cur from the IBA Committee and the ‘insolvency professional’ what is perhaps a must for strengthening arbitration in India is promoting a similar cadre of ‘arbitrators’.

This would help in not only having specialised professionals but would also ensure that arbitration does not take a back seat as compared to litigation in court.

Step V: Awareness Generation

Strengthening of arbitration in the country would have to be coupled with promoting arbitration as a mode for dispute resolution. This would include preventing tendency of private players to rush to the courts without resorting to the relevant provisions of arbitration in the contract whereby the commencement/continuation of the work was stalled. This can be done through creating awareness as to better understanding of commercial matters and an eco-system wherein the awards were passed by neutral umpires to ensure that it is a win-win situation for all the stake holders leaving a limited scope of the award being challenged under Section 34 of the Arbitration Act, 1996.

II. ADDRESSING POLICY ISSUES

In addition to restructuring the arbitration setup as discussed above, there are a few issues that need to be addressed at the policy level.

Foremost amongst these is ensuring disposal of proceedings in time and ensuring that the project under dispute should not stall as a consequence of the difference. It has often been observed that work under contract gets stalled due to disputes particularly in government infrastructure projects. Two main reasons for this are lack of decision making strength with officials in resolving the arbitration proceedings and apprehension that they may be hauled up or may face the vigilance proceedings. In such cases not only the disputes needed to be nipped in bud considering the money value over time but also the proceedings should not be allowed to linger on any account. One suggested way of fast tracking of disputes in case of government contracts is having an independent settlement committee consisting of a retired High Court Judge, Secretary of the concerned Ministry and another member which could be approached by the stake holders at any stage of proceedings for resolution of disputes.

The *second* issue is converging between the legal regimes for international arbitration and domestic arbitration. The domestic regime for arbitration should follow the principles of the international regime and equal standards should be applied to both the regimes.

The *third* is the scope of challenging the arbitration award before courts. Under Section 34 of the Indian Arbitration and Conciliation Act, 1996 (the Act) an award would be considered to be in conflict with the public policy in India only of “(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81 or (ii) it is in contravention with the fundamental policy of Indian law or (iii) it is in conflict with the most basic notions of morality or justice, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute. Challenging arbitral awards on grounds of ‘public policy’ has

become an Achilles heel for arbitration in India: a means by which losing parties can attack arbitral awards, on much broader grounds than are permitted in other countries.

This has been a source of conflicting opinion between the Law Commission and interpretation by the Supreme Court on what constitutes public policy. When considering the enforcement of foreign awards, the courts have adopted a narrower approach¹⁴ and as far as domestic awards are concerned, the courts have upheld a broad view of public policy. In 2003, the Supreme Court in *ONGC v Saw Pipes*¹⁵ upheld reviewing the merits of an arbitral awards on grounds that a tribunal had made an error in applying Indian law. In 2014, this was confirmed two other Supreme Court decisions. In *ONGC –v- Western Geco*¹⁶, the Supreme Court upheld the above approach and directed that a court could assess whether a tribunal: (i) has applied a "judicial approach" i.e. has not acted in an arbitrary manner; (ii) has acted in accordance with the principles of natural justice, including applying its mind to the relevant facts; and (iii) has avoided reaching a decision which is so perverse or irrational that no reasonable person would have arrived at it. Subsequently, in *Associate Builders -v- DDA*¹⁷, the Supreme Court stated that section 34 does not normally permit the courts to review findings of fact made by arbitrators. It therefore restored the arbitral award. However, the Supreme Court only clarified, and did not restrict, the law concerning public policy. In particular, the Supreme Court said an award can be set aside if it is contrary to the fundamental policy of Indian law, contrary to the interest of India, contrary to justice and/or morality or patently illegal. The decisions of the Supreme Court were reconsidered by the Law Commission in its 246th Report and it recommended restricting of the definition of public policy by Courts. It held that an award can be set aside on public policy grounds only if it is opposed to the “fundamental policy of Indian law” or it is in conflict with “most basic notions of morality or justice”. Accordingly, amendments made in 2015 to Section 34 have added explanations as to what would be public policy. In the present context, the interpretation of the recent amendments by Court is critical for ensuring that challenges to arbitral awards are not admitted by Court on grounds of being against public policy. Until and unless there is a prima facie case justifying the need for an elaborate argument on the objection petition, there should be a provision of their dismissal at the inception stage. A circular has been issued by the Government of India whereby 75% of the amount was required to be deposited as a guarantee for the purpose of enforcement of award while the same was under challenge before the courts of law under Section 34 of the Arbitration Act. Further, as a matter of policy, Government of India is not challenging arbitral awards, passed on sound grounds unless a legal advice to the contrary is given. It is claimed that objections are being filed only in around 20% of the arbitral awards while rest 80% are finally disposed at the arbitration stage alone.

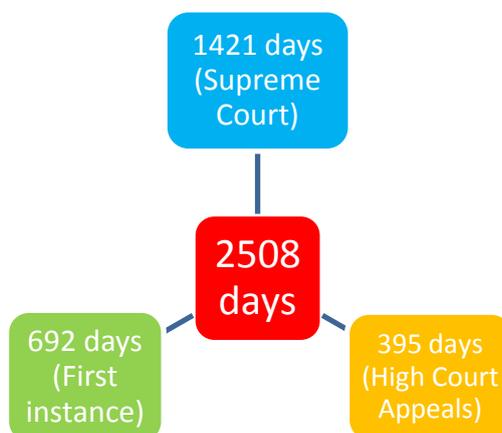
¹⁴ Shri Lal Mahal Ltd -v- Progeto Grano Spa (Civil Appeal No. 5085 of 2013)

¹⁵ ONGC Ltd. –v- Saw Pipes Ltd. 2003 (5) SCC 705

¹⁶ ONGC Ltd. –v- Western Geco International Ltd. 2014 (9) SCC 263

¹⁷ Associate Builders –v- Delhi Development Authority 2014 (4) ARBLR 307

However, what remains a cause of concern is the time taken to resolve challenges filed under section 34 of the 1996 Act. A study has estimated that it takes 24 months to resolve challenges under section 34 at the in lower courts, 12 months in High Courts and 48 months in Supreme Court. In all it takes around 2508 days on an average to decide applications filed under Section 34.



III. LEGISLATIVE CONCERNS

Updated arbitral legislation with certainty and flexibility are key aspects that help parties in deciding upon the seat in an international arbitration. While the recent 2015 amendments have made the requisite, on the legislative front, Indian is in a position to be a preferred seat for international arbitration. However, there is one key aspect of settling arbitration proceedings within twelve months under Section 29-A of the Arbitration Act which has been subject to debate and varying viewpoints particularly in complex international cases where the arbitral proceedings become lengthy. It has been argued that though routine matters can be completed within the prescribed time frame, the question of extension may be considered in cases of international arbitration. On the other hand it has also been argued that the introduction of this provision has brought in accountability in arbitrators which in turn brings discipline and accountability in lawyers as well as litigants.

Though both arguments for and against making delivery of arbitral awards time bound are valid, it is important that that efforts to abide by this amendment are undertaken and only after passage of a reasonable period of time if it is felt that 12 months is too short a period that legislative changes to this may be sought. In the meanwhile institutions should take over the management of time limit and the case management of the arbitration proceedings and should evolve techniques to control the arbitration proceedings which would make the entire system more transparent. While deciding the time limit, due regard should be given to the number of witnesses, number and complexity of issues involved, volume of record, the stakes involved and the number of arbitrators. Further, guidelines can be framed for providing time slabs for deciding the matters, keeping in view the considerations given above. Perhaps, the consent for extension of time by further six months as provided in Section 29 B should also be taken from the parties at the start of the arbitration proceedings.

V. NEED FOR JUDICIAL SUPPORT

In addition to the local legislation of a country which guides the arbitration process therein, the courts of that jurisdiction play a pivotal role in exercising supervisory jurisdiction over arbitration and in marking an arbitral institution into a “good seat”. Though Arbitration involves parties’ autonomy, but judicial co-operation is vital to give effect to the law of arbitration. Therefore, an effort is to be made to identify those steps which would make good balance between judiciary and arbitration, at pre, during and post arbitral proceedings. This would entail court intervention in upholding/restraining arbitral awards, providing timely court assistance when needed, recognising party autonomy in the arbitral process.

In the Indian context, interference by courts was identified as one of the major reasons for delay in arbitrations. An award in *White Industries Vs. Republic of India* in 2011, is a case in point. In this matter, an Australian company successfully claimed compensation, equivalent to the amount of award, from the Indian government on account of judicial delay. There are two issues that emerge from the above award: one is interference by courts and two delay in arbitration. With respect to interference by courts, it is well debated and agreed that judiciary should minimize its intervention into the arbitration, as is being done in various other jurisdictions. In China for instance, the Supreme Court alone can interfere in arbitration matters. This helps in lowering and limiting the impediments in arbitral awards.

Another issue that has been recognised as a cause of concern is lack of consistency in decisions by Indian judiciary on arbitration and decisions taken by arbitral authorities. Judicial supervision lacks uniformity in so far as owing to the federal structure of States and Central relations in India and each State having its own Judiciary, the perspective of individual Courts to the objections filed under Section 34 of Arbitration and Conciliation Act vary as per local conditions. This calls for action on the part of judicial academies which should be asked to impart training to judges on how to deal with cases challenging and seeking setting aside of arbitral award and other related issues, besides ensuring that frequent transfer of judges holding such courts should be avoided.

Heavy reliance on retired judges as arbitrators has also been identified as being problematic. This affects the proceedings in two ways. One, it is believed that with retired judicial members as arbitrators, the case acquires a rather languid pace, with traditional hierarchy taking precedence in the matter. Coupled with this is the exorbitant fee charge for arbitration by retired judges which is seen to have a discouraging impact on the parties. It has been suggested that of fixing a lump sum fees for the Arbitrators instead of provision of per hearing remuneration would perhaps be a solution to this issue. Presently, the law is silent on this issue as to who can be appointed arbitrator, generally arbitrators are being appointed from judicial background. There is a need to expand the base of arbitration not only from judiciary but members of Bar should also be got involved in this field.

Another aspect of concern is the low support of civil courts in referring matters for arbitration. Section 89 of the Civil Procedure Code (CPC) provides: “Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for – arbitration, conciliation, judicial settlement including settlement through Lok Adalat; or mediation”. There is a need to sensitise judges to refer civil disputes for arbitration on one hand and upholding the arbitral awards/their implementation

Assistance of Court is needed during arbitration proceedings particularly for enforcement of awards within a time frame and for initiation of contempt proceedings in case of non-compliance of interim arbitration orders. This would include that arbitral orders under section 17(2) may be treated as court orders and recourse may be taken to the provisions Section 25 (5) of the Act along with Order 39 Rule 2-A of CPC.

Clearly, there is a need to sensitize the judges and the consumers of justice that the parties should be bound by arbitration and there is need to enforce trust in arbitrators. The fact that the petition is termed as a “suit” in various states in the country, necessarily implies that the proceedings are continued as a suit thus resulting in delay. The court should interfere only in rare cases and the concept of public policy under section 34 of the Act should not be interpreted too broadly. When it comes to enforcing an arbitration agreement, courts must hold parties to their agreement to resolve issues through the agreed mode of dispute resolution –arbitration. For instance, in U.K., there are only two narrow grounds for challenging the arbitration award: (a) whether arbitration tribunal lacked jurisdiction and the very constitution of arbitration tribunal was not valid and (b) injustice caused by serious irregularity or a situation where arbitrator has gone so wrong. Clearly, though the ground of ‘public policy’ is also recognized in UK, but courts there have been given very restricted interpretation to it.

The judiciary and the arbitration proceedings should be supportive roles to each other- when the arbitrator decides the merits of a case, the court should support the decision and its implementation. Broadly, the courts should support arbitration in the following ways: Where it is mandatory to refer the matter to the arbitration; in case of interim measures, which assume importance in absence of any provision for appointment of emergency arbitrators and the role of the court becomes all the more important; in case of application under Section 11 reference may be made to designated institutions rather than individual arbitrators; court may ensure effective arbitration by constituting special/designated benches.

VI. MAKING INDIA THE PREFERRED INTERNATIONAL ARBITRATION SEAT

India has diverse and useful human resources in law as well as other disciplines which can help support and sustain the domestic arbitration ecosystem in India. Legal

reforms are certainly a step in the right direction to strengthen the arbitration. However it also needs further support on few other fronts. First amongst these is the need to decentralise dispute resolution mechanism as a private market based solution. Parties can resolve privately through constituted tribunals without reaching out to courts. This would need a vibrant arbitration bar as well respected pool of the seasoned arbitrators who build enough confidence amongst the ‘potentially litigant’ community that they seek resolution through arbitration rather than judiciary. It would also need an administrative mechanism to ensure that arbitration matters would have to handle separately and efficiently. For this, the government would need to create an enabling framework for institutional arbitration including arbitration events, training and conferences. In addition there is a call for demonstrating to the world that Indian arbitral institutions are homogenised with the world and can deliver an effective arbitration work at lower cost. Major Indian cities have the necessary Infrastructures like communication with other facilities to help international arbitrators. Taking a cue from the exponential growth of SIAC, what is needed to make India the global hub of international arbitration is ensuring that arbitration in India be less time consuming and more cost effective as compared to arbitration elsewhere across the globe. It also needs a commitment by institutions to accord primacy to the agreement to arbitrate. This includes primacy not only to conduct arbitration but also to implement the arbitral award without interference, except on public interest considerations.

India is on the track of establishing confidence in its legal system which is the fundamental condition for any country to become an international arbitration venue. Needless to say that regular amendment in the Arbitration laws to keep abreast with economic changes would be needed. However, given that India has already done the needful in this regard recently, the present need is reforms in the implementation of the legislative changes by the judiciary along with building of institutional capacity in the country. Only then would we be able to “resolve in India”.

**CASE MANAGEMENT THROUGH COURT ANNEXED MEDIATION
AND OTHER DEVELOPMENTS**

**Madan B. Lokur
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The foremost reason for India to introduce case management in its courts is without doubt the ever increasing number of cases pending at all levels in the judiciary. The last quarter of 2015 closed with 2.7 million cases pending in the district courts, 38,75,014 cases pending in the High Courts (these are constitutional courts) and 34,502 cases in the Supreme Court (59,272 if connected matters are included).¹ With an increase in institution of cases and a significant number of vacant judicial posts in all courts across the country,² case management is indispensable.

Experience in dealing with a vast population and limited resources has resulted in the realization that real access to justice can be achieved only if adversarial mindsets are relaxed and the justice delivery system is supplemented. Therefore, coupled with case management, the necessity of introducing effective alternative dispute resolution mechanisms is important.

However, the goal of case management and ADR systems should not only be to expedite the delivery of justice - delays in resolution of disputes have an unequal impact on the parties - but also to improve the efficiency in decision making in the courts. Therefore, case management and ADR systems must be

* Research Assistance by Ms. Rupam Sharma.

¹ <http://supremecourtfindia.nic.in/courtnews/Supreme%20Court%20News%20Oct-Dec%202016.pdf>. Last accessed on 08.07.2016, 1:56PM.

² 4501 in the district judiciary, 420 in the High Courts as on 31.12.2015 and 2 in the Supreme Court as on 08.07.2016. Ibid.

viewed in combination as an effort to provide real access to justice and not merely as a tool for disposal of cases.

Challenges and attempts to overcome them

Apart from an overload of cases pending in courts, an absence of a case management system and a generally ineffective ADR system, the courts in India are witness to a disorganized manner of progression of cases and the fate of hearings depend heavily on lawyers rather than on any other participant in the justice delivery process. Additionally, the overload of cases makes it virtually impossible for the judges and the administrative court staff to track cases, schedule meaningful dates of hearings and calendaring of events. These challenges need to be looked at from a broader and pan-India perspective and long term solutions ought to be found and not *ad hoc* or tentative solutions.

In his study on the challenges faced by the Indian judiciary, Justice M. Jagannadha Rao, former judge of the Supreme Court of India identified various practical aspects of court functioning in India in the context of the evident mismanagement which could easily be rectified to save time, costs and efforts. For example, he mentioned the system of calling of cases (not ready for final disposal) merely listed for determining procedural adherences like service of notice or summons, identification and removal of procedural defects, filing of affidavits, completion of pleadings etc. He noted that judges themselves monitor each such stage of a case and thereby lose significant working hours. Another aspect pointed out by Justice Rao was the failure of the courts to impose costs. Often, successful

parties are not awarded costs and there is no predictability regarding factors which might result in grant of costs by the judge.³

The first step: Pre-dating the views of Justice Rao, the Parliament in India amended the Civil Procedure Code (or the CPC) in 1999 and 2002. The amendments were the first effort to bring some semblance of organization in procedural laws and introduce case management practices in civil trials by reducing causes of delays and providing statutory time frames for various procedural stages and modifying the requirements of certain others. For the purposes of the present discussion, the insertion of section 89 by The Code of Civil Procedure (Amendment) Act 1999 and its subsequent enforcement from 01.07.2002⁴ is a significant development as this provision mandates efforts at settlement by the courts. The section reads as follows:

89. Settlement of disputes outside the Court- (1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the court may reformulate the terms of a possible settlement and refer the same for –

a) arbitration;

b) conciliation;

c) judicial settlement including settlement through Lok Adalat; or

³ Justice M. Jagannadha Rao, Case Management And Its Advantages, http://lawcommissionofindia.nic.in/adr_conf/Mayo%20Rao%20case%20mngt%203.pdf Last accessed on 10.07.2016, 9:16 AM.

⁴ See the Press Release of 01.07.2002 by the Ministry of Law, Justice and Company Affairs at <http://pib.nic.in/archieve/lreng/lyr2002/rjul2002/01072002/r010720022.html> Last accessed on 10.07.2016, 9:31 AM.

d) mediation

(2) Where a dispute has been referred-

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authorities Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authorities Act, 1987 shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

The Supreme Court upheld the constitutional validity of the amendments to the CPC and observed, with respect to section 89, that the obvious reason for such an introduction in the statute books is the realization that all cases filed in the court need not necessarily result in a trial in view of the overburdened system and the growing pendency.⁵ Not content with this, the Supreme Court thought it necessary to inquire into the viability of the amendments and directed the establishment of a Committee with a specific mandate to formulate a case management framework

⁵ *Salem Advocate Bar Association versus Union of India*, (2003) 1 SCC 49.

which should be adopted (with or without modification) by the High Courts.⁶ Taking a step back, the fact that the constitutionality of the amendments to the CPC, including Section 89 thereof, was challenged by a Bar association is an indication of the resistance to change within the legal fraternity.

Pursuant to the direction of the Supreme Court, a Committee headed by Justice Rao was constituted and which gave its Report comprising of three parts. Reports 2 and 3 are the relevant parts for the present discussion. [Report 1 dealt with specific amendments to the CPC]. Report 2 comprised of draft rules for alternative dispute resolution and Report 3 comprised of draft rules on case flow management. This Report was filed by the Committee before the Supreme Court which considered and accepted it in *Salem Advocate Bar Association, Tamil Nadu versus Union of India*⁷. The Supreme Court further directed that a copy of the judgment be circulated to all High Courts, the Central and State Governments/Union Territories expressing a hope of expeditious follow up action.

Civil Procedure Mediation Rules, 2003 contained in Report 2

The Rules provide for the appointment of a mediator. They provide, *inter alia*, that parties can appoint their mediator(s) on the condition that the person does not suffer from any of the disqualifications stipulated in these rules. The court can appoint a mediator if the parties fail to arrive at a unanimous decision.⁸ The High Courts as well as the courts of Principal District and Sessions Judge should maintain a panel of mediators.⁹ Persons like retired judges of the Supreme Court, High Courts, District and Sessions Courts, legal practitioners with at least 15 years of standing at the Bar, experts or other professionals with 15 years of standing,

⁶ Ibid.

⁷ *Salem Advocate Bar Association, Tamil Nadu versus Union of India*, (2005) 6 SCC 344 [**Salem II**].

⁸ Rule 2, Civil Procedure Mediation Rules laid down in the Committee Report (as reproduced in Salem II)

⁹ Rule 3, *ibid*.

institutions that are themselves experts in mediation were eligible for empanelment.¹⁰ Persons declared insolvent or of unsound mind, those with pending criminal charges or convictions or disciplinary proceedings, interested parties, a legal practitioner who represented or is representing the parties in any proceedings is disqualified for the purposes of empanelment.¹¹ The mediator is under an obligation to inform the parties in writing of any information which might create a doubt to the mediator's neutrality.¹² The parties may agree on the procedure to be followed in mediation and the model rules provide a procedure in case the parties are unable to agree upon the same.¹³ The mediators are not bound by the provisions of the CPC or the Evidence Act 1872.¹⁴ The court can take action in the form of imposition of costs against a party who does not appear in the mediation proceedings without sufficient cause.¹⁵ The role of the mediator is envisaged as merely facilitative in nature and it is clarified that a settlement cannot be imposed upon the parties.¹⁶ Sixty days is the time stipulated for completion of mediation which can be extended by the court for a further maximum period of thirty days *suo moto* or upon request by the mediator or any of the parties.¹⁷ Complete confidentiality and separation of the court and mediation proceedings is envisaged.¹⁸

Model Case Flow Management Rules contained in Report 3

The first substantive effort towards introducing case flow management in courts in India was in the form of the draft rules formulated by the Committee on

¹⁰ Rule 4, *ibid.*

¹¹ Rule 5, *ibid.*

¹² Rule 8, *ibid.*

¹³ Rule 11, *ibid.*

¹⁴ Rule 12, *ibid.*

¹⁵ Rule 13, *Ibid.*

¹⁶ Rule 16, 17, *ibid.*

¹⁷ Rule 18, *ibid.*

¹⁸ Rules 20-23, *ibid.*

the directions of the Supreme Court in Salem (II). The draft rules were framed for both the district courts as well as the High Courts with further sub classifications. The general idea gathered from these rules is as follows:

Cases can be classified in tracks on the basis of the complexity of the dispute involved and fixing of time for disposal for each track which shall be supervised by the appointed judge(s). Stipulating a period of time for completion of each stage of the trial is also envisaged.¹⁹ The draft rules mention referral to mediation under section 89 of the CPC²⁰ and then proceed to prescribe rules of case flow management to be followed in the event of a failure of mediation.²¹ The imposition of costs should be liberal (both in terms of frequency and quantum; the latter should consider the actual costs resulting from the conduct of the party).²² The practice of calling of cases with the aim of merely ensuring attendance should be discontinued²³ and the prescribed limit on adjournments to three should be strictly adhered to.²⁴ Miscellaneous applications should not be allowed to delay the suit unless the court deems fit to grant time.²⁵ Officers can be made personally responsible in the event a public authority before the court is seen to be conducting itself unreasonably.²⁶ Generally speaking, Justice Rao linked mediation with case flow management in the draft rules submitted by him.

Implementation of section 89 of the CPC and Mediation

Mediation, arbitration and conciliation are not new concepts in the Indian legal system. Arbitration was always a part of an alternative dispute resolution

¹⁹ Rule 1, Model Case Flow Management Rules laid down in the Committee Report (original suit). (as reproduced in Salem II)

²⁰ Rule 5, *ibid.*

²¹ Rule 6, *ibid.*

²² Rule 8, *ibid.*

²³ Rule 3, *ibid.*

²⁴ Rule 10, *ibid.*

²⁵ Rule 11, *ibid.*

²⁶ Part VI, *ibid.* (trial courts and first appellate subordinate courts).

system²⁷ while mediation and conciliation were introduced through the Industrial Disputes Act, 1947 which mentions that conciliation officers are “charged with the duty of mediating in and promoting the settlement of industrial disputes”²⁸. However, serious efforts to introduce mediation as an alternative were made only in the mid-1990s when the then Chief Justice of India A.M. Ahmadi constituted a team to study expediting justice delivery in India. This led to a visit to the United States by an Indian team sponsored by the Institute for Study and Development of Legal Systems (ISDLS), a San Francisco based non-profit NGO. Eventually, Parliament accepted the need for mediation as a possible additional alternative to the conventional method of dispute resolution through the court system. As mentioned above, the CPC was amended and Section 89 introduced to include mediation as a dispute resolution mechanism.

There were several subsequent visits back and forth between India and the United States, with the ISDLS taking the lead in these meetings and discussions. Programmes were held to train lawyers in the nuances of conflict resolution and even judges from the Supreme Court of the United States such as Justices Sandra Day O’Connor and Stephen Breyer visited India to encourage mediation - but to no real effect.²⁹ It was evident that notwithstanding the efforts of individuals, Parliament and the Supreme Court, mediation did not seem to take off as an alternative dispute resolution mechanism. This was due to the absence of any institutional mechanism to carry it forward. It was also clear that these *ad hoc* efforts towards popularizing mediation would not be able to bear fruit without institutional support.³⁰

²⁷ Arbitration is provided for in Section 89 of the Code of Civil Procedure, 1908 as it originally stood.

²⁸ Industrial Disputes Act of 1947 section 4.

²⁹ <http://aryme.com/getdoc-2-4-30.php> Last accessed on 10.07.2016, 10:55 AM.

³⁰ For example, a lawyer Mr. Niranjana Bhatt established the Institute for Arbitration Mediation Legal Education and Development (AMLEAD) in Ahmedabad in Gujarat.

Acknowledging the ground reality that the provision introducing mediation to the justice delivery system was not being given meaningful effect to, the then Chief Justice of India R.C. Lahoti constituted the Mediation and Conciliation Project Committee (MCPC) in April 2005 with the intention of encouraging the amicable settlement of disputes through a court annexed mediation process.³¹ Under the initiative of the MCPC a pilot project was launched in Delhi's District Courts in August 2005 so that cases pending in the courts could be resolved through an institutional mechanism. In other words, the MCPC appreciated the qualitative difference between cases that could be resolved through a vastly popular Lok Adalat (or People's Court) process and cases that should be referred to court annexed mediation.

Mediation and Conciliation Project Committee

The purpose of launching such a pilot project at the grass-root level was to try and inculcate a 'settlement culture' among litigants and lawyers. This would not only benefit the litigants in terms of saving on litigation expenses and time spent in courts but would also benefit the justice delivery system by reducing appeals and the time taken in recording evidence as well as eliminating (to the extent possible) other procedures thereby expediting justice delivery. The project has been more than successful with the Delhi Mediation Centre clocking in over 160,000 referrals over the last decade, with a settlement rate nearly touching 70 per cent.³² Today the Delhi Mediation Centre has established court annexed mediation centres in six district court complexes located in different parts of the city,³³ with referrals pouring in for disputes on a variety of issues ranging from family matters to property disputes. The Delhi Mediation Centre is also receiving references of

³¹ The author has been a member of the Mediation and Conciliation Project Committee since its inception.

³² <http://www.delhimediationcentre.gov.in/statistical.htm> Last accessed on 10.07.2016, 11:02 AM.

³³ <http://www.delhimediationcentre.gov.in/location.htm> Last accessed on 10.07.2016, 11:07 AM.

compoundable offences of a minor nature thereby helping in reducing the burden on the magistrates. Although case management was also an intended consequence of court annexed mediation, it was not given much thought despite the Report of Justice Rao and its acceptance by the Supreme Court.

In addition to the Delhi Mediation Centre, mediation centres established from grants given by the Thirteenth Finance Commission in metropolitan cities in the States of Haryana, Jharkhand, Kerala, Maharashtra and Punjab have been faring rather well with lawyers and judges being given exclusive training in conflict resolution. Notwithstanding the liberal financial grants, there are space-and-resource constraints in the mediation centres, but considerable success has nevertheless been achieved. Unfortunately, no accurate assessment of the impact of the efforts to encourage mediation as an alternative dispute resolution system has been possible vis-à-vis case management but it is expected that sustained wide spread efforts will certainly help the courts to better manage their human resource, facilitate dispute resolution and popularize harmonious resolution that will change the deeply rooted adversarial mindset prevalent in the country and promote social harmony.

The MCPC is encouraging mediation as an alternative by employing a three pronged strategy. Firstly, it is sending its trained mediators and trainers to different parts of the country to spread awareness about the concept and technique of mediation and its advantages, namely, expeditious and affordable justice as well as imparting finality to a dispute. Secondly, it is training lawyers and judges to become mediators through a sustained training programme. After lawyers and judges are trained as mediators and are convinced of the benefits of mediation, they can instill confidence in the litigants to try out the alternative available to them. Finally, the MCPC is coaching and mentoring mediators by associating

recognized mediators with them through mediation sessions. By adopting this capacity-building and confidence-building technique, the mediators can improve their skills and become ‘better’ mediators. In the venture of encouraging mediation, the Government of India has made sufficient funds available to the States through the National Legal Services Authority (NALSA). Further, considerable amounts for promotion of mediation in the country have also been made available by the Thirteenth and the Fourteenth Finance Commissions.³⁴

The MCPC is not substituting the widespread Lok Adalat system with court annexed mediation (given the figures involved, it certainly cannot), but is supplementing it, particularly in respect of cases that require greater time and effort to resolve.

Another significant development encouraging mediation in the recent past has been the establishment of the Delhi Dispute Resolution Society (DDRS) in Delhi - an attempt by the Government of Delhi to resolve disputes without the disputing parties having to approach a court. The mission of the society is to ensure timely and responsive justice and also to provide the people of Delhi with easy access to justice.³⁵ The DDRS has slowly built up a citizen’s movement of community dispute resolution. It has established nine mediation centres and one mediation clinic in Delhi which are managed by the coordinators who are paid by the Delhi Government. Among the large variety of disputes dealt with by the mediation centres of the DDRS are petty disputes of a recurring nature that occur in a community, such as disputes between a landlord and a tenant, differences

³⁴ The Finance Commission is constituted by the President of India under Article 280 of the Constitution. It makes recommendations to the President, inter alia, as to the distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them and the allocation between the States of the respective shares of such proceeds.

³⁵ The Citizens Charter of the DDRS.

http://delhi.gov.in/wps/wcm/connect/doi_ddrs/DELHI+DISPUTES+RESOLUTION+SOCIETY/Home/Citizen+Charter Last accessed on 10.07.2016, 11:14 AM.

arising from parking of vehicles, noisy celebrations, neighbourhood nuisance etc. These mediation centres have resolved over 10,000 cases over the last few years.³⁶ Providing an avenue for such dispute resolution fosters, among other things, social equilibrium and harmony.

Apart from these success stories, it is evident that mediation as an efficacious alternative dispute resolution mechanism is slowly gaining ground since some mediators are gradually shifting away from court annexed mediation to private mediation. Though the number of such ‘professional’ mediators is very limited, there is a perceptible change in the mindset of some lawyers, apart from some disputants who are willing to try out an alternative.

Challenges and Solutions recognized in Regional Conferences on Mediation

Between 2015 and 2016, the MCPC organized five regional conferences on issues relating to court annexed mediation and encouraging it as a viable ADR system. These regional conferences were held between August 2015 and January 2016. All the High Courts in the country participated in the regional conferences. They were represented by those judges who are members of the Mediation Committee of the participating High Court, the Member Secretary of State Legal Services Authority, Coordinators of certain Mediation Centres, mediators and trainers were also among the participants. All the participating High Courts presented the progress made in encouraging mediation, the ongoing efforts to improve access to mediation as an ADR mechanism, the challenges faced by them and certain plausible measures which could prove to be significant in increasing the success rate of settlements through mediation.

³⁶ The figures made available to the author are that as on 31.03.2016. The DDRS mediation centres had received 36,889 references and 14,241 disputes had been settled.

The presentations made by the participating High Courts across the country reflect various common issues faced by them with respect to dispute resolution through mediation. The top three issues are briefly mentioned below.

1. Lack of Awareness: The one most basic reason for the slow acceptance of dispute resolution through mediation is simply that most litigants are not aware of the advantages and benefits of the process of mediation and what it entails or the possibility of resolving a dispute through a non-adversarial approach. Lack of awareness is more pronounced in the rural areas as most of the infrastructure related developments in mediation are concentrated in the urban areas. Moreover, there is a possibility that concerted efforts to promote other ADR mechanisms like Lok Adalats by the Legal Services Authority might be adversely impacting on the resort to mediation as an equally viable dispute resolution mechanism.

Solutions: It is important to ensure that the benefits of mediation are adequately publicized and its advantages promoted by the higher judiciary in the country. The Bar too needs to be sensitized to promote its participation in out of court settlement processes like mediation. Similarly, there is a need of frequent seminars and meets for referral judges to keep them sensitized regarding the need to increase referrals to mediation and to activate them to do so. Electronic and print media should be exploited to its fullest in spreading awareness regarding mediation. While the most popular campaigning methods are advertisements and jingles on radio and television, they can be made more interactive. Assistance from professional agencies can be availed of in the dissemination of information regarding mediation as well as conducting empirical research so as to enable better implementation and supervision. The emerging popularity of social media makes it easier and more economical to spread awareness among the public. The aim should

be to reach out to all parts of the country and not be confined to the urban areas where information is easier to transmit and receive.

2. Lack of Incentives: The next obstacle to the growth of mediation is that the stakeholders find the process to be lacking in adequate incentives. Mediators, Lawyers, Referral Judges and the parties to the dispute themselves are the major stakeholders in the mediation process. The information gathered from various mediation centres in all parts of the country suggests that there are not enough incentives for the stakeholders to make efforts towards promotion of the process. Lawyers are apprehensive that out of court resolutions will adversely impact their private practice, parties are not confident enough of the final relief they would get, judges might view it as a dilution of their say over a matter while mediators have much to complain about in matters relating to adequate remuneration and accreditation of mediators. Parties might have real apprehensions regarding the binding nature of the settlement arrived through mediation. Therefore, it is witnessed that parties with adequate resources and social standing do not usually opt for mediation. Mediation is not a full time engagement and therefore mediators might view it as their secondary obligation. Low referral rates might be a result of the 'points system' where conclusion of cases through mediation brings lower 'points' to the referral judges.

Solutions: Continuous interaction among different regions of the country and different stakeholders for the purpose of learning from the challenges faced, possible solutions and successes is important for not only motivating the concerned High Courts to ensure proper implementation, supervision and the required adaptations and revisions but also for evolving a more certain and uniform framework of mediation for all regions to the extent their peculiarities allow. In addition to the High Court mediation committee, district monitoring committees can be established to ensure that changing trends in mediation in a district are

available for analysis and provide a base for required policy changes. The four main stakeholders in the process can be assured of certain incentives. First, the parties could be refunded the court fee paid irrespective of the stage of referral to mediation and at the same time be assured of the enforceability of their settlements. Second, the referral judges should be assured a gradation point for cases resolved through cases referred by them. Third, the High Courts can also encourage judicial officers to participate in mediation trainings.

3. Absence of Legislation: A large body of problems in mediation can be resolved by enacting legislation. Unlike arbitration and Lok Adalats (the more popular dispute resolution processes) mediation lacks a statute governing the various aspects involved in the process. The absence of legislation is felt most acutely in the supervision and organization of mediators. Moreover, there is no mechanism in place to encourage attendance of the parties to mediation sessions. A statute might also prove to be a guide to the referral judges by laying down criteria for proper identification of cases suitable for settlement through mediation. In numerous cases, mediation does not succeed because of improper identification and referrals. Overall, there is an overwhelming uncertainty in the process due to the want of a binding code.

Solutions: There is a need for an institutional and legal framework for mediation at all levels from the national to the district level. A statute governing mediations could incorporate budgetary provisions for allocation of funds to cater to the requirements of a mediation centre. The statute might provide for compliance of a mediation settlement by the parties. The legislation could also be 'expansionist' by encouraging referrals from fora such as consumer commissions, motor accident claims tribunals, debt recovery tribunals etc. Standard protocol addressing issues such as use of video conferencing, direct notice to the parties

regarding the sessions and other incidental issues relating to mediation, supervision by the referral judge, etc. could be laid down.

Court annexed mediation can be more successful: Experience gained over the last more than ten years of active participation in activities relating to mediation in India, suggests that the challenges faced by the MCPC can easily be overcome through strategic planning.

In this direction, one of the important decisions taken by the MPCP is to encourage mediation in two metropolitan cities in every State. Once the 'mediation culture' is accepted in two metropolitan cities, its acceptance in other cities and towns in the State becomes that much easier. The stakeholders come to know, through word of mouth or through information made available through the social media or the print media, that mediation has been successful in a relatively close-by metropolitan city. This strategy has worked rather well in at least six States in the country. Even in these States, there is still a long way to go but at least some firm beginning has been made.

One of the positive results of adopting this strategy is that the number of mediators who have completed successful mediations has increased tremendously. Their suitability to become trainers is being assessed through the Mediation Committee of the concerned High Court and through a capsule course conducted for them to assess their potential for becoming trainers. After the basic formalities are completed in this regard and the mediators successfully complete the capsule course, they are put through a Training of Trainers programme. This has proved to be extremely successful and as of now there are a little more than 100 mediation trainers available in India. The MCPC has proposed to utilize their services to impart 40-hour training to those interested in becoming mediators and also to conduct refresher courses for existing mediators. While this may take some time

to achieve results, I am quite hopeful that there will be light at the end of the tunnel.

National Court Management Systems

As will be evident from the above discussion, case management through mediation has not been given any importance in the justice delivery system in India. This is despite the painstaking efforts of Justice Rao and legislative intervention. What is the reason? There is no answer to this, except perhaps a lack of interest in the judicial leadership to bring about effective judicial reforms. An exception to this disinterest was an idea conceptualized by Justice S.H. Kapadia, the then Chief Justice of India in consultation with the Minister of Law and Justice, Government of India. The Chief Justice established a committee called the National Court Management Systems (NCMS) in May, 2012. The terms of reference of the NCMS consisted of six policy issues³⁷ with one of them being to introduce a system of Case Management to enhance the user friendliness of the judicial system.

A Policy and Action Plan prepared by the NCMS in consultation with an advisory committee was released by the Chief Justice of India in 2012 with reference to ADR under its 'case management' action plan.³⁸ A sub-committee headed by Justice A.M. Khanwilkar (then Judge of the Bombay High Court) formulated an advisory report on case management on the basis of suggestion from various High Courts in the country as well as experts on the subject. It included a discussion on aspects like best practices, experiences of other countries, a five-year development plan for management, computerization of the processes, determination of judge-staff and judge-case ratio, development of performance index for judicial officers, determination of time limits for various stages in a case

³⁷ <http://supremecourtfindia.nic.in/judges/sjud/ncms27092012.pdf> Last accessed on 10.07.2016, 11:31 AM.

³⁸ Ibid.

among many others. The advisory report reiterated the significance of implementation of section 89 of the CPC and development of alternative dispute mechanisms.³⁹

Notwithstanding this, case management in India has not received the consideration that it deserves and these two significant developments on the subject have remained in the nature of recognition or acknowledgement of the necessity of case management and nothing more. Unfortunately, preparing a concrete framework and then implementing it does not seem to appear on the horizon. The only aspect of case management that appears to be getting some consideration is ADR (generally) but even that is not viewed through the lens of case management. Developments in ADR are as necessary as developments in case management but the tragedy is that the twain do not meet.

Each legal system must formulate a tailor made case management mechanism for it to be successful. For instance, in India certain significant policy decisions might have to be taken before a case flow management mechanism is introduced. Due to the work load, judges may not be able to undertake the constant monitoring required under case management and new posts may have to be sanctioned. This would require serious consideration on many aspects such as the qualifications of the personnel who would be undertaking this task, the cost involved etc. The sheer bulk of case load in the courts in India makes any manual case flow management virtually impossible and therefore requisite software will have to be put in place for constant monitoring, supervision, updation of cases. This is being done through the e-Committee of the Supreme Court. This seemingly easy task has finer considerations like training staff, inculcating acceptability of new technology, providing access to internet etc. Further, attorney compliance,

³⁹ <http://www.sci.nic.in/Case%20Management%20System.pdf> Last accessed on 08.07.2016, 11:30 PM.

especially in the district courts might prove to be a significant impediment in any effort towards a case management system.

Conclusion

The reason for the failure of most potentially good efforts in introducing case management through mediation and other prevailing ADR systems and towards improving the existing conditions (be it arrears, mismanagement, alternative dispute resolution) is rooted in behavioural concerns of the stakeholders. It might be an apprehension of the unknown, insecurity or simply some vested interests which make implementation of novel ideas difficult. Therefore, each jurisdiction has to recognize such fundamental impediments and work towards their elimination or resolution. Small steps in the form of pilot introductions and sufficient engagement with the stakeholders can result in gradual reforms and the aim should be to not cease trying. The question is: Can this be achieved in a specified time-frame in India? Is there a will and commitment to bring about the changes required? That is the real challenge.

ADR and Access to Justice: Issues and Perspectives

Hon'ble Thiru Justice S.B.Sinha, Judge Supreme Court of India

Introduction

Justice is the foundation and object of any civilized society. The quest for justice has been an ideal which mankind has been aspiring for generations down the line. Preamble to our Constitution reflects such aspiration as “justice-social, economic and political”. Article 39-A of the Constitution provides for ensuring equal access to justice. Administration of Justice involves protection of the innocent, punishment of the guilty and the satisfactory resolution of disputes.

The world has experienced that adversarial litigation is not the only means of resolving disputes. Congestion in court rooms, lack of manpower and resources in addition with delay, cost, procedure speak out the need of better options, approaches and avenues. Alternative Dispute Resolution mechanism is a click to that option.

Mahatma Gandhi had put in correct words as : “I had learnt the true picture of law. I had learnt to find out the better side of human nature and to enter men's heart. I realised that the true function of a lawyer was to unite partie riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromised of hundred of cases. I lost nothing thereby-not even money-certainly not my soul.”

Can't we strive for better 'Access to Justice'?

This has been rightly said that: 'An effective judicial system requires not only that just results be reached but that they be reached swiftly.' But the currently available infrastructure of courts in India is not adequate to settle the growing litigation within reasonable time. Despite the continual efforts, a common man may sometimes find himself entrapped in litigation for as long as a life time, and some times litigation carries on even on to the next generation. In the process, he may dry up his resources, apart from suffering harassment. Thus, there is a chain reaction of litigation process and civil cases may even give rise to criminal cases. ***Speedy disposal of cases and delivery***

of quality justice is an enduring agenda for all who are concerned with administration of justice.

In this context, there is an imminent need to supplement the current infrastructure of courts by means of Alternative Dispute Resolution (ADR) mechanisms. Apart from bringing efficiency in working of the judiciary, measures are being taken all over the world for availing ADR systems for resolving pending disputes as well as at pre-litigation stage. Efforts towards ADR have met with considerable success and good results elsewhere in the world, especially in the litigation-heavy United States, where professional teams of mediators and conciliators have productively supplemented the dispute resolution and adjudication process.

In 1995 the International Center for Alternative Dispute Resolution (ICADR) was inaugurated by Shri P.V.Narasimha Rao, the Prime Minister of India had observed:

While reforms in the judicial sector should be undertaken with necessary speed, it does not appear that courts and tribunals will be in a position to hear the entire burden of the justice system. It is incumbent on government to provide a reasonable cost as many modes of settlements of disputes as are necessary to cover the variety of disputes that arise. Litigants should be encouraged to resort to alternative dispute resolution so that the court system proper would be left with a smaller number of important disputes that demand judicial attention.

Problems of Formal Legal system:

Awareness: The lack of awareness of legal rights and remedies among common people acts as a formidable barrier to accessing the formal legal system.

Mystification: The language of the law, invariably in very difficult and complicated English, makes it unintelligible even to the literate or educated person. Only few

attempts have been made at vernacularising the language of the law and making it simpler and easily comprehensible to the person.

Delays: The greatest challenge that the justice delivery system faces today is the delay in the disposal of case and prohibitive cost of litigation. Alternative dispute resolution was thought of as a weapon to meet this challenge. The average waiting time, both in the civil and criminal subordinate courts, can extend to several years. This negates fair justice. To this end, there are several barricades. The judiciary in India is already suffering from a docket explosion. In fact, as on 31st October 2005, the number of cases pending before the Supreme Court was 253587003. The huge backlog of cases only makes justice less accessible. The delay in the judicial system results in loss of public confidence on the confidence on the concept of justice.

Expenses and Costs: We are all aware of the ineffectiveness of our cost regime-even the successful litigant is unable to recover the actual cost of the litigation. The considerable delay in reaching the conclusion in any litigation adds to the costs and makes the absence of an effective mechanism for their recovery even more problematic.

What is Alternative Dispute Resolution system?

ADR is not a recent phenomenon as the concept of parties settling their disputes themselves or with the help of third party, is very well-known to ancient India. Disputes were peacefully decided by the intervention of Kulas (family assemblies), Srenis (guilds of men of similar occupation), Parishad, etc.,

The primary object of ADR movement is avoidance of vexation, expense and delay and promotion of the ideal of "access of justice" for all. ADR system seeks to provide cheap, simple, quick and accessible justice. ADR is a process distinct from normal judicial process. Under this, disputes are settled with the assistance of third party, where proceedings are simple and are conducted, by and large, in the manner agreed to by the parties. ADR stimulates to resolve the disputes expeditiously with less expenditure of time, talent money with the decision making process towards substantial justice, maintaining confidentiality of subject matter. **So, precisely saying, ADR aims at**

provide justice that not only resolves dispute but also harmonizes the relation of the parties.

What are the mechanisms of ADR?

- Arbitration
- Mediation
- Conciliation/Reconciliation
- Negotiation
- Lok Adalat

ADR can be broadly classified into two categories; court-annexed options (it includes mediation, conciliation) and community based dispute resolution mechanism (Lok-Adalat).

What are the functions of ADR?

1. ADR is not to supplant altogether the traditional legal system, but it offers an alternative form to the litigating parties.
2. ADR tends to settle the disputes in a neutral and amicable fashion
3. ADR can be seen as integral to the process of judicial reform signifying the “access to justice approach”.
4. The very raison d’etre of the ADR is an effort towards the etiology of malise and its elimination rather than treatment of its symptoms. That means, this approach seeks for a better and longer lasting solution.
5. ADR can be viewed as a compromise where non loses or wins, but everyone walks out a winner.

Advantage of ADR

Justice Warren Burger, the former CJI of American Supreme Court had observed:

“the harsh truth is that we may be on our way to a society overrun by hordes of lawyers, hungry as locusts, and bridges of Judges in numbers never before contemplated. The notion-that ordinary people want black robed judges well-dressed lawyers, fine paneled court rooms as the setting to resolve their disputes, is not correct. People with legal problems like people with pain, want relief and they want it as quickly and inexpensively as possible”. The benefits or advantages that can be accomplished by the ADR system are summed up here briefly:

1. Reliable information is an indispensable tool for adjudicator. Judicial proceedings make halting progress because of reluctance of parties to part with inconvenient information. ADR moves this drawback in the judicial system. The truth could be difficult found out by making a person stand in the witness-box and he pilloried in the public gaze. Information can be gathered more efficiently by an informal exchange across the table. Therefore, ADR is a step towards success where judicial system has failed in eliciting facts efficiently.
2. In Mediation or Conciliation, parties are themselves prodded to take a decision, since they are themselves decision-makers and they are aware of the truth of their position, the obstacle does not exist.
3. The formality involved in the ADR is lesser than traditional judicial process and costs incurred is very low in ADR
4. While the cost procedure results in win-lose situation for the disputants
5. Finality of the result, cost involved is less, the time required to be spent is less, efficiency of the mechanism, possibility of avoiding disruption.

An analysis on Evolution of ADR mechanisms in Indian Judiciary

ADR was at one point of time considered to be a voluntary act on the part of the parties which has obtained statutory recognition in terms of CPC Amendment Act, 1999, Arbitration and Conciliation Act, 1996, Legal Services Authorities Act, 1997 and Legal Services Authorities (Amendment) Act, 2002. The Parliament apart from litigants and the general public as also the statutory authorities like Legal Services Authority have now thrown the ball into the court of the judiciary. What therefore, now is required would be implementation of the Parliamentary object. The access to justice is a human right and fair trial is also a human right. In some countries trial within a reasonable time is a part of the human right legislation. But, in our country, it is a Constitutional obligation in terms of Art.14 and 21. Recourse to ADR as a means to have access to justice may, therefore, have to be considered as a human right problem. Considered in that context the judiciary will have an important role to play.

Even before the existence of Section 89 of the Civil Procedure Code (CPC), there were various provisions that gave the power to the courts to refer disputes to mediation, which sadly have not really been utilized. Such provisions, inter alia, are in the Industrial Disputes Act, the Hindu Marriage Act and the Family Courts Act and also present in a very nascent form via Section 80, Order 32 A and Rule 5 B of Order 27 of the CPC. A trend of this line of thought can also be seen in *ONGC Vs. Western Co. of Northern America* and *ONGC Vs. Saw Pipes Ltd.*

Industrial Disputes Act, 1947 provides the provision both for conciliation and arbitration for the purpose of settlement of disputes.

Section 23(2) of the **Hindu Marriage Act, 1955** mandates the duty on the court that before granting relief under this Act, the Court shall in the first instance, make an endeavor to bring about a reconciliation between the parties, where it is possible according to nature and circumstances of the case.

For the purpose of reconciliation the Court may adjourn the proceeding for a reasonable period and refer the matter to person nominated by court or parties with the direction to report to the court as to the result of the reconciliation. [section 23(3) of the Act].

The **Family Court Act, 1984** was enacted to provide for the establishment of Family Courts with a view to promote conciliation in, and secure speedy settlement of, disputes relating to marriage and family affairs and for matter connected therewith by adopting an approach radically different from that ordinary civil proceedings. [*K.A.Abdul Jalees v. T.A.Sahida (2003) 4 SCC 166*]. Section 9 of the Family Courts Act, 1984 lays down the duty of the family Court to assist and persuade the parties, at first instance, in arriving at a settlement in respect of subject matter.

The Family Court has also been conferred with the power to adjourn the proceedings for any reasonable period to enable attempts to be made to effect settlement if there is a reasonable possibility.

Section 80(1) of Code of Civil Procedure lays down that no suit shall be instituted against government or public officer unless a notice has been delivered at the government office stating the cause of action, name, etc. The object of Section 80 of CPC – the whole object of serving notice u/s 80 is to give the government sufficient warning of the case which is of going to be instituted against it and that the government, if it so wished can settle the claim without litigation or afford restitution without recourse to a court of laws. [*Ghanshyam Dass v. Domination of India, (1984) 3 SCC 46*]. The object of s.80 is to give the government the opportunity to consider its or his legal position and if that course is justified to make amends or settle the claim out of court. - [*Raghunath Das v. UOI AIR 1969 SC 674*]

Order 23 Rule 3 of CPC is a provision for making an decree on any lawful agreement or compromise between the parties during the pendency of the suit by which claim is satisfied or adjusted. The scheme of Rule 3 of Order 23 proves that if the court is satisfied that a suit has been adjusted wholly or partly by and lawful agreement or

compromise, the court shall pass a decree in accordance to that. Order 23, Rule 3 gives mandate to the Court to record a lawful adjustment or compromise and pass a decree in term of such compromise or adjustment.

Order 27 Rule 5B confers a duty on court in suit against the government or a public officer to assist in arriving at a settlement. In a suit where Government or public officer is a party it shall be the duty of the Court to make an endeavor at first instance, where it is possible according to the nature of the case, to assist the parties in arriving at a settlement.

If it appears to the court in any stage of the proceedings that there is a reasonable possibility of a settlement, the court may adjourn the proceeding to enable attempts to be made to effect settlement.

Order 32A of CPC lays down the provision relating to “suits relating to matter concerning the family”. It was felt that ordinary judicial procedure is not ideally suited to the sensitive area of personal relationships. Litigations involving affairs of the family seem to require special approach in view of the serious emotional aspects involved. In this circumstances, the objective of family counseling as a method of achieving the object of preservation of family should be kept in forefront. Therefore, Order 32A seeks to highlight the need for adopting a different approach where matters concerning the family are at issue, including the need for effort to bring about amicable settlement.

The provisions of this Order applies to all proceedings relating to family, like guardianship, custody of minor, maintenance, wills, succession, etc.,

Rule 3 imposes a duty on the Court to make an effort of settlement by way of providing assistance where it is possible to do so. The Court may also adjourns the proceeding if it thinks fir to enable attempt to be made to effect a settlement where there is a reasonable possibility of settlement. In discharge of this duty Court may take assistance of **welfare expert** who is engaged in promoting the welfare of the family.
[Rule 4]

The concept of employing ADR has undergone a sea change with the insertion of S.89 of CPC by amendment in 2002. As regards the actual content, s.89 of CPC lays

down that where it appears to the court that there exists element of settlement, which may be acceptable to the parties, the Court shall formulate the terms of the settlement and give them to the parties for their comments. On receiving the response from the parties, the Court may formulate the possible settlement and refer it to either:- Arbitration, Conciliation; Judicial Settlement including settlement through Lok Adalats; or Mediation. As per sub-section (2) of Section 89, when a dispute is referred to arbitration and conciliation, the provisions of Arbitration and Conciliation Act will apply. When the Court refers the dispute of Lok Adalats for settlement by an institution or person, the Legal Services Authorities, Act, 1987 alone shall apply.

Supreme Court started issuing various directions as so as to see that the public sector undertakings of the Central Govt. and their counterparts in the States should not fight their litigation in court by spending money on fees on counsel, court fees, procedural expenses and waiting public time. (see *Oil and Natural Gas Commission v. Collector of Central Excise*, 1992 Supp2 SCC 432, *Oil and Natural Gas Commission v. Collector of Central Excise*, 1995 Supp4 SCC 541 and *Chief Conservator of Forests v. Collector*, (2003) 3 SCC 472).

In *ONGC v. Collector of Central Excise*, [1992 Supp2 SCC 432],[*ONGC I*] there was a disputes between the public sector undertaking and GOI involving principles to be examined at the highest governmental level. Court held it should not be brought before the Court wasting public money any time. In *ONGC v. Collector of Central Excise*, [1995 Supp4 SCC 541] (*ONGC II*) dispute was between govt. dept and PSU. Report was submitted by cabinet secretary pursuant to SC order indicating that instructions has been issued to all depts. It was held that public undertaking to resolve the disputes amicably by mutal consultation in or through or good offices empowered agencies of govt. or arbitration avoiding litigation. GOI directed to constitute a committee consisting of representatives of different depts. To monitor such disputes and to ensure that no litigation comes to court or tribunal without the Committee's prior examination and clearance. The order was directed to communicate to every HC for information to all subordinate courts. In ***Chief Conservator of Forests v. Collector (2003) 3 SCC 472*** ***ONGC I AND II*** were relied on and it was said that state/union govt. must evolve a

mechanism for resolving interdepartmental controversies- disputes between dept. of Govt cannot be contested in court.

In ***Punjab & Sind Bank v. Allahabad Bank, 2006(3) SCALE 557*** it was held that the direction of the Supreme Court in ***ONGC III*** [(2004) 6 SCC 437], to the govt. to set up committee to monitor disputes between government departments and public sector undertakings make it clear that the machinery contemplated is only to ensure that no litigation comes to court without the parties having had an opportunity of conciliation before an in-house committee.

In the judgment of the Supreme Court of India in ***Salem Bar Association vs. Union of India (2005) 6 SCC 344***, the Supreme Court has requested prepare model rules for ADR and also draft rules of mediation under section 89(2)(d) of Code of Civil Procedure, 1908. The rule is framed as “Alternative Dispute Resolution and Mediation Rules, 2003”.

Rule 4 of the Alternative Dispute Resolution and Mediation Rules, 2003”, lays down that the Court has to give guidance to parties (when parties are opting for any mode of ADR) by drawing their attention to the relevant factors which parties will have to take into account, before they exercise their opinion as to the particular mode of settlement, namely;

- (i) it will be to the advantage of the parties, so far as time and expense are concerned, to opt for one of these modes of settlement rather than seek a trial on the disputes arising in the suit;
- (ii) where there is **no relation between the parties** which requires to be presented it will be in the interests of the parties to seek reference of the matter to arbitration as envisaged in clause (1) of sub-section (1) of sec.89.
- (iii) where there is a **relationships between the parties which requires to be preserved**, it will be in the interests of the parties to seek reference of the matter to **conciliation or mediation**, as envisaged in clauses (b) or (d) of sub-section (1) of sec.89.

The Rule also says that Disputes arising in **matrimonial, maintenance and child custody matters shall, among others, be treated as cases where a relationship between the parties has to be preserved.**

(iv) where parties are interested in a final settlement which may lead to a compromise, it will be in the interests of the parties to seek reference of the matter to judicial settlement including Lok Adalat as envisaged in clause (c) of sub-section(1) of section 89.

According to **Rule 8**, the provisions of these Rules may be applied to proceedings before the Courts, including Family courts constituted under the Family Courts (66 of 1984), while dealing with matrimonial, and child custody disputes.

Different modes of justice delivery mechanism of ADR:

The Constitution of India calls upon the state to provide for free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic inability. India socio-economic conditions warrant highly motivated and sensitized legal service programs as large population of consumers of justice (heart of the judicial anatomy) are either poor or ignorant or illiterate or backward, and as such, at a disadvantageous position. The State, therefore, has a duty of secure that the operation of legal system promotes justice on the basis of equal opportunity. Alternative dispute resolution is, neatly, worked out in the concept of Lok Adalat. It has provided an important juristic technology and vital tool for easy and early settlement of disputes. It has gain proved to be a successful and viable national imperative and incumbency, guest suited for the larger and higher section so the present society of Indian system. The concept of legal services which includes Lok Adalat is a **“revolutionary evolution of resolution of disputes”**. Lok Adalats provide speedy and inexpensive justice in both rural and urban areas. They cater the need of weaker sections of society.

The object of the Legal Services Authority Act, 1987 was to constitute legal services authorise is for providing free and competent legal services to the weaker sections of the society; to organise Lok Adalats to ensure that the operations of the legal system promoted justice on a basis of equal opportunity.

Under the Act permanent Lok Adalat is to set up for providing compulsory pre-litigation mechanism for conciliations and settlement of cases relating too public utility services.

The concept of Lok Adalat is no longer an experiment in India, but it is an effective and efficient, pioneering and palliative alternative mode of dispute settlement which is accepted as a viable economic, efficient, informal, expeditious form of resolution of disputes. It is hybrid or admixture of mediation, negotiation, arbitration and participation. The true basis of settlement of disputes by the Lok Adalat is the principle of mutual consent, voluntary acceptance of conciliation with the help of counselors and conciliation. It is a participative, promising and potential ADRM. It revolves round the principle of creating awareness amongst the disputants to the effect that their welfare and interest, really, lies in arriving, at amicable, immediate, consensual and peaceful settlement of the disputes.

Shri M.C.Setalvad, former Attorney General of India has observed: "...equality is the basis of all modern systems of jurisprudence and administration of justice... in so far as a person is unable to obtain access to a court of law for having his wrongs redressed or for defending himself against a criminal charge, justice becomes unequal ...Unless some provision is made for assisting the poor men for the payment of Court fees and lawyer's fees and other incidental costs of litigation, he is denied equality in the opportunity to seek justice."

The great advantage of arbitration is that it combines strength with flexibility. Strength because, it yields enforceable decisions and is backed by judicial framework which , in the last resort, can call upon the coercive powers of the state. Flexible because it allows the contestants to choose the procedure which fit nature of the dispute and the business context in which it occurs. Arbitration Act, 1940. Arbitration acknowledged the pivotal role of the partie sin resolving their disputes. But this Act did not fulfill the essential functions of ADR The extent of Judicial Interference under the Act defeated the very purpose of speedy justice. The Act 1996 came into effect to remove few of its difficulties and judicial intervention was limited to some extent. But Arbitration had some ailments: (I) traditional adversarial system is run in a arbitration proceedings; (II)

proceedings are delayed as both parties take lot o time presenting their submissions; (III) the cost of arbitration is much more than the order ADR process, thereby, it does not attract the poor litigants; (IV) participatory role of the parties are neglected as the submissions are made by the party counsels.

Mediation can be defined as a process to resolve a dispute between two or more parties in the presence of a mutually accepted third party who through confidential discussion attempts to help the parties in reaching a commonly agreed solution to their problems. The biggest advantage of mediation is that the entire process is strictly confidential. Mediation saves time and financial and emotional cost of resolving a dispute, thereby, leads to reestablishment of trust and respect among the parties.

Other advantages are:

An interest-based procedure is followed as distinct from a right-based procedure adopted by a court

Emotions and feelings between parties can be preserved causing minimum stress and heartache.

There is possibility of resolving multiple disputes.

A properly conceived mediation as method of alternative dispute resolution will ensure wide access to justice for all sections of the people. This system has assumed a great importance as Lok Adalats are regular features in various parts of the country. Except litigants who stand to gain by delaying the process of justice, others do not perhaps enjoy taking recourse of litigation that consumes innumerable number of years and considerable amounts by way of expenses. *Martin Luther King* had said "The bank of Justice shall not be bankrupt". This is only possible if we develop effective and efficient mechanism of alternate dispute resolution by setting up of extra mediation centers at all level in the country.

There is a subtle difference between mediation and conciliation. While in meditation, the third party, neutral intermediary, termed as mediator plays more active role by giving independent compromise formulas after hearing both the parties; in conciliation, the third neutral intermediary's role, mainly is to bring the parties together in a frame of mind

to forget their animosities and be prepared for an acceptable compromise on terms midway between the stands taken before the commencement of conciliation proceedings.

Three reasons why mediation or conciliation is not gaining momentum:

Lack of institutionalization

Lack of case management

Excessive interlocutory appeals

Out of the methods of ADR, mediation and conciliation are the most suited methods for a country like India because by and large people in India at least in the rural areas would like to settle their disputes amicably. But in urban areas case is different where in commercial disputes, litigants want quick disposal of cases, would like the same to be done under a legal framework and with the intervention of professionals and so, these litigants prefer arbitration.

Not many Indians can afford litigation. This kind of state of affairs makes common people, especially rural people, cynical about judicial process.

We must take the ADR mechanism beyond the cities. Gram Nayalals should process 60 to 70 percent of rural litigation leaving the regular courts to devote their time to complex civil and criminal matters. With a participatory, flexible machinery available at the village level where non-adversarial, settlement-oriented procedures are employed, the rural people will have fair, quick and inexpensive system of dispute settlement.

Rent and eviction constitute a considerable chunk of litigation in urban courts and they take on an average time period of three years or more than that. The Law Commission felt that an alternative method for these disputes is imperative.

Panchayati Raj or self-governance at the village level is in revolutionary process in our democratic governance. Along with powers of administration, system of self-government dispute resolution can also be delegated to these institutes. If the object of judicial reform is fair, quick and inexpensive justice to the common people, there can be no better way to pursue the objective than to invoke participatory systems at the grass root

level for simpler disputes so that judicial time at higher levels is sought only for hard and complex litigation.

According to Law Commission recommendation a very simple procedure envisaging quick decision, informed by justice, equity and good conscience. The CPC and Evidence Act not to be applied to proceedings before those. In respect of jurisdiction, the Commission preferred criminal jurisdiction covering boundary disputes, tenancies, irrigation disputes, minor property disputes, family disputes, wage disputes irrespective of pecuniary value of the dispute. It would be wise to avoid to confer criminal jurisdiction of Gram Nyayalayas in the initial stage. In districts, towns and other urban areas where the nature of disputes are quantitatively different from rural areas, the litigations are of money suits, suits on mortgage, succession and inheritance suits, rent and eviction suits, matrimonial disputes. The staggering number of pendency of suits seeks for an alternative.

Few maladies and its ailments:

We have already examined in the "evolution of ADR mechanisms" that initially the ADR mechanisms were tried to be implemented with much emphasis on Statutes by way of inserting the ADR clauses in those statutes. But these process and policy was not of that much success. Thereby, the trend is the imposition of responsibility and duty on Court and in this process Courts are authorised to give directives for the adoption of ADR mechanisms by the parties and for that purpose Court has to play important role by way of giving guidance, etc. Power is also conferred upon court so that it can intervene in different stages of proceedings.

But these goals cannot be achieved unless requisite infrastructure is provided and institutional frame work is put to place. A judicial impact assessment is carried out in U.K. by preparing a financial memorandum whenever a new Bill is introduced. The

Financial memorandum indicates the amount of expenditure that is likely to be incurred as a result of any statute or amendment in the existing statute.

Before bringing in S.89 of the CPC and other Statutes, no assessment was carried out as regards financial implications or the infrastructural requirements too make it effective. For example:

For mediation, trained mediator will be required and expenses will have to be incurred for their training. Most of our courts do not have adequate space even for their existing work, and thus, it may not be possible to accommodate them to provide for suitable accommodation of the ADR regime all these have to be complied with and this is not too late to make these arrangement.

Mediation/Conciliation/reconciliation is carried out in a matrimonial matter in child custody case. Usually in the Dist. Courts, there is no space available for children to meet his parents. Some meetings are held in the Chambers of the Judges not only at the district level but also at the High Court.

Conciliation is provided for under the Industrial Disputes Act and it takes place in the office of the Conciliation Officer or in the premises of the management which does not give a fair chance to the workmen to negotiate. There should be a neutral space for such mediation or negotiation.

The institutional framework must be brought about at three stages. The first stage is to bring awarenesss, the second awareness and the third implementation.

Awareness: in view of this holding seminars, workshops, etc. would be imperative. A ADR literacy programme has to be done for mass awareness. Awareness camp should be to change the mindset of all concerned disputants, the lawyers and judges.

Our lack of awareness would be tested from the fact that how many of us are aware that in terms of Sec.7(hb) of the Notaries Act, 1952 one of the functions of a notary is to act as an arbitrator, conciliator, if so required.

Acceptance: In this regard training of the ADR practitioners should be made by some University together with other institution. Extensive training would also be necessary to be imparted to those who intend to act as a facilitator, mediators, conciliators.

Industrial dispute Act, 1947 provides for appointment of conciliator who although are "charged with the duty of mediating in the promoting the settlement of industrial disputes" failed in performing their duties as they do not have requisite training. Similarly matrimonial courts and family courts are unable to effectively settle the dispute as they do not have either the requisite training or the mindset there of.

Imparting of training should be made a part of continuing education on different facets of ADR so far as judicial officers and judges are concerned.

Implementation: for this purpose, judicial officers must be trained to identify cases which would be suitable for taking recourse to a particular form of ADR. In the decision of House of Lords in *Dunnett V. Railtrack* (In railway administration, [2002]2 All ER 850, the Court had noticed that: "the encouragement and facilitating of ADR by the court in an aspect of active case management which in turn is an aspect of achieving the overriding objective. The parties have a duty to help the court in furthering that objective and therefore, they have a duty to consider seriously the possibility of ADR procedures being utilized for the purpose of resolving their claim or particular issues within it when encouraged by the court to do so."

How to make ADR mechanisms more viable?

We cannot stop the inflow of cases because the doors of justice cannot be closed. But there is a dire need to increase the outflow either by strengthening (both qualitatively

and quantitatively) the capacity of the existing system or by way of finding some additional outlets. In this situation ADR mechanism implementation can be such a drastic step for which three things are required most:

- Mandatory reference to ADRs
- Case management by Judges
- Committed teams of Judges and Lawyers

Equal justice for all is a cardinal principle on which entire system of administration of justice based. It is too deep rooted in the body and spirit of common law as well as civil law jurisprudence that the very meaning which we ascribe to the word “justice” embraces it. We cannot conceive justice which is not fair and equal. Effective access to justice has thus come to be recognized as the most basic requirement, the most basic human right, in modern egalitarian legal system which purports to guarantee and not merely proclaims legal rights to all.

We should aim to achieve earlier and more proportionate resolution of legal problems and disputes by:

- Increasing advice and assistance to help people resolve their disputes earlier and more effectively;
- Increasing the opportunities for people involved in court cases to settle their disputes out of court; and
- Reducing delays in resolving those disputes that need to be decided by the courts.

To implement the noble ideas and to ensure the benefits of ADR to common people, the four essential players (government, bench, bar litigants) are required to coordinate and work as a whole system.

Case management includes identifying the issues in the case; summarily disposing of some issues and deciding in which order other issues to be resolved; fixing timetables for the parties to take particular steps in the case; and limiting disclosure and expert evidence.

- **Government:** Govt has to support new changes. If the govt support and implements changes, ADR institutes will have to be set up at every level from district to national level.
- **Bench:** unless mindset of the judges are changed, there will be no motivation for the lawyers to go to any of the ADR methods.
- **Bar:** the mindset of the members of the Bar is also to be changed accordingly otherwise it would be difficult it is difficult to implement ADR. The myth that ADR was alternative decline in Revenue or Alternative Drop in Revenue is now realizing that as more and more matters get resolved their work would increase and not decrease.
- **Litigants:** few parties are usually interested in delay and not hesitate in taking a stand so as to take the benefit if delay. Parties have to realize that at the end, litigation in court may prove very costly to them in terms of both cost and consequence.

Conclusion and suggestion:

ADR is quicker, cheaper, more user-friendly than courts. It gives people an involvement in the process of resolving their disputes that is not possible in public, formal and adversarial justice system perceived to be dominated by the abstruse procedure and recondite language of law. It offers choice: choice of method, of procedure, of cost, of representation, of location. Because often it is quicker than judicial proceedings, it can

ease burdens on the Courts. Because it is cheaper, it can help to curb the upward spiral of legal costs and legal aid expenditure too, which would benefit the parties and the taxpayers.

In this juncture, few things are most required to be done for furtherance of smooth ADR mechanisms. Few of them are:

Creation of awareness and popularizing the methods is the first thing to be done. NGOs and medias have prominent role to play in this regard.

For Court- annexed mediation and conciliation, necessary personnel and infrastructure shall be needed for which government funding is necessary.

Training programmes on the ADR mechanism are of vital importance. State level judicial academies can assume the role of facilitator or active doer for that purpose.

While the Courts have never tired of providing access to justice for the teeming millions of this country, it would not be incorrect to state that the objective would be impossible to achieve without reform of the justice dispensation mechanism. There are two ways in which such reform can be achieved- through changes at the structural level, and through changes at the operational level. Changes at the structural level challenge the very framework itself and requires an examination of the viability of the alternative frameworks for dispensing justice. It might required an amendment to the Constitution itself or various statutes. On the other hand, changes at the operational level requires one to work within the framework trying to indentify various ways of improving the effectiveness of the legal system.

Needless to say, this will considerably reduce the load on the courts apart from providing instant justice at the door-step, without substantial cost being involved. This is also avoid procedural technicalities and delays and justice will hopefully be based on truth and morality, as per acknowledged considerations of delivering social justice.

Indian Supreme Court strikes down pre-deposit requirement in arbitration agreement (M/S Icomm Tele v Punjab State Water Supply & Sewerage Board)

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Arbitration analysis: The Indian Supreme Court (the Court) held as arbitrary and unconstitutional, an arbitration clause mandating a contractor of a State's Water Supply and Sewerage Board (the State Board) to furnish a pre-deposit of 10% of the amount of its claim in arbitration at the time of invocation of arbitration. In doing so, the Court re-affirmed the primary purpose of arbitration as 'de-clogging the Court system.' The Court held that such a pre-deposit clause was itself a 'clog' on entering the arbitral process and would render the same impermissibly 'ineffective and expensive.' Siddharth Ratho, Senior Member and Moazzam Khan, head of the International Dispute Resolution Practice at Nishith Desai Associates consider the decision.

M/S Icomm Tele Ltd v Punjab State Water Supply & Sewerage Board & Anr Civil Appeal No 2713 of 2019 (arising out of SLP (Civil) No 3307 of 2018)

What are the key implications of this decision?

In the recent past, we have witnessed courts increasingly adopting a pro-arbitration approach by refraining from interfering in the arbitral process. This judgment however, is a unique example of a court forwarding the object of arbitration by in fact taking the bold step of 'interfering' and rectifying a commercial understanding between parties that was found to be arbitrary and discouraging towards the arbitration process.

Through this judgment, the judiciary has demonstrated the ideal way in which courts may play a guiding role in the arbitral process by stepping in constructively when parties may overstep the four corners of the constitution or may act against the very objective of arbitration, while maintaining utmost reverence for party autonomy, the very crux of alternative dispute resolution mechanism. Parties should be mindful that although commercial contracts may be protected from judicial scrutiny, they are still required to be fair, just and reasonable.

It will also be interesting to see if this judgment leads to development of a new jurisprudence around claiming exemplary costs and damages and the calculation thereof in cases of frivolous claims.

What was the background?

The State Board had issued a notice inviting tender for certain works related to augmentation of water supply, sewerage schemes, pumping stations and such. M/S Icomm Tele Ltd (the Contractor) was eventually awarded the tender. Accordingly, a formal contract was entered between the State Board and the Contractor with the notice inviting the tender forming part and parcel of the formal contract.

The arbitration clause in question read as follows:

'viii. It shall be an essential term of this contract that in order to avoid frivolous claims the party invoking arbitration shall specify the dispute based on facts and calculations stating the amount claimed under each claim and shall **furnish a "deposit-at-call" for ten percent of the amount claimed**, on a schedule bank in the name of the Arbitrator by his official designation who shall keep the amount in deposit till the announcement of the award. In the event of an award in favour of the claimant, the deposit shall be refunded to him in proportion to the amount awarded w.r.t the amount claimed and the balance, if any, shall be forfeited and paid to the other party.'

When disputes arose and arbitration was subsequently invoked, the Contractor sought waiver of the pre-deposit of 10% of the claim amount. On such a request being denied, the Contractor approached the High Court of Punjab & Haryana challenging the validity of such a pre-deposit requirement. However, the High Court did not find the condition to be arbitrary or unreasonable, thereby refusing to strike it down. The Contractor accordingly approached the Supreme Court to decide whether such a clause was in fact arbitrary and/or discriminatory, violative of Article 14 of the constitution of India (Article 14) and therefore liable to be set aside.

Contractor's submissions

The Contractor argued that the arbitration clause amounts to a contract of adhesion since there is unfair bargaining power between itself and the State Board due to which it ought to be struck down in keeping with the principals laid down in *Central Inland Water Transport Corpn v Brojo Nath Ganguly (1986) 3 SCC 156* (not reported by LexisNexis® UK). The Contractor further argued that such a clause was arbitrary and violative of Article 14 as even if the award is in favour of a claimant, what would be refunded is only in proportion to the actual amount awarded with the rest being forfeited to a respondent, despite it having lost the case.

Lastly it argued that the 10% deposit requirement would amount to a clog on entering the arbitration process while attempting to discourage filing of frivolous claim, and that in any event, frivolous claims could always be compensated through heavy costs stipulated in the eventual award.

State Board's submissions

The State Board countered the above stating that there is no such infraction of Article 14 since the said clause would apply to both parties equally, and this being the case, the clause cannot be struck down as being discriminatory. It further submitted that *Central Inland Water Transport Corpn* which lays down that contracts of adhesion ie contracts in which there is unequal bargaining power between private persons and the State are liable to be set aside because they are unconscionable, does not apply where both parties are businessmen and where the contract is a commercial transaction.

What did the Indian Supreme Court decide?

Violation of Article 14

The Court held that a clause can be violative of Article 14 if it is found to be discriminatory or arbitrary. It agreed with the State Board's argument that the concept of unequal bargaining does not apply to commercial contracts and that therefore the said clause could not be said to be discriminatory. The reason being that businessmen ought to be aware of the nature of commercial transactions and therefore cannot use the argument of unequal bargaining power to their advantage. However, it placed reliance on *ABL International Ltd. v Export Credit Guarantee Corpn Of India Ltd, (2004) 3 SCC 553* (not reported by LexisNexis® UK) to hold that even within the contractual sphere, the requirement of Article 14 to act fairly, justly and reasonably by persons who are 'state' authorities or instrumentalities continues.

The Court thus opined that conditions laid down in the arbitration clause are arbitrary (even if not discriminatory) for the following reasons:

- there is no nexus between frivolous claims and the condition of 10% pre-deposit since the pre-deposit amount is a pre-condition regardless of whether the claim is frivolous or genuine. Frivolous claims can be avoided by imposing exemplary costs and therefore an arbitrary condition of pre-deposit such as in the clause in question need not be resorted to
- given the fact that the said clause envisaged refund only in proportion to the amount awarded, with the balance being forfeited to the other party, even though such a party may have lost the case, the same is certainly arbitrary and violative of Article 14, even if not discriminatory

Deterring a party from invoking arbitration is contrary to the object of de-clogging the court system

The Court emphasised that arbitration is to be encouraged because of high pendency of cases and costs of litigation. It pointed out that several judgments have reiterated that the primary object of arbitration is to reach a final disposal of disputes in a speedy, effective, inexpensive and expeditious manner. A deposit of 10% of a huge claim would be far greater than any court fee that may be charged for filing a suit, it observed. Considering this, the Court opined that deterring a party to an arbitration from invoking such an alternative resolution process by such a 'deposit-at-call' clause would discourage arbitration, contrary to the object of de-clogging the Court system, and would render the arbitral process ineffective and expensive.

Having considered the above, the Court went on to strike down the said clause and allowed the appeal of the Contractor.

The views expressed are not necessarily those of the proprietor.

Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd.

(2018)6SCC287

Decided On: 15.03.2018

Judges/Coram: *Rohinton Fali Nariman and Navin Sinha, JJ.*

JUDGMENT

1. Leave granted.

2. The present batch of appeals raises an important question as to the construction of Section 26 of the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the "Amendment Act"), which reads as follows:

Section 26. Act not to apply to pending arbitral proceedings.

Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.

3. The questions raised in these appeals require the mentioning of only a few important dates. In four of these appeals, namely, **Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. and Ors.** (SLP(C) No. 19545-19546 of 2016), **Arup Deb and Ors. v. Global Asia Venture Co.** (SLP(C) No. 20224 of 2016), **M/s. Maharashtra Airports Development Co. Ltd. v. M/s. PBA Infrastructure Ltd.** (SLP(C) No. 5021 of 2017) and **UB Cotton Pvt. Ltd. v. Jayshri Ginning and Spinning Pvt. Ltd.** (SLP(C) No. 33690 of 2017), Section 34 applications under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "1996 Act") were all filed prior to the coming into force of the Amendment Act w.e.f. 23rd October, 2015. In the other four appeals, the Section 34 applications were filed after the Amendment Act came into force. The question with which we are confronted is as to whether Section 36, which was substituted by the Amendment Act, would apply in its amended form or in its original form to the appeals in question.

4. The relevant facts of the first appeal namely, **Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. and Ors.** (SLP(C) Nos. 19545-19546 of 2016), are as follows. A notice dated 18th January, 2012 was sent by Respondent No. 1 invoking arbitration under a franchise agreement dated 12th March, 2011. A Sole Arbitrator was appointed, who delivered two arbitral awards dated 22nd June, 2015 against the Appellant and in favour of the Respondents. On 16th September, 2015, the Appellants filed an application Under Section 34 of the 1996 Act in the Bombay High Court challenging the aforesaid arbitral awards. On 26th November, 2015, the Respondents filed two execution applications in the High Court for payment of the amounts awarded under the two awards, pending enforcement of such awards. These were resisted by two Chamber Summons filed by the Appellants dated 3rd December, 2015, praying for dismissal of the aforesaid execution applications stating that the old Section 36 would be applicable, and that, therefore, there would be an automatic stay of the awards until the Section 34 proceedings had been decided. The Chamber Summons were argued before a learned Single Judge, who, by the impugned judgment in Special Leave Petition (Civil) No. 19545-19546 of 2016, dismissed the aforesaid Chamber Summons and found that the amended Section 36 would be applicable in the facts of this case. This is how the appeal from the aforesaid judgment has come before us.

5. As aforementioned, the skeletal dates necessary to decide the present appeals in the other cases would only be that so far as two of the other appeals are concerned, namely, **Arup Deb and Ors. v. Global Asia Venture Co.** (SLP(C) No. 20224 of 2016) and **M/s. Maharashtra Airports Development Co. Ltd. v. M/s. PBA Infrastructure Ltd.** (SLP(C) No. 5021 of 2017), the Section 34 applications were filed on 27th April, 2015, and 25th May, 2015 respectively and the stay petitions or execution applications in those cases filed Under Section 36 were dated 16th December, 2015 and 26th October, 2016 respectively. In **U.B. Cotton Pvt. Ltd. v. Jayshri Ginning and Spinning Pvt. Ltd.** (SLP(C) No. 33690 of 2017), the Section 34 application was filed on 22nd February, 2013 and the execution application was filed in 2014, which was transferred, by an order dated 12th January, 2017, to the Commercial Court, Rajkot as Execution Petition No. 1 of 2017. In the other cases, namely, **Wind World (India) Ltd. v. Enercon GMBH through its Director** (SLP(C) Nos. 8372-8373 of 2017), **Yogesh Mehra v. Enercon GMBH through its Director** (SLP(C) Nos. 8376-8378 of 2017), **Ajay Mehra v. Enercon GMBH through its Director** (SLP(C) Nos. 8374-8375 of 2017), and **Anuradha Bhatia v. M/s. Ardee Infrastructure Pvt. Ltd.** (SLP(C) Nos. 9599-9600 of 2017), the Section 34 applications were filed after 23rd October, 2015, viz., on 7th December, 2016 in the first two appeals, on 6th December, 2016 in the third appeal and on 4th January, 2016 in the last appeal.

6. Section 36, which is the bone of contention in the present appeals, is set out hereinbelow:

PRE-AMENDED PROVISION

Section 36. Enforcement.

Where the time for making an application to set aside the arbitral award Under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.

AMENDED PROVISION

Section 36. Enforcement.

(1) Where the time for making an application to set aside the arbitral award Under Section 34 has expired, then, subject to the provisions of Sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.

(2) Where an application to set aside the arbitral award has been filed in the Court Under Section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of Sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application Under Sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).

...

17. Having heard extensive and wide ranging arguments on the reach of Section 26 of the Amendment Act, it will be important to first bear in mind the principles of interpretation of such a provision. That an Amendment Act does include within its provisions that may be repealed either wholly or partially and that the provisions of Section 6 of the General Clauses Act would generally apply to such Amendment Acts is beyond any doubt-See **Bhagat Ram Sharma v. Union of India**, MANU/SC/0611/1987 : 1988 (Supp) SCC 30 at 40-41. That such a provision is akin to a repeal and savings Clause would be clear when it is read with Section 27 of the Amendment Act and Section 85 of the 1996 Act, which are set out hereinbelow:

Section 27. Repeal and savings.

(1) The Arbitration and Conciliation (Amendment) Ordinance, 2015, is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the principal Act, as amended by the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of the principal Act, as amended by this Act.

xxx xxx xxx

Section 85. Repeal and savings.--

(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal,--

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all Rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act.

18. At this point, it is instructive to refer to the 246th Law Commission Report which led to the Amendment Act. This Report, which was handed over to the Government in August, 2014, had this to state on why it was proposing to replace Section 36 of the 1996 Act:

AUTOMATIC STAY OF ENFORCEMENT OF THE AWARD UPON ADMISSION OF CHALLENGE

43. Section 36 of the Act makes it clear that an arbitral award becomes enforceable as a decree only after the time for filing a petition Under Section 34 has expired or after the Section 34 petition has been dismissed. In other words, the pendency of a Section 34 petition renders an arbitral award unenforceable. The Supreme Court, in *National Aluminum Co. Ltd. v. Pressteel & Fabrications*, MANU/SC/1082/2003 : (2004) 1 SCC 540 held that by virtue of Section 36, it was impermissible to pass an Order directing the losing party to deposit any part of the award into Court. While this

decision was in relation to the powers of the Supreme Court to pass such an order Under Section 42, the Bombay High Court in *Afcons Infrastructure Limited v. The Board of Trustees, Port of Mumbai* MANU/MH/1398/2013 : 2014 (1) Arb LR 512 (Bom) applied the same principle to the powers of a Court Under Section 9 of the Act as well. Admission of a Section 34 petition, therefore, virtually paralyzes the process for the winning party/award creditor.

44. The Supreme Court, in *National Aluminium*, has criticized the present situation in the following words:

However, we do notice that this automatic suspension of the execution of the award, the moment an application challenging the said award is filed Under Section 34 of the Act leaving no discretion in the court to put the parties on terms, in our opinion, defeats the very objective of the alternate dispute resolution system to which arbitration belongs. We do find that there is a recommendation made by the concerned Ministry to the Parliament to amend Section 34 with a proposal to empower the civil court to pass suitable interim orders in such cases. In view of the urgency of such amendment, we sincerely hope that necessary steps would be taken by the authorities concerned at the earliest to bring about the required change in law.

45. In order to rectify this mischief, certain amendments have been suggested by the Commission to Section 36 of the Act, which provide that the award will not become unenforceable merely upon the making of an application Under Section 34.

So far as the transitory provision, so described by the Report, is concerned, the Report stated:

76. The Commission has proposed to insert the new Section 85-A to the Act, to clarify the scope of operation of each of the amendments with respect to pending arbitrations/proceedings. As a general rule, the amendments will operate prospectively, except in certain cases as set out in Section 85-A or otherwise set out in the amendment itself.

The Report then went on to amend Section 36 as follows:

Amendment of Section 36

19. In Section 36, (i) add numbering as Sub-section (1) before the words "Where the time" and after the words "Section 34 has expired," delete the words "or such application having been made, it has been refused" and add the words "then subject to the provision of Sub-section (2) hereof,"

(ii) insert Sub-section "(2) Where an application to set aside the arbitral award has been filed in the Court Under Section 34, the filing of such an application shall not by itself render the award unenforceable, unless upon a separate application made for that purpose, the Court grants stay of the operation of the award in accordance with the provisions of Sub-section (3) hereof;"

(iii) insert Sub-section "(3) Upon filing of the separate application Under Sub-section (2) for stay of the operation of the award, the court may, subject to such conditions as it may deem fit, grant stay of the operation of the award for reasons to be recorded in writing."

(iv) insert proviso "Provided that the Court shall while considering the grant of stay, in the case of an award for money shall have due regard to the provisions for grant of stay of money decrees under the Code of Civil Procedure, 1908."

[NOTE: This amendment is to ensure that the mere filing of an application Under Section 34 does not operate as an automatic stay on the enforcement of the award. The Supreme Court in *National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd. and Anr.*, MANU/SC/1082/2003 : (2004) 1 SCC 540, recommends that such an amendment is the need of the hour.]¹

The transitory provision Section 85A was then set out as follows:

Insertion of Section 85A

A new Section Section 85A on transitory provisions has been incorporated.

Transitory provisions.-- (1) Unless otherwise provided in the Arbitration and Conciliation (Amending) Act, 2014, the provisions of the instant Act (as amended) shall be prospective in operation and shall apply only to fresh arbitrations and fresh applications, except in the following situations-

(a) the provisions of Section 6-A shall apply to all pending proceedings and arbitrations. Explanation: It is clarified that where the issue of costs has already been decided by the court/tribunal, the same shall not be opened to that extent.

(b) the provisions of Section 16 Sub-section (7) shall apply to all pending proceedings and arbitrations, except where the issue has been decided by the court/tribunal.

(c) the provisions of second proviso to Section 24 shall apply to all pending arbitrations.

(2) For the purposes of the instant section,--

(a) "fresh arbitrations" mean arbitrations where there has been no request for appointment of arbitral tribunal; or application for appointment of arbitral tribunal; or appointment of the arbitral tribunal, prior to the date of enforcement of the Arbitration and Conciliation (Amending) Act, 2014.

(b) "fresh applications" mean applications to a court or arbitral tribunal made subsequent to the date of enforcement of the Arbitration and Conciliation (Amending) Act, 2014.

[NOTE: This amendment is to clarify the scope of operation of each of the proposed amendments with respect to pending arbitrations/proceedings.]

19. The debates in Parliament in this context were referred to by counsel on both sides. Shri T. Satpathy (Dhenkanal) stated:

You have brought in an amendment to Section 25 (a) saying that this Act will not be retrospective. When the Bill for judges' pension and salary could be retrospective, why can you not amend it with retrospective effect so that ONGC-RIL case could be brought under this Act and let it be adjudicated as early as possible within 18 months and let the people of this country get some justice some time. Let us be fair to them.

To similar effect is the speech of Shri APJ Reddy, which reads as under:

It is unclear whether the amended provisions shall apply to pending arbitration proceedings. The Law Commission of India, in its 246th Report, which recommended amendments to the Arbitration & Conciliation Act, 1996, had proposed to insert a new Section 85-A to the Act, which would clarify the scope of operation to each amendment with respect to pending arbitration proceedings. However, this specific recommendation has not been incorporated into the Ordinance. One of the reasons for bringing about this ordinance is to instill a sense of confidence in foreign investors in our judicial process, with regard to certainty of implementation in practice and ease of doing business. Therefore, it is strongly urged to incorporate Section 85A as proposed by the 246th Report of the Law Commission of India, where it clearly states the scope of operation of the amended provisions.

The Law Minister in response to the aforesaid speeches stated:

Nobody has objected to this Bill but some of our friends have observed certain things. They have said that the Bill is the need of the hour and that a good Bill has been brought. A few suggestions have been given by them. One of the suggestions was that it should have retrospective effect. If the parties agree, then there will be no problem. Otherwise, it will only have prospective effect."

20. Finally, Section 26 in its present form was tabled as Section 25A at the fag end of the debates, and added to the Bill. A couple of things may be noticed on a comparison of Section 85A, as proposed by the Law Commission, and Section 26 as ultimately enacted. First and foremost, Section 85A states that the amendments shall be prospective in operation and then bifurcates proceedings into two parts-(i) fresh arbitrations, and (ii) fresh applications. Fresh arbitrations are defined as various proceedings before an arbitral tribunal that is constituted, whereas fresh applications mean applications to a Court or Tribunal, made subsequent to the date of enforcement of the Amendment Act. Three exceptions are provided by Section 85A, to which the Amendment Act will apply retrospectively. The first deals with provisions relating to costs, the second deals with the new provision contained in Section 16(7) (which has not been adopted by the Amendment Act) and the third deals with the second proviso to Section 24, which deals, inter alia, with oral hearings and arguments on a day-to-day basis and the non-grant of adjournments, unless sufficient cause is made out.

21. What can be seen from the above is that Section 26 has, while retaining the bifurcation of proceedings into arbitration and Court proceedings, departed somewhat from Section 85A as proposed by the Law Commission.

22. That a provision such as Section 26 has to be construed literally first, and then purposively and pragmatically, so as to keep the object of the provision also in mind, has been laid down in **Thyssen** (supra) in paragraph 26 as follows:

26. Present-day courts tend to adopt a purposive approach while interpreting the statute which repeals the old law and for that purpose to take into account the objects and reasons which led to the enacting of the new Act. We have seen above that this approach was adopted by this Court in *M.M.T.C. Ltd. case* [MANU/SC/1298/1996: (1996) 6 SCC 716]. Provisions of both the Acts, old and new, are very different and it has been so observed in *Sundaram Finance Ltd. case* [MANU/SC/0012/1999 : (1999) 2 SCC 479]. In that case, this Court also said that provisions of the new Act have to be interpreted and construed independently and that in fact reference to the old Act may actually lead to misconstruction of the provisions of the new Act. The Court said that it will be more relevant, while construing the provisions of the new Act, to refer to the UNCITRAL Model Law rather than the old Act. In the case of *Kuwait Minister of Public Works v. Sir Frederick Snow and Partners* [MANU/UKHL/0014/1984: (1984) 1 All ER 733 (HL)] the award was given before Kuwait became a party to the New York Convention recognised by an Order in Council in England. The House of Lords held that though a foreign award could be enforced in England under the (U.K.) Arbitration Act, 1975 as when the proceedings for enforcement of the award were initiated in England Kuwait had

become a party to the Convention. It negated the contention that on the date the award was given Kuwait was not a party to the New York Convention. (at pages 370-371)

Similarly, in **Milkfood Limited** (supra) at 315, this Court, while construing Section 85 of the 1996 Act, had this to say:

70. Section 85 of the 1996 Act repeals the 1940 Act. Sub-section (2) of Section 85 provides for a non obstante clause. Clause (a) of the said Sub-section provides for saving Clause stating that the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before the said Act came into force. Thus, those arbitral proceedings which were commenced before coming into force of the 1996 Act are saved and the provisions of the 1996 Act would apply in relation to arbitral proceedings which commenced on or after the said Act came into force. Even for the said limited purpose, it is necessary to find out as to what is meant by commencement of arbitral proceedings for the purpose of the 1996 Act wherefore also necessity of < href="#" class="dictdataview">reference to Section 21 would arise. The court is to interpret the repeal and savings clauses in such a manner so as to give a pragmatic and purposive meaning thereto. It is one thing to say that commencement of arbitration proceedings is dependent upon the facts of each case as that would be subject to the agreement between the parties. It is also another thing to say that the expression "commencement of arbitration proceedings" must be understood having regard to the context in which the same is used; but it would be a totally different thing to say that the arbitration proceedings commence only for the purpose of limitation upon issuance of a notice and for no other purpose. The statute does not say so. Even the case-laws do not suggest the same. On the contrary, the decisions of this Court operating in the field beginning from *Shetty's Constructions* [MANU/SC/1070/1998 : (1998) 5 SCC 599] are ad idem to the effect that Section 21 must be taken recourse to for the purpose of interpretation of Section 85(2)(a) of the Act. There is no reason, even if two views are possible, to make a departure from the decisions of this Court as referred to hereinbefore.

23. All learned Counsel have agreed, and this Court has found, on a reading of Section 26, that the provision is indeed in two parts. The first part refers to the Amendment Act not applying to certain proceedings, whereas the second part affirmatively applies the Amendment Act to certain proceedings. The question is what exactly is contained in both parts. The two parts are separated by the word 'but', which also shows that the two parts are separate and distinct. However, Shri Viswanathan has argued that the expression "but" means only that there is an emphatic repetition of the first part of Section 26 in the second part of the said Section. For this, he relied upon the Concise Oxford Dictionary on Current English, which states:

Introducing emphatic repetition; definitely (wanted to see nobody, but nobody).

Quite obviously, the context of the word "but" in Section 26 cannot bear the aforesaid meaning, but serves only to separate the two distinct parts of Section 26.

24. What will be noticed, so far as the first part is concerned, which states, "Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree..." is that: (1) "the arbitral proceedings" and their commencement is mentioned in the context of Section 21 of the principal Act; (2) the expression used is "to" and not "in relation to"; and (3) parties may otherwise agree. So far as the second part of Section 26 is concerned, namely, the part which reads, "...but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act" makes it clear that the expression "in relation to" is used; and the expression "the" arbitral proceedings and "in accordance with the provisions of Section 21 of the principal Act" is conspicuous by its absence.

25. That the expression "the arbitral proceedings" refers to proceedings before an arbitral tribunal is clear from the heading of Chapter V of the 1996 Act, which reads as follows:

Conduct of Arbitral Proceedings

The entire chapter consists of Sections 18 to 27 dealing with the conduct of arbitral proceedings before an arbitral tribunal. What is also important to notice is that these proceedings alone are referred to, the expression "to" as contrasted with the expression "in relation to" making this clear. Also, the reference to Section 21 of the 1996 Act, which appears in Chapter V, and which speaks of the arbitral proceedings commencing on the date on which a request for a dispute to be referred to arbitration is received by the Respondent, would also make it clear that it is these proceedings, and no others, that form the subject matter of the first part of Section 26. Also, since the conduct of arbitral proceedings is largely procedural in nature, parties may "otherwise agree" and apply the Amendment Act to arbitral proceedings that have commenced before the Amendment Act came into force.² In stark contrast to the first part of Section 26 is the second part, where the Amendment Act is made applicable "in relation to" arbitral proceedings which commenced on or after the date of commencement of the Amendment Act. What is conspicuous by its absence in the second part is any reference to Section 21 of the 1996 Act. Whereas the first part refers only to arbitral proceedings before an arbitral tribunal, the second part refers to Court proceedings "in relation to" arbitral proceedings, and it is the commencement of these Court proceedings that is referred to in the second part of Section 26, as the words "in relation to the arbitral proceedings" in the second part are not controlled by the application of Section 21 of the

1996 Act. Section 26, therefore, bifurcates proceedings, as has been stated above, with a great degree of clarity, into two sets of proceedings-arbitral proceedings themselves, and Court proceedings in relation thereto. The reason why the first part of Section 26 is couched in negative form is only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if parties otherwise agree. If the first part of Section 26 were couched in positive language (like the second part), it would have been necessary to add a proviso stating that the Amendment Act would apply even to arbitral proceedings commenced before the amendment if the parties agree. In either case, the intention of the legislature remains the same, the negative form conveying exactly what could have been stated positively, with the necessary proviso. Obviously, "arbitral proceedings" having been subsumed in the first part cannot re-appear in the second part, and the expression "in relation to arbitral proceedings" would, therefore, apply only to Court proceedings which relate to the arbitral proceedings. The scheme of Section 26 is thus clear: that the Amendment Act is prospective in nature, and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the principal Act, on or after the Amendment Act, and to Court proceedings which have commenced on or after the Amendment Act came into force.

26. We now consider some of the submissions of learned Counsel for the parties as to what ought to be the true construction of Section 26. According to Shri Sundaram, the second part of Section 26 should be taken to be the principal part, with the first part being read as an exception to the principal part. This is so that Section 6 of the General Clauses Act then gets attracted to the first part, the idea being to save accrued rights. Section 6 applies unless a contrary intention appears in the enactment in question. The plain language of Section 26 would make it clear that a contrary intention does so appear, Section 26 being a special provision having to be applied on its own terms.

27. Thus, in **Transport and Dock Workers' Union and Ors. v. New Dholera Steamship Ltd., Bombay and Ors.** (1967) 1 LLJ 434, a Five Judge Bench of this Court held:

6. It was contended before us that as an appeal is a continuation of the original proceeding the repeal should not affect the enforcement of the provisions of the Ordinance in this case. Reliance is placed upon Section 6 of the General Clauses Act, 1897 wherein is indicated the effect of repeal of an enactment by another. It is contended that as the Payment of Bonus Ordinance has been repealed by Section 40(1), the consequences envisaged in Section 6 of the General Clauses Act must follow and the present matter must be disposed of in accordance with the Ordinance as if the Act had not been passed. It is submitted that there was a right and a corresponding obligation to pay bonus Under Section 10 of the Ordinance and that right and obligation cannot be obliterated because of the repeal of the Ordinance. This argument is not acceptable because of the provisions of the second Sub-section of Section 40. That Sub-section reads as follows:

40. Repeal and saving.

(1)***

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under this Act as if this Act had commenced on the 29th May, 1965.

Section 6 of the General Clauses Act applies ordinarily but it does not apply if a different intention appears in the repealing Act. Here a different intention is made to appear expressly and the special saving incorporated in the repealing Act protects only anything done or any action taken under the Ordinance which is deemed to have been done or taken under this Act as if the Act had commenced on 29th May, 1965. Nothing had been done under the Ordinance and no action was taken which needs protection; nor was anything pending under the Ordinance which could be continued as if the Act had not been passed. There was thus nothing which was to be saved after the repeal of the Ordinance and this question which might have arisen under the Ordinance now ceases to exist.

In **Kalawati Devi Harlalka v. CIT** MANU/SC/0160/1967 : (1967) 3 SCR 833, a repeal and savings provision contained in Section 297 of the Income Tax Act, 1961 was held to evidence an intention to the contrary Under Section 6 of the General Clauses Act as follows:

14. The learned Counsel for the Appellant submits that Parliament had Section 6 of the General Clauses Act in view, and therefore no express provision was made dealing with appeals and revisions, etc. In our view, Section 6 of the General Clauses Act would not apply because Section 297(2) evidences an intention to the contrary. In *Union of India v. Madan Gopal Kabra* [MANU/SC/0053/1953 : 25 ITR 5] while interpreting Section 13 of the Finance Act, 1950, already extracted above, this Court observed at p. 68:

Nor can Section 6 of the General Clauses Act, 1897, serve to keep alive the liability to pay tax on the income of the year 1949-50 assuming it to have accrued under the repealed State law, for a "different intention" clearly appears in Sections 2 and 13 of the Finance Act read together as indicated above.

It is true that whether a different intention appears or not must depend on the language and content of Section 297(2). It seems to us, however, that by providing for so many matters mentioned above, some in accord with what would

have been the result Under Section 6 of the General Clauses Act and some contrary to what would be the result Under Section 6, Parliament has clearly evidenced an intention to the contrary.

28. Shri Sundaram's submission is also not in consonance with the law laid down in some of our judgments. The approach to statutes, which amend a statute by way of repeal, was put most felicitously by B.K. Mukherjea, J. in **State of Punjab v. Mohar Singh**, MANU/SC/0043/1954 : 1955 1 SCR 893 at 899-900, thus:

In our opinion the approach of the High Court to the question is not quite correct. Whenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the Section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving Clause is by itself not material. It is in the light of these principles that we now proceed to examine the facts of the present case.

This statement of the law has subsequently been followed in **Transport and Dock Workers Union and Ors. v. New Dholera Steamships Ltd., Bombay and Ors.** (Supra) at paragraph 6 and **T.S. Baliah v. T.S. Rengachari**, MANU/SC/0238/1968 : 1969 3 SCR 65 at 71-72.

29. Equally, the suggested interpretation of Shri Viswanathan would not only do violence to the plain language of Section 26, but would also ignore the words "in relation to" in the second part of Section 26, as well as ignore the fact that Section 21 of the 1996 Act, though mentioned in the first part, is conspicuous by its absence in the second part. According to Shri Viswanathan, the expression "arbitral proceedings commenced" is the same in both parts and, therefore, the commencement of arbitral proceedings Under Section 21 is the only thing to be looked at in both parts. Thus, according to the learned senior Counsel, if arbitral proceedings have commenced prior to coming into force of the Amendment Act, the said proceedings, together with all proceedings in Court in relation thereto, would attract only the provisions of the unamended 1996 Act. Similarly, when arbitral proceedings have commenced Under Section 21 after the coming into force of the Amendment Act, those proceedings, including all courts proceedings in relation thereto, would be governed by the Amendment Act. This is not the scheme of Section 26 at all, as has been pointed out above. Further, this argument is more or less the conclusion reached by the report of the High Level Committee, headed by Justice B.N. Srikrishna, to amend the 1996 Act.³ It can be seen from the report of the High Level Committee that an amendment would be required to Section 26 to incorporate its findings. Section 87 of the proposed Arbitration and Conciliation (Amendment) Bill, 2018 cannot be looked at, at this stage, for the interpretation of Section 26 of the Amendment Act for two reasons: (i) Section 87, as ultimately enacted, may not be in the form that is referred to in the press release; and (ii) a proposed Bill, introducing a new and different provision of law can hardly be the basis for interpretation of a provision of law as it now stands. Obviously, therefore, Shri Viswanathan's approach leads to an amendment of Section 26, as recommended by the Srikrishna Committee, and not interpretation thereof. For all these reasons, his argument must, therefore, be rejected. Shri Datar's argument is more or less the same as Shri Viswanathan's, and suffers from the same infirmity as Shri Viswanathan's interpretation. Shri A. Krishnan, in bringing in the concept of "seat", is again doing complete violence to the language of Section 26, as "place of arbitration" is a well-known concept contained in Section 20 of the 1996 Act, which finds no mention whatsoever in Section 26 of the Amendment Act. For these reasons, his interpretation cannot also be accepted.

30. Shri Neeraj Kishan Kaul, learned senior Counsel appearing on behalf of Respondents in SLP(C) Nos. 19545-19546 of 2016, has argued that the first part of Section 26 does not apply to Court proceedings at all, thereby indicating that the Amendment Act must be given retrospective effect insofar as Court proceedings in relation to arbitral proceedings are concerned. For this purpose, he relied on **Minister of Public Works of the Government of the State of Kuwait** (supra).

31. In that case, the question that arose was as to the correct construction of Section 7(1) of the U.K. Arbitration Act, 1975. The said Section was given retrospective effect in applying the New York Convention to arbitration agreements that were entered into before the convention was made applicable, for the reason that nobody had an accrued right/defence which was taken away. All defences available in a common law action on the award would be available and continued to be available. Hence, it was held that the award could always have been enforced by one form of procedure and that it subsequently became enforceable by an alternative form. This judgment can have no application to the present case, inasmuch as the Amendment Act, as applicable to Court proceedings that arose in relation to arbitral proceedings, cannot be said to apply to mere forms of procedure, but also includes substantive law applicable to such Court proceedings post the Amendment Act. Also, it is wholly fallacious to say that since the first part of

Section 26 does not refer to Court proceedings in relation to arbitral proceedings, the Amendment Act is retrospective insofar as such proceedings are concerned. The second part of Section 26 would then have to be completely ignored, which, as has been seen hereinabove, applies to Court proceedings in relation to arbitral proceedings only prospectively, i.e. if such Court proceedings are commenced after the Amendment Act comes into force. For these reasons, such an interpretation of Section 26 is unacceptable.

32. Shri Chidambaram, appearing on behalf of some of the Respondents, has argued that the interpretation accepted by this Court *supra* is the correct interpretation. He has also argued that, alternatively, the expression "in relation to arbitral proceedings" in the second part of Section 26 would also include within it arbitral proceedings before the arbitral tribunal, as otherwise Section 26 would not apply the Amendment Act to such arbitral proceedings. We are afraid that this alternative interpretation does not appeal to us, for the simple reason that when the first part of Section 26 makes it clear that arbitral proceedings commenced before the Amendment Act would not be governed by the Amendment Act, it is clear that arbitral proceedings that have commenced after the Amendment Act comes into force would be so governed by it, as has been held by us above. The negative form of the language of the first part only becomes necessary to indicate that parties may otherwise agree to apply the Amendment Act to arbitral proceedings commenced even before the Amendment Act comes into force. The absence of any reference to Section 21 of the 1996 Act in the second part of Section 26 of the Amendment Act is also a good reason as to why arbitral proceedings before an arbitral tribunal are not contemplated in the second part.

33. Shri Sibal has argued that Section 26 is not a savings Clause at all and cannot be construed as such. According to the learned senior Counsel, Section 26 manifests a clear intention to destroy all rights, vested or otherwise, which have accrued under the unamended 1996 Act. We are unable to accept these submissions as it is clear that the intendment of Section 26 is to apply the Amendment Act prospectively to arbitral proceedings and to court proceedings in relation thereto. This approach again does not commend itself to us.

34. Dr. Singhvi has, however, argued that the approach indicated by us above could be termed as an "intermediate approach", i.e. it is an approach which does not go to either of the extreme approaches of Shri Sundaram, Shri Viswanathan and Shri Datar or that of Shri Sibal. Further, according to the learned senior Counsel, this approach has the merit of both clarity, as well as no anomalies arising as a result, as it is clear that the Amendment Act is to be applied only prospectively with effect from the date of its commencement, and only to arbitral proceedings and to court proceedings in relation thereto, which have commenced on or after the commencement of the Amendment Act. We think this is the correct approach as has already been indicated by us above.

35. The judgment in **Thyssen** (*supra*), was strongly relied upon by counsel on both sides. It is, therefore, important to deal with this judgment in a little detail. In **Thyssen** (*supra*), Section 85 of the 1996 Act came up for consideration. What is clear is that Section 85(2)(a) had the expression "in relation to arbitral proceedings" in both parts of Sub-section (2)(a). When speaking of the repealed enactments, it stated that they will apply "in relation to" arbitral proceedings which commenced before the 1996 Act came into force, but that otherwise the 1996 Act shall apply "in relation to" arbitral proceedings, which commenced on or after the 1996 Act came into force.

36. The judgment in **Thyssen** (*supra*) construed Section 85 as follows:

23. Section 85(2)(a) of the new Act is in two limbs: (1) provisions of the old Act shall apply in relation to arbitral proceedings which commenced before the new Act came into force unless otherwise agreed by the parties, and (2) the new Act shall apply in relation to arbitral proceedings which commenced on or after the new Act came into force. The first limb can further be bifurcated into two: (a) provisions of the old Act shall apply in relation to arbitral proceedings commenced before the new Act came into force, and (b) the old Act will not apply in such cases where the parties agree that it will not apply in relation to arbitral proceedings which commenced before the new Act came into force. The expression "in relation to" is of the widest import as held by various decisions of this Court in *Doypack Systems (P) Ltd.* [MANU/SC/0300/1988 : (1988) 2 SCC 299], *Mansukhlal Dhanraj Jain* [MANU/SC/0633/1995 : (1995) 2 SCC 665], *Dhanrajamal Gobindram* [MANU/SC/0362/1961 : AIR 1961 SC 1285: (1961) 3 SCR 1020] and *Navin Chemicals Mfg.* [MANU/SC/0571/1993 : (1993) 4 SCC 320] This expression "in relation to" has to be given full effect to, particularly when read in conjunction with the words "the provisions" of the old Act. That would mean that the old Act will apply to the whole gambit of arbitration culminating in the enforcement of the award. If it was not so, only the word "to" could have sufficed and when the legislature has used the expression "in relation to", a proper meaning has to be given. This expression does not admit of restrictive meaning. The first limb of Section 85(2)(a) is not a limited saving clause. It saves not only the proceedings pending at the time of commencement of the new Act but also the provisions of the old Act for enforcement of the award under that Act. (at page 369)

The judgment then goes on to refer to Section 48 of the Arbitration Act, 1940, which is set out therein as follows:

48. *Saving for pending references.*--The provisions of this Act shall not apply to any reference pending at the commencement of this Act, to which the law in force immediately before the commencement of this Act shall notwithstanding any repeal effected by this Act continue to apply. (at page 349)

Paragraph 33 goes on to state the difference between Section 85(2)(a) of the 1996 Act and the earlier Section 48 of the 1940 Act, as follows:

33. Because of the view of Section 85(2)(a) of the new Act which we have taken, it is not necessary for us to consider difference in the repealing provisions as contained in Section 48 of the old Act and Section 85 of the new Act. We may, however, note that Under Section 48 of the old Act the concept is of "reference" while under the new Act it is "commencement". Section 2(e) of the old Act defines "reference". Then Under Section 48 the word used is "to" and Under Section 85(2) (a) the expression is "in relation to". It, therefore, also appears that it is not quite relevant to consider the provision of Section 48 of the old Act to interpret Section 85(2)(a). (at page 375)

Paragraph 25 specifically states that Section 6 of the General Clauses Act will not apply, inasmuch as a different intention does appear from the plain language of Section 85(2)(a). Ultimately, after stating seven conclusions in paragraph 22, this Court went on to state that enforcement of an award under the 1940 Act would be an accrued right for the reason that the challenge procedure Under Section 30 of the 1940 Act was wider and completely different from the challenge procedure Under Section 34 of the 1996 Act, and that to avoid confusion and hardship, it would be important to refer to the expression "in relation to" as meaning the entire gamut of arbitral proceedings, beginning with commencement and ending with enforcement of an award.

37. The judgment in **Thyssen** (supra) dealt with a differently worded provision, and emphasized the difference in language between the expression "to" and the expression "in relation to". In reference to the Acts which were repealed Under Section 85, proceedings which commenced before the 1996 Act were to be governed by the repealed Acts. These proceedings would be the entire gamut of proceedings, i.e. from the stage of commencement of arbitral proceedings until the challenge proceedings against the arbitral award had been exhausted. Similar was the position with respect to the applicability of the 1996 Act, which would again apply to the entire gamut of arbitral proceedings, beginning with commencement and ending with enforcement of the arbitral award. It is clear, therefore, that Section 85(2)(a) has two major differences in language with Section 26: one, that the expression "in relation to" does not appear in the first part of Section 26 and only the expression "to" appears; and, second, that "commencement" in the first part of Section 26 is as is understood by Section 21 of the 1996 Act. The second part of Section 85(2)(a) is couched in language similar to the second part of Section 26 with this difference, that Section 21 contained in the first part of Section 26 is conspicuous by its absence in the second part.

38. The judgment in **Thyssen** (supra) was followed in **N.S. Nayak** (supra). After setting out paragraph 32 of the judgment in **Thyssen** (supra) and paragraphs 22 and 23 of the aforesaid judgment, this Court concluded:

13. As stated in paragraph 22, Conclusion 1 without any reservation provides that the provisions of the old Act shall apply in relation to the arbitral proceedings which have commenced before coming into force of the new Act. Conclusion 2, in our view, is required to be read in context with Conclusion 1, that is to say, the phrase "in relation to arbitral proceedings" cannot be given a narrow meaning to mean only pendency of the proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the old Act for the award becoming a decree Under Section 17 thereof and also appeal arising thereunder. Hence, Conclusions 1 and 2 are to be read together which unambiguously reiterate that once the arbitral proceedings have started under the old Act, the old Act would apply for the award becoming a decree and also for appeal arising thereunder.

14. Conclusion 3 only reiterates what is provided in various Sections of the Arbitration Act, which gives option to the parties to opt for the procedure as per their agreement during the arbitral proceedings before the arbitrator. The phrase "unless otherwise agreed by the parties" used in various sections, namely, 17, 21, 23(3), 24(1), 25, 26, 29, 31, 85(2)(a) etc. indicates that it is open to the parties to agree otherwise. During the arbitral proceedings, right is given to the parties to decide their own procedure. So if there is an agreement between the parties with regard to the procedure to be followed by the arbitrator, the arbitrator is required to follow the said procedure. Reason being, the arbitrator is appointed on the basis of the contract between the parties and is required to act as per the contract. However, this would not mean that in appeal parties can contend that the appellate procedure should be as per their agreement. The appellate procedure would be governed as per the statutory provisions and parties have no right to change the same. It is also settled law that the right to file an appeal is accrued right that cannot be taken away unless there is specific provision to the contrary. There is no such provision in the new Act. In the present cases, the appeals were pending before the High Court under the provisions of the old Act and, therefore, appeals are required to be decided on the basis of the statutory provisions under the said Act. Hence, there is no substance in the submission made by the learned Counsel for the Appellant. (at pages 63-64)

The majority judgment in **Milkfood Limited** (supra), after referring to the judgments in **Thyssen** (supra) and **N.S. Nayak** (supra), concluded that, on the facts of that case, the 1940 Act will apply and not the 1996 Act. These judgments are distinguishable for the same reasons, as they only follow and apply **Thyssen** (supra).

39. From a reading of Section 26 as interpreted by us, it thus becomes clear that in all cases where the Section 34 petition is filed after the commencement of the Amendment Act, and an application for stay having been made Under Section 36 therein, will be governed by Section 34 as amended and Section 36 as substituted. But, what is to happen to Section 34 petitions that have been filed before the commencement of the Amendment Act, which were governed by Section 36 of the old Act? Would Section 36, as substituted, apply to such petitions? To answer this question, we have necessarily to decide on what is meant by "enforcement" in Section 36. On the one hand, it has been argued that "enforcement" is nothing but "execution", and on the other hand, it has been argued that "enforcement" and "execution" are different concepts, "enforcement" being substantive and "execution" being procedural in nature.

40. At this stage, it is necessary to set out the scheme of the 1996 Act. An arbitral proceeding commences Under Section 21, unless otherwise agreed by parties, when a dispute arises between the parties for which a request for the dispute to be referred to arbitration is received by the Respondent. The arbitral proceedings terminate Under Section 32(1) by the delivery of a final arbitral award or by the circumstances mentioned in Section 32(2). The mandate of the arbitral tribunal terminates with the termination of arbitral proceedings, save and except for correction and interpretation of the award within the bounds of Section 33, or the making of an additional arbitral award as to claims presented in the proceedings, but omitted from the award. Once this is over, in cases where an arbitral award is delivered, such award shall be final and binding on the parties and persons claiming under them, Under Section 35 of the 1996 Act. Under Section 36, both pre and post amendment, such award shall be "enforced" in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the Court. It is clear that the scheme of the 1996 Act is materially different from the scheme of the 1940 Act. Under Section 17 of the 1940 Act, once an award was delivered, the Court had to pronounce judgment in accordance with the award, following which a decree would be drawn up, which would then be executable under the Code of Civil Procedure. Under Section 36 of the 1996 Act, the Court does not have to deliver judgment in terms of the award, which is then followed by a decree, which is the formal expression of the adjudication between the parties. Under Section 36 of the 1996 Act, the award is deemed to be a decree and shall be enforced under the Code of Civil Procedure as such.

41. This brings us to the manner of enforcement of a decree under the Code of Civil Procedure. A decree is enforced under the Code of Civil Procedure only through the execution process-see Order XXI of the Code of Civil Procedure. Also, Section 36(3), as amended, refers to the provisions of the Code of Civil Procedure for grant of stay of a money decree. This, in turn, has reference to Order LXI, Rule 5 of the Code of Civil Procedure, which appears under the Chapter heading, "Stay of Proceedings and of Execution". This being so, it is clear that Section 36 refers to the execution of an award as if it were a decree, attracting the provisions of Order XXI and Order LXI, Rule 5 of the Code of Civil Procedure and would, therefore, be a provision dealing with the execution of arbitral awards. This being the case, we need to refer to some judgments in order to determine whether execution proceedings and proceedings akin thereto give rise to vested rights, and whether they are substantive in nature.

42. In **Lalji Raja and Sons v. Hansraj Nathuram**, MANU/SC/0008/1971: (1971) 1 SCC 721 at 728, this Court was concerned with a judgment debtor's right to resist execution of a decree. Section 20(1)(b) of the Code of Civil Procedure (Amendment) Act, 1951 was extended to Madhya Bharat and other areas, as a result of which the judgment debtor's right to resist execution of a decree was protected. In this context, this Court held that the Amendment Act of 1951 made decrees, which could have been executed only by courts in British India, executable in the whole of India. Stating that the change made was one relating to procedure only, this Court held:

15. This provision undoubtedly protects the rights acquired and privileges accrued under the law repealed by the Amending Act. Therefore the question for decision is whether the non-executability of the decree in the Morena Court under the law in force in Madhya Bharat before the extension of "the Code" can be said to be a right accrued under the repealed law. We do not think that even by straining the language of the provision it can be said that the non-executability of a decree within a particular territory can be considered as a privilege. Therefore the only question that we have to consider is whether it can be considered as a "right accrued" within the meaning of Section 20(1)(b) of the Code of Civil Procedure (Amendment) Act, 1950. In the first place, in order to get the benefit of that provision, the non-executability of the decree must be a right and secondly it must be a right that had accrued from the provisions of the repealed law. It is contended on behalf of the judgment-debtors that when the decree was passed, they had a right to resist the execution of the decree in Madhya Bharat in view of the provisions of the Indian Code of Civil Procedure (as adapted) which was in force in the Madhya Bharat at that time and the same is a vested right. It was further urged on their behalf that that right was preserved by Section 20(1)(b) of the Code of Civil Procedure (Amendment) Act, 1950. It is difficult to consider the non-executability of the decree in Madhya Bharat as a vested right of the judgment-debtors. The non-executability in question pertains to the jurisdiction of certain courts and not to the rights of the judgment-debtors. Further the relevant provisions of the Code of Civil Procedure in force in Madhya Bharat did not confer the right claimed by the judgment-debtors. All that has happened in view of the extension of "the Code" to the whole of India in 1951 is that the decrees which could have been executed only by courts in British India are now made executable in the whole of India. The change made is one relating to procedure and jurisdiction. Even before "the Code" was extended to Madhya Bharat the decree in question could have been executed either against the person

of the judgment-debtors if they had happened to come to British India or against any of their properties situated in British India. The execution of the decree within the State of Madhya Bharat was not permissible because the arm of "the Code" did not reach Madhya Bharat. It was the invalidity of the order transferring the decree to the Morena Court that stood in the way of the decree-holders in executing their decree in that court on the earlier occasion and not because of any vested rights of the judgment-debtors. Even if the judgment-debtors had not objected to the execution of the decree, the same could not have been executed by the court at Morena on the previous occasion as that court was not properly seized of the execution proceedings. By the extension of "the Code" to Madhya Bharat, want of jurisdiction on the part of the Morena Court was remedied and that court is now made competent to execute the decree.

16. That a provision to preserve the right accrued under a repealed Act "was not intended to preserve the abstract rights conferred by the repealed Act.... It only applies to specific rights given to an individual upon happening of one or the other of the events specified in statute" -- See Lord Atkin's observations in *Hamilton Gell v. White*. [(1922) 2 KB 422]. The mere right, existing at the date of repealing statute, to take advantage of provisions of the statute repealed is not a "right accrued" within the meaning of the usual saving Clause -- See *Abbot v. Minister for Lands* [(1895) AC 425] and *G. Ogden Industries Pvt. Ltd. v. Lucas*. [(1969) 1 All ER 121]

In *Narhari Shivram Shet Narvekar v. Pannalal Umediram* MANU/SC/0016/1976: (1976) 3 SCC 203 at 207, this Court, following *Lalji Raja* (supra), held as follows:

8. Learned Counsel appearing for the Appellant however submitted that since the Code of Civil Procedure was not applicable to Goa the decree became in executable and this being a vested right could not be taken away by the application of the Code of Civil Procedure to Goa during the pendency of the appeal before the Additional Judicial Commissioner. It seems to us that the right of the judgment debtor to pay up the decree passed against him cannot be said to be a vested right, nor can the question of executability of the decree be regarded as a substantive vested right of the judgment debtor. *A fortiori* the execution proceedings being purely a matter of procedure it is well settled that any change in law which is made during the pendency of the cause would be deemed to be retroactive in operation and the appellate court is bound to take notice of the change in law.

Since it is clear that execution of a decree pertains to the realm of procedure, and that there is no substantive vested right in a judgment debtor to resist execution, Section 36, as substituted, would apply even to pending Section 34 applications on the date of commencement of the Amendment Act.

43. The matter can also be looked at from a slightly different angle. Section 36, prior to the Amendment Act, is only a clog on the right of the decree holder, who cannot execute the award in his favour, unless the conditions of this Section are met. This does not mean that there is a corresponding right in the judgment debtor to stay the execution of such an award. Learned Counsel on behalf of the Appellants have, however, argued that a substantive change has been made in the award, which became an executable decree only after the Section 34 proceedings were over, but which is now made executable as if it was a decree with immediate effect, and that this change would, therefore, take away a vested right or accrued privilege in favour of the Respondents. It has been argued, relying upon a number of judgments, that since Section 36 is a part of the enforcement process of awards, there is a vested right or at least a privilege accrued in favour of the Appellants in the unamended 1996 Act applying insofar as arbitral proceedings and court proceedings in relation thereto have commenced, prior to the commencement of the Amendment Act. The very judgment strongly relied upon by Senior Counsel for the Appellants, namely **Garikapati Veeraya** (supra), itself states in proposition (v) at page 515, that the vested right of appeal can be taken away only by a subsequent enactment, if it so provides specifically or by necessary intendment and not otherwise. We have already held that Section 26 does specifically provide that the court proceedings in relation to arbitral proceedings, being independent from arbitral proceedings, would not be viewed as a continuation of arbitral proceedings, but would be viewed separately. This being the case, it is unnecessary to refer to judgments such as **Union of India v. A.L. Rallia Ram**, MANU/SC/0003/1963 : (1964) 3 SCR 164 and **NBCC Ltd. v. J.G. Engineering (P) Ltd.**, MANU/SC/0013/2010 : (2010) 2 SCC 385, which state that a Section 34 proceeding is a supervisory and not an appellate proceeding. **Snehadeep Structures (P) Ltd. v. Maharashtra Small-Scale Industries Development Corporation Ltd.**, MANU/SC/0030/2010 : (2010) 3 SCC 34 at 47-49, which was cited for the purpose of stating that a Section 34 proceeding could be regarded as an "appeal" within the meaning of Section 7 of the Interest on Delayed Payments To Small Scale and Ancillary Industrial Undertakings Act, 1993, is obviously distinguishable on the ground that it pertains to the said expression appearing in a beneficial enactment, whose object would be defeated if the word "appeal" did not include a Section 34 application. This is made clear by the aforesaid judgment itself as follows:

36. On a perusal of the plethora of decisions aforementioned, we are of the view that "appeal" is a term that carries a wide range of connotations with it and that appellate jurisdiction can be exercised in a variety of forms. It is not necessary that the exercise of appellate jurisdiction will always involve re-agitation of entire matrix of facts and law. We have already seen in *Abhayankar* [MANU/SC/0456/1969 : (1969) 2 SCC 74] that even an order passed by virtue of limited power of revision Under Section 115 of the Code is treated as an exercise of appellate jurisdiction, though under that provision, the Court cannot go into the questions of facts. Given the weight of authorities in favour of giving

such a wide meaning to the term "appeal", we are constrained to disagree with the contention of the learned Counsel for the Respondent Corporation that appeal shall mean only a challenge to a decree or order where the entire matrix of law and fact can be re-agitated with respect to the impugned order/decreed. There is no quarrel that Section 34 envisages only limited grounds of challenge to an award; however, we see no reason why that alone should take out an application Under Section 34 outside the ambit of an appeal especially when even a power of revision is treated as an exercise of appellate jurisdiction by this Court and the Privy Council.

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40. It may be noted that Section 6(1) empowers the buyer to obtain the due payment by way of *any proceedings*. Thus the proceedings that the buyer can resort to, no doubt, includes arbitration as well. It is pertinent to note that as opposed to Section 6(2), Section 6(1) does not state that in case the parties choose to resort to arbitration, the proceedings in pursuance thereof will be governed by the Arbitration Act. Hence, the right context in which the meaning of the term "appeal" should be interpreted is the Interest Act itself. The meaning of this term under the Arbitration Act or the Code of Civil Procedure would have been relevant if the Interest Act had made a reference to them. For this very reason, we also do not find it relevant that the Arbitration Act deals with applications and appeals in two different chapters. We are concerned with the meaning of the term "appeal" in the Interest Act, and not in the Arbitration Act.

44. Learned senior Counsel appearing on behalf of the Respondents, has also argued that the expression "has been" in Section 36(2), as amended, would make it clear that the Section itself refers to Section 34 applications which have been filed prior to the commencement of the Amendment Act and that, therefore, the said Section would apply, on its plain language, even to Section 34 applications that have been filed prior to the commencement of the Amendment Act. For this purpose, the judgment in **State of Bombay v. Vishnu Ramchandra** MANU/SC/0068/1960 : (1961) 2 SCR 26, was strongly relied upon. In that judgment, it was observed, while dealing with Section 57 of the Bombay Police Act, 1951, that the expression "has been punished" is in the present perfect tense and can mean either "shall have been" or "shall be". Looking to the scheme of the enactment as a whole, the Court felt that "shall have been" is more appropriate. This decision was referred to in paragraphs 60 and 61 of **Workmen v. Firestone Tyre & Rubber Co. of India (P) Ltd.**, MANU/SC/0305/1973 : (1973) 1 SCC 813 at 838 and the ratio culled out was that such expression may relate to past or future events, which has to be gathered from the context, as well as the scheme of the particular legislation. In the context in which Section 11A of the Industrial Disputes Act, 1947 was enacted, this Court held that Section 11A has the effect of altering the law by abridging the rights of the employer. This being so, the expression "has been" would refer only to future events and would have no implication to disputes prior to December 15, 1971. However, in a significant paragraph, this Court held:

63. It must be stated at this stage that procedural law has always been held to operate even retrospectively, as no party has a vested right in procedure....

45. Being a procedural provision, it is obvious that the context of Section 36 is that the expression "has been" would refer to Section 34 petitions filed before the commencement of the Amendment Act and would be one pointer to the fact that the said Section would indeed apply, in its substituted form, even to such petitions. The judgment in **L'Office Cherifien Des Phosphates and Anr. v. Yamashita-Shinnihon Steamship Co. Ltd.**, MANU/UKHL/0046/1993 : (1994) 1 AC 486 is instructive. A new Section 13A was introduced with effect from 1st January, 1992, by which Arbitrators were vested with the power of dismissing a claim if there is no inordinate or an inexcusable delay on the part of the claimant in pursuing the claim. This Section was enacted because the House of Lords in a certain decision had suggested that such delays in arbitration could not lead to a rejection of the claim by itself. What led to the enactment of the Section was put by Lord Mustill thus:

My Lords, the effect of the decision of the House in the Bremer Vulkan case, coupled with the inability of the courts to furnish any alternative remedy which might provide a remedy for the abuse of stale claims, aroused a chorus of disapproval which was forceful, sustained and (so far as I am aware) virtually unanimous. There is no need to elaborate. The criticisms came from every quarter. Several Commonwealth countries hastily introduced legislation conferring on the court, or on the arbitrator, a jurisdiction to dismiss stale claims in arbitration. The history of the matter, and the reasons why the question was not as easy as it might have appeared, were summarized in an Article published in 1989 by Sir Thomas Bingham (Arbitration International, vol. 5, pp. 333 et seq.), and there is no need to rehearse them here. Taking account of various apparent difficulties the Departmental Advisory Committee on Arbitration hesitated for a time both as to the principle and as to whether the power to dismiss should be vested in the court or the arbitrator, but the pressure from all quarters became irresistible and in 1990 the Courts and Legal Services Act inserted, through the medium of Section 102, a new Section 13A in the Arbitration Act, 1950. (at page 522)

The question which arose in that case was whether delay that had taken place before the Section came into force could be taken into account by an arbitrator in order to reject the claim in that case. The House of Lords held that given the clamor for change and given the practical value and nature of the rights involved, it would be permissible to look at delay caused even before the Section came into force. In his concluding paragraph, Lord Mustill held:

In this light, I turn to the language of Section 13A construed, in case of doubt, by reference to its legislative background. The crucial words are: "(a)... there has been inordinate and inexcusable delay..." Even if read in isolation these words would I believe be sufficient, in the context of Section 13A as a whole, to demonstrate that the delay encompasses all the delay which has caused the substantial risk of unfairness. If there were any doubt about this the loud and prolonged chorus of complaints about the disconformity between practices in arbitration and in the High Court, and the increasing impatience for something to be done about it, show quite clearly that Section 13A was intended to bite in full from the outset. If the position were otherwise it would follow that, although Parliament has accepted the advice of all those who had urged that this objectionable system should be brought to an end, and has grasped the nettle and provided a remedy, it has reconciled itself to the continuation of arbitral proceedings already irrevocably stamped with a risk of injustice. I find it impossible to accept that Parliament can have intended any such thing, and with due respect to those who have suggested otherwise I find the meaning of Section 13A sufficiently clear to persuade me that in the interests of reform Parliament was willing to tolerate the very qualified kind of hardship involved in giving the legislation a partially retrospective effect. Accordingly, I agree with Beldam L.J. that the arbitrator did have the powers to which he purported to exercise. I would therefore allow the appeal and restore the award of the arbitrator.

46. In 2004, this Court's judgment in **National Aluminium Co.** (supra) had recommended that Section 36 be substituted, as it defeats the very objective of the alternative dispute resolution system, and that the Section should be amended at the earliest to bring about the required change in law. It would be clear that looking at the practical aspect and the nature of rights presently involved, and the sheer unfairness of the unamended provision, which granted an automatic stay to execution of an award before the enforcement process of Section 34 was over (and which stay could last for a number of years) without having to look at the facts of each case, it is clear that Section 36 as amended should apply to Section 34 applications filed before the commencement of the Amendment Act also for the aforesaid reasons.

47. Both sides locked horns on whether a proceeding Under Section 36 could be said to be a proceeding which is independent of a proceeding Under Section 34. In view of what has been held by us above, it is unnecessary for us to go into this by-lane of forensic argument.

48. However, Shri Viswanathan strongly relied upon the observations made in paragraph 32 in **Thyssen** (supra) and the judgment in **Hameed Joharan v. Abdul Salam**, MANU/SC/0444/2001 : (2001) 7 SCC 573. It is no doubt true that paragraph 32 in **Thyssen** (supra) does, at first blush, support Shri Viswanathan's stand. However, this was stated in the context of the machinery for enforcement Under Section 17 of the 1940 Act which, as we have seen, differs from Section 36 of the 1996 Act, because of the expression "in relation to arbitral proceedings", which took in the entire gamut, starting from the arbitral proceedings before the arbitral tribunal and ending up with enforcement of the award. It was also in the context of the structure of the 1940 Act being completely different from the structure of the 1996 Act, which repealed the 1940 Act. In the present case, it is clear that "enforcement" in Section 36 is to treat the award as if it were a decree and enforce it as such under the Code of Civil Procedure, which would only mean that such decree has to be executed in the manner indicated. Also, a stray sentence in a judgment in a particular context cannot be torn out of such context and applied in a situation where it has been argued that enforcement and execution are one and the same, at least for the purpose of the 1996 Act. In **Regional Manager and Anr. v. Pawan Kumar Dubey** MANU/SC/0464/1976: (1976) 3 SCR 540, at 544 it was held:

We think that the principles involved in applying Article 311(2) having been sufficiently explained in *Shamsher Singh's case* (supra) it should no longer be possible to urge that *Sughar Singh's case* (supra) could give rise to some misapprehension of the law. Indeed, we do not think that the principles of law declared and applied so often have really changed. But, the application of the same law to the differing circumstances and facts of various cases which have come up to this Court could create the impression sometimes that there is some conflict between different decisions of this Court. Even where there appears to some conflict, it would, we think, vanish when the *ratio decidendi* of each case is correctly understood. It is the Rule deducible from the application of law to the facts and circumstances of a case which constitutes its *ratio decidendi* and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.

49. For the same reason, it is clear that the judgment in **Hameed Joharan** (supra), which stated that execution and enforcement were different concepts in law, was in the context of Article 136 of the Limitation Act, 1963, read with Section 35 of the Indian Stamp Act, 1899, which is wholly different. The argument in that case was that Article 136 of the Limitation Act prescribes a period of 12 years for the execution of a decree or order, after it becomes enforceable. What was argued was that it would become enforceable only when stamped and Section 35 of the Stamp Act was referred to for the said purpose. In this context, this Court held:

And it is on this score it has been contended that the partition decree thus even though already passed cannot be acted upon, neither becomes enforceable unless drawn up and engrossed on stamp papers. The period of limitation, it has

been contended in respect of the partition decree, cannot begin to run till it is engrossed on requisite stamp paper. There is thus, it has been contended, a legislative bar Under Section 35 of the Indian Stamp Act for enforceability of partition decree. Mr. Mani contended that enforcement includes the whole process of getting an award as well as execution since execution otherwise means due performance of all formalities, necessary to give validity to a document. We are, however, unable to record our concurrence therewith. Prescription of a twelve-year period certain cannot possibly be obliterated by an enactment wholly unconnected therewith. Legislative mandate as sanctioned Under Article 136 cannot be kept in abeyance unless the selfsame legislation makes a provision therefor. It may also be noticed that by the passing of a final decree, the rights stand crystallized and it is only thereafter its enforceability can be had, though not otherwise. (at page 593)

It is for this reason that it was stated that enforceability of a decree under the Limitation Act cannot be the subject matter of Section 35 of the Stamp Act. Therefore, Section 35 of the Stamp Act could not be held to "overrun" the Limitation Act and thus, give a complete go-by to the legislative intent of Article 136 of the Limitation Act. Here again, observations made in a completely different context have to be understood in that context and cannot be applied to a totally different situation.

50. As a matter of fact, it was noticed that furnishing of stamp paper was an act entirely within the domain and control of the Appellant in that case, and any delay in the matter of furnishing the same cannot possibly be said to stop limitation, as no one can take advantage of his own wrong (see paragraph 13). As a matter of fact, the Court held that unless a distinction was made between execution and enforcement, the result in that case would lead to an "utter absurdity". The Court held, "absurdity cannot be the outcome of an interpretation of a Court order and wherever there is even a possibility of such absurdity, it would be a plain exercise of judicial power to repeal the same rather than encouraging it" (see paragraph 38).

51. Shri Viswanathan then referred us to this Court's judgment in **Akkayanaicker v. A.A.A. Kotchadainaidu and Anr.** MANU/SC/0793/2004 : (2004) 12 SCC 469, which, according to him, has followed the judgment in **Hameed Joharan** (supra). This judgment again would have no application for the simple reason that the narrow point that was decided in that case was whether the time period for execution of a decree Under Section 136 of the Limitation Act would start when the decree was originally made or whether a fresh period of limitation would begin after the decree was amended having been substantially scaled down by a Debt Relief Act. This Court held that as the original decree could not be enforced and only the amended decree could be enforced, 12 years has to be counted from the date of the amended decree. It is clear that this judgment also does not carry the matter further.

52. It was also argued that an award by itself had no legal efficacy, until it became enforceable, and that, therefore, until it could be enforced as a decree of the Court, it would continue to remain suspended. Here again, the judgment in **Satish Kumar** (supra) is extremely instructive. The question in that case was as to whether, under the 1940 Act, an award had any legal efficacy before a judgment followed thereupon and it was made into a decree. A Full Bench of the Punjab and Haryana High Court held that until it is made a Rule of the Court, such an award is waste paper. This Court strongly disagreed and followed its unreported decision in *Uttam Singh Dugal & Co. v. Union of India* as follows:

It seems to us that the main reason given by the two Full Benches for their conclusion is contrary to what was held by this Court in its unreported decision in *Uttam Singh Dugal & Co. v. Union of India* [Civil Appeal No. 162 of 1962-- judgment delivered on 11-10-1962]. The facts in this case, shortly stated, were that *Uttam Singh Dugal & Co.* filed an application Under Section 33 of the Act in the Court of the Subordinate Judge, Hazaribag. The Union of India, Respondent 1, called upon Respondent 2, Col. S.K. Bose, to adjudicate upon the matter in dispute between Respondent 1 and the Appellant Company. The case of *Uttam Singh Dugal & Co.* was that this purported reference to Respondent 2 for adjudication on the matters alleged to be in dispute between them and Respondent 1 was not competent because by an award passed by Respondent 2 on April 23, 1952 all the relevant disputes between them had been decided. The High Court held inter alia that the first award did not create any bar against the competence of the second reference. On appeal this Court after holding that the application Under Section 33 was competent observed as follows:

The true legal position in regard to the effect of an award is not in dispute. It is well settled that as a general rule, all claims which are the subject-matter of a reference to arbitration merge in the award which is pronounced in the proceedings before the arbitrator and that after an award has been pronounced, the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award. After an award is pronounced, no action can be started on the original claim which had been the subject-matter of the reference. As has been observed by Mookerjee, J., in the case of *Bhajahari Saha Banikya v. Behary Lal Basak* [33 Cal. 881 at p. 898] the award is, in fact, a final adjudication of a Court of the parties own choice, and until impeached upon sufficient grounds in an appropriate proceeding, an award, which is on the fact of it regular, is conclusive upon the merits of the controversy submitted, unless possibly the parties have intended that the award shall not be final and conclusive ... in reality, an award possesses all the elements of vitality, even though it has not been formally enforced, and it may be relied upon in a litigation between the parties relating to the same subject-matter". This conclusion, according to the learned Judge,

is based upon the elementary principle that, as between the parties and their privies, an award is entitled to that respect which is due to the judgment of a court of last resort. Therefore, if the award which has been pronounced between the parties has in fact, or can, in law, be deemed to have dealt with the present dispute, the second reference would be incompetent. This position also has not been and cannot be seriously disputed.

This Court then held on the merits "that the dispute in regard to overpayments which are sought to be referred to the arbitration of Respondent 2 by the second reference are not new disputes; they are disputes in regard to claims which the Chief Engineer should have made before the arbitration under the first reference". This Court accordingly allowed the appeal and set aside the order passed by the High Court.

This judgment is binding on us. In our opinion this judgment lays down that the position under the Act is in no way different from what it was before the Act came into force, and that an award has some legal force and is not a mere waste paper. If the award in question is not a mere waste paper but has some legal effect it plainly purports to or affects property within the meaning of Section 17(1)(b) of the Registration Act.

(at pages 248-249)

53. Justice Hegde, in a separate concurring judgment, specifically stated that an award creates rights in property, but those rights cannot be enforced until the award is made a decree of the Court. The Learned Judge put it very well when he said, "It is one thing to say that a right is not created, it is an entirely different thing to say that the right created cannot be enforced without further steps". The Amendment Act has only made an award executable conditionally after it is made, like a judgment of a Court, the only difference being that a decree would not have to be formally drawn following the making of such award.

54. Shri Viswanathan then argued, relying upon **R. Rajagopal Reddy v. Padmini Chandrasekharan** MANU/SC/0061/1996 : (1995) 2 SCC 630, **Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.** MANU/SC/0329/2001 : (2001) 6 SCC 356, **Sedco Forex International Drill. Inc. v. CIT** MANU/SC/2079/2005 : (2005) 12 SCC 717 and **Bank of Baroda v. Anita Nandrajog** MANU/SC/1587/2009 : (2009) 9 SCC 462, that a clarificatory amendment can only be retrospective, if it does not substantively change the law, but merely clarifies some doubt which has crept into the law. For this purpose, he referred us to the amendments made in Section 34 by the Amendment Act and stated that despite the fact that Explanations 1 and 2 to Section 34(2) stated that "for the avoidance of any doubt, it is clarified", this is not language that is conclusive in nature, but it is open to the Court to go into whether there is, in fact, a substantive change that has been made from the earlier position or whether a doubt has merely been clarified. According to learned senior Counsel, since fundamental changes have been made, doing away with at least two judgments of this Court, being **Saw Pipes Ltd.** (supra) and **Western Geco** (supra), as has been held in paragraph 18 in **HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited (Formerly Gas Authority of India Ltd.)** MANU/SC/1066/2017, it is clear that such amendments would only be prospective in nature. We do not express any opinion on the aforesaid contention since the amendments made to Section 34 are not directly before us. It is enough to state that Section 26 of the Amendment Act makes it clear that the Amendment Act, as a whole, is prospective in nature. Thereafter, whether certain provisions are clarificatory, declaratory or procedural and, therefore, retrospective, is a separate and independent enquiry, which we are not required to undertake in the facts of the present cases, except to the extent indicated above, namely, the effect of the substituted Section 36 of the Amendment Act.

55. Learned Counsel for the Appellants have painted a lurid picture of anomalies that would arise in case the Amendment Act were generally to be made retrospective in application. Since we have already held that the Amendment Act is only prospective in application, no such anomalies can possibly arise. It may also be noted that the choosing of Section 21 as being the date on which the Amendment Act would apply to arbitral proceedings that have been commenced could equally be stated to give rise to various anomalies. One such anomaly could be that the arbitration agreement itself may have been entered into years earlier, and disputes between the parties could have arisen many years after the said arbitration agreement. The argument on behalf of the Appellants is that parties are entitled to proceed on the basis of the law as it exists on the date on which they entered into an agreement to refer disputes to arbitration. If this were to be the case, the starting point of the application of the Amendment Act being only when a notice to arbitrate has been received by the Respondent, which as has been stated above, could be many years after the arbitration agreement has been entered into, would itself give rise to the anomaly that the amended law would apply even to arbitration proceedings years afterwards as and when a dispute arises and a notice to arbitrate has been issued Under Section 21. In such a case, the parties, having entered into an arbitration agreement years earlier, could well turn around and say that they never bargained for the change in law that has taken place many years after, and which change will apply to them, since the notice, referred to in Section 21, has been issued after the Amendment Act has come into force. Cut off dates, by their very nature, are bound to lead to certain anomalies, but that does not mean that the process of interpretation must be so twisted as to negate both the plain language as well as the object of the amending statute. On this ground also, we do not see how an emotive argument can be converted into a legal one, so as to interpret Section 26 in a manner that would be contrary to both its plain language and object.

56. However, it is important to remember that the Amendment Act was enacted for the following reasons, as the Statement of Objects and Reasons for the Amendment Act states:

2. The Act was enacted to provide for speedy disposal of cases relating to arbitration with least court intervention. With the passage of time, some difficulties in the applicability of the Act have been noticed. Interpretation of the provisions of the Act by courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act. With a view to overcome the difficulties, the matter was referred to the Law Commission of India, which examined the issue in detail and submitted its 176th Report. On the basis of the said report, the Arbitration and Conciliation (Amendment) Bill, 2003 was introduced in the Rajya Sabha on 22nd December, 2003. The said Bill was referred to the Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice for examination and Report. The said Committee, submitted its Report to the Parliament on 4th August, 2005, wherein the Committee recommended that since many provisions of the said Bill were contentious, the Bill may be withdrawn and a fresh legislation may be brought after considering its recommendations. Accordingly, the said Bill was withdrawn from the Rajya Sabha.

3. On a reference made again in pursuance of the above, the Law Commission examined and submitted its 246th Report on "Amendments to the Arbitration and Conciliation Act, 1996" in August, 2014 and recommended various amendments in the Act. The proposed amendments to the Act would facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user-friendly, cost effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases.

4. As India has been ranked at 178 out of 189 nations in the world in contract enforcement, it is high time that urgent steps are taken to facilitate quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered and reduce the pendency of cases in courts and hasten the process of dispute resolution through arbitration, so as to encourage investment and economic activity.

5. As Parliament was not in session and immediate steps were required to be taken to make necessary amendments to the Arbitration and Conciliation Act, 1996 to attract foreign investment by projecting India as an investor friendly country having a sound legal framework, the President was pleased to promulgate the Arbitration and Conciliation (Amendment) Ordinance, 2015.

6. It is proposed to introduce the Arbitration and Conciliation (Amendment) Bill, 2015, to replace the Arbitration and Conciliation (Amendment) Ordinance, 2015, which inter alia, provides for the following, namely:

(i) to amend the definition of "Court" to provide that in the case of international commercial arbitrations, the Court should be the High Court;

(ii) to ensure that an Indian Court can exercise jurisdiction to grant interim measures, etc., even where the seat of the arbitration is outside India;

(iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days;

(iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues;

(v) to provide that the arbitral tribunal shall make its award within a period of twelve months from the date it enters upon the reference and that the parties may, however, extend such period up to six months, beyond which period any extension can only be granted by the Court, on sufficient cause;

(vi) to provide that a model fee Schedule on the basis of which High Courts may frame Rules for the purpose of determination of fees of arbitral tribunal, where a High Court appoints arbitrator in terms of Section 11 of the Act;

(vii) to provide that the parties to dispute may at any stage agree in writing that their dispute be resolved through fast track procedure and the award in such cases shall be made within a period of six months;

(viii) to provide for neutrality of arbitrators, when a person is approached in connection with possible appointment as an arbitrator;

(ix) to provide that application to challenge the award is to be disposed of by the Court within one year.

7. The amendments proposed in the Bill will ensure that arbitration process becomes more user-friendly, cost effective and lead to expeditious disposal of cases.

57. The Government will be well-advised in keeping the aforesaid Statement of Objects and Reasons in the forefront, if it proposes to enact Section 87 on the lines indicated in the Government's press release dated 7th March, 2018. The immediate effect of the proposed Section 87 would be to put all the important amendments made by the Amendment

Act on a back-burner, such as the important amendments made to Sections 28 and 34 in particular, which, as has been stated by the Statement of Objects and Reasons, "...have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act", and will now not be applicable to Section 34 petitions filed after 23rd October, 2015, but will be applicable to Section 34 petitions filed in cases where arbitration proceedings have themselves commenced only after 23rd October, 2015. This would mean that in all matters which are in the pipeline, despite the fact that Section 34 proceedings have been initiated only after 23rd October, 2015, yet, the old law would continue to apply resulting in delay of disposal of arbitration proceedings by increased interference of Courts, which ultimately defeats the object of the 1996 Act.⁴ It would be important to remember that the 246th Law Commission Report has itself bifurcated proceedings into two parts, so that the Amendment Act can apply to Court proceedings commenced on or after 23rd October, 2015. It is this basic scheme which is adhered to by Section 26 of the Amendment Act, which ought not to be displaced as the very object of the enactment of the Amendment Act would otherwise be defeated.

58. At the fag end of the arguments, Shri Viswanathan, in rejoinder, raised another point which arises only in Civil Appeals arising out of SLP(C) No. 8374-8375 of 2017 and 8376-8378 of 2017. According to him, the impugned judgment, when it dealt with the majority award in favour of Respondent Enercon GmbH, went behind the award in ordering execution of a portion of the award in favour of Enercon, when the majority award, in paragraph 331(3) (b), specifically ordered the 2nd and 3rd Defendants to pay to WWIL, which is a joint venture company, a sum of Rs. 6,77,24,56,570/-. The majority award of the tribunal had specifically stated, in paragraph 298, as follows:

Enercon's claim is first pleaded as damages payable by the Mehra directors directly to Enercon. It also pleads an alternative claim for such further or other relief as the Tribunal considers appropriate (paragraph 18 of the application of 13 December 2015 and paragraph 323.4 of its closing written submission dated 13 May 2016, as also its Statement of Claim of 30 September 2014, at paragraph 102(M).) In the Tribunal's view, given that WWIL is only part owned by Enercon (hence Enercon's pecuniary disadvantage resulting from the Mehra directors' wrongdoing is not the same as that of WWIL) and further that WWIL remains the person most immediately affected by such wrongdoing, the liability of the Mehra directors is best discharged by requiring them to deciding upon such relief in favour of WWIL (as distinct from direct relief in favour of Enercon), the Tribunal sees no material disadvantage to Enercon, and, as for the Mehra directors, no possible prejudice or other unfairness, whether as a matter of pleading, the form of relief or otherwise.

It is only thereafter that the Tribunal awarded the aforesaid amount in paragraph 331(3) (b) as follows:

(b) Jointly and severally-

(i) to pay to WWIL the sum of INR 6,772,456,570, being the profit made by Vish Wind on the sale of allotment rights to WWIL in the years ending 31 March 2011 and 2012 together with interest thereon at the rate of 3% over European Central Bank rate from those dates until the date of this Award.

(ii) To pay to the Claimants their legal and other costs in the sum of 3,794,970.

59. It is thus Shri Viswanathan's contention that it is the decree holder alone who can execute such decree in its favour, and that in the present case it is WWIL who is the decree holder, insofar as paragraph 331(3)(b) is concerned and, that, therefore, Enercon's Chamber Summons, to execute this portion of the award, is contrary to the Code of Civil Procedure as well as a number of judgments construing the Code.

60. On the other hand, the submission of the other side is that the Mehra brothers, who are the 2nd and 3rd Defendants in the arbitration proceedings, are in control and management of WWIL, and have wrongfully excluded Enercon from such control and management. WWIL, therefore, will never put this decree into execution. This being so, the interest of justice requires that we should not interfere with the High Court judgment as there is no person that would be in a position to enforce the award apart from Enercon.

61. We are of the opinion that even though the High Court may not be strictly correct in its appreciation of the law, yet it has attempted to do justice on the facts of the case as follows:

These last words are important. If what Mr. Mehta says is correct and the decree was in favour of WWIL and not Enercon, that necessarily posits a rejection of Enercon's claim for damages and, therefore, a material disadvantage to Enercon. But this is not what the Arbitral Tribunal did at all. It accepted Enercon's plea. It accepted its argument that the Mehra brothers were guilty of wrongdoing. It accepted that the Mehra brothers were liable to make good any advantage or benefit they have received. The Arbitral Tribunal merely changed the vehicle or direction by which that recompense, restitution or recovery was to be made. The nomenclature is immaterial. Given the nature of disputes, indeed, WWIL could never put this decree into execution. It never sought this relief. It could not have. This is not in fact, as paragraph 298, says a relief in favour of WWIL at all although WWIL may benefit from it. It is a relief and a decree in favour of and only of Enercon.

In this view of the matter, we do not think it appropriate, in the interest of justice, to interfere with the impugned judgment on this count.

62. In view of the above, the present batch of appeals is dismissed. A copy of the judgment is to be sent to the Ministry of Law and Justice and the Learned Attorney General for India in view of what is stated in paragraphs 56 and 57 supra.

¹As a matter of fact, the amended Section 36 only brings back Article 36(2) of the UNCITRAL Model Law, which is based on Article 6 of the New York Convention, and which reads as under:

36(2). If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (a) (v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

²Section 29A of the Amendment Act provides for time limits within which an arbitral award is to be made. In **Hitendra Vishnu Thakur v. State of Maharashtra** MANU/SC/0526/1994: (1994) 4 SCC 602 at 633, this Court stated:

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.
(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.
(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication. It is, inter alia, because timelines for the making of an arbitral award have been laid down for the first time in Section 29A of the Amendment Act that parties were given the option to adopt such timelines which, though procedural in nature, create new obligations in respect of a proceeding already begun under the unamended Act. This is, of course, only one example of why parties may otherwise agree and apply the new procedure laid down by the Amendment Act to arbitral proceedings that have commenced before it came into force.

³Shri Tushar Mehta, learned ASG, referred to a press release from the Government of India, dated March 7th, 2018, after arguments have been concluded, in a written submission made to us. According to him, the press release refers to a new Section 87 in a proposed amendment to be made to the 1996 Act. The press release states that the Union Cabinet, chaired by the Prime Minister, has approved the Arbitration and Conciliation (Amendment) Bill, 2018 in which a new Section 87 is proposed to be inserted as follows:

A new Section 87 is proposed to be inserted to clarify that unless parties agree otherwise the Amendment Act 2015 shall not apply to (a) Arbitral proceedings which have commenced before the commencement of the Amendment Act of 2015 (b) Court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the Amendment Act of 2015 and shall apply only to Arbitral proceedings commenced on or after the commencement of the Amendment Act of 2015 and to court proceedings arising out of or in relation to such Arbitral proceedings.

The Srikrishna Committee had recommended the following:

The Committee feels that permitting the 2015 Amendment Act to apply to pending court proceedings related to arbitrations commenced prior to 23 October 2015 would result in uncertainty and prejudice to parties, as they may have to be heard again. It may also not be advisable to make the 2015 Amendment Act applicable to fresh court proceedings in relation to such arbitrations, as it may result in an inconsistent position. Therefore, it is felt that it may be desirable to limit the applicability of the 2015 Amendment Act to arbitrations commenced on or after 23 October 2015 and related court proceedings.

Recommendations

1. Section 26 of the 2015 Amendment Act may be amended to provide that:

a. unless parties agree otherwise, the 2015 Amendment Act shall not apply to: (a) arbitral proceedings commenced, in accordance with Section 21 of the ACA, before the commencement of the 2015 Amendment Act; and (b) court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the 2015 Amendment Act; and b. the 2015 Amendment Act shall apply only to arbitral proceedings commenced on or after the commencement of the 2015 Amendment Act and to court proceedings arising out of or in relation to such arbitral proceedings.

2. The amended Section 26 shall have retrospective effect from the date of commencement of the 2015 Amendment Act.

The High-Level Committee recommended this after referring to divergent views taken by various High Courts. This included the interpretation given by the Calcutta High Court in **Electrosteel Castings Limited v. Reacon Engineers (India) Pvt. Ltd.** (A.P. No. 1710 of 2015 decided on 14.01.2016) and **Tufan Chatterjee v. Rangan Dhar**, (FMAT No. 47 of 2016 decided on 02.03.2016), the Madhya Pradesh High Court in **Pragat Akshay Urja Limited Co. v. State of M.P. and Ors.**, (Arbitration Case Nos. 48, 53 and 54/2014, decided on 30.06.2016), the Madras High Court in **New Tirupur Area Development v. Hindustan Construction Co. Limited**, (Application No. 7674 of 2015 in O.P. No. 931 of 2015) and the Bombay High Court in **Rendezvous Sports World**

v. **BCCI** (Chamber Summons No. 1530 of 2015 in Execution Application (L) No. 2481 of 2015, Chamber Summons No. 1532 of 2015 in Execution Application (L) No. 2482 and Chamber Summons No. 66 of 2016 in Execution Application (L) No. 2748 of 2015 decided on 08.08.2016).

In addition to this, the following decisions by various High Courts also deal with the applicability of the Amendment Act:

i. Calcutta High Court: **Nitya Ranjan Jena v. Tata Capital Financial Services Ltd.**, GA No. 145/206 with AP No. 15/2016, **West Bengal Power Development Corporation Ltd. v. Dongfang Electric Corporation**, MANU/WB/0519/2017, **Saraf Agencies v. Federal Agencies for State Property Management** MANU/WB/0189/2017 : AIR 2017 Cal. 65, **Reliance Capital Ltd. v. Chandana Creations**, 2016 SCC Cal. 9558 and **Braithwaite Burn & Jessop Construction Co. Ltd. v. Indo Wagon Engineering Ltd.** MANU/WB/0442/2017 : AIR 2017 (NOC 923) 314.

ii. Bombay High Court: **M/s. Maharashtra Airport Development Co. Ltd. v. M/s. PBA Infrastructure Ltd.**, MANU/MH/4332/2017, **Enercon GmbH v. Yogesh Mehra**, MANU/MH/0400/2017: 2017 SCC Bom 1744 and **Global Aviation Services Pvt. Ltd. v. Airport Authority of India**, Commercial Arbitration Petition No. 434/2017,

iii. Madras High Court: **Jumbo Bags Ltd. v. New India Assurance Co. Limited**, MANU/TN/0353/2016: 2016 (3) CTC 769.

iv. Delhi High Court: **ICI Soma JV v. Simplex Infrastructures Ltd.**, MANU/DE/2773/2016, **Tantia-CCIL (JV) v. Union of India**, ARB.P. 615/2016, **Raffles Design International India Pvt. Ltd. v. Educomp Professional Education Ltd. and Ors.**, OMP (I) (COMM.) 23/2015, **Orissa Concrete and Allied Industries Ltd. v. Union of India and Ors.**, Arb. P. No. 174 of 2016, **Takamol Industries Pvt. Ltd. v. Kundan Rice Mills Ltd.**, EX.P. 422/2014 & EA No. 739/2016, **Apex Encon Projects Pvt. Ltd. v. Union of India and Anr.**, MANU/DE/4152/2017 and **Ratna Infrastructure Projects Pvt. Ltd. v. Meja Urja Nigam Pvt. Ltd.**, MANU/DE/0944/2017.

v. Patna High Court: **SPS v. Bihar Rajya Pul Nirman Nigam Ltd.**, Request Case No. 14 of 2016 and **Kumar and Kumar Associates v. Union of India**, MANU/BH/0529/2016: 2017 1 PLJR 649.

vi. Gujarat High Court: **OCI Corporation v. Kandla Export Corporation and Ors.**, MANU/GJ/2796/2016 : 2017 GLH (1) 383, **Abhinav Knowledge Services Pvt. Ltd. v. Babasaheb Ambedkar Open University** MANU/GJ/1142/2017 : AIR 2017 (NOC 1012) 344 and **Pallav Vimalbhai Shah v. Kalpesh Sumatibhai Shah**, O/IAAP/15/2017.

vii. Kerala High Court: **Shamsudeen v. Shreeram Transport Finance Ltd.**, MANU/KE/2137/2016 : ILR 2017 Vol. 1, Ker. 370 and **Jacob Mathew v. PTC Builders**, MANU/KE/1876/2017 : 2017 (5) KHC 583.

viii. Tripura High Court: **Subhash Podder v. State of Tripura**, MANU/TR/0232/2016 : 2016 SCC Tri. 500.

ix. Chhatisgarh High Court: **Orissa Concrete and Allied Industries Limited v. Union of India and Ors.**, Arbitration Application No. 34/2014.

x. Rajasthan High Court: **Dwarka Traders Pvt. Ltd. v. Union of India, S.B.**, Arbitration Application No. 95/2013 and **Mayur Associates, Engineers and Contractors v. Gurmeet Singh and Ors.**, S.B. Arbitration Application No. 74/2013.

xi. Himachal Pradesh High Court: **RSWM v. The Himachal Pradesh State Supplies Co. Ltd.**, Arb Case No. 104/2016 and **P.K. Construction Co. and Ors. v. Shimla Municipal Co. and Ors.**, Civil Writ Petition No. 2322/2016.

xii. Punjab & Haryana High Court: **Alpine Minmetals India Pvt. Ltd. v. Noble Resources Ltd.**, LPA No. 917/2017.

⁴These amendments have the effect, as stated in **HRD Corporation (Marcus Oil and Chemical Division) v. Gail (India) Limited (Formerly Gas Authority of India Ltd.)** MANU/SC/1066/2017 of limiting the grounds of challenge to awards as follows:

...In fact, the same Law Commission Report has amended Sections 28 and 34 so as to narrow grounds of challenge available under the Act. The judgment in **ONGC v. Saw Pipes Ltd.**, MANU/SC/0314/2003: (2003) 5 SCC 705, has been expressly done away with. So has the judgment in **ONGC v. Western Geco International Ltd.**, MANU/SC/0772/2014: (2014) 9 SCC 263. Both Sections 34 and 48 have been brought back to the position of law contained in **Renusagar Power Plant Co. Ltd. v. General Electric Co.**, MANU/SC/0195/1994 : (1994) Supp (1) SCC 644, where "public policy" will now include only two of the three things set out therein, viz., "fundamental policy of Indian law" and "justice or morality". The ground relating to "the interest of India" no longer obtains. "Fundamental policy of Indian law" is now to be understood as laid down in **Renusagar** (supra). "Justice or morality" has been tightened and is now to be understood as meaning only basic notions of justice and morality i.e. such notions as would shock the conscience of the Court as understood in **Associate Builders v. Delhi Development Authority**, MANU/SC/1076/2014 : (2015) 3 SCC 49. Section 28(3) has also been amended to bring it in line with the judgment of this Court in **Associate Builders** (supra), making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one.

Suresh Narayan Kadam and others v Central Bank of India and others

(2016)11 SCC 306

Bench: Madan B. Lokur, R.K. Agrawal, JJ.

Facts: The Maharashtra Housing and Area Development Authority (MHADA) had constructed some buildings for the lower and middle income groups in a complex known as Samata Nagar, Kandivli, Mumbai. Each building had

twenty flats. The Central Bank of India (for short 'the Bank') took possession of the land and ten such buildings on 16th August, 1982 with the intention of housing the families of a total of 200 employees. Pursuant thereto, the Bank issued Circulars on 15th September, 1982 and 25th May, 1983 relating to the policy of allotment of the flats to its Class III and Class IV employees. The Circular dated 15th September, 1982 provided that the flats would be allotted to employees under the jurisdiction of the Central Office, Bombay Main Office and the Bombay Metropolitan Regional Office. It also provided that the allotment would be as per the absolute discretion of the management and that the facility of allotment was not given as a condition of service nor did any right vest in any staff member. The Circular dated 25th May, 1983 made some minor modifications in the eligibility for allotment but the sum and substance, as far as the present proceedings are concerned, remained more or less the same.

Relevant paras of Judgement:

Held, land was leased out by the MHADA to the Bank for the purposes of housing middle income group employees or lower income group employees. As a result of the redevelopment plan, the Bank was intending to demolish the buildings and to construct luxury apartments for their managerial level officers, contrary to the lease agreement with MHADA. Assuming this to be so, if there is a violation of the provisions of the lease deed between the MHADA and the Bank, it is really for them to settle their differences, if any. The employees do not come into the picture at all. The various clauses in the lease agreement that have been referred to do not in any manner involve the employees and for them to raise an issue about any alleged violation of the provisions of the lease deed is totally inconsequential. This is not a public interest litigation where the rule relating to standing can be relaxed. SC is therefore not inclined to accept this submission of the employees that since the MHADA had leased out the land to the Bank for housing middle income group or lower income group employees, the Bank is disentitled from demolishing the buildings and constructing luxury apartments for their managerial level officers. Thus, there is no merit in these petitions and therefore decline to grant special leave to appeal and dismiss these petitions but with no order as to costs. SC grants them time to vacate the premises allotted to them on or before 31-3-2016. Order accordingly.

The Judgment was delivered by: Madan B. Lokur, J.

1. The proceedings in these petitions as indeed the proceedings in the Bombay High Court (out of which the present petitions have arisen) indicate a clear need for encouraging an amicable settlement process, preferably through mediation, in which the services of a mediator well-versed in the art, science and technique of mediation may be taken advantage of. The alternative, of course, is protracted litigation which may not be the best alternative for the contesting parties or for a society that requires expeditious justice delivery.

2. In his Foreword written on 12th April, 2011 to the first edition of "Mediation Practice & Law – The path to successful dispute resolution" written by Mr. Sriram Panchu, Senior Advocate and Mediator, Mr. Fali S. Nariman, a Senior Advocate of this Court and a respected jurist, writes:

"The same subject matter of disputation between two parties can be dealt with in two different ways, not necessarily exclusive: first, by attempting to resolve a dispute in such a way that the parties involved win as much as possible and lose as little as possible through the intervention of a third party steeped in the techniques of mediation; and second, (failing this) the dispute would be left to be resolved by each party presenting its case before a disinterested third party with an expectation of a binding decision on the merits of the case: a win-all lose-all, final determination".

The second alternative may not be the best alternative, as already mentioned by us.

3. The decision rendered by the High Court which is under challenge before us states that efforts were made to have the disputes between the contesting parties settled but it is clear that no institutional mechanism was invited to assist in the settlement process. The proceedings before us also indicate that several efforts were made to encourage the contesting parties to arrive at a settlement, and at one point of time the parties did reach an interim arrangement but that could not fructify into a final settlement only because of the absence of an intervention through an institutional mechanism. Appreciating this, this Court has consistently encouraged the settlement of disputes through an institutionalized alternative dispute resolution mechanism and there are at least three significant decisions rendered by this Court on the subject. They are: (i) Salem Advocate Bar Assn. (II) v. Union of India (2005) 6 SCC 344 2005 Indlaw SC 592 (ii) Afcons Infrastructure Ltd. V. Cherian Varkey Construction Co. (P) Ltd. (2010) 8 SCC 24 2010 Indlaw SC 688 (iii) K. Srinivas Rao v. D.A. Deepa (2013) 5 SCC 226 2013 Indlaw SC 110.

4. That apart this Court has, on several occasions, referred disputes for amicable settlement through the Mediation Centre functioning in the Supreme Court premises itself and Mediation Centres across the country in a large variety of disputes including (primarily) matrimonial disputes. In spite of the encouragement given by this Court, for one reason or another, institutionalized mediation has yet to be recognized as an acceptable method of dispute resolution provoking Mr. Fali S. Nariman to comment in the same Foreword in the context of the Afcon's decision that "Mediation must stand on its own; its success judged on its own record, un-assisted by Judges.

STATE OF M.P.VS. MADANLAL

2015(7) SCALE 261

Summary of Judgment

Facts

The Respondent as accused was sent up for trial for the offence punishable under Section 376(2) (f) Indian Penal Code before the learned Sessions Judge. The case of the prosecution before the Court below was that on 27.12.2008, the victim, aged about 7 years, PW1, was proceeding towards Haar from her home and on the way the accused, Madan Lal, met her and came to know that she was going in search of her mother who had gone to graze the goats. The accused told her that her mother had gone towards the river and accordingly took her near the river Parvati, removed her undergarment and made her sit on his lap, and at that time the prosecutrix shouted. As the prosecution story proceeds, he discharged on her private parts as well as on the stomach and washed the same. Upon hearing the cry of the prosecutrix, her mother, Ramnali Bai, PW2, reached the spot, and then accused took to his heels. The prosecutrix narrated the entire incident to her mother which led to lodging of an FIR by the mother of the prosecutrix. On the basis of the FIR lodged, criminal law was set in motion, and thereafter the investigating agency examined number of witnesses, seized the clothes of the Respondent-accused, sent certain articles for examination to the forensic laboratory and eventually after completing the examination, laid the chargesheet before the concerned court, which in turn, committed the matter to the Court of Session.

The learned trial Judge on the basis of the material brought on record came to hold that the prosecution had been able to establish the charge against the accused and accordingly found him guilty and sentenced him, however, the said judgment of conviction and order of sentence was in assail before the High Court.

The High Court, as is manifest, has converted the offence to one under 354 Indian Penal Code and confined the sentence to the period of custody already undergone.

Observation of the Court

In the instant appeal, as a reminder, though repetitive, first we shall dwell upon, in a painful manner, how some of the appellate Judges, contrary to the precedents and against the normative mandate of law, assuming a presumptuous role have paved the path of unbelievable laconicity to deal with criminal appeals which, if we permit ourselves to say, ruptures the sense of justice and punctures the criminal justice dispensation system.

It is mandatory for the appellate court to peruse the record which will necessarily mean the statement of the witnesses. In a case based upon direct eyewitness account, the testimony of the eyewitnesses is of paramount importance and if the appellate court reverses the finding recorded by the trial court and acquits the accused without considering or examining the testimony of the eyewitnesses, it will be a clear infraction of Section 386 Code of Criminal Procedure

As it seems to us the learned Single Judge has been influenced by the compromise that has been entered into between the accused and the parents of the victim as the victim was a minor. The learned trial Judge had rejected the said application on the ground that the offence was not compoundable.

Supreme Court Held

A compromise entered into between the parties cannot be construed as a leading factor based on which lesser punishment can be awarded. Rape is a non-compoundable offence and it is an offence against the society and is not a matter to be left for the parties to compromise and settle.

Court relied on *Shimbhu and Anr. v. State of Haryana* (2014) 13 SCC 318 wherein it was held that

“We would like to clearly state that in a case of rape or attempt of rape, the conception of compromise under no circumstances can really be thought of. Sometimes solace is given that the perpetrator of the crime has acceded to enter into wedlock with her which is nothing but putting pressure in an adroit manner; and we say with emphasis that the Courts are to remain absolutely away from this subterfuge to adopt a soft approach to the case, for any kind of liberal approach has to be put in the compartment of spectacular error.

Any kind of liberal approach or thought of mediation in this regard is thoroughly and completely sans legal permissibility.

Court opined that matter has to be remitted to the High Court for a reappraisal of the evidence and for a fresh decision. The consequence of such remand is that the order of the High Court stands lacinated and as the Respondent was in custody at the time of the pronouncement of the judgment by the trial Court, he shall be taken into custody forthwith by the concerned Superintendent of Police and thereafter the appeal before the High Court be heard afresh.

Vikram Bakshi and others v Sonia Khosla (Dead) By Lrs.

(2014) 15 SCC 80

Bench: Justice A. K. Sikri and Justice Surinder Singh Nijjar

The Judgment was delivered by: A. K. Sikri, J.

1. A spate of litigation between the two groups depicts a severe fight between them where settlement appears to be a distant dream, at least as of now, with tough positions taken and on each and every facet/ nuance of the disputes, they have joined issues. However, we are happy to find consensual approach on one aspect at least viz. the future course of action that needs to be adopted in these matters which have landed in this Court (albeit against interim orders) as the proceedings are still pending at different levels either in the Company Law Board or in the High Court. This much positive stance, aimed at cutting the corners and edging out the niceties for early resolution of the main dispute between the parties needs to be commended. For this reason, apart from stating the controversy involved in each of the matters, our purpose would be served in stating the course of action which needs to be adopted, as agreed between the parties, without going into the nitty-gritty of the issues involved. With this introduction we describe herein below the nature of the dispute in these petitions.

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2. When the two parties joined together for collaborative business venture, it is but natural that the relationship starts with mutual trust and faith in each other. At the time of fostering such a relationship, they expect that with joint efforts in the proposed business venture, they would be able to achieve unparallel milestones, which would otherwise be impossible with their individual efforts. The joining together is with the aim of making one plus one as eleven and not two. However, over a period of time, if due to unfortunate and unforeseen circumstances/ events, the relationship becomes bitter and the two collaborative partners fall apart, it results in a position where one minus one is not only reduced to zero but becomes negative. That perhaps is the story of the present litigation and if the disputes are not resolved early, either by adjudicatory process or amicably between the parties, the negative factor will keep growing and keep widening its fangs which may not be conducive to any of the litigants before us.

3. The respondents herein (Khosla Group) are the owners of the prime lands in Kasauli, District Solan, Himachal Pradesh. Legally, this land is owned by Montreaux Resort Pvt. Ltd. (MRL) and shareholding of the MRL was earlier exclusively held by the family members of the Khosla Group. It was their vision to develop this real estate into a tourist resort of repute. The Khosla group needed requisite finances and administrative expertise for this purpose.

The petitioners (Bakshi Group) extended its helping hand. In fact it was conceived as a dream project of both the groups. For this purpose MOU dated 21.12.2005 was entered into between Mr. Deepak Khosla, Mr. R.P. Khosla, MRL and Mr. Vikram Bakshi. The project was joint venture between the Khosla Group and Mr. Vikram Bakshi wherein the Bakshi Group was to pump in the necessary finances and to take charge of administration by managing the entire project. MRL was the special purpose vehicle for the execution of the project. The MOU envisaged transfer of shareholding in MRL by Khosla Group to Vikram Bakshi on certain demands made by the latter to the former.

4. Pursuant to the MOU dated 23.12.2005, Mr. Vinod Surah and Mr. Wadia Prakash (nominees of Mr. Vikram bakshi) were appointed as Additional Directors of MRL. An agreement dated 31.3.2006 was entered, for executing the proposed project, between the respondent, Ms. Sonia Khosla, wife of Mr. Deepak Khosla, Mr. R.P. Khosla, MRL and Mr. Vikram Bakshi. The agreement recorded that 51% shareholding in the company had been transferred to Mr. Vikram Bakshi. The said agreement, inter alia, provided that:

- (a) Land for the project shall be purchased in the name of MRL.
- (b) The responsibility of development of lands, managing the project and arranging finances would be that of Mr. Vikram Bakshi.
- (c) Khosla's would be paid a total consideration of Rs. 6.44 crores on completion of different milestones of which an amount of Rs. 3.30 crores was to be as a loan bearing interest @ 12% per annum.
- (d) Khosla's would sell their entire shareholding in MRL to Mr. Vikram Bakshi.

5. For some reasons (both the groups have their own version in this behalf with blame game against each other) the project did not kick off and ran into rough weather with the sowing of the seeds of mutual distrust and lack of faith. It led to filing of a petition u/s. 397 and 398 of the Companies Act by Ms. Sonia Khosla against Bakshi Group, though in that petition she impleaded some of the members of Khosla family also as respondents (may be performa respondents). Her allegation was that she held 49% shares in the Company which had been further reduced to 36% and that the affairs of the Company were being managed in a manner oppressive to the minority shareholders. In this petition she admitted that majority shareholding was with Mr. Vikram Bakshi.

6. The relief prayed for in the said petition, inter alia, was for passing an order for removal of the petitioners from the Board of Directors of the Company. Various miscellaneous applications came to be filed in the aforesaid petition. Notably among those was an application u/s. 8 of the Arbitration and Conciliation Act filed by Mr. Vikram Bakshi. Mr. Vineet Khosla also filed an application claiming himself to be the Director of the Company and alleging that Mr. Wadia Prakash and Mr. Vinod Surah had ceased to be the Directors of the Company on 30.9.2006 since they were not confirmed in the AGM of the Company and, therefore, the subsequent appointment of Mr. Vikram Bakshi by the Board was bad in law.

7. Another significant development which took place was that on 18.12.2007 purported meeting of the Company was held by Ms. Sonia Khosla and Mr. Vinay Khosla wherein Mr. Deepak Khosla and Mr. R.K. Garg were appointed as the Directors of the Company and in this meeting the Board of the Company allotted 6.58 lakhs equity shares to eleven persons of the Khosla Group. It hardly needs to be mentioned that the Bakshi Group contends that this alleged meeting on 18.12.2007 was of illegally constituted Board. The Bakshi Group also taken the position that Mr. Wadia Prakash and Mr. Vinod Surah continue to be legally appointed Directors and likewise appointment of Mr. Vikram Bakshi by the Board of the Company was also as per law.

8. The Company Law Board (CLB) passed orders dated 31.1.2008 directing the maintenance of status quo with regard to the shareholding and the Directors of the Company as it existed on the date of the filing of the petition i.e. 13.8.2007. Observations were made in this order that the respondent-Sonia Khosla had tried to overreach the CLB by changing its composition and to increase the share capital of the Company.

9. Aggrieved by this order of the CLB, Mr. R.P. Khosla filed the appeal in the High Court of Delhi. However, he sought permission to withdraw the appeal. On 11.4.2008, noticing that the parties had agreed that C.P. No. 114/2007 is to be withdrawn and the status quo as on the date of filing of the said petition would be maintained, the said C.P. was dismissed as withdrawn. Sonia Khosla had also filed appeal against the same very order dated 31.1.2008 of the CLB. This was also dismissed by the High Court on 22.4.2008, albeit on merits. Both Mr. R.P. Khosla as well as Sonia Khosla filed Review Petitions seeking review of orders dated 11.4.2008 and 22.4.2008 respectively. These Review Petitions were also dismissed on 6.5.2008.

10. As the things stood at that stage, the effect of the aforesaid proceedings was that the order dated 31.1.2008 passed by CLB continued to operate. It is at that stage, the litigation started taking a different turn altogether.

11. Ms. Sonia Khosla filed an application u/s. 340 of the Code of Criminal Procedure (Cr.PC) before the CLB alleging that forged documents were filed before the CLB. However, while this application is still pending before the CLB, in October, 2008 she filed another application u/s. 340 Cr. PC in the High Court of Delhi on the same very grounds which were taken in the application before CLB. She sought prosecution of the petitioners u/s. 195(i)(b)(ii) read with S. 340 Cr. PC alleging that the minutes of the AGM of the Company allegedly held on 30.9.2006 were forged. The reason given therein to approach the High Court was that she was forced to file the petition in the High Court as there was a complete inaction on the part of CLB on her application before it. She sought to rest her application on sub-s. 2 of S. 340 Cr. PC for its maintainability in the High Court. In this application orders dated 15.2.2010 are passed by the High Court and that order is the subject matter of challenge in the present proceedings. As can be easily discerned, the petitioners' main contention is that application u/s 340 Cr. PC is not maintainable.

SLP(C)No. 23796-98 of 2010

12. As mentioned above, in the Company Petition filed by Ms. Sonia Khosla interim orders dated 31.1.2008 were passed by the CLB directing the parties to maintain status quo with regard to shareholding and the Directors of the Company as it existed on the date of filing of the Company Petition i.e. 13.8.2007. The consequences thereof was not to give effect to the purported Board meeting of the Company on 14.12.2007 wherein Mr. Deepak Khosla and Mr. R.K. Garg were inducted as Directors and there was also an allotment of 6.58 lakhs equity shares to the persons of Khosla Group. Further, as mentioned above this order was challenged both by R.P. Khosla as well as Ms. Sonia Khosla by filing appeal in the High Court. Whereas appeal filed by Mr. R.P. Khosla was dismissed on 11.4.2008, the appeal of Ms. Sonia was dismissed on merits on 22.4.2008 and the Review Petitions filed by both of them were also dismissed on 6.5.2008. However, Mr. R.K. Garg who was taken as Director in the purported meeting held on 14.12.2007 also felt aggrieved by the order of the CLB. The effect of the status quo ante order was that he could not be treated as the Director of the Company during the subsistence of the said order. Mr. R.K. Garg challenged this order by filing a writ petition in the High Court of Delhi on 26.2.2008. In that writ petition orders of status quo were passed on 7.4.2008. However, on 9.4.2009, Mr. R.K. Garg (Respondent No. 1 herein) withdrew this petition as alternate remedy of filing appeal against the impugned order of the CLB is provided under Section 10F of the Companies Act. After withdrawing the writ petition the Respondent No. 1 filed Co. Appeal No. (SB) 23 of 2009. In this appeal the company judge of the High Court has passed orders dated 13.4.2010 issuing notice in the said appeal, in the application for condonation of delay as well as in the stay application. Simultaneously, the High Court has also stayed the operation of the orders dated 31.1.2008 passed by CLB in so far as it has cancelled the shareholding and Directorship of Respondent No. 1.

The instant present Special Leave Petition impugns the aforesaid order dated 13.4.2010 passed by the High Court, primarily on the ground that since the appeal is time barred till the delay is condoned there is no appeal in the eyes of law and, therefore, the High Court could not have passed interim orders.

13. Though the aforesaid two SLP's are the main proceedings before us, even in these proceedings Contempt Petitions and petitions u/s. 340 Cr. PC are filed. Moreover, narration of the events disclosed above would demonstrate that main proceedings are the Co. Petition filed by Ms. Sonia Khosla under

Section 397-98 of the Companies Act before the CLB where issues relating to the affairs of the Company are to be thrashed out. However, from this on case, number of other proceedings have sprung up. In fact, as of today more than 80 cases are pending between the parties. Most of these do not even touch the main dispute as they are in the nature of either Contempt Petitions, (Civil or Criminal) or petitions u/s. 340 Cr. PC etc.

14. As stated in the beginning of this order, though it was going to be collaborative efforts of the two groups in developing a dream project and for certain reasons the parties have drifted apart, one legal action which was triggered with the filing of the Company Petition by Ms. Sonia Khosla before the CLB, has today swollen into an acrimony of gigantic proportion. With all these incidental and peripheral proceedings, which are allowed to take centre stage, the main dispute which is the subject matter of company petition before the CLB has taken a back seat. There have been attempts made on different levels, during court proceedings, to see whether there could be amicable resolution of the disputes between the parties. However, as on date these attempts have been of no avail.

15. According to us it would have been more appropriate for the parties to atleast agree to resort to mediation as provided u/s. 89 if CPC and make an endeavour to find amicable solution of the dispute, agreeable to both the parties. One of the aims of mediation is to find an early resolution of the dispute. The sooner dispute is resolved the better for all the parties concerned, in particular, and the society, in general. For parties, dispute not only strains the relationship but also destroy it. And, so far as society is concerned it affects its peace. So what is required is resolution of dispute at the earliest possible opportunity and via such a mechanism where the relationship between individual goes on in a healthy manner. Warren Burger, once said:

"The obligation of the legal profession is... to serve as healers of human conflict... (we) should provide mechanisms that can produce an acceptable result in shortest possible time, with the least possible expense and with a minimum of stress on the participants. That is what justice is all about."

MEDIATION is one such mechanism which has been statutorily brought into place in our Justice System. It is one of the methods of Alternative Dispute Resolution and resolves the dispute in a way that is private, fast and economical. It is a process in which a neutral intervener assists two or more negotiating parties to identify matters of concern, develop a better understanding of their situation, and based upon that improved understanding, develop mutually acceptable proposals to resolve those concerns. It embraces the philosophy of democratic decision-making [Alfin, et al., Mediation theory & Practice, (2nd Ed. 2006) Lexis Nexis.

16. Thus, mediation being a form of Alternative Dispute Resolution is a shift from adversarial litigation. When the parties desire an on-going relationship, mediation can build and improve their relationships. To preserve, develop and improve communication, build bridges of understanding, find out options for settlement for mutual gains, search unobvious from obvious, dive underneath a problem and dig out underlying interests of the disputing parties, preserve and maintain relationships and collaborative problem solving are some of the fundamental advantages of mediation. Even in those cases where relationships have turned bitter, mediation has been able to produce positive outcomes, restoring the peace and amity between the parties.

17. There is always a difference between winning a case and seeking a solution. Via mediation, the parties will become partners in the solution rather than partners in problems. The beauty of settlement through mediation is that it may bring about a solution which may not only be to the satisfaction of the parties and, therefore, create a win win situation, the outcome which cannot be achieved by means of judicial adjudication. Thus, life as well as relationship goes on with Mediation for all the parties concerned and thus resulting into peace and harmony in the society. While providing satisfaction to the litigants, it also solves the problem of delay in our system and further contributes towards economic, commercial and financial growth and development of the country.

18. This Bench is of firm opinion that mediation is new dimension of access to justice. As it is one of the best forms, if not the best, of conflict resolution. The concept of Justice in mediation is advanced in the oeuvres of Professors Stulberg, Love, Hyman, and Menkel-Meadow (Self-Determination Theorists). Their definition of justice is drawn primarily from the exercise of party self- determination. They are hopeful about the magic that can occur when people open up honestly and empathetically about their needs and fears in uninhibited private discussion. And, as thinkers, these jurists are optimistic that the magnanimity of the human spirit can conquer structural imbalances and resource constraints.

Justice in mediation also encompasses external developments, beliefs about human nature and legal regulation. Various jurists are drawn to mediation in the belief that litigation and adversarial warring are not the only, or the best ways to approach conflict. And how optimistically and skeptically mediators assess the capabilities of individual parties and institutional actors to construct fair outcomes from the raw material of human conduct.

Mediation ensures a just solution acceptable to all the parties to dispute thereby achieving 'win-win' situation. It is only mediation that puts the parties in control of both their disputes and its resolution. It is mediation through which the parties can communicate in a real sense with each other, which they have not been able to do since the dispute started. It is mediation which makes the process voluntary and does not bind the parties against their wish. It is mediation that saves precious time, energy as well as cost which can result in lesser burden on exchequer when poor litigants are to be provided legal aid. It is mediation which focuses on long term interest and helps the parties in creating numerous options for settlement. It is mediation that restores broken relationship and focuses on improving the future not of dissecting past. It is based on an alternative set of values in which formalism is replaced by informality of procedure, fair trial procedures by direct participation of parties, consistent norm enforcement by norm creation, judicial independence by the involvement of trusted peers, and so on. This presents an alternative conceptualization of justice.

19. We have purposely stated the aforesaid advantages of mediation process in a hope that if not now, in near future the parties may agree on exploiting this mechanism to their advantage.

20. In this backdrop, Mr. Dushyant Dave, the learned Senior Counsel who appeared for Bakshi Group in SLP (C) No. 6873 of 2010 made a fervent plea before this Court to invoke the provisions of Art. 142 of the Constitution and put an end to the entire litigation between the parties pending in various courts by putting the parties to such terms, which this court finds to be equitable for both the parties. On behalf of Bakshi Group he also gave the offer to surrender/give 50% of land to the Khosla Group and also an amount of Rs. 6.40 Crores, He even submitted that if this Court finds the said amount to be inadequate the Court would be empowered to fix higher amount. However, that was not acceptable to the other side as according to them not only they are entitled to get the entire land which belongs to them but the amount of compensation which Bakshi Group is liable to pay to them would be many times more than the amount offered. Lest we be misunderstood, we are not blaming either side. We have indicated this, just to give a hint of the magnitude of imbroglio that has occurred between the parties. At the same time, as there are many cases of different nature pending in different courts it is not possible to exercise powers under Art. 142 of the Constitution and to resolve all those cases. However, we feel sad about the state of affairs. The dispute which has arisen, out of MOU/ collaboration agreement between the parties is not unique or unprecedented. Such type of differences do arise. Day in and day out there are litigations of the kind which is filed in the CLB by Ms. Sonia Khosla. However, what is unprecedented is the monstrous proportions which this litigation has assumed with the multiplication of proceedings between the parties today which arose out of one petition before the CLB.

21. In fact, though the learned Senior Counsel for the parties had argued the matters before us at length on the previous occasions, at the stage of conclusions of the arguments, the learned Senior Counsel Mr. Cama appearing for Khosla Group suggested for an early decision of the Company Petition before the CLB as a better alternative so that at least main dispute between the parties is adjudicated upon at an early date. He was candid in his submission that the issues which are subject matter of these two Special Leave Petitions and arise out of the proceedings in the High Court, have their origin in the orders dated 31.1.2008, which is an interim order passed by the CLB. He thus, pointed out that once the Company Petition itself is decided, the issues involved therein namely whether Board meeting dated 14.12.2007 was illegal or whether Board meeting dated 30.9.2006 was barred in law would also get decided. In the process the CLB would also be in a position to decide as to whether minutes of AGM of the Company allegedly held on 30.9.2006 are forged or not and on that basis application u/s. 340 Cr. PC which is filed before the Company Law Board would also be taken care of by the CLB itself. Learned Senior Counsels appearing for the Bakshi Group immediately agreed with the aforesaid course of action suggested by Mr. Cama. We are happy that at least there is an agreement between both the parties on the procedural course of action, to give quietus to the matters before us as well. In view of the aforesaid consensus, about the course of action to be adopted in deciding the disputes between the parties, we direct the Company Law Board to decide Company Petition No. 114 of 2007 filed before it by Ms. Sonia Khosla within a period of six months from the date of receiving a copy of this order. Since, it is the CLB which will be deciding the application u/s. 340 Cr. PC filed by Ms. Sonia Khosla in the CLB, High Court need not proceed further with the Criminal Misc. (Co.). No. 3 of 2008. Likewise the question whether Mr. R.K. Garg was validly inducted as a Director or not would be gone into by the CLB, the proceedings in Co. Appeal No. (SB) 23 of 2009 filed by Mr. R.K. Garg in the High Court, also become otiose.

22. The only aspect on which some directions need to be given are, as to what should be the interim arrangement. The Bakshi Group wants orders dated 31.1.2008 passed by CLB to continue the interregnum. The Khosla Group on the other hand refers to orders dated 11.4.2008 as it is their submission that this was a consent order passed by the High Court after the orders of the CLB and, therefore, this order should govern the field in the meantime..

23. After considering the matter, we are of the opinion that it is not necessary to either enforce orders dated 31.1.2008 passed by the CLB or orders dated 11.4.2008 passed by the High Court. Fact remains that there has been a complete deadlock, as far as affairs of the Company are concerned. The project has not taken off. It is almost dead at present. Unless the parties re-concile, there is no chance for a joint venture i.e. to develop the resort, as per the MOU dated 21.12.2005. It is only after the decision of CLB, whereby the respective rights of the parties are crystallised, it would be possible to know about the future of this project. Even the Company in question is also defunct at present as it has no other business activity or venture. In a situation like this, we are of the opinion that more appropriate orders would be to direct the parties to maintain status quo in the meantime, during the pendency of the aforesaid company petition before the CLB. However, we make it clear that if any exigency arises necessitating some interim orders, it would be open to the parties to approach the CLB for appropriate directions.

24. Both these petitions are disposed of in the aforesaid terms. All other pending I.As including criminal contempt petitions and petitions filed u/s. 340 Cr. PC are also disposed of as in the facts of this case, we are not inclined to entertain such application. No costs.

K. Srinivas Rao v D.A. Deepa

(2013) 5 SCC 226 **Bench:** Ranjana Prakash Desai, Aftab Alam, JJ.

The Judgment was delivered by: Ranjana Prakash Desai, J.

Relevant parts of the Judgement

32. Quite often, the cause of the misunderstanding in a matrimonial dispute is trivial and can be sorted. Mediation as a method of alternative dispute resolution has got legal recognition now. We have referred several matrimonial disputes to mediation centres. Our experience shows that about 10 to 15% of matrimonial disputes get settled in this Court through various mediation centres. We, therefore, feel that at the earliest stage i.e. when the dispute is taken up by the Family Court or by the court of first instance for hearing, it must be referred to mediation centres. Matrimonial disputes particularly those relating to custody of child, maintenance, etc. are preeminently fit for mediation. S. 9 of the Family Courts Act enjoins upon the Family Court to make efforts to settle the matrimonial disputes and in these efforts, Family Courts are assisted by Counsellors. Even if the Counsellors fail in their efforts, the Family Courts should direct the parties to mediation centres, where trained mediators are appointed to mediate between the parties. Being trained in the skill of mediation, they produce good results.

33. The idea of pre-litigation mediation is also catching up. Some mediation centres have, after giving wide publicity, set up "Help Desks" at prominent places including facilitation centres at court complexes to conduct pre-litigation mediation. We are informed that in Delhi Government Mediation and Conciliation Centres, and in Delhi High Court Mediation Centre, several matrimonial disputes are settled. These centres have a good success rate in pre-litigation mediation. If all mediation centres set up pre-litigation desks/clinics by giving sufficient publicity and matrimonial disputes are taken up for pre-litigation settlement, many families will be saved of hardship if, at least, some of them are settled.

34. While purely a civil matrimonial dispute can be amicably settled by a Family Court either by itself or by directing the parties to explore the possibility of settlement through mediation, a complaint under Section 498-A of the IPC presents difficulty because the said offence is not compoundable except in the State of Andhra Pradesh where by a State amendment, it has been made compoundable. Though in

Ramgopal & Anr. v. State of Madhya Pradesh & Anr. (2010) 13 SCC 540, this Court requested the Law Commission and the Government of India to examine whether offence punishable under Section 498-A of the IPC could be made compoundable, it has not been made compoundable as yet. The courts direct parties to approach mediation centres where offences are compoundable. Offence punishable under Section 498-A being a non-compoundable offence, such a course is not followed in respect thereof. This Court has always adopted a positive approach and encouraged settlement of matrimonial disputes and discouraged their escalation.

**Afccons Infrastructure Limited and another v Cherian Varkey Construction Company
(Private) Limited and others**

2010 Indlaw SC 688, (2010) 8 SCC 24

Judges: R.V. Raveendran, J.M. Panchal

The Judgment was delivered by: R. V. Raveendran, J.

1. Leave granted. The general scope of S. 89 of the Code of Civil Procedure ('Code' for short) and the question whether the said section empowers the court to refer the parties to a suit to arbitration without the consent of both parties, arise for consideration in this appeal.

2. The second respondent (Cochin Port Trust) entrusted the work of construction of certain bridges and roads to the appellants under an agreement dated 20.4.2001. The appellants sub-contracted a part of the said work to the first respondent under an agreement dated 1.8.2001. It is not in dispute that the agreement between the appellants and the first respondent did not contain any provision for reference of the disputes to arbitration.

3. The first respondent filed a suit against the appellants for recovery of Rs.210,70,881 from the appellants and their assets and/or the amounts due to the appellants from the employer, with interest at 18% per annum. In the said suit an order of attachment was made on 15.9.2004 in regard to a sum of Rs.2.25 crores. Thereafter in March 2005, the first respondent filed an application u/s. 89 of the Code before the trial court praying that the court may formulate the terms of settlement and refer the matter to arbitration. The appellants filed a counter dated 24.10.2005 to the application submitting that they were not agreeable for referring the matter to arbitration or any of the other ADR processes u/s. 89 of the Code.

In the meanwhile, the High Court of Kerala by order dated 8.9.2005, allowed the appeal filed by the appellants against the order of attachment and raised the attachment granted by the trial court subject to certain conditions. While doing so, the High Court also directed the trial court to consider and dispose of the application filed by the first respondent u/s. 89 of the Code.

4. The trial court heard the said application u/s. 89. It recorded the fact that first respondent (plaintiff) was agreeable for arbitration and appellants (defendants 1 and 2) were not agreeable for arbitration. The trial court allowed the said application u/s. 89 by a reasoned order dated 26.10.2005 and held that as the claim of the plaintiff in the suit related to a work contract, it was appropriate that the dispute should be settled by arbitration. It formulated sixteen issues and referred the matter to arbitration. The appellants filed a revision against the order of the trial court. The High Court by the impugned order dated 11.10.2006 dismissed the revision petition holding that the apparent tenor of s. 89 of the Code permitted the court, in appropriate cases, to refer even unwilling parties to arbitration.

The High Court also held that the concept of preexisting arbitration agreement which was necessary for reference to arbitration under the provisions of the Arbitration & Conciliation Act, 1996 ('AC Act' for short) was inapplicable to references u/s. 89 of the Code, having regard to the decision in *Sukanya Holdings (P) Ltd. v. Jayesh H. Pandya & Anr.* [2003 (5) SCC 531 2003 Indlaw SC 326]. The said order is challenged in this appeal.

5. On the contentions urged, two questions arise for consideration:

"(i) What is the procedure to be followed by a court in implementing s. 89 and Order 10 Rule 1A of the Code?"

"(ii) Whether consent of all parties to the suit is necessary for reference to arbitration u/s. 89 of the Code?"

6. To find answers to the said questions, we have to analyse the object, purpose, scope and tenor of the said provisions.

7. If s. 89 is to be read and required to be implemented in its literal sense, it will be a Trial Judge's nightmare. It puts the cart before the horse and lays down an impractical, if not impossible, procedure in sub-s. (1). It has mixed up the definitions in sub-s. (2). In spite of these defects, the object behind s. 89 is laudable and sound. Resort to alternative disputes resolution (for short 'ADR') processes is necessary to give speedy and effective relief to the litigants and to reduce the pendency in and burden upon the courts. As ADR processes were not being resorted to with the desired frequency, Parliament thought it fit to introduce S. 89 and Rules 1-A to 1-C in Order X in the Code, to ensure that ADR process was resorted to before the commencement of trial in suits.

In view of its laudable object, the validity of section 89, with all its imperfections, was upheld in *Salem*

Advocate Bar Association v. Union of India reported in [2003 (1) SCC 49 2002 Indlaw SC 1374 - for short, *Salem Bar - (I)*] but referred to a Committee, as it was hoped that s. 89 could be implemented by ironing the creases. In *Salem Advocate Bar Association v. Union of India* [2005 (6) SCC 344 2005 Indlaw SC 592 - for short, *Salem Bar-(II)*], this Court applied the principle of purposive construction in an attempt to make it workable.

What is wrong with s. 89 of the Code?

8. The first anomaly is the mixing up of the definitions of 'mediation' and 'judicial settlement' u/cls. (c) and (d) of sub-s. (2) of s. 89 of the Code. Cl. (c) says that for "judicial settlement", the court shall refer the same to a suitable institution or person who shall be deemed to be a Lok Adalat. Cl. (d) provides that where the reference is to "mediation", the court shall effect a compromise between the parties by following such procedure as may be prescribed. It makes no sense to call a compromise effected by a court, as "mediation", as is done in cl. (d). Nor does it make any sense to describe a reference made by a court to a suitable institution or person for arriving at a settlement as "judicial settlement", as is done in cl. (c). "Judicial settlement" is a term in vogue in USA referring to a settlement of a civil case with the help of a judge who is not assigned to adjudicate upon the dispute.

"Mediation" is also a well known term and it refers to a method of non-binding dispute resolution with the assistance of a neutral third party who tries to help the disputing parties to arrive at a negotiated settlement. It is also synonym of the term 'conciliation'. (See : Black's Law Dictionary, 7th Edition, Pages 1377 and 996). When words are universally understood in a particular sense, and assigned a particular meaning in common parlance, the definitions of those words in s. 89 with interchanged meanings has led to confusion, complications and difficulties in implementation. The mix-up of definitions of the terms "judicial settlement" and "mediation" in S. 89 is apparently due to a clerical or typographical error in drafting, resulting in the two words being interchanged in cls. (c) and (d) of S. 89(2). If the word "mediation" in cl. (d) and the words "judicial settlement" in cl. (c) are interchanged, we find that the said clauses make perfect sense.

9. The second anomaly is that sub-s. (1) of s. 89 imports the final stage of conciliation referred to in s. 73(1) of the AC Act into the pre-ADR reference stage u/s. 89 of the Code. Sub-s. (1) of s. 89 requires the court to formulate the terms of settlement and give them to the parties for their observation and then reformulate the terms of a possible settlement and then refer the same for any one of the ADR processes. If sub-s. (1) of S. 89 is to be literally followed, every Trial Judge before framing issues, is required to ascertain whether there exists any elements of settlement which may be acceptable to the parties, formulate the terms of settlement, give them to parties for observations and then reformulate the terms of a possible settlement before referring it to arbitration, conciliation, judicial settlement, Lok Adalat or mediation. There is nothing that is left to be done by the alternative dispute resolution forum. If all these have to be done by the trial court before referring the parties to alternative dispute resolution processes, the court itself may as well proceed to record the settlement as nothing more is required to be done, as a Judge cannot do these unless he acts as a conciliator or mediator and holds detailed discussions and negotiations running into hours.

10. S. 73 of AC Act shows that formulation and reformulation of terms of settlement is a process carried out at the final stage of a conciliation process, when the settlement is being arrived at. What is required to be done at the final stage of conciliation by a conciliator is borrowed lock, stock and barrel into s. 89 and the court is wrongly required to formulate the terms of settlement and reformulate them at a stage prior to reference to an ADR process. This becomes evident by a comparison of the wording of the two provisions.

<p>S. 73(1) of Arbitration and Conciliation Act, 1996 relating to the final stage of settlement process in conciliation.</p>	<p>S. 89(1) of Code of Civil Procedure relating to a stag before reference to an ADR process.</p>
<p>When it appears to the conciliator that there exist elements of a settlement which may be acceptable t the parties, he shall formulate the terms of a possib settlement and submit them to the parties for their observations. After receiving the observations of th parties, the conciliator may reformulate the terms of possible settlement in the light of such observation</p>	<p>Where it appears to the Court that there exist elements of a settlement which may be acceptable t the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of possible settlement and refer the same for (a) arbitration; (b) conciliation; (c) judicial settlement including settlement through Lok Adalat; or (d) mediation.</p>

Formulation and re-formulation of terms of settlement by the court is therefore wholly out of place at the stage of pre ADR reference. It is not possible for courts to perform these acts at a preliminary hearing to decide whether a case should be referred to an ADR process and, if so, which ADR process.

11. If the reference is to be made to arbitration, the terms of settlement formulated by the court will be of no use, as what is referred to arbitration is the dispute and not the terms of settlement; and the Arbitrator will adjudicate upon the dispute and give his decision by way of award. If the reference is to conciliation/mediation/Lok Adalat, then drawing up the terms of the settlement or reformulating them is the job of the conciliator or the mediator or the Lok Adalat, after going through the entire process of conciliation/ mediation. Thus, the terms of settlement drawn up by the court will be totally useless in any subsequent ADR process. Why then the courts should be burdened with the onerous and virtually impossible, but redundant, task of formulating terms of settlement at pre-reference stage?

12. It will not be possible for a court to formulate the terms of the settlement, unless the judge discusses the matter in detail with both parties. The court formulating the terms of settlement merely on the basis of pleadings is neither feasible nor possible. The requirement that the court should formulate the terms of settlement is therefore a great hindrance to courts in implementing s. 89 of the Code. This Court therefore diluted this anomaly in Salem Bar (II) by equating "terms of settlement" to a "summary of disputes" meaning thereby that the court is only required to formulate a 'summary of disputes' and not 'terms of settlement'.

How should s. 89 be interpreted?

13. The principles of statutory interpretation are well settled. Where the words of the statute are clear and unambiguous, the provision should be given its plain and normal meaning, without adding or rejecting any words. Departure from the literal rule, by making structural changes or substituting words in a clear statutory provision, under the guise of interpretation will pose a great risk as the changes may not be what the Legislature intended or desired. Legislative wisdom cannot be replaced by the Judge's views. As observed by this Court in somewhat different context: *"When a procedure is prescribed by the Legislature, it is not for the court to substitute a different one according to its notion of justice. When the Legislature has spoken, the Judges cannot afford to be wiser."* (See : Shri Mandir Sita Ramji vs. Lt. Governor of Delhi - (1975) 4 SCC 298 1974 Indlaw SC 105).

There is however an exception to this general rule. Where the words used in the statutory provision are vague and ambiguous or where the plain and normal meaning of its words or grammatical construction thereof would lead to confusion, absurdity, repugnancy with other provisions, the courts may, instead of adopting the plain and grammatical construction, use the interpretative tools to set right the situation, by adding or omitting or substituting the words in the Statute. When faced with an apparently defective provision in a statute, courts prefer to assume that the draftsman had committed a mistake rather than concluding that the Legislature has deliberately introduced an absurd or irrational statutory provision. Departure from the literal rule of plain and straight reading can however be only in exceptional cases, where the anomalies make the literal compliance of a provision impossible, or absurd or so impractical as to defeat the very object of the provision. We may also mention purposive interpretation to avoid absurdity and irrationality is more readily and easily employed in relation to procedural provisions than with reference to substantive provisions.

13.5. A classic example of correcting an error committed by the draftsman in legislative drafting is the substitution of the words 'defendant's witnesses' by this Court for the words 'plaintiff's witnesses' occurring in Order VII Rule 14(4) of the Code, in Salem Bar-II. We extract below the relevant portion of the said decision:

"Order VII relates to the production of documents by the plaintiff whereas Order VIII relates to production of documents by the defendant. Under Order VIII Rule 1A(4) a document not produced by defendant can be confronted to the plaintiff's witness during cross-examination. Similarly, the plaintiff can also confront the defendant's witness with a document during cross-examination. By mistake, instead of 'defendant's witnesses', the words 'plaintiff's witnesses' have been mentioned in Order VII Rule (4). To avoid any confusion, we direct that till the legislature corrects the mistake, the words 'plaintiff's witnesses, would be read as 'defendant's witnesses' in Order VII Rule 4. We, however, hope that the mistake would be expeditiously corrected by the legislature."

13.6. Justice G.P. Singh extracts four conditions that should be present to justify departure from the plain words of the Statute, in his treatise "Principles of Statutory Interpretation" (12th Edn. - 2010, Lexis Nexis - page 144) from the decision of the House of Lords in Stock v. Frank Jones (Tipton) Ltd., [1978] 1 All E.R. 948 : [1978] 1 W.L.R. 231]:

".....a court would only be justified in departing from the plain words of the statute when it is satisfied that (1) there is clear and gross balance of anomaly; (2) Parliament, the legislative promoters and the draftsman could not have envisaged such anomaly and could not have been prepared to accept it in the interest of a supervening legislative objective; (3) the anomaly can be obviated without detriment to such a legislative objective; and (4) the language of the statute is susceptible of the modification required to obviate the anomaly."

14. All the aforesaid four conditions justifying departure from the literal rule, exist with reference to s. 89 of the Code. Therefore, in Salem Bar -II, by judicial interpretation the entire process of formulating the terms of settlement, giving them to the parties for their observation and reformulating the terms of possible settlement after receiving the observations, contained in sub-s. (1) of section 89, is excluded or done away with by stating that the said provision

merely requires formulating a summary of disputes. Further, this Court in Salem Bar-II, adopted the following definition of 'mediation' suggested in the model mediation rules, in spite of a different definition in s. 89(2)(d):

"Settlement by 'mediation' means the process by which a mediator appointed by parties or by the Court, as the case may be, mediates the dispute between the parties to the suit by the application of the provisions of the Mediation Rules, 2003 in Part II, and in particular, by facilitating discussion between parties directly or by communicating with each other through the mediator, by assisting parties in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, generating options in an attempt to solve the dispute and emphasizing that it is the parties' own responsibility for making decisions which affect them."

All over the country the courts have been referring cases u/s. 89 to mediation by assuming and understanding 'mediation' to mean a dispute resolution process by negotiated settlement with the assistance of a neutral third party. Judicial settlement is understood as referring to a compromise entered by the parties with the assistance of the court adjudicating the matter, or another Judge to whom the court had referred the dispute.

15. S. 89 has to be read with Rule 1-A of Order 10 which requires the court to direct the parties to opt for any of the five modes of alternative dispute resolution processes and on their option refer the matter. The said rule does not require the court to either formulate the terms of settlement or make available such terms of settlement to the parties to reformulate the terms of possible settlement after receiving the observations of the parties. Therefore the only practical way of reading S. 89 and Order 10, Rule 1-A is that after the pleadings are complete and after seeking admission/denials wherever required, and before framing issues, the court will have recourse to s. 89 of the Code. Such recourse requires the court to consider and record the nature of the dispute, inform the parties about the five options available and take note of their preferences and then refer them to one of the alternative dispute resolution processes.

16. In view of the foregoing, it has to be concluded that proper interpretation of s. 89 of the Code requires two changes from a plain and literal reading of the section.

Firstly, it is not necessary for the court, before referring the parties to an ADR process to formulate or re-formulate the terms of a possible settlement. It is sufficient if the court merely describes the nature of dispute (in a sentence or two) and makes the reference.

Secondly, the definitions of 'judicial settlement' and 'mediation' in cls. (c) and (d) of s. 89(2) shall have to be interchanged to correct the draftsman's error. Cls. (c) and (d) of s. 89(2) of the Code will read as under when the two terms are interchanged:

(c) for "mediation", the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act; (d) for "judicial settlement", the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed. The above changes made by interpretative process shall remain in force till the legislature corrects the mistakes, so that s. 89 is not rendered meaningless and infructuous.

Whether the reference to ADR Process is mandatory?

17. S. 89 starts with the words "where it appears to the court that there exist elements of a settlement". This clearly shows that cases which are not suited for ADR process should not be referred u/s. 89 of the Code. The court has to form an opinion that a case is one that is capable of being referred to and settled through ADR process. Having regard to the tenor of the provisions of Rule 1A of Order 10 of the Code, the civil court should invariably refer cases to ADR process. Only in certain recognized excluded categories of cases, it may choose not to refer to an ADR process. Where the case is unsuited for reference to any of the ADR process, the court will have to briefly record the reasons for not resorting to any of the settlement procedures prescribed u/s. 89 of the Code.

Therefore, having a hearing after completion of pleadings, to consider recourse to ADR process u/s. 89 of the Code, is mandatory. But actual reference to an ADR process in all cases is not mandatory. Where the case falls under an excluded category there need not be reference to ADR process. In all other case reference to ADR process is a must.

18. The following categories of cases are normally considered to be not suitable for ADR process having regard to their nature:

- (i) Representative suits under Order 1 Rule 8 CPC which involve public interest or interest of numerous persons who are not parties before the court. (In fact, even a compromise in such a suit is a difficult process requiring notice to the persons interested in the suit, before its acceptance).
- (ii) Disputes relating to election to public offices (as contrasted from disputes between two groups trying to get control over the management of societies, clubs, association etc.).

- (iii) Cases involving grant of authority by the court after enquiry, as for example, suits for grant of probate or letters of administration.
- (iv) Cases involving serious and specific allegations of fraud, fabrication of documents, forgery, impersonation, coercion etc.
- (v) Cases requiring protection of courts, as for example, claims against minors, deities and mentally challenged and suits for declaration of title against government.
- (vi) Cases involving prosecution for criminal offences.

19. All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special Tribunals/Forums) are normally suitable for ADR processes :

- (i) All cases relating to trade, commerce and contracts, including
 - disputes arising out of contracts (including all money claims);
 - disputes relating to specific performance;
 - disputes between suppliers and customers;
 - disputes between bankers and customers;
 - disputes between developers/builders and customers;
 - disputes between landlords and tenants/licensor and licensees;
 - disputes between insurer and insured;
- (ii) All cases arising from strained or soured relationships, including
 - disputes relating to matrimonial causes, maintenance, custody of children;
 - disputes relating to partition/division among family members/co- parceners/co-owners; and - disputes relating to partnership among partners.
- (iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including
 - disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.);
 - disputes between employers and employees;
 - disputes among members of societies/associations/Apartment owners Associations;
- (iv) All cases relating to tortious liability including
 - claims for compensation in motor accidents/other accidents; and
- (v) All consumer disputes including
 - disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or 'product popularity.

The above enumeration of 'suitable' and 'unsuitable' categorization of cases is not intended to be exhaustive or rigid. They are illustrative, which can be subjected to just exceptions or additions by the court/Tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process. How to decide the appropriate ADR process under section 89?

20. S. 89 refers to five types of ADR procedures, made up of one adjudicatory process (arbitration) and four negotiatory (non adjudicatory) processes - conciliation, mediation, judicial settlement and Lok Adalat settlement. The object of s. 89 of the Code is that settlement should be attempted by adopting an appropriate ADR process before the case proceeds to trial. Neither s. 89 nor Rule 1A of Order 10 of the Code is intended to supersede or modify the provisions of the Arbitration and Conciliation Act, 1996 or the Legal Services Authorities Act, 1987.

On the other hand, s. 89 of the Code makes it clear that two of the ADR processes - Arbitration and Conciliation, will be governed by the provisions of the AC Act and two other ADR Processes - Lok Adalat

Settlement and Mediation (See : amended definition), will be governed by the Legal Services Authorities Act. As for the last of the ADR processes - judicial settlement (See : amended definition), s. 89 makes it clear that it is not governed by any enactment and the court will follow such procedure as may be prescribed (by appropriate rules).

21. Rule 1A of Order 10 requires the court to give the option to the parties, to choose any of the ADR processes. This does not mean an individual option, but a joint option or consensus about the choice of the ADR process. On the other hand, s. 89 vests the choice of reference to the court. There is of course no inconsistency. S. 89 of the Code gives the jurisdiction to refer to ADR process and Rules 1A to 1C of Order 10 lay down the manner in which the said jurisdiction is to be exercised. The scheme is that the court explains the choices available regarding ADR process to the parties, permits them to opt for a process by consensus, and if there is no consensus, proceeds to choose the process.

22. Let us next consider which of the ADR processes require mutual consent of the parties and which of them do not require the consent of parties.

Arbitration

23. Arbitration is an adjudicatory dispute resolution process by a private forum, governed by the provisions of the AC Act. The said Act makes it clear that there can be reference to arbitration only if there is an 'arbitration agreement' between the parties. If there was a pre-existing arbitration agreement between the parties, in all probability, even before the suit reaches the stage governed by Order 10 of the Code, the matter would have stood referred to arbitration either by invoking s. 8 or s. 11 of the AC Act, and there would be no need to have recourse to arbitration u/s. 89 of the Code. S. 89 therefore pre-supposes that there is no pre-existing arbitration agreement.

Even if there was no pre-existing arbitration agreement, the parties to the suit can agree for arbitration when the choice of ADR processes is offered to them by the court u/s. 89 of the Code. Such agreement can be by means of a joint memo or joint application or a joint affidavit before the court, or by record of the agreement by the court in the ordersheet signed by the parties. Once there is such an agreement in writing signed by parties, the matter can be referred to arbitration u/s. 89 of the Code; and on such reference, the provisions of AC Act will apply to the arbitration, and as noticed in Salem Bar-I, the case will go outside the stream of the court permanently and will not come back to the court.

24. If there is no agreement between the parties for reference to arbitration, the court cannot refer the matter to arbitration u/s. 89 of the Code. This is evident from the provisions of AC Act. A court has no power, authority or jurisdiction to refer unwilling parties to arbitration, if there is no arbitration agreement. This Court has consistently held that though s. 89 of the Code mandates reference to ADR processes, reference to arbitration u/s. 89 of the Code could only be with the consent of both sides and not otherwise.

24.3. The position was reiterated by this Court in Jagdish Chander v. Ramesh Chander [2007 (5) SCC 719 2007 Indlaw SC 1570] thus :

"It should not also be overlooked that even though S. 89 mandates courts to refer pending suits to any of the several alternative dispute resolution processes mentioned therein, there cannot be a reference to arbitration even under S. 89 CPC, unless there is a mutual consent of all parties, for such reference." (Emphasis supplied)

24.4. Therefore, where there is no pre-existing arbitration agreement between the parties, the consent of all the parties to the suit will be necessary, for referring the subject matter of the suit to arbitration u/s. 89 of the Code.

Conciliation

25. Conciliation is a non-adjudicatory ADR process, which is also governed by the provisions of AC Act. There can be a valid reference to conciliation only if both parties to the dispute agree to have negotiations with the help of a third party or third parties either by an agreement or by the process of invitation and acceptance provided in s. 62 of AC Act followed by appointment of conciliator/s as provided in s. 64 of AC Act. If both parties do not agree for conciliation, there can be no 'conciliation'. As a consequence, as in the case of arbitration, the court cannot refer the parties to conciliation under section 89, in the absence of consent by all parties. As contrasted from arbitration, when a matter is referred to conciliation, the matter does not go out of the stream of court process permanently. If there is no settlement, the matter is returned to the court for framing issues and proceeding with the trial.

The other three ADR Processes

26. If the parties are not agreeable for either arbitration or conciliation, both of which require consent of all parties, the court has to consider which of the other three ADR processes (Lok Adalat, Mediation and Judicial Settlement) which do not require the consent of parties for reference, is suitable and appropriate and refer the parties to such ADR process. If mediation process is not available (for want of a mediation centre or qualified mediators), necessarily the court will have to choose between reference to Lok Adalat or judicial settlement. If facility of mediation is available, then the choice becomes wider. If the suit is complicated or lengthy, mediation will be the recognized choice. If the suit is not complicated and the disputes are easily sortable or could be settled by applying clear cut legal principles, Lok Adalat will be the preferred choice. If the court feels that a suggestion or guidance by a Judge would be appropriate, it can refer it to another Judge for dispute resolution. The court has used its discretion in choosing the

ADR process judiciously, keeping in view the nature of disputes, interests of parties and expedition in dispute resolution.

"Whether the settlement in an ADR process is binding in itself?"

27. When the court refers the matter to arbitration under S. 89 of the Act, as already noticed, the case goes out of the stream of the court and becomes an independent proceeding before the arbitral tribunal. Arbitration being an adjudicatory process, it always ends in a decision. There is also no question of failure of ADR process or the matter being returned to the court with a failure report. The award of the arbitrators is binding on the parties and is executable/enforceable as if a decree of a court, having regard to S. 36 of the AC Act. If any settlement is reached in the arbitration proceedings, then the award passed by the Arbitral

Tribunal on such settlement, will also be binding and executable/enforceable as if a decree of a court, u/s. 30 of the AC Act.

28. The other four ADR processes are non-adjudicatory and the case does not go out of the stream of the court when a reference is made to such a non- adjudicatory ADR forum. The court retains its control and jurisdiction over the case, even when the matter is before the ADR forum. When a matter is settled through conciliation, the Settlement Agreement is enforceable as if it is a decree of the court having regard to S. 74 read with S. 30 of the AC Act. Similarly, when a settlement takes place before the Lok Adalat, the Lok Adalat award is also deemed to be a decree of the civil court and executable as such u/s. 21 of the Legal Services Authorities Act, 1987. Though the settlement agreement in a conciliation or a settlement award of a Lok Adalat may not require the seal of approval of the court for its enforcement when they are made in a direct reference by parties without the intervention of court, the position will be different if they are made on a reference by a court in a pending suit/proceedings.

As the court continues to retain control and jurisdiction over the cases which it refers to conciliations, or Lok Adalats, the settlement agreement in conciliation or the Lok Adalat award will have to be placed before the court for recording it and disposal in its terms. Where the reference is to a neutral third party ('mediation' as defined above) on a court reference, though it will be deemed to be reference to Lok Adalat, as court retains its control and jurisdiction over the matter, the mediation settlement will have to be placed before the court for recording the settlement and disposal. Where the matter is referred to another Judge and settlement is arrived at before him, such settlement agreement will also have to be placed before the court which referred the matter and that court will make a decree in terms of it. Whenever such settlements reached before non-adjudicatory ADR Fora are placed before the court, the court should apply the principles of Order 23 Rule 3 of the Code and make a decree/order in terms of the settlement, in regard to the subject matter of the suit/proceeding. In regard to matters/disputes which are not the subject matter of the suit/proceedings, the court will have to direct that the settlement shall be governed by S. 74 of AC Act (in respect of conciliation settlements) or S. 21 of the Legal Services Authorities Act, 1987 (in respect of settlements by a Lok Adalat or a Mediator). Only then such settlements will be effective.

Summation

29. Having regard to the provisions of S. 89 and Rule 1-A of Order 10, the stage at which the court should explore whether the matter should be referred to ADR processes, is after the pleadings are complete, and before framing the issues, when the matter is taken up for preliminary hearing for examination of parties under Order 10 of the Code. However, if for any reason, the court had missed the opportunity to consider and refer the matter to ADR processes under S. 89 before framing issues, nothing prevents the court from resorting to S. 89 even after framing issues. But once evidence is commenced, the court will be reluctant to refer the matter to the ADR processes lest it becomes a tool for protracting the trial.

30. Though in civil suits, the appropriate stage for considering reference to ADR processes is after the completion of pleadings, in family disputes or matrimonial cases, the position can be slightly different. In those cases, the relationship becomes hostile on account of the various allegations in the petition against the spouse. The hostility will be further aggravated by the counter-allegations made by the respondent in his or her written statement or objections. Therefore, as far as Family Courts are concerned, the ideal stage for mediation will be immediately after service of respondent and before the respondent files objections/written statements. Be that as it may.

31. We may summarize the procedure to be adopted by a court u/s. 89 of the Code as under :

- a) When the pleadings are complete, before framing issues, the court shall fix a preliminary hearing for appearance of parties. The court should acquaint itself with the facts of the case and the nature of the dispute between the parties.
- b) The court should first consider whether the case falls under any of the category of the cases which are required to be tried by courts and not fit to be referred to any ADR processes. If it finds the case falls under any excluded

category, it should record a brief order referring to the nature of the case and why it is not fit for reference to ADR processes. It will then proceed with the framing of issues and trial.

- c) In other cases (that is, in cases which can be referred to ADR processes) the court should explain the choice of five ADR processes to the parties to enable them to exercise their option.
 - d) The court should first ascertain whether the parties are willing for arbitration. The court should inform the parties that arbitration is an adjudicatory process by a chosen private forum and reference to arbitration will permanently take the suit outside the ambit of the court. The parties should also be informed that the cost of arbitration will have to be borne by them. Only if both parties agree for arbitration, and also agree upon the arbitrator, the matter should be referred to arbitration.
 - e) If the parties are not agreeable for arbitration, the court should ascertain whether the parties are agreeable for reference to conciliation which will be governed by the provisions of the AC Act. If all the parties agree for reference to conciliation and agree upon the conciliator/s, the court can refer the matter to conciliation in accordance with s. 64 of the AC Act.
 - f) If parties are not agreeable for arbitration and conciliation, which is likely to happen in most of the cases for want of consensus, the court should, keeping in view the preferences/options of parties, refer the matter to any one of the other three other ADR processes : (a) Lok Adalat; (b) mediation by a neutral third party facilitator or mediator; and (c) a judicial settlement, where a Judge assists the parties to arrive at a settlement.
 - (g) If the case is simple which may be completed in a single sitting, or cases relating to a matter where the legal principles are clearly settled and there is no personal animosity between the parties (as in the case of motor accident claims), the court may refer the matter to Lok Adalat. In case where the questions are complicated or cases which may require several rounds of negotiations, the court may refer the matter to mediation. Where the facility of mediation is not available or where the parties opt for the guidance of a Judge to arrive at a settlement, the court may refer the matter to another Judge for attempting settlement.
 - (h) If the reference to the ADR process fails, on receipt of the Report of the ADR Forum, the court shall proceed with hearing of the suit. If there is a settlement, the court shall examine the settlement and make a decree in terms of it, keeping the principles of Order 23 Rule 3 of the Code in mind.
 - (i) If the settlement includes disputes which are not the subject matter of the suit, the court may direct that the same will be governed by S. 74 of the AC Act (if it is a Conciliation Settlement) or S. 21 of the Legal Services Authorities Act, 1987 (if it is a settlement by a Lok Adalat or by mediation which is a deemed Lok Adalat). This will be necessary as many settlement agreements deal with not only the disputes which are the subject matter of the suit or proceeding in which the reference is made, but also other disputes which are not the subject matter of the suit.
 - (j) If any term of the settlement is ex facie illegal or unenforceable, the court should draw the attention of parties thereto to avoid further litigations and disputes about executability.
32. The Court should also bear in mind the following consequential aspects, while giving effect to S. 89 of the Code:
- (i) If the reference is to arbitration or conciliation, the court has to record that the reference is by mutual consent. Nothing further need be stated in the order sheet.
 - (ii) If the reference is to any other ADR process, the court should briefly record that having regard to the nature of dispute, the case deserves to be referred to Lok Adalat, or mediation or judicial settlement, as the case may be. There is no need for an elaborate order for making the reference.
 - (iii) The requirement in S. 89(1) that the court should formulate or reformulate the terms of settlement would only mean that court has to briefly refer to the nature of dispute and decide upon the appropriate ADR process.
 - (iv) If the Judge in charge of the case assists the parties and if settlement negotiations fail, he should not deal with the adjudication of the matter, to avoid apprehensions of bias and prejudice. It is therefore advisable to refer cases proposed for Judicial Settlement to another Judge.
 - (v) If the court refers the matter to an ADR process (other than Arbitration), it should keep track of the matter by fixing a hearing date for the ADR Report. The period allotted for the ADR process can normally vary from a week to two months (which may be extended in exceptional cases, depending upon the availability of the alternative forum, the nature of case etc.). Under no circumstances the court should allow the ADR process to become a tool in the hands of an unscrupulous litigant intent upon dragging on the proceedings.
 - (vi) Normally the court should not send the original record of the case when referring the matter for an ADR forum. It should make available only copies of relevant papers to the ADR forum. (For this purpose, when pleadings

are filed the court may insist upon filing of an extra copy). However if the case is referred to a Court annexed Mediation Centre which is under the exclusive control and supervision of a Judicial Officer, the original file may be made available wherever necessary.

33. The procedure and consequential aspects referred to in the earlier two paragraphs are intended to be general guidelines subject to such changes as the concerned court may deem fit with reference to the special circumstances of a case. We have referred to the procedure and process rather elaborately as we find that s. 89 has been a non-starter with many courts. Though the process under S. 89 appears to be lengthy and complicated, in practice the process is simple: know the dispute; exclude 'unfit' cases; ascertain consent for arbitration or conciliation; if there is no consent, select Lok Adalat for simple cases and mediation for all other cases, reserving reference to a Judge assisted settlement only in exceptional or special cases. Conclusion

34. Coming back to this case, we may refer to the decision in Sukanya Holdings relied upon by the respondents, to contend that for a reference to arbitration u/s. 89 of the Code, consent of parties is not required. The High Court assumed that Sukanya Holdings has held that s. 89 enables the civil court to refer a case to arbitration even in the absence of an arbitration agreement. Sukanya Holdings does not lay down any such proposition. In that decision, this Court was considering the question as to whether an application under s. 8 of the AC Act could be maintained even where a part of the subject matter of the suit was not covered by an arbitration agreement. The only observations in the decision relating to S. 89 are as under:

"Reliance was placed on S. 89 CPC in support of the argument that the matter should have been referred to arbitration. In our view, S. 89 CPC cannot be resorted to for interpreting S. 8 of the Act as it stands on a different footing and it would be applicable even in cases where there is no arbitration agreement for referring the dispute for arbitration. Further, for that purpose, the court has to apply its mind to the condition contemplated under S. 89 CPC and even if application under S. 8 of the Act is rejected, the court is required to follow the procedure prescribed under the said section."

The observations only mean that even when there is no existing arbitration agreement enabling filing of an application under s. 8 of the Act, there can be a reference u/s. 89 to arbitration if parties agree to arbitration. The observations in Sukanya Holdings do not assist the first respondent as they were made in the context of considering a question as to whether s. 89 of the Code could be invoked for seeking a reference under s. 8 of the AC Act in a suit, where only a part of the subject-matter of the suit was covered by arbitration agreement and other parts were not covered by arbitration agreement. The first respondent next contended that the effect of the decision in Sukanya Holdings is that "s. 89 of CPC would be applicable even in cases where there is no arbitration agreement for referring the dispute to arbitration." There can be no dispute in regard to the said proposition as S. 89 deals, not only with arbitration but also four other modes of non-adjudicatory resolution processes and existence of an arbitration agreement is not a condition precedent for exercising power under S. 89 of the Code in regard to the said four ADR processes.

35. In the light of the above discussion, we answer the questions as follows:

"(i) The trial court did not adopt the proper procedure while enforcing S. 89 of the Code. Failure to invoke S. 89 suo moto after completion of pleadings and considering it only after an application under S. 89 was filed, is erroneous.

(ii) A civil court exercising power under S. 89 of the Code cannot refer a suit to arbitration unless all the parties to the suit agree for such reference."

36. Consequently, this appeal is allowed and the order of the trial court referring the matter to arbitration and the order of the High Court affirming the said reference are set aside. The Trial Court will now consider and decide upon a non-adjudicatory ADR process. Appeal allowed.

2007 (97) DRJ 541

HIGH COURT OF DELHI

CS (OS) No. 135 of 2002 IA No. 579 of 2002 & IA No. 1860 of 2002

Bawa Masala Company..... Plaintiff

versus

Bawa Masala Company Pvt. Ltd. & Anr. Defendants

Sanjay Kishan Kaul, J.

Decided on 06.08.2007

Civil Procedure Code, 1908

Section 89 — Alternate Dispute Resolution — Appointment of mediators — Adoption of process known as — Early Neutral Evaluation — Confidential process adopted by Evaluators in which after considering the case of each of the parties the evaluators share their conclusions with the parties and if no settlement is possible the matter is referred back to court — Matter referred to Early Neutral Evaluation for exploring the possibilities of settlement.

(Conts. in File of)

PRESENT: Mr. Parag Anand with Mr. A.K. Kotach, Advocates for the Plaintiff.

Mr. Subhojit Banerjee, Advocate for the Defendants.

Sanjay Kishan Kaul, J. (Oral)

CS (OS) No. 135/2002

IA No. 579/2002 (u/O.39 R 1 & 2 CPC) & IA No. 1860/2002 (u/S 8 of the Arbitration Act)

1. The legal dispute in the present case was referred for mediation. Mr. Ravi Vermani, Advocate and Mr. Dilip Mehta, Advocate were the mediators. It is stated that there were a number of other cases/disputes pending before the trial court and even they were called for mediation to the Delhi High Court Mediation & Conciliation Centre. The mediators were successful in resolving all the other disputes but unfortunately the dispute in the present case has not been resolved.

2. Learned counsels for the parties suggest that another effort should be made to resolve the disputes amicably by alternative dispute resolution mechanism. Learned counsels for the parties suggest that instead of the process of mediation, an endeavour be made through the process of 'Early Neutral Evaluation (ENE)'.
3. In order to appreciate the contention, it is necessary to examine the methodology of ENE. ENE is a process of alternative dispute resolution, which has been adopted in the United States of America. In the words of

Robert A. Cooper: "Early neutral evaluation is a technique used in American litigation to provide early focus to complex commercial litigation, and based on that focus, to provide a basis for sensible case management or other results – if the rest of case, in the very early stages."

4. A senior counsel or a panel with expertise and experience in the subject matter of litigation are called upon to conduct ENB. Such persons are referred to as the Evaluator or a neutral person. A written brief is received by the lawyers to such neutral evaluator, summarising the facts, legal arguments and authorities in support of each party's case. In a nutshell, the process would be same as would be required for making submissions in Court.

5. In the initial session before the evaluator, a representative of each party accompanied by their lawyers would be present and a short concise presentation would be made by the counsels for each side referring to the documents and legal argument. It is open to the evaluator to raise queries of the counsels for the parties and involve the decision makers of the parties in the process. The neutral evaluator thereafter retires to prepare what amounting to the neutral evaluator is the neutral dispute in the case and what is per the neutral evaluator is the likely outcome on each of the issues/aspects. The evaluator also estimates the costs to each of the parties.

6. The evaluator thereafter shares his conclusions with the parties either at joint sessions or at private sessions, called caucuses. Said private caucuses are often useful as they may allow a more frank and free discussion about the strengths or weaknesses of the respective parties. If no settlement is possible the matter is referred back to the Court without disclosing the reason for the failure of the process of ENB. Thus, the confidentiality and the principles of mediation are equally amenable to such ENB.

7. The aforesaid feature would show that such ENB is one of the the key in the ADR Multi-Option Programme. It has the same features as a mediation process of being not binding, confidential and non-adversarial in nature. The differences that in case of a mediation the solutions normally emerge from the parties and the mediator makes an endeavour to find the most acceptable solution by bridging the gap between the parties. In case of ENB, the evaluator acts as a neutral person to assess the strengths and weaknesses of each of the parties and discusses the same with the parties (party or its counsel), so that the parties are aware of the independent evaluation of the merits of their case. ENB is thus distinct from mediation being explicitly evaluative in nature and normally requires the expertise in the subject matter. It also follows an procedure of law as opposed to interest of parties and it is not a process of discussion towards negotiated settlement.

8. The process of ENB is, however, distinct from arbitration as there is no testimony or oath or examination and such neutral evaluation is not



accorded. The process is confidential and cannot be used by any of the parties against the other. There is no award or result filed. It is really a judgement by the neutral evaluator on the basis of material on record without the judgement being binding and in a case of non-agreement, the matter is referred back to the court without disclosure of reasons as in the case of a mediator.

9. Learned counsels for the parties state that since two persons who are adversaries of standing, and have spent time in the mediation process being carried out with the ramifications of the dispute between the two parties, it would be generally inappropriate if they are jointly appointed as Early Neutral Evaluators.

10. ENR is, thus, a different form of alternative dispute resolution, and I see no reason why this process cannot be resorted to towards the object of negotiated settlement in pursuance to Section 89 of the Code of Civil Procedure, 1908 specially when the parties volunteer for the same. The provisions of the said Section *inter alia* provide for Alternative Dispute Resolution Mechanism, which *inter alia* includes mediation. ENR also broadly follows the same tenures as mentioned through the court's said a negotiated settlement, not a neutral assessment.

11. In view of the aforesaid, I deem it appropriate that such a neutral evaluation should take place by the two mediators/evaluators appointed aforesaid, one acting as neutral evaluator in terms of what has been explained hereinabove and the result of success or failure be communicated to this Court by the order of the two neutral evaluators.

12. List for a return on 21/11/2007.

2007 (97) DRJ 543

TECH. CLERK - OF THE ...

CIVIL No. 7355/2006 & Cr.M. No. 1945/2006

D.K. Modi, Petitioner

versus

K.C. Abraham, Enforcement Officer, Respondent

A.K. Sikri, J.

Decided on 20/12/2006

Foreign Exchange Regulation Act, 1973

Section 56 - Prosecution for violation of provisions of Act
Adjudication proceedings arising out of same facts, exonerated the
accused - Allegations made in complaint found to be same as in

SALEM ADVOCATE BAR ASSOCIATION, TAMIL NADU VS. UNION OF INDIA (UOI)

(2005)6SCC344

Summary of Judgment

The challenge to the constitutional validity of amendments made to the Code of Civil Procedure by Amendment Acts of 1999 and 2002 was rejected by Supreme Court in *Salem Advocates Bar Association, T.N. v. Union of India* (AIR2003SC189), it was also noticed in the judgment that modalities have to be formulated with respect to the manner in which section 89 of the Code and, for that matter, the other provisions, which have been introduced by way of amendments, should be operated. For this purpose, a Committee headed by a former Judge of this Court and Chairman, Law Commission of India (Justice M. Jagannadha Rao) was constituted so as to ensure that the amendments become effective and result in quicker dispensation of justice. It was further observed that the Committee may consider devising a model case management formula as well as rules and regulations which should be followed while taking recourse to the methods of Alternate Disputes Resolution (ADR) referred to in section 89. It was also observed that the model rules, with or without modification, that have been formulated, may be adopted by the High Courts concerned for giving effect to section 89(2)(d) of the Code.

Reports I, II and III submitted to the Supreme Court of India by the Committee.

Report I deals with clarifications on amendments to the Code of Civil Procedure 1908 made by the Amending Acts of 1909 and 2002.

Report II deals with clarifications on the responses to the Consultation Paper and Draft Rules relating to Alternative Disputes Resolution and Mediation as envisaged by section 89 of the Code of Civil Procedure.

Report III deals with Case Management procedures for use in the Courts.

The Hon'ble Supreme Court of India accepted the Reports I to III in its judgment in *Salem Advocates Bar Association vs. Union of India* 2005 (6) SCC 344. ***The High Courts have been requested to frame rules as per the Report II*** and evolve case management procedures.



Court Administrators and the Judiciary - Partners in the Delivery of Justice **By The Honorable Wayne Martin AC, Chief Justice of Western Australia¹**

Abstract:

This article examines several topics relating to the administration and governance of courts in democratic societies. It includes a summary of the development of court administration as a profession, highlighting Australia and the United States. The summary includes a discussion of how judges and court administrators must work together and coordinate their efforts in key areas of court administration and management. The article also reviews separation of powers issues, highlighting the problems that emerge in systems in which oversight and administration of the courts is vested in the executive branch or power of government, most commonly in a justice ministry. It reviews the practical advantages of having courts governed and managed through institutional mechanisms failing under judicial power rather than the executive power.

Keywords: Court administration, history of court administration, court administration in Australia, relationship between judges and court administrators, separation of powers, institutional independence of the judicial system

1. Introduction

Court administration is a subject of vital importance not only to those who are engaged in the task of administering justice, but also to the broader community. It is difficult to imagine a society or community which is not dependent upon the rule of law for its happiness and prosperity. Without the rule of law, there is either anarchy or despotism. And of course the rule of law depends upon the effective administration of justice by the courts created for that purpose.

It is now generally recognized that the effective administration of justice depends critically upon a successful partnership between the judiciary and those responsible for the administration of the courts. It has not always been thus, as the brief historical review later in this article shows. That review also highlights the unintended consequences of developments in many common law jurisdictions which entrenched the executive model for court administration.

The next section of this article examines some examples of the more recent reforms in court administration and the clearly emerging trend towards greater administrative autonomy and judicial control. This is followed by an examination of two of the emerging objectives of recent court administration reform — case management and 'New Public Management' ('NPN') principles — and how these have necessitated a close working collaboration between judges and court administrators. In this context, the last section addresses the question of whether there is in fact a bright line which demarcates the judicial function from the administrative function in contemporary court administration, and the implications for the executive model of court administration.

Before turning to that, however, some preliminary comments are apposite.

2. The Importance of a Successful Partnership between the Judiciary and Administrators

Contemporary recognition of the vital importance to the community of effective collaboration between the judiciary and those who provide administrative support to the work of the court is encapsulated in the United Nations Office of Drugs and Crime ('UNDOC') publication, *Resource Guide on Strengthening Judicial Integrity and Capacity*:

Although most of the discussion on judicial competency and ethics focus on the role of judges, there is a growing recognition of the importance of the role of court personnel. Non-judicial court support personnel, who frequently make

¹ Institutional Affiliation: Supreme Court of Western Australia, Email Address: chief.justice.chambers@justice.wa.gov.au, See biography at article end. Acknowledgement: The article is based on an address delivered to the 7th International Association for Court Administration Conference, Sydney, 26 September 2014. I am indebted to Dr. Jeannine Purdy for her assistance in the preparation of this article. However, responsibility for the opinions expressed and any errors is mine.

up the bulk of judiciary's employees, are crucial to any reform program that aims at strengthening integrity and capacity of the justice system. Courts cannot carry out their functions without these personnel. They are responsible for administrative and technical tasks that contribute to the outcome of cases and the efficiency of the judiciary. Perhaps most importantly, these officials typically serve as the initial contact point and the dispenser of information to nearly all who come into contact with the judicial system. This initial contact forms citizens' impressions of the system and shapes the confidence that they place in the courts. This role places court employees in an ideal position to promote innovation and help improve services to the public, thereby raising the stature of the court in the public eye.²

3. The Importance of an International Perspective

There is much to be gained from taking an international perspective of issues relating to court administration which many face many times a day in the course of their work. An international perspective provides the opportunity to step back from the daily grind and place the issues in a broader perspective. This can only enhance our capacity to analyze and respond effectively to the more significant underlying issues.

Some years ago, at an international conference concerning the judicial function, I made the observation that:

The issues which we share in common ... are vastly greater, and more significant, than the issues which are specific to our individual jurisdictions. The rule of law is a universal concept, and the skills required to maintain the rule of law effectively derive from our shared humanity, and depend much more upon the way in which we interact with our fellow human beings in the administration of the law, than the language we use, the precise structure of our particular judicial system, or, often, the content of the laws we administer. ... The rule of law depends upon the independence of the judiciary. Judges must be free to administer the law without fear or favor, free from interference. The challenges to judicial independence are many and varied ...³

For reasons which I develop later, one potential source of challenge to the independence of the judiciary lies in the arrangements that are made with respect to the administration of the courts in which the judiciary serve. An international perspective of the manner in which that challenge has been addressed can only inform and enhance our response to this challenge in our particular jurisdictions.

4. The International Association for Court Administration

The importance of an international perspective upon issues relating to court administration was recognized 10 years ago when the International Association for Court Administration (IACA) was created. It is interesting to note that the need for such an organization was presciently anticipated by Professor Carl Baar when, after addressing the third Asia Pacific Courts Conference in Shanghai in 1998, he observed that: 'It is a mark of the coming century that judges and courts in many countries, despite their diversity, meet together to share their commonly-understood problems and celebrate their emergence as distinct and significant institutions.'⁴

As Professor Baar observed, the characteristics of court administration have a universality which transcends the particular political, social, cultural, ideological or governance characteristics of any particular jurisdiction:

Courts not only share functions that both reinforce and check the exercise of public power, but also share common institutional characteristics and concerns. These are often summarized in the twin concepts of judicial independence and impartiality. ... [T]he fundamental clash of political theories does not seem to have produced a fundamental clash between judges — whether in liberal regimes, Marxist regimes or regimes based on Asian values or apartheid — over the institutional principles underlying the courts, and the need to protect the principles of independence and impartiality

² United Nations Office of Drugs and Crime, *Resource Guide on Strengthening Judicial Integrity and Capacity* (2011) 21 (citation omitted). The UNDOC notes, at 21 n 11, that: Among other functions, court personnel manage court facilities, assist with case management, protect evidence, facilitate the appearance of prisoners and witnesses, and perform a variety of other functions that help avoid postponements and ensure a professional and timely adjudication process. They also help judges conduct thorough legal research and draft decisions, and they ensure that decisions are properly announced and published, thus supporting consistency in decision-making. Court personnel also process and maintain case files to preserve the record for appeal; and promote judicial independence through competent budget and finance controls, and by fostering strong public relations and transparency in court proceedings.

³ Chief Justice Wayne Martin, 'Judicial Training in a Globalised World' (2014) 2 *Judicial Education and Training* 8, 8–9.

⁴ Carl Baar, 'The Emergence of the Judiciary as an Institution' (1999) 8 *Journal of Judicial Administration* 216, 216.

in practice. This phenomenon is all the more remarkable because the emergence of judging as an activity requiring independence and impartiality is relatively recent.⁵

The importance of the arrangements made in any particular jurisdiction for the administration of the courts of that jurisdiction so as to achieve judicial independence and impartiality, both real and apparent,⁶ is a theme to which I will return.

5. Court Administration — A Brief History⁷

The quaint history of the administration of the common law courts of justice shows not only how much the administration of these courts has changed, but also the presumably unintended effect which the elimination of sinecures, nepotism and corruption had upon the capacity of the judiciary to control the courts' administration. A colorful picture of the administration of the courts at Westminster in the 18th and 19th centuries is provided by former Justice Bruce McPherson of the Supreme Court of Queensland:

Like most other things associated with courts, an account of their staff begins some way back in time. Until well into the first half of the [19th] century, the offices and officers of both Chancery and the courts of common law in England were impressive in number and variety, and included such indispensable functionaries as a purse-bearer, a chaff-wax [whose duty was to prepare wax for sealing documents] and a sealer, not to mention the bag-bearer [who literally attended court with a bag containing the books, documents and pleas] to the *custos brevium* [the keeper of the writs]. Antedating as they did a permanent paid public service, court offices were a saleable commodity that lay in the disposition of the Lord Chancellor or the Chief Justice of the particular court in question. Holders of office were remunerated by fees exacted from litigants as the price of many useless services that were seldom, in fact, performed. Vested interests of purchasers of those offices were thus at stake, and reform came gradually because it was thought necessary to compensate those whose offices were abolished. After 1810 much was done to abolish sinecures, and by 1837 legislation had been passed providing for masters, clerks and messengers of court to receive fixed salaries. Although they were still remunerated out of court fees, what remained after paying their salaries was directed into consolidated funds, and officers were made liable to removal for accepting 'gratuities' in return for their services.⁸

As Justice McPherson points out, these reforms travelled to colonial Australia. Significantly he observed:

As the means of ending past abuses, they have naturally been welcomed. Attention is less often given to the fact that they also served to diminish the extensive control that powers of appointment, remuneration and dismissal of court officers gave to the judiciary.⁹

Later, I refer to the more recent phenomenon by which the courts of Australia, in common with the courts of many countries, have been subjected to contemporary principles of public administration often collected under the slogan 'New Public Management' ('NPM'). For present purposes it is sufficient to note that, like the reforms of the 19th century, while driven by the best of motives and intentions, they risk the unintended consequence of diminishing the capacity of the judiciary to control the administration of the courts in which they serve.

5.1. An Historical Anomaly

There is a curious historical anomaly which should also be noted. As Professor Baar observed:

Only in the last two centuries has it been possible in the English-speaking world to talk about courts without using the term 'courts of justice' to differentiate judicial bodies from the royal courts surrounding European monarchs. In this century, many former British colonies still retained executive control over the exercise of judicial power.¹⁰

Judicial independence and impartiality are relatively recent concepts. In the English language the word 'court' reflects the close connection between the judiciary and the monarchy at a time when executive and legislative power were both reposed in the monarch. Even in relatively recent times in the United Kingdom, the most senior member of the judiciary was a member of both the executive government and the legislature, and the members of the highest court were all

⁵ Ibid, 220–221.

⁶ 'Justice must not only be done, but must also be seen to be done.'

⁷ My apologies for the common law focus of this section, but considerations of space do not permit a broader comparative analysis.

⁸ Justice B H McPherson, 'Structure and Government of Australian Courts' (1992) 1 *Journal of Judicial Administration* 166, 175 (citations omitted).

⁹ Ibid, 176.

¹⁰ Baar, above n 4, 221 (citation omitted).

members of the legislature. It is hardly surprising that the same approach was taken in many British colonies. In many of those colonies, the Chief Justice had full executive authority and served as one of the officials administering the colony under the supervision of the Governor.¹¹

As the Canadian Judicial Council has observed, this had a particular effect upon the administration of the courts of Singapore:

In colonial times, there was no separation of executive and judicial authority; as a result, the chief justice sat in cabinet. Thus court administration was under the authority of the chief justice in British times, and remained with the chief justice after independence. Singapore court officials have never known any other system, taking for granted and taking seriously their responsibility for managing the Courts and introducing a wide range of innovations in technology and organization.¹²

Hence the anomaly. When the common law courts were closely aligned with the executive, the judiciary had the practical capacity to control the administration of the courts. In many jurisdictions, the steps which have been taken to separate the judiciary from the executive, in the interests of judicial independence, have had the consequence of significantly reducing the capacity of the judiciary to control the administration of the courts, thereby diminishing judicial independence in a very real and practical sense. The courts of Singapore provide a notable exception, as anyone with even a passing interest in court administration will attest, given the innovation and efficiencies which have been achieved by the administrators of the courts in that country under the direction of the judiciary.

In other common law jurisdictions, this anomalous loss of judicial independence has been addressed by the creation of governance structures which have restored the power of the judiciary to direct and control the administration of the courts in which they serve.¹³ However, in many common law jurisdictions, the anomaly remains and under the 'executive model' of court administration, most personnel engaged to administer the court and support the exercise of the judicial function are to a degree controlled by, but always ultimately answerable to, executive government and not to the judiciary. In the increasing number of jurisdictions in which that model of court administration has been abandoned, it has been recognized that not only does it diminish judicial independence, in a real and practical sense, but it is also inefficient economically and managerially, for reasons which I develop later.

5.2. The Executive Model

Justice Bruce McPherson's interesting history of court administration in Australia provides some colorful examples of the inevitable tensions created by the executive model of court administration. The obvious areas of tension concern staffing and budgetary resources.

5.3. Staffing Tensions

In 1889 the executive government of Queensland purported to create the new office of 'taxing officer' of the Supreme Court of Queensland without the prior approval of the judges. During the course of argument in the litigation which followed, Chief Justice Lilley (a former Premier and Attorney General) was moved to volubly enunciate the independence of the court when he observed: 'The Supreme Court is not under any department; it is under the Judges. The Crown comes into the court as a suitor, and as nothing else. It cannot come here to command, nor can it put in any officers to interfere with the functions of the court.'¹⁴

In the judgment later delivered, speaking on behalf of the Full Court, Lilley CJ asserted judicial control over all court staff in these terms:

¹¹ Traces of this approach to colonial governance remain, even in contemporary Australia. See Rebecca Ananian-Welsh and George Williams, *Judges in Vice-Regal Roles* (9 September 2014) Judicial Conference of Australia <http://www.jca.asn.au/judges-in-vice-regal-roles-september-2014/>.

¹² Canadian Judicial Council, *Alternative Models of Court Administration* (September 2006) 106 ('*Alternative Models*').

¹³ Such as the judicial council model adopted in South Australia and Victoria, and in a modified form in Ireland, or the limited autonomous court model adopted by the Federal Courts of Australia and the Canadian Supreme Court, or the executive/guardian model adopted by the other Federal Courts of Canada (see Canadian Judicial Council, *Comparative Analysis of Key Characteristics of Court Administration Systems* (6 July 2011) ('*Comparative Analysis*'). I use the term 'judicial council model' as employed by the then Lord Justice Thomas, for the Council of Europe, in *Councils for the Judiciary – Preliminary Report: States without a High Council* (March 2007); that is to mean 'a body run by the judiciary which enables the judiciary to administer the courts with a professional management structure': at 5.

¹⁴ McPherson, above n 8, 173 quoting 'Supreme Court Tuesday, September 10 – Monthly Full Court', *Brisbane Courier* (Brisbane), 11 September 1889, 1, 3.

Now, it matters not what rank a person holds in the Supreme Court, whether called a clerk or registrar, if he is lawfully appointed to carry on the administration of justice or the administration of the Court in any way, however humble, he is an officer of the Court subject to the jurisdiction of the Court; all these officers, from the registrar down to the humblest clerk in the office, is subject to the authority of the Court, controlled by it in the discharge of his duties in the Court, and any interference with them is an interference with the Court itself, and cannot be allowed. The importance of this state of the law can hardly be overestimated.¹⁵

However, there is reason to suspect that this is more wishful thinking than an accurate statement of the true position under the 'executive model' of court administration. For example, as Justice McPherson points out,¹⁶ a little earlier in New South Wales in 1883, the Prothonotary, Mr T M Slattery, acted in accordance with the direction of the judges of the court and refused to report to government with respect to his administration of intestate estates. He was dismissed by the government of the day, even though he was obeying the directions of the judiciary.¹⁷

It should not be thought that tensions under the executive model of court administration between the executive control of administrative staff and the independence of the judiciary are confined to the annals of history. Within the last 30 years, a Registrar of the District Court of Western Australia, who had both quasi-judicial and administrative responsibilities, vacated his office as a consequence of a dispute relating to his asserted independence from executive direction.

5.4. Budget Tensions

Not surprisingly, many examples of tension between the executive and the judiciary under the executive model of court administration can be found in the area of budgetary constraint. Justice McPherson provides two examples, each related to the expenses of circuit travel.

In 1887 a long-running dispute over the circuit expenses of the northern judge came to a head when the government unilaterally altered the rules by including in the estimates a reduced sum specifically to cover expenses in the north. No-one told Cooper J about it until the money was about to run out; but the government was in the end forced to relent in the face of his threat to close the circuit, release the prisoners awaiting trial, and return forthwith to his base in Bowen.

The Premier responsible for the confrontation was none other than Sir Samuel Griffith. As Chief Justice of the High Court, he had the chance in 1906 to sample the effects of executive frugality when Federal Attorney-General J B Symon elected to cut court expenses by reducing the number of associates and telephones and refusing to install bookshelves for the High Court in Sydney. His contention that the High Court should confine its sittings to Melbourne led Griffith to adopt Cooper's expedient of cancelling the court sittings due to take place there. The conflict ended only with the fall of the government of which Symon was a member. The judges won their point, the High Court remaining resolutely peripatetic until the creation of a permanent seat in Canberra under the *High Court of Australia Act 1976*.¹⁸

My reference to historical examples should not be taken to suggest that tensions between the executive and the judiciary with respect to budget under the executive model of court administration are historical. To the contrary, I suspect that virtually every head of a court administered under that model would be able to provide endless examples of tension arising from disputes over the provision of resources. I will relate one example from the many I could provide, chosen because it relates to the same subject as Justice McPherson's historical examples — namely, circuit expenses.

Some years ago now, a senior official advised me that a circuit to the north of our State would have to be cancelled because there was insufficient funding remaining within the relevant budget item for the current financial year. Trials had been listed for the circuit, cases had been prepared, witnesses and jurors summoned, etc. A little like Justice Cooper in 1887, I responded by advising the official that while of course I accepted that the provision of the resources necessary to enable the court to function was a matter for executive government, he or any other official minded to give me a written direction to cancel the circuit should understand that the direction would be attached to a media release which I would issue immediately. Happily the direction never came and the circuit proceeded.

5.5. A Threat to Independence

There is a more fundamental point which underpins these apparently superficial examples. As Professor Baar points out, whatever may have been the case in the past, the importance of judicial independence and impartiality now has a universality which transcends politics, ideology and culture. In countries with a written constitution like Australia, it is often

¹⁵ *Byrnes v James* (1889) 3 *Queensland Law Journal* 165, 168–169.

¹⁶ McPherson, above n 8, 178.

¹⁷ A classic example of the adage 'no man can serve two masters'.

¹⁸ McPherson, above n 8, 172 (citations omitted).

recognized as a fundamental characteristic of the constitutional structures for the governance of the country. But can a court which lacks the capacity to decide where and when it will sit, because it depends upon executive government for resources, truly be said to be independent? Can a court which lacks the capacity to appoint and fully control its staff truly be described as independent? Can a court in which most staff are appointed and ultimately controlled by the most prolific litigant in the court truly be said to be impartial?

5.6. Managerial Efficiency and Accountability

There is another dimension to these issues. That dimension concerns the relationship between managerial efficiency and accountability. One does not need to be an economist to understand that holding the person responsible for the allocation of resources accountable for the outcomes achieved by the utilization of those resources is likely to improve efficiency. Most budgets operate on precisely this principle. Disconnection between the authority to allocate resources, and accountability for the outputs from those resources is a recipe for inefficiency and waste.

Because systems for the administration of courts are infrequent topics of conversation amongst members of the general public gathered in bars, restaurants, or indeed anywhere, members of the community understandably hold the courts accountable for their performance. So, when the time which it takes to process a routine application for probate of a deceased estate blows out from two weeks to ten weeks because of staff shortages, the families affected by their incapacity to access the deceased estate so as to put food on the table complain to me, not to the department of government responsible for providing the staff. Very few of those correspondents would be aware that the department has the exclusive responsibility for providing human resources to the court, and that there is nothing which I or any other member of the judiciary can do if adequate resources are not provided. This means that, in a very real sense, the departmental officials who make decisions with respect to the allocation of human resources are not accountable for the consequences of those decisions and those who are held accountable lack the authority to discharge their responsibilities. If one were designing a governance structure for a public enterprise from scratch, it is hard to imagine a worse model.

The problems of efficiency and accountability to which I refer persist even if we assume public knowledge of the arcane structure for the administration of the courts under the executive model. That is because of the bifurcated nature of responsibility under that model. So, when a citizen complains to executive government about delays in the courts, the responsible minister customarily responds by referring to the independence of the judiciary and the inability of executive government to dictate the manner in which the courts allocate and list cases for trial. When that same citizen writes to me complaining about delays in trial times, I reply referring to the fact that executive government decides the level of resources to be provided to the courts, and that the court can only do so much with the resources which have been provided. The citizen exasperated by this passing of the buck from one branch of government to another might be forgiven for thinking that nobody is responsible, or at least that nobody is accepting responsibility.

6. Court Administration Reforms – Some Examples

6.1. The United States

In the United States at least some commentators have suggested that reforms in court administration during the last century were driven more by notions of managerial efficiency and economy than by the objective of institutional independence. Gordon Bermant and Russell R Wheeler assert:

The idea of a truly independent judicial branch, administratively responsible and competent, even if not administratively autonomous, emerged only in the twentieth century as a product of the Progressive Movement's effort to rationalize government and make it more efficient.¹⁹

Support for this proposition can be found in the writings of Professor Roscoe Pound. In 1906, he called for the unification of courts in the states in order to facilitate the development of systemic court administration controlled by judges rather than local political elites.²⁰ In 1914, Pound elaborated what has been described as the 'principle of real administrative autonomy for the judiciary'.²¹ However, it seems clear that Pound's justification for providing the judiciary with administrative autonomy was economy and efficiency, not judicial independence. Referencing state court systems, he wrote (with others):

¹⁹ Gordon Bermant and Russell R Wheeler, 'Federal Judges and the Judicial Branch: Their Independence and Accountability' (1995) 46 *Mercer Law Review* 835, 855.

²⁰ However, by 1940 he was able to record only individual experiments in some states: Pamela Ryder-Lahey and Professor Peter H Solomon, 'The Development and Role of the Court Administrator in Canada' (January 2008) 1(1) *International Journal for Court Administration* 31, 31 citing Roscoe Pound, *The Organization of Courts* (1940).

²¹ *Alternative Models*, above n 12, 61.

the court should be given control of the clerical and administrative force through a chief clerk, responsible to the court for the conduct of this part of its work. We have hampered the administration of justice by the extreme to which we have carried the decentralization of courts. In many jurisdictions the clerks are independent officers, over whom the courts have little or no control. ... Each clerk's office [in most states] is independent of every other. It is no one's duty to study the system, suggest improvements, or enforce them when made. What responsibility will do in this connection, when joined to corresponding power, is shown in the Municipal Court of Chicago, where the system of abbreviated records is said to have effected a saving of \$200,000 a year. Moreover, if courts are to do the work demanded of the law in large cities ... and in industrial communities, they must develop much greater administrative efficiency, and must be able to compete in this respect with administrative boards and commissions.²²

Whatever the motivation, in 1939, the US Congress passed legislation creating the Administrative Office of the United States Courts. The office was responsible for administering the federal courts, including determining their budget, under the control and supervision of what is now known as the Judicial Conference of the United States.²³ The independence of the US Federal Courts from executive interference extends even to their budget, which is prepared by the Administrative Office and approved by the Judicial Conference, before being sent to the office of the President, who has a statutory obligation to forward it to Congress without change.²⁴ However, similar progress in state court systems lagged behind their federal counterparts; according to Alexander B Aikman, it was not until 1947 that an administrator was engaged to assist a US State Chief Justice to bring professional services to the court.²⁵ According to Aikman:

It is only since the mid-1950s that courts, the 'third branch', actually have started to create a coherent institution ... Extraordinary strides in court administration and in courts themselves have been made since 1947. The judiciary has gone a long way toward establishing itself as a viable, truly independent, responsible, and accountable, branch of government. Part of the growth and maturation is attributable to the growth and maturation of court administration.²⁶

6.2. Canada

In Canada the 'emergence of the court administrator ... was tied to the movement to unify and streamline provincial courts that began in the late 1960s and reflected a realization that courts had fallen behind the rest of government in the process of administrative modernization'.²⁷ However, it seems that the modernisation of court administration in Canada 'made some judges nervous that functions that mattered to the administration of justice were being performed by staff that were subordinate to the executive branch'.²⁸

These concerns were addressed in a major report sponsored by the Canadian Judges Conference and the Canadian Institute for the Administration of Justice and published in 1981 — *Masters in their Own House: A Study on the Independent Judicial Administration of the Courts*.²⁹ In that report, the authors called for the establishment of court services departments accountable to provincial judicial councils. However, it seems that the movement towards greater judicial control of court administration was impeded by the decision of the Supreme Court of Canada in *Valente v The Queen*³⁰ in which it was held that the independence of the judiciary did not require court administration to be subject to judicial control, but that only functions directly related to the adjudicative process, such as the assignment of judges, the scheduling of trials and the allocation of courtrooms was required to be under the control of the judiciary.³¹ Notwithstanding that decision, while most provincial and territorial courts in Canada remain governed under the executive model, at the federal level, the Supreme Court of Canada has achieved what has been described as limited autonomy, and the other federal courts are administered by what is described as the executive/guardian model.³²

6.3. Australia

A similar structure has emerged in Australia. The federal courts have a degree of autonomy, administered by Registrars/CEOs who are responsible to the judiciary but within a budget set by the executive. South Australia and

²² Sue K Dosal, Mary C McQueen and Russell R Wheeler, "Administration of Justice Is Archaic" —The Rise of Modern Court Administration: Assessing Roscoe Pound's Court Administration Prescriptions' (2007) 82(5) *Indiana Law Journal* 1293, 1301 quoting Charles W Eliot et al, The National Economic League, *Preliminary Report on Efficiency in the Administration of Justice* (1914) 17.

²³ *Alternative Models*, above n 12, 62.

²⁴ *Ibid.*

²⁵ Alexander B Aikman, *The Art and Practice of Court Administration* (2006) 2 (citation omitted).

²⁶ *Ibid.*

²⁷ Ryder-Lahey and Solomon, above n 20, 31.

²⁸ *Ibid.*, 34.

²⁹ Jules Deschênes (with Carl Barr), Canadian Judicial Council, *Masters in their Own House: A Study on the Independent Judicial Administration of the Courts* (1981).

³⁰ [1985] 2 SCR 673.

³¹ Ryder-Lahey and Solomon, above n 20, 34.

³² See *Comparative Analysis*, above n 13, 39–99.

recently Victoria have moved to the judicial council model, while the other states and territories remain under the executive model.

6.4. Europe

As many would know, Ireland moved away from the executive model in favour of a modified judicial council model about 15 years ago, and among the non-common law countries, the Scandinavian countries of Denmark, Norway, and Sweden, as well as Holland have been prominent in segregating court administration from executive control. Many other countries in Europe have created judicial councils.³³

6.5. International Standards for Court Administration

Various international organizations have directed their attention to the relationship between court administration and the independence of the judiciary over the last few decades. In 1980, the International Bar Association embarked upon a project to develop an international code of minimum standards for judicial independence,³⁴ which included requirements relating to court administration. In 1983, the Montreal Declaration on the Independence of Justice adopted standards similar to those formulated by the International Bar Association,³⁵ and included a provision that 'the main responsibility for court administration shall vest in the judiciary'.³⁶ In 1995, the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* was adopted at a conference of Supreme Court Chief Justices from the Asia Pacific region.³⁷ It contains prescribed minimum standards for judicial independence after allowing for national differences within the various countries represented in the LAWASIA organization. In relation to judicial administration, the Beijing Principles provide:

The assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court.

The principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the judiciary, or in a body in which the judiciary is represented and has an effective role.

The budget of the courts should be prepared by the courts or a competent authority in collaboration with the courts having regard to the needs of the independence of the judiciary and its administration. The amount allotted should be sufficient to enable each court to function without an excessive workload.³⁸

In 1997, the Chief Justices of the Australian States and Territories issued a 'Declaration of Principles on Judicial Independence' which referred with approval to the Beijing Statement of Principles.³⁹ The question of whether the current arrangements for the administration of all of the Australian courts comply with the Beijing Principles is a fair question for debate, but the competing arguments lie beyond the scope of this paper.

6.6. Models of Court Administration

I have already referred to the emergence of different models of court administration in differing jurisdictions, prompted in some cases by a desire to reinforce judicial independence, and in others by a desire to improve economy and efficiency. There have been a number of very helpful surveys of different models in different jurisdictions. Notable amongst those surveys are the comparative analyses of key characteristics of court administration systems presented to and published by the Canadian Judicial Council in 2011, and the preliminary report requested by the Council of Europe on Councils for the Judiciary which was presented by the then Lord Justice Thomas in 2007.⁴⁰ Other authors have made important contributions to this analysis.⁴¹

Differing taxonomies have emerged in the course of these comparative analyses, but they usually identify the extent to which the administration of the court is under the control of the executive and the extent to which the administration is

³³ Thomas, above n 13.

³⁴ Shimon Shetreet, 'The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration' in Shimon Shetreet and Jules Deschênes (eds), *Judicial Independence: The Contemporary Debate* (1985) 394.

³⁵ Ibid, 395,

³⁶ *Montreal Declaration on The Independence of Justice* (10 June 1983) article 2.40.

³⁷ It was amended on 28 August 1997.

³⁸ *The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, Beijing (19 August 1995, as amended in Manila, 28 August 1999) articles 35, 36 and 37.

³⁹ Published in (1996-97) 15 *Australian Bar Review* 176.

⁴⁰ See *Comparative Analysis*, above n 12; Thomas, above n 13.

⁴¹ See, eg, Tin Bunjevac, 'Court governance: the challenge of change' (2011) 20 *Journal of Judicial Administration* 201.

subject to control and direction by the judiciary. It is unnecessary to replicate these helpful analyses in this paper. It is sufficient to note that in different jurisdictions, different methods have been adopted in an attempt to enhance judicial independence, improve efficiency and reduce cost. It is clear from the various reviews to which I have referred that in both common law and civil law jurisdictions, a clear trend towards greater administrative autonomy and judicial control is readily apparent.

7. Two Emerging Objectives - Case Management and New Public Management

Over the last few decades, in most jurisdictions two significant objectives have emerged which have had a profound effect upon court administration, and upon the relationship between the judiciary and court administrators. Those two objectives are the proper management of individual cases and the application of the principles of public administration embodied in the expression 'New Public Management' ('NPM').

7.1. Case Management

In common law jurisdictions, traditionally, the emphasis upon the adversarial process resulted in the progress of the case being largely left to the parties. If they took no action, the court took no action. Predictably enough, in the civil side of the court's work, this produced massive backlogs of cases which had been lying stagnant for many years.

In civil law jurisdictions, although the court has traditionally taken greater responsibility for the progress of each case, responsibility for each case is allocated to a particular judicial officer. Caseloads varied between judges, as did attitudes towards expedition and timeliness, which could be idiosyncratic. Overall supervision by the court as a whole was limited.

In both common law and civil law jurisdictions, the last few decades have seen an appreciation of the need to introduce better systems for the management of cases, across the whole jurisdiction of the court, so as to improve timeliness, consistency of process, and efficiency. In many (probably most) common law jurisdictions, there has been a significant cultural shift toward proactive intervention by the court in the progress and resolution of individual cases. In many jurisdictions, this cultural shift has been accompanied by the introduction of procedures for the referral of cases to alternative dispute resolution (ADR), which has become the dominant means for the resolution of civil disputes.⁴²

The number of cases which have to be managed in most jurisdictions has meant that judges have had to turn to court administrators for the introduction of systems and technology to support the new approach. In a very real sense, the judges and the administrators have become partners in the achievement of a common objective - the just and fair resolution of all cases before the court in the shortest possible time and at the minimum cost.

The impact of the introduction of case management upon court administration in common law jurisdictions has been cogently expressed by Ryder-Lahey and Solomon:

Over time the emphasis in judicial administration in the USA shifted from improving the organization and structure of courts to enhancing their accountability, performance, efficiency, and effectiveness. This shift came from the realization that improvements in structure alone would not achieve the goal of efficient and effective courts. Of primary concern was addressing the problems of case backlog and delay, including the potential of caseload management and mediation. Judges also came to recognize that administrative efficiency of courts required professional managers and staff capable of working with judges in formulating and executing policies at the court.

Caseload management became in the 1970s a central concern among judges, lawyers and especially court administrators. The increasing caseload in many courts and the accompanying growth in court delay made the achievement of efficiencies imperative and provided fertile soil for the introduction of changes in scheduling and allocation of cases and of major reforms in the processing of cases. Changes in scheduling required wresting control of the calendars of courts away from local lawyers, prosecutors, and elected clerks of courts, and the assertion instead of judicial control. By 1984 the bar recognized the potential benefit of time standards governing the progress and disposition of cases.

Ultimate responsibility for caseload management rested officially with judges. Judges had the authority to seek assistance from the court administrators and get these administrators actively involved in the pursuit of caseload management innovations. Such innovations included new systems of allocating cases among judges (not by

⁴² In the Supreme Court of Western Australia, for example, less than 3% of the cases lodged with the court are resolved at trial – the majority are settled, many following mediation. This ratio is comparable to many superior courts in the common law world (Chief Justice Wayne Martin, 'Managing Change in the Justice System' (18th Australian Institute of Judicial Administration ('AIJA') Oration in Judicial Administration, Brisbane, 14 September 2012) 6).

specialization but by the complexity of cases and the time needed for resolution); and new ways of tracking and managing cases from initiation to disposition. Thus, caseload management came increasingly to imply the use of early screening and disposition, and various forms of alternative dispute resolution. In some courts new posts like 'case manager' or 'trial coordinator' were established, in addition to or as substitutes for 'court administrators'.

Arguably, it was the new body of knowledge about caseload management that gave court administrators a distinct professional identity. Court administrators fully versed in the latest techniques of caseload management, including the use of computers, offered something to the operation of courts that persons with legal training did not.⁴³

A similar point was made in the UNDOC's *Resource Guide on Strengthening Judicial Integrity and Capacity*:

Case management, performance evaluation and technological developments increase the organizational complexity of courts and require new professional skills and abilities that do not necessarily fit the traditional professional profile or job description of judges. This led to the increased prominence of the position of court administrator that in many jurisdictions has authority over all non-judicial court management and administration functions. More specifically, functions that are typically assigned to such court executives or managers include long-range administrative planning, finance, budget, procurement, human resources, facilities management, court security, emergency preparedness planning, and employee discipline in addition to the ministerial and judicial support functions. These new court professionals liberate the chief judges of the courts from having to invest considerable time and energy on non-judicial functions for which they have not been trained. As a consequence, chief judges of the courts can focus on the judicial functions for which they have been trained and can work to implement more far-reaching strategies aimed at guaranteeing a high quality of judicial decisions and dispute resolution. Finally, since the overall functioning of a court depends heavily on the interplay between judges and administrative staff, it is important to set up a system capable of building a shared responsibility between the head of the court and the court administrator for the overall management of the office.⁴⁴

7.2. New Public Management ('NPM')

The adoption of case management techniques over the last four decades corresponds to a broader change in the approach to public administration which has been applied to many agencies and branches of government in many countries. Although in most countries the courts are regarded as an independent branch of government, separate and distinct from the executive branch, they have not been exempted from the modern principles of public management.⁴⁵ Those principles, and their application to the judiciary, have been described by Swiss researchers, Professor Yves Emery and Lorenzo De Santis:

Nowadays, organizations within the judicial branch are targets for modernization strategies inspired by the NPM. The new public management (NPM) movement started in the Anglo-Saxon world in the 1970s prior to spreading elsewhere. Its main claim is the superiority of private-sector managerial techniques over those of the more traditional public administration ...

All public organizations are accountable to the citizens and governments for the way that they spend their money. NPM techniques are aimed at rendering public institutions more efficient and thus, more valuable for the population (so-called 'value for money') and consequently are supposed to help politicians achieve good management of public resources by enhancing the legitimacy of public institutions. Not surprisingly, as NPM is the son of two opposites, namely the new institutional economics and the business-type managerialism, it created lively debates in both research and practice. As for its methods, Hood [in 'A Public Management For All Seasons?'] defines seven doctrinal components: professional management in the public sector, the use of measures and standards of performance, emphasis on outputs, disaggregation of units, greater competition, stress on private-sector styles and on greater discipline and parsimony in resource use. Others emphasize the centrality of quantitative measurement together with notions such as efficiency, effectiveness and economy. When applied to the judiciary, this led the chief justice of New South Wales to declare that, 'there is clearly a trade-off between efficiency and expedition on the one hand, and fair procedures on the other hand'.⁴⁶

⁴³ Ryder-Lahey and Solomon, above n 20, 32–33.

⁴⁴ UNDOC, above n 2, 40.

⁴⁵ See, eg, Professor Andreas Lienhard's examination of the benefits and risks of NPM, from the perspective of Swiss constitutional and administrative law, and including the feasibility of applying NPM to the organisation of the justice system (Andreas Lienhard, 'New Public Management and Law: The Swiss Case' (Winter 2011/12) 4(2) *NISPAcee Journal of Public Administration and Public Policy* (Special Issue: Law and Public Management Revisited) 169, especially at 183-184).

⁴⁶ Yves Emery and Lorenzo Gennaro De Santis, 'What Kind of Justice Today? Expectations of "Good Justice", Convergences and Divergences between Managerial and Judicial Actors and how they fit within Management-Oriented Values' (June 2014) 6(1) *International Journal for Court Administration* 1, 1–2 (citations omitted).

However, the vital point is that there is no need to trade off judicial independence in order to improve managerial efficiency. To the contrary, they can be aligned. This alignment between judicial independence and the achievement of managerial efficiency in accordance with NPM principles is well demonstrated in a monograph commissioned by the Australasian Institute of Judicial Administration in 2004, in which three senior academics in the field of management reviewed the operation of Australia's courts from a managerial perspective.⁴⁷ The thesis of the monograph was put succinctly in an address by one of the authors a few years later:

the courts play a role as an arm of government; and the courts should assume control over court staff and court budgets if they are to be independent of the other arms of government.

(And this is the managerial perspective) Courts also play a role as providers of services. In performing this role, the Executive holds the courts responsible to produce certain services. Principles of sound management demand that those who are to be held responsible to produce must be given the power to fulfil the tasks demanded of them. If the courts are to be held responsible for the production of services they must be given the power to manage their own staff and manage their own budgets.

This managerial perspective means that the perception of a conflict between sound management and the proper role of the courts as an arm of government is illusory. Both principles demand that our courts should be responsible for managing their own staff and should be free to allocate the funds allocated them by the Executive.⁴⁸

However, the application of NPM principles to the courts comes at a price. As Richard Foster PSM has noted:

notions of accountability and performance tend to come laden with the nomenclature of business and bureaucracy — inputs, outputs, objectives, outcomes, policies, programs and key performance indicators. Such language can sit uncomfortably with the judiciary and it often falls to the senior court administrator to assist them in understanding their accountabilities and responsibilities.⁴⁹

So, like case management, the application of NPM principles to the courts has necessitated a collaborative partnership between the judiciary and those responsible for the administration of the court not only in the management and the administration of the court, but also in the design and application of data collection systems which enable the court to report to executive government and the broader community upon the outcomes which have been achieved by the utilization of public resources.

7.3. Another Threat to Independence

However, there are real dangers if too much emphasis is placed upon the statistical reporting of outcomes. Those dangers include a potential threat to the fundamental objective of the judicial branch of government, which is the provision of justice. That threat arises if judges are influenced in their management of individual cases by a desire to improve statistical outcomes, rather than a focus upon the needs of justice in each individual case. As Chief Justice Spigelman has famously observed many times in this context, 'Not everything that counts can be counted';⁵⁰ nor indeed does everything that can be counted matter.

I know from personal experience that there is an almost irresistible tendency to collect data that can be collected easily and to assume, without careful analysis, that the data collected reveals useful information about performance and efficiency, when often it does not. This danger emphasizes again the vital need for a full partnership between the judiciary and the administration. If that partnership is to be successful, the judiciary must discharge the responsibility of identifying precisely what matters in the management of the court by reference to the fundamental objectives of the court. The responsibility of the administrator is to design and implement systems which collect information on the extent to which those fundamental objectives are being achieved. If those systems capture useful information, it can be used to inform decisions as to the processes and procedures which might better achieve the things that really matter, and to report to executive government and the community on the extent to which the court has achieved its fundamental objectives. This can only occur if there is a common understanding between the judiciary and the administration as to the fundamental objectives of the court. If wrong or inaccurate measures of performance are used by executive government to inform

⁴⁷ John Alford, Royston Gustavson and Philip Williams, *The Governance of Australia's Courts: A Managerial Perspective* (2004).

⁴⁸ Philip Williams, 'The Governance of Australia's Courts: A Managerial Perspective' (AIJA Courts Governance Seminar, 31 May 2008) 1.

⁴⁹ Richard Foster, 'Towards Leadership: The Emergence of Contemporary Court Administration in Australia' (February 2013) 5(1) *International Journal for Court Administration* 1, 5.

⁵⁰ See, eg, Chief Justice J J Spigelman, 'Quality in an Age of Measurement: The Limitations of Performance Indicators' (Sydney Leadership Alumni Lecture — The Benevolent Society, Sydney, 28 November 2001) 1.

decisions with respect to the amount or the allocation of the resources provided to the court, the quality of justice delivered by the court will be diminished.

Courts are not Businesses

There are other dangers in an over-rigorous application of NPM principles to the judicial branch. Principles adopted from the private sector, designed to improve the profitability of a business venture, cannot be applied without modification or analysis to a court. A court is not a business venture.⁵¹ Courts are indispensable to the rule of law, and the value of the rule of law, or the provision of justice in an individual case, defies quantification on a balance sheet.

A Business Case?

Despite this fairly obvious proposition, the ubiquity of NPM principles in contemporary public administration can require any proposal for the expenditure of funds to be justified by a 'business case', even though, obviously enough, a court is not a business. The notion of a business case can be readily understood in the private sector, where the fundamental objective of deriving profit requires that expenditure should only be incurred if it produces an acceptable rate of return. The concept has no ready or apparent application to an enterprise in which the fundamental objective is the delivery of justice. Nevertheless, it has been suggested that, for example, every appointment of a judicial officer should be justified by a 'business case'.

It may be possible to make some sense of a 'business case' in the context of a court if there are service and performance parameters which can be measured objectively and against which expenditure can be assessed. So, if the failure to appoint a judge will result in an increase in the median time taken to resolve cases in the court, the consequence of failing to appoint a judge can be assessed, albeit not in terms of revenue or profit. However, that assessment is only useful if one places an economic value upon the timely disposition of cases. But if 'justice delayed is justice denied', can an economic algorithm be usefully applied to the quality of justice provided by a court? And, if the failure to appoint a judge not only delays median times to resolution, but increases the workload of the judges to the point where the quality of justice provided in individual cases diminishes, how is that to be measured in a 'business case'?

7.4. Where does Judging End and Administration Begin?

In the preceding section of this paper I have assessed the impact which contemporary attitudes towards case management and NPM principles have had upon the relationship between judges and court administrators. I have concluded that the emergence of those objectives has necessitated a close working collaboration. In that context, in the last section of this paper I will return to the vital topic of judicial independence and address the question of whether there is in fact a bright line which demarcates the judicial function from the administrative function in contemporary court administration. The answer to that question has profound implications for appropriate court governance structures. For example, the executive model, although in retreat, presupposes that there is a clear delineation between the judicial function, which is the exclusive province of the judicial branch of government, and the administrative function, which is under the control of the executive. If that assumption is flawed, then so is the model.

The contemporary relevance of this issue, in the context of the emphasis upon a managerial approach to court administration, is neatly encapsulated in the following passage:

The question of independence of the judiciary, due to a more performance-orientated administration of justice, is often brought forward by the heads of the courts. They keep protesting against the reduction of their initiatives and influence in favor of managers who have a direct relationship with the central administration. Such a tension between judges and managers is not peculiar to England, France and the Netherlands, and may prevail at a European level. The question is to know where the action of « judging » begins, and where the action of « administering » ends.⁵²

In his review of court governance systems, Lord Justice Thomas noted that the distinction between matters which were the subject of judicial responsibility, and matters of administration, was 'never clear cut and there has been no success in drawing the line'. He went on to observe: 'This is a factor which has to be considered when deciding whether administrative services can be provided to the judiciary which are not ultimately answerable to the judiciary as opposed to the executive.'⁵³

At different ends of the spectrum of functions performed in a contemporary court, the allocation of responsibility is clear-cut. The adjudication of a case after trial is the clear responsibility of the judiciary, and nobody would suggest that the

⁵¹ At least not since the abolition of sinecures dependent upon extracting maximum fees from litigants.

⁵² Loïc Cadet et al, 'Better Administering for Better Judging' (December 2012) *International Journal For Court Administration* (Special Issue) 1, 6 (citations omitted).

⁵³ Thomas, above n 13, 17.

judiciary should take responsibility for the engagement of cleaning contractors or the acquisition of pens and paper. However, there are many areas between the two ends of this spectrum in which the allocation of responsibility is far from clear. I will endeavor to make that proposition good by considering a variety of functions performed in a contemporary court. The topics are not meant to be exhaustive.

Judicial or Administrative Functions?

1. Accepting or Rejecting Documents Filed at Court

Most courts have specific requirements which must be satisfied before a document will be accepted for filing. The standards will commonly cover matters of form⁵⁴ and substance. Usually those standards will be prescribed by the judiciary and implemented by administrative staff at the front counter or registry of the court.

The manner in which the prescribed standards are implemented can have a profound effect upon the character of the justice dispensed by the court. If those standards are enforced pedantically, with a zealous eye to detail, legally represented parties will suffer delays while documents are redrawn and will incur additional cost, and parties without legal representation may find this practical barrier to justice insurmountable and give up. On the other hand, if the prescribed standards are disregarded by court staff, and documents are accepted that are not properly attested or verified, the quality of justice delivered by the court will be diminished. The creation and maintenance of an administrative culture which strikes an appropriate balance between these two extremes can only be achieved by close collaboration between the judiciary and court administrators. The judiciary must clearly enunciate the manner in which they would like the balance to be struck, having regard to the objectives of the court, in terms of accessibility by self-represented litigants and the maintenance of appropriate standards with respect to reliability and authenticity of documentation. The administrators must implement systems for training and supervision which enable the desired balance to be consistently achieved.

Analysed in this way, it would be facile to suggest that the role of either the judiciary or the administration is more important than the other in the discharge of this important function. Nor would it be accurate to describe this function as falling exclusively within the province of either the judiciary or the administration.

2. Case File Maintenance and Management

In most courts, responsibility for the maintenance and management of case files rests with administrative personnel. Responsibility for the IT systems that are now increasingly engaged to perform or support this function also usually rests with administrative personnel. However, the manner in which this function is performed can have a significant effect upon the quality of justice delivered by the judiciary. If documents are misfiled, or take a long time to reach the relevant file, the quality and efficiency of the judicial function will be diminished. Perhaps more significantly, in most courts there will be systems employed so as to identify documents of particular significance, or which require a prompt or even urgent judicial response. The quality and efficiency of those systems will have a significant effect upon the quality and efficiency of judicial work. For that reason, the judiciary must be involved in the specification and oversight of those systems. This is another area in which it would be invidious to suggest that either the judiciary or the administration has a more important role than the other, or to assert that the function is exclusively judicial or exclusively administrative

3. The Administrative Disposition of Cases

Most courts exercising civil jurisdictions will have procedures by which cases can be resolved administratively - for example, if a party fails to respond to court process, or if the moving party fails to take any action in the case for a prescribed period. Often those processes will be implemented administratively, without reference to a judicial officer. However, they usually result in an order of the court which finally disposes of the case. The processes have characteristics which are both administrative and judicial, in the sense that they result in the final disposition of the case. The effective implementation of these procedures is a matter in which the administration and the judiciary have a joint interest.

4. Allocating Cases to Judicial Officers

Systems used to allocate cases to judicial officers vary widely. At the risk of over-generalization, in courts with docket-based systems of case management, the process requires each case to be allocated to a particular docket. In courts which do not operate dockets, the process will require each hearing to be allocated to a judicial officer.

The systems used to allocate cases or hearings also vary widely. In some courts, the judiciary perform this function. In others, the function is entirely administrative. In many courts, like mine, the systems involve both judicial officers and administrative personnel.⁵⁵

⁵⁴ Font size, lay-out of the document, manner of execution, etc.

Even in those courts in which allocations are performed entirely by administrative personnel, it is obvious that the judiciary have a vital interest in the efficient and impartial performance of the function, and must take responsibility for the methodology employed. So, whatever systems are used to allocate cases, this is another function which cannot be said to lie exclusively within the province of either the judiciary or the administration, nor can the role of either be said to be more important than the other.

5. Effective Utilization of Information Technology

Courts increasingly rely upon information technology to dispense justice. There are now very few areas of activity which do not depend heavily upon IT support. IT systems support electronic filing, case management, the listing of cases and notification to the parties, the research and information resources available to the judiciary, trials are commonly conducted using audio visual systems and digitized data, and IT systems support the preparation and publication of reasons and orders of the court, court hearing lists and information for the public on court procedure and statistics.

In most courts, judges have come to rely heavily upon IT managers who are part of the administrative resources of the court for the design, implementation and operation of the various systems which support the judicial function. Close collaboration between the judiciary and relevant IT personnel is essential if the systems are to achieve their objectives. This is yet another area in which the judiciary and administrative personnel have equally important roles and responsibilities and which cannot be said to lie within the exclusive realm of either.

6. Data Collection and Analysis

The comments I have already made with respect to the significance of data collection and analysis in the context of New Public Management principles demonstrate the importance of this function to each of the judiciary and the administration, and the important roles which each must play in this area. It is yet another area of joint enterprise or partnership.

7. Budget Management

The relationship between the management of the budget and resources available to the court and the effective performance of the judicial function is obvious. Illustrations can be seen in the examples I cited of tension arising in relation to circuit expenses. The level of resources available to support the judiciary, in terms of personal staff, research facilities, clerical and administrative support will obviously affect the quality and efficiency of the justice provided by the court. In most courts decisions will have to be made as to the allocation of limited resources between competing areas of court operations. If the court is to achieve its fundamental objectives, the choice between competing priorities must be made by close collaboration between the judiciary and administration. This is yet another area of joint enterprise or partnership.

8. Designing, Constructing and Maintaining Court Buildings

Contemporary research shows a clear relationship between the design and quality of court buildings and the quality of justice delivered in those buildings. This is hardly surprising. Appropriate building design should give all court users - public, media, litigants, witnesses, security and administrative personnel and judiciary - safe and secure access to the spaces and facilities which they need to achieve their objectives.

In the past there has been a tendency to consign responsibility for the design, construction and maintenance of court buildings to administrative personnel because it is usually executive government which bears the cost. In that process, the judiciary are sometimes seen as 'stakeholders', to be consulted by the project team in the same way as other court users, like the legal profession and the media are consulted.

However, in more recent times, in most jurisdictions a more enlightened approach has been taken, in which the judiciary and court administration are viewed jointly as 'the client' by the architects, builders and treasury officials responsible for delivering the project. Experience has shown that this approach delivers much better outcomes in terms of buildings that provide the functionality required for the efficient delivery of justice. So, this is yet another area in which joint enterprise is essential.

9. Recruiting, Supervising and Retaining Court Staff

In most courts, responsibility for the recruitment, supervision and retention of court staff rests with administrative personnel, although in some courts the judiciary may have a role in the appointment of the chief executive officer. Nobody would seriously suggest that judicial officers should be involved in the recruitment or supervision of base-level clerical

⁵⁵ In the Supreme Court of Western Australia, civil cases managed by a judge on a docket are allocated by a judge. Criminal trials are mainly, but not exclusively, allocated under the supervision of a judge. Administrative staff list civil cases that are not managed on a docket and various miscellaneous cases for hearing.

staff. However, the manner in which those staff are recruited, trained and supervised can have a significant effect upon the quality of justice dispensed by the court, as the example I have already cited in relation to shortages of staff in the probate section of my court illustrates. As the judiciary are held responsible for the outcomes produced by the administrative personnel of the court, they should also have the responsibility and the authority to determine policies with respect to recruitment, training and supervision of administrative staff in collaboration with those responsible for the implementation of those policies.

10. The Development of Policy with respect to Court Administration and Procedures

As with any other complex organization, courts must constantly review policies relating to administration and procedures to take account of changing circumstances and opportunities for improved efficiencies. Any effective process of procedural reform must give weight to the fundamental objectives of the court, as assessed by the judiciary, but must also give weight to administrative efficiency, which is best assessed by those responsible for the administration. This is yet another area in which joint collaboration is essential.

11. Managing the Relationship between the Judiciary and Court Users

Courts are increasingly regarding themselves as service providers, with a responsibility to continually improve the quality of their service. This is evident in the development of systems for the assessment of the quality of the service delivered, such as the International Framework for Court Excellence, developed in a joint enterprise between the courts of Singapore, the United States and Australia.⁵⁶ Even the most superficial glance at that framework will show the importance of the respective roles performed by the judiciary and administrative personnel in service delivery.

In most jurisdictions, communication between the judiciary and court users is constrained to communication within the court process - during hearings and in the publication of reasons for decision, although heads of jurisdiction will often act as a spokesperson for the court. Management of the daily interface between the court and its users is largely the responsibility of administrative personnel, although the judiciary have an obvious and direct interest in that process. The culture which characterizes interaction between court personnel and court users will have a significant impact upon the public assessment of the quality of justice provided by the court. This is yet another area which requires close collaboration between the judiciary, who must take responsibility for providing the cultural settings or parameters which are to govern the interface between the court and the public, and the administrative personnel who are responsible for implementing those standards.

8. Is There a Bright Line between the Judicial and the Administrative Function?

In the preceding section I have not attempted to cover all the many and diverse functions performed by a modern court. However, the functions which I have specifically assessed cover many, if not most of the more important functions which lie between the extreme ends of the spectrum which I earlier posited - namely, adjudication in court at the one end, and buying stationery at the other. The analysis strongly suggests that all of these important functions must be regarded as the joint responsibility of the judiciary and the administration if they are to be effectively performed. The analysis reinforces the views of Lord Justice Thomas and Cadet et al as to the difficulty of assessing where judging begins and administering ends. It leads me to conclude that while there are ends of the spectrum of court activities which can be classified as exclusively judicial or exclusively administrative, there is a large range of important functions between those ends of the spectrum which are neither.

The consequences which follow from that conclusion are, I suggest, obvious. Earlier portions of this paper assessed court administration from the perspective of judicial independence and managerial efficiency. I suggested that the achievement of those objectives has resulted in a demonstrable trend towards systems of court administration which provide the court with a degree of autonomy and independence from executive government. The assumption which underpins the executive model of court administration, to the effect that all functions which are performed by a court can be classified as either judicial or administrative is demonstrably false. The fact that the effective performance of many of the functions performed by contemporary courts requires close collaboration between the judiciary and administrative personnel should inform the creation of court governance structures which embody a partnership in which each of the partners has different but equally important roles in the achievement of their common objective: the delivery of justice.

⁵⁶ With assistance from the European Commission for the Efficiency of Justice, Spring Singapore and the World Bank (International Consortium for Court Excellence, *The International Framework for Court Excellence* (2nd ed , March 2013) pp 3, 4).



GUIDING PRINCIPLES FOR EFFECTIVE CASE MANAGEMENT

The criminal justice system exists to provide order that is just. To have the necessary moral authority it must protect the rights of the accused, including the right to disclosure and a fair trial, and it must resolve matters effectively. Effectiveness is not mere efficiency or cost cutting. It is ensuring that every step of the process contributes to a just result by working the way it is intended to work, without waste.

Management of cases that go to trial is part of this. This paper identifies five basic principles that can contribute to the effective handling of cases.

1. Cooperation & expectations: Effective case management requires cooperation and clear expectations.

The sectors or “players” in the justice system are autonomous within their sphere. This distributes power and identifies where responsibility for each decision resides. No element is “in control” of the justice system. But each depends on the others. The combination of autonomy and interdependence means they must cooperate appropriately to be effective.

It follows that decisions affecting process should be made with consideration for the impact they have on the rest of the system. The needs of each element of the formal system as well as the accused, witnesses and victims must be considered in developing effective case management practices.

A successful case management system meets broadly accepted expectations and respects the interests of participants. Cooperation is informed by stated, mutual expectations that enable accurate prediction of events and requirements, including resource requirements and performance standards.

The public expects accountability and good stewardship of the criminal justice system.

The Court expects the participants to prepare and conduct each case properly in accordance with the relevant laws, rules and practice directions. This includes early consideration of issues so that hearings focus on what can only be resolved in court and counsel arrive prepared to optimize each appearance.

There is or ought to be an expectation that all counsel actively cooperate with each other and the court in the effective management and conduct of cases.

Other people affect the operation of the courts. Witnesses and victims who understand the system and their part in it will contribute more effectively to the process. The timely provision of information and resources to them pays dividends. This is particularly true for the accused during the initial stages of a case.

The proper disposition of a case requires management of a long supply line consisting of many people and much information. People seen as minor or peripheral participants such as prisoner escorts and policymakers can have a significant impact on court operation. Failure to bring a prisoner to court for a scheduled appearance defeats the best-case management system. Failure to advise authorities that a prisoner is no longer needed for court results in unnecessary prisoner movement. Significant changes in enforcement policy affect demands on the criminal justice system.

Fundamental to cooperation is development of realistic expectations and obligations that respond to the needs of all criminal justice constituencies. One such expectation is that justice ministers within government will take a leadership role in acting as a broker amongst the criminal justice constituencies and in advocating for the support and resources that the system may demonstrably require.

Implementation Examples

- a. Pamphlets and web pages that explain court procedures and how to obtain legal counsel in lay terms should be encouraged not only as a means of promoting justice in individual cases but also to improve the effectiveness of each appearance and of the system as a whole

2. Leadership: The court has a leadership role in effective case management.

A system that can't be managed must be lead. Leadership among autonomous players requires the application of influence and in the justice system that requires moral authority. Without a leader, cooperation is less likely to happen and is unlikely to become the norm.

Some judges are uncomfortable with an active role in case management. A judge must, above all else, be above all else. The judge is the impartial apex of the adversarial system's triangle, deciding guilt or innocence in each case without regard to external considerations.

But in our adversarial system, judges have the independence and authority to lead the other players. In short, their impartiality gives judges a unique opportunity to lead effective case management.

We believe good leadership does not detract from impartiality. The judicial leadership we are calling for is less about managing the cases than it is about ensuring the parties are prepared for an effective hearing. While some of the skills and activities required by case management are fundamentally different than the traditional role of judges, case management is not inconsistent with it. Judges have always controlled procedures to ensure hearings are fair and effective. Extending this role "upstream" is only sensible since the effectiveness of a hearing is largely dependent on the preparedness of the

parties. We believe judges and court administration can oversee cases to ensure they are managed in accordance with commonly accepted norms while retaining the flexibility to respond to the unique needs of individual cases.

Judicial leadership does not absolve other players of their responsibility to contribute to an effective justice system. Leadership does not work in isolation. It requires cooperation, respect and the frank exchange of ideas and concerns. Once sectors have forged cooperative relationships and a genuine regard for the roles of each participant, a procedure to effectively manage cases in accordance with appropriate principles becomes a common goal because the relationship makes it impossible to blame the others for common problems.

In short, it is not so much a matter of judges managing cases as seeing to it that cases are managed in accordance with generally accepted standards. Our vision is not that judges manage more. It is that they will manage less because effective case management by each sector will be the norm.

Good case management practices can be established without judicial leadership but judicial support is essential to the application of case management. Consistent enforcement of rules, forms, and expectations for pre-appearance preparation is key to each sector managing cases efficiently.

Efficiency, effectiveness and access to justice are all interconnected. The court, through judges and court administration, with the assistance of other justice system participants, has a leadership role to play in meaningful case management.

Implementation Examples

Active case management by the court

- a. In B.C, Criminal Caseflow Management Rules were developed and implemented with active participation by the judiciary, and are now integrated into criminal case processes.
- b. In Ontario, a criminal case management protocol has been developed.
- c. In Ontario, and several other jurisdictions, Judges regularly participate in educational sessions on their role in the management of cases.

Case preparation

- a. Prosecution policies should guide and encourage early resolution.
- b. Requirements for early and complete disclosure expedite the process. BC's Rules require counsel to assure the court that they are ready for trial and have stated a preliminary position on sentencing in advance of the trial date.
- c. Police can expedite disclosure by vetting, within legal parameters, sensitive witness information and providing duplicate copies of Reports to Crown Counsel for disclosure.

3. Culture: Effective case management creates a criminal justice system culture of responsibility, awareness, and appropriate collaboration.

The third major guiding principle for case management is the cultivation of a case management culture. Sloppy case management is no more acceptable than sloppy case presentation.

The expectations and standards called for above will only be effective to the extent they are followed. Obviously this requires enforcement. We are aware of a study of Scottish Courts that indicates that the degree of judicial tolerance for adjournments is a key variable in effective case management. There are more interests at stake than the Crown and defence but judges sometimes feel they have little choice but to grant an adjournment if Crown and defence agree on the need. This may be in the interests of Bench and Bar collegiality or in the larger interests of justice – regardless of the reason counsel aren't prepared, it would be an injustice to proceed. But put simply, there are many reasons why counsel may want an adjournment and judges have the means to signal their displeasure at some of them even while granting the adjournment. Counsel should be put to the test by the court so that, even if an adjournment may be necessary, counsel will have the benefit of the court's views to guide future case preparation.

Given our views on the tight relationship between case management and case flow management, we recognize that enforcement of expectations is most effective when each case can be understood in the context of all the cases. Under principle 5 we discuss information needs.

That said, a case management culture is best created collaboratively. But once, the decision has been taken to create one, jurisdictions should consider a "case management blitz" to create momentum, signal commitment and to quickly raise management standards across the system. Professional development programs for the Bench and Bar can be coordinated to concentrate on case management for a period of one or two years in order to validate the concept, support its implementation, equip each player with the necessary knowledge, explain the rules, and keep lawyers current on substantive issues affecting decision-making at each stage of a case, such as sentencing.

A case management culture demands case management data and information. As has been said, "You can't manage what you can't measure." While the quality of justice defies measurement its quantity doesn't. The justice system should demand the same evidentiary rigour about its case processing as it does about its cases. Some judges and lawyers are apprehensive about data collection – perhaps fearing somehow that it will detract from the quality of justice done in each case. We do not think this stands logically beside demands for access, efficiency and effectiveness.

Implementation Examples

- a. Research and data analysis about the justice system should be within the system, to enhance understanding of issues of common interest.
- b. Professional development should encourage a sense of shared responsibility for the justice system, and a vision of justice as a “system of systems”.

4. Local Control: All case management is local.

Effective management of cases is the product of local commitment to good practice. Legislation can enable and support case management but the local bench and Bar will manage well or badly according to their needs and views. And if local control were not inescapable it would still be desirable. It is crucial to effectiveness because only local control can respond to local pressures, issues and personalities. Implemented cooperatively, it brings sectors together, increases communication, understanding and respect for their various roles and their interdependence, and provides a sense of ownership in new initiatives.

The Centre of Criminology report found high variance in case processing times throughout the jurisdictions, demonstrating the need for local or regional solutions that are in line with accepted guiding principles.

But local control can stifle innovation. If local control is to be effective it is vital we strengthen our capacity to share best practices and to provide the data and analysis needed to assess the effectiveness of local practice and alleged “best practices” in particular.

We have examined case management programs based on rules of court, legislation and practice notes. Each has strengths and weaknesses and one is not inherently better than the other. Each location must adopt an approach that is acceptable to local justice system participants.

Implementation Examples

Local case management or court users committees enhance understanding of issues and pressure points and encourage shared initiatives to improve efficiency and effectiveness.

Joint working groups on particular issues of local importance improve communications, build relationships across sectors and foster a sense of ownership and responsibility within the system.

5. Management information: effective case management requires management information.

The justice system is, in some respects, an information system. It gathers, analyzes and evaluates information about someone or something in light of legal information. Considering the volume of information the system handles it is ironic that so little information *about* the system is widely available. A great deal is known about each case and very little about cases in aggregate. Knowledge, in the form of statistics or management information, is a crucial component in understanding exactly what is going on and where to develop and focus initiatives.

There is a large body of national data at the Canadian Centre for Justice Statistics that is supplemented by local data in many jurisdictions. Certainly the quality and usefulness of data can always be improved. Meaningful comparisons over time and location require standard definitions and protocols. Something as basic as what is “one case” can mean different things to different participants within jurisdictions and nationally and can produce very different data as a result.

Case processing time data is important for many case management decisions, especially in relation to policy development and establishment of local resource targets. Yet it paints different pictures depending on whether the time when a warrant is outstanding is counted or not in the data.

But even given these concerns, the information currently available is extensive and valuable. It appears a major impediment is lack of demand for the information or lack of capacity to utilize it. This should change. The Justice Information Council, composed of the provincial deputy ministers responsible for justice in Canada, should attach a higher priority to the collection and dissemination of information about the justice system generally and case flow in particular, and jurisdictions should ensure they fully exploit the potential of CCJS.

Better information is needed to ensure we understand both the problem and the alleged solution. The Centre of Criminology of the University of Toronto study notes a dearth of research on the nature and sources of the case processing problems and suggests that some assumptions about procedures to improve the efficiency of the courts are incorrect. The report indicates that preliminary inquiries might actually enhance case processing time.

We may be closer to useful data than appears. Utilizing data, made available through information technology, can assist each sector to actively manage their own process issues; and jointly develop strategies to address issues that involve one or more of them so they can collectively ensure the justice system makes effective use of its time and resources.

Implementation Examples

Integrated management information systems such as Justice Enterprise Information System (JEIN) in Nova Scotia and Justice Information System (JUSTIN) in BC connect parts of the justice system and provide certain types of process information, which can be used for management purposes. These systems may also provide ready access to information about movement of prisoners, case status, correctional histories and other information necessary to the efficient management and analysis of court systems.

IMPLEMENTATION APPROACHES

There are several ways case management or case flow management can be implemented. These may be generally described as:

1. Moral suasion – this is the judge who actively manages their courtroom. These are not formal rules. For example in this courtroom, counsel will provide a written outline of their argument.
2. Local practice – this is moral suasion applied to a set of cases. It is usually geographically circumscribed but can be based on case type. For example, in all commercial crime cases counsel will provide a draft exhibit list.
3. Practice preference – this is more formal and indicates an official preference but is not mandatory. For example, counsel should attempt to pre-mark exhibits on commercial crime cases. It may be applied to a local or general area. Unlike local practices, they are usually published. They are frequently issued by the Chief Judge or Justice but can also be issued by Administrative Judges.
4. Practice directives or notices– these are formal directions that have binding force. For example, counsel will use and file a specific form when mutually agreeing to limit the scope of a preliminary inquiry. Practice directives are normally issued by the Chief Judge or Justice. They are published.
5. Statutory enactments – these are case management and case flow management decisions that are imposed uniformly through a statute. An example is the focusing hearing for preliminary inquiries under s. 536.4(1).
6. Rules of Court – these are broad based rules which can include case management and case flow aspects that are created under s. 482. They require the approval of the lieutenant governor in council of the relevant province and must be published in the Canada Gazette. The British Columbia Criminal Case Management Rules were promulgated under s. 482 after approval by a majority of the provincial court judges in British Columbia.
7. Case Management Rules – these are specific case management rules created under s. 482.1. This rule making power was created because there was uncertainty about the scope of rules permitted under s. 482. Rules made under this section require the approval of the lieutenant governor in council of the relevant province and must be published in the Canada Gazette. This section permits rules that delegate power to court administrative staff.

At present the Criminal Code [ss. 482(5) and 482.1(6)] provide that both Rules of Court and Case Management Rules can be supplanted by the Governor General in Council to secure national uniformity. As outlined further below, consideration should be given to streamlining the process of creating case management systems – either through practice directions or rules – such that there is local autonomy over case management approaches.

RECOMMENDATIONS

The goal of case management is that each appearance be effective and timely, and that duplication and waste of effort be avoided. Expectations and standards should be clear and reasonable so that each sector can rely on the other to meet its commitments. Care should be taken to ensure that expectations clearly fall within a sector's role and articulate a healthy relationship between sectors so they are not seen as mere attempts at off-loading or cost shifting.

With this as a model, we recommend the following:

1. Establishment of Advisory Committees:

- a. There should be permanent case standards advisory committees in each province and territory established by the Chief Justice or Chief Judge to collaboratively identify expectations and standards in respect of case management, and the means by which conformity to them may be measured and enforced.
- b. Depending on local factors such as the size of the jurisdiction, the number of courts, the geography, it may be desirable to establish more than one committee (per level of court) or to establish subcommittees.
- c. The committees should be composed of representatives of the justice sectors including, the bench, Crown, defense Bar and court administration. Local committees may consider including representatives from the police on such committees either generally or on an issue-by-issue basis.

2. Role of Committees:

The committees should:

- a. see their role as recommending to the Chief Justice or Chief Judge the most appropriate means to address local case management issues.
- b. collaboratively identify expectations and standards in respect of case management that are specific to each of the justice sectors.
- c. review and make recommendations to Chief Justice/Chief Judge or Attorney General (as appropriate) on whether the expectations and standards should be embodied in rules, practice directives, guidelines or some combination of all three depending on the substance.
- d. make a statement of principles including:

- i. Effective management of cases is a shared responsibility;
- ii. It is the duty of the parties to resolve issues that can be resolved without a judge and to efficiently present to a judge those issues which cannot;
- iii. Judges not only have the right to insist that parties are prepared to present and argue cases when they come to court but judges have a duty to the parties and the public to insist that they are.

3. Tools to Use or Recommend:

a. Self-Management Through Checklists

- i. Each sector, including the judiciary, should be encouraged to develop their own checklists and other guides which aid memory and delegation of routine tasks. Checklists are common in many areas of practice today. While it would be advantageous to develop them pursuant to the Committee's expectations and standards, if there is no committee or it is proceeding slowly, each sector is encouraged to develop checklists on its own, being careful to consult the other sectors.
- ii. Without departing from local control, we see merit in national organizations (such as the National Judicial Institute, the CBA, and other organizations representing the Bar, including organizations of defence counsel and Crown Attorneys'), developing model checklists as a means of articulating best practices and validating key sector responsibilities for case management.

b. Identification and Use of Key Indicators

- i. The Committee should identify key indicators - information each sector requires to monitor the flow of the mass of cases and the progress of each case against the stated expectations.
- ii. The indicators should be reported regularly, in an understandable format, and should not be so excessive in number or detail as to overwhelm the user or producer. The purpose of key indicators is to call attention to possible problems so further analysis can take place.
- iii. Selection of key indicators is also a local matter since conditions vary widely between jurisdictions but should include
 - The number of cases in the system,
 - The number of appearances per case,
 - If possible, the intended purpose of each appearance and whether an appearance achieved its intended purpose,
 - "Backlog" or next available dates.
- iv. The key indicator report should be a publicly available document.
- v. Ideally, the key indicator report should be specific to court location in the interests of transparency and accountability, and so remedial action, such as resource deployment, can be taken quickly. However, initially it may be necessary to blend information, at least in the publicly available report, in order to ease the transition to a case management culture.

4. Further consideration should be given to streamlining the process provided in the *Criminal Code* for creating case management systems:

- a. Consideration should be given to amending s. 482 of the *Criminal Code* to facilitate local rule making. We doubt the requirement of publication in the Canada Gazette is worth the time it consumes and we see the procedural distinction between rules made by superior courts and provincial courts as archaic.



THE ROLE OF JUDICIAL OFFICER IN THE COURT MANAGEMENT & E-COURT MAINTENANCE (SUGGESTED METHOD IN DISTRICT COURT)

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Abstract: *In this paper I studied the role of judicial officers in court Management and e-court system monitoring. I have discussed relevant responsibilities & duties of The Principle District Judge , Principle Judges and judge (for his own court). Those responsibilities are compared with the additional work for executing any plan or mission. I have also discussed that for the need of management training and succession planning in subordinate courts. As per my study, optimum use of internal stakeholders is necessary. It is a preliminary study to prepare a platform for any system or plan in court organization. Few concepts in court management and e-court management (computerized management) are discussed.*

Key words: *Case Information System, Court management, Caseload management, Case-flow management, e-court monitoring.*

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INTRODUCTION:

“The Best Preparation For Good Work Tomorrow is to do Good Work Today”

....Elbert Hubbard

Hon'ble Chief Justice of India, Hon'ble Justice Shri. S.H. Kapadia has expressed a desire to establish comprehensive Court Management Systems for the country that will enhance quality, responsiveness and timeliness of courts^[1].

The Indian Court has adopted Court Management through professional manager and e-court system. Both missions are to be effectively executed by the stakeholders. The Judge who is the leader of his court and responsible for the Judicial system has to execute both missions in addition to his current court working. The statement of the mission speaks that, Judge is responsible for implementing the policy and action plan. The court managers who possess a Master degree in Business Administration are to assist with the court only for managing it as per the mission and plan. Therefore the role of Court manager is just like a catalyst.

In a district place there is a Principle district judge, administrative judge and at Taluqa place there are principle judges for the administrative works. They also preside over their independent court. They are discharging their work to manage the court and their administrative work as per the circulars, Manuals provided by the superior courts.

Both missions speaks that, the judge must do justice to all irrespective of status. He has to reduce backlog of cases. Without undue regard to the procedural technicalities, they have to administer the justice.

focused delivery of justice. Therefore it is necessary to increase internal human resource capacity, infrastructure and resources. The e-court mission is most useful to take effective steps for expeditious delivery of justice.

For any system in management, it is necessary to create a platform for proposed changes that may facilitate to execute any plan / mission effectively.

A) Present Position of Administration and Court Management work:

(i) Principle District Judge :(Major Tasks)

The Principle district judge is the initial contact between the court and a member of the bar with regard to court services. He may delegate some tasks to other judges but the principle district judge is only the judicial officer who is responsible for the district court . Other Judges are sources of information and supporting judges to him. The bar association,



government and other agencies have concern with the court organization. So the principal district judge has to maintain relations with other agencies like government agencies, semi-government, civic body, vendors of infrastructure. The principle district judge builds relationship with all stakeholders. He has to hold periodic meeting with the other judges for different subjects/issues. He has to conduct departmental enquiries, budget, library, Buildings and Equipment, Land acquisition for court building or court building expansion, court space alterations and construction, court security, Managing court property, residential quarter allotment to judges and staff etc.

The Principal District Judge is responsible for court business like controlling to the staff, recruitment, promotion and transfer of staff. He is responsible for seeing that the court is administered effectively and efficiently and in compliance of the statutes like Speedy trial of cases, Under trial cases, Legal Services, reduce backlog, case assignments, and to prepare a policy for statutory requirement compliance, recruitment process, promotion process, writing confidential Report, inspection of courts etc. He has to determine administrative policies and actions of his district. He possesses listening skills. Principle district judge is also responsible for the functioning of courts in the district for its administrative tasks and therefore he is head /chairman/patron-in-chief of various committees.

(ii) Principle Judge at Taluqa Places & Administrative Judge at District Place:

The Principle District judge is responsible for the administrative work of the district judge courts within the district. The principle Judicial officer at Taluqa place court is responsible for administrative functions at Taluqa place.

At some district place, there is a system for administrative work by Senior Civil Judge for Civil Cases and Chief Judicial Magistrate for Criminal cases. Both the establishments are separate establishments.

In court administrative process the above all administrative judges focus on coaching, giving feedback and helping the court staff to realize potential. He has to make continuous efforts to develop the knowledge of the court staff to meet current needs.

(iii) Judge (for his own court):

Judicial and administrative functions at his own court. In court business process he has to focus on coaching, giving feedback and helping the court staff to realize potential. He has to make continuous efforts to develop the knowledge of the court staff to meet current needs.



Here the individual judge of his own court includes Principle district judges of his own court, principle judge of for his own court, administrative judges and other judges in their own courts as discussed above. They are responsible for the effective administration at their own court.

Thus the present position of the judicial officer shows that, as per settled practice and traditional ways, different circulars, rules and court manuals the judicial officers are also discharging Non-judicial work and administrative work of the court.

B) Court Management System [Expected Management in addition/advanced Tasks]

(i) Principle District Judge :

The National Court Management System has to set measurable performance standards for Indian Courts. The set of measurable performance standards includes a system for monitoring and enhancing the performance parameters on quality, responsiveness and timeliness, a system of case management to enhance user friendliness of the Judicial system. It will provide a common national platform for recording and maintaining judicial statistics from across the country. It will provide real time statistics on cases and courts that will enable systematic analysis of key factors such as quality, timeliness and efficiency of the judicial system across courts, districts/states, types of cases, stages of cases, costs of adjudication, time lines of cases, productivity and efficiency of the courts, use of budgets and financial resources. It would enhance transparency and accountability. A court Development planning System that will provide a framework for systematic five year plans for the future development of the Indian Judiciary. The planning system will include individual court development plans for all the courts^[1].

The High court has to frame standard system for the court management. As per the directions of the superior court, the principle district judge to execute the mission effectively. As per established performance standards to the courts including on timeliness, efficiency; quality of court performance; infrastructure; and human resources; access to justice; as well as for systems for court management and case management. It establishes the performance standards applicable to the court.

The Principle District Judge has to Carry out an evaluation of the compliance of the court with such standards; identify deficiencies and deviations; identify steps required to achieve compliance; maintain such an evaluation on a current basis through annual updates. He has



to Monitor the implementation of the court development plan and report to superior authorities on the progress. He has to ensure that statistics on all aspects of the functioning of the court are compiled and reported accurately and promptly in accordance with systems established by the High Court; As per Standard systems for court management developed at the High Court Level. He has to ensure that reports on statistics are duly completed and provided as required. He has to ensure that the processes and procedures of the court (Including for filing, scheduling, conduct of adjudication, access to information and documents and grievance Redressal) are fully compliant with the policies and standards established by the High Court for court management and that they safeguard the quality .He has to ensure efficiency and timeliness , and minimize costs to litigants and to the State; and enhance access to justice. He has to ensure that case management systems are fully compliant with the policies and standards established by the High Court for case management and that they address the legitimate needs of each individual litigant in terms of quality, efficiency and timeliness, costs to litigants and to the State. He has to ensure that the court meets standards established by the High Court on access to justice, legal aid and user friendliness. He has to ensure that the court meets quality of adjudication standards established by the High Court. He has to ensure that Human Resource Management of ministerial staff in the court complies with the Human Resource Management standards established by the High Court. He has to ensure that the core systems of the court are established and function effectively (documentation management; utilities management; infrastructure and facilities management; financial systems management (audit; accounts; payments)[2].

The Principal District Judges bear the responsibility of effective management of the courts in order to ensure optimal levels of performance. It is the Principal District Judges who have the responsibility to distribute workload amongst different courts and also to ensure that judges are able to deliver qualitative and timely justice. Given the ever increasing pendency and arrears in all the courts and also considering the increasing number of cases being filed, there has arisen a strong need for effective management techniques [3].

From the above statements it clearly shows that, the National Court Management System has to set measurable performance standards for Indian Courts. The High court has to frame standard system for the court management and as per the directions of the superior



court, the principle district judge to execute the mission effectively. The Principal District Judges bear the responsibility of effective management of the courts in order to ensure optimal levels of performance.

Thus the Role of Principle District Judge would be as :-

- 1) He has to Monitor Court development plan, case load, reduce backlog, identify the causes for delay in trials.
- 2) He has to monitor caseloads and identify the problems in case load for each individual court. Monitoring court means monitoring performance and providing feedback to judges and court staff and court manager.

For any system or Plan the Principle District Judge may require to do some material tasks:-

- 1) To review judgment of the judge as per percentage and interval as directed.
- 2) To ascertain the information of the court available to public at the website of the District Court. Including effective working with Judicial Service Center.
- 3) Take effective steps to develop the court business process.
- 4) Assess the pendency of cases and frequency of filing new cases as directed.
- 5) Responsiveness in legal aid as expected from the plan or system. He may require to review the decided cases where legal aid was provided to ascertain the quality of provided legal aid.
- 6) Granting adjournments and its reasons and to find out to minimize the ratio of adjournments.
- 7) He has to examine the quality of judgment delivered by the judge.
- 8) More effective grievance resolution method for complaints received about working with internal stakeholders.
- 9) Monitor the rate of disposal and efficiency of the judge.
- 10) Control over the working of the Court Manager.

(ii) Principle Judge at Taluqa Places/ Administrative Judge at District Place:

- 1) He has to execute the plan/mission as directed .
- 2) He has to monitor case load, reduce backlog, identify the causes for delay in trials.
- 3) He has to Control over the working of court manager.
- 4) He has to review the court business , the distribution of work and cases (with the permission from the Principal district Judge) and to find out available resources to reduce backlog, proper local arrangements for lawyers and litigants.



- 5) He has to identify the needs of training to the stakeholders.
- 6) He has to continuously review with management of court business, maintaining a technological system. He must make sure that the information technology is effectively in use of the court working.
- 7) He has to resolve the local issues for court business.
- 8) He has to submit the reports to the Principal District Judge for execution of the management system and e-court system.
- 9) He has to find out need of resources (including Human resources) to execute the plan/system.
- 10) He has to find out the need of a midterm court development plan and send the proposal to the principle district judge.
- 11) He has to hold meetings of the joint judges of the other courts from the judicial station.
- 12) Principle judge should be in continuous in touch with the court manager for professional advice.

Caseload Management:

Caseload process is to support to manage the cases and its activities effectively at individual court. The 'Caseload Management System' from CIS is very important tool to assist the Judge and Manager in taking its benefits for achieving the goals of the plan or mission.

Caseload does not mean number of physically pending / instituted cases only. It includes the actual load in that case. Load means complex nature, seriousness, urgency and method for its trial. Caseload is also called as workload. Key elements are allocation of judicial resources and cases.

Example: At some Taluqa places, if there are two courts. Ordinarily, the system for the allotment of case is to follow Odd and Even number. It means Odd number case is to be allotted to court No.1 and Even number of cases is to be allotted to Court No.2.

Caseload does not mean to allot cases equally. The caseload is nothing but to check the quality of each and every case. If the nature of cases of both courts is verified by qualitative method then the actual load of cases can be ascertain. It may show the real position of workload.

Example: It may be possible that, in court No.1 there would be more criminal cases under



section 66(1)(b) of The Bombay Prohibition Act. It is summary trial case. If the cases pending in court No. 2 are less in number but are regular criminal cases under Indian Penal code. For Regular criminal cases the procedure is warrant trial. It means the workload of Court No.2 is more.

Example: In a suit for declaration where the Will-deed is under challenge. Then the administrative judge has to decide for the allotment of such suit. It is expected that, complex suit to be allotted to the senior judges from that cadre.

Example: For civil suits also, it is necessary to check actual workload of that court. If most of civil suits at court no.2 are for the recovery of money. The civil suits pending in court no.1 are under The Specific Relief Act, The Partition Act. It means caseload at court No.1 is more than the caseload at Court No.2

Judge possess the skill to identify the nature of the case. Not merely due to legal knowledge or pleading but as per his experience, he can easily identify the complex nature of the case. Therefore the Administrative Judge who has to allot cases, he can easily ascertain the workload of cases. For that purpose, the data from the joint courts should be available. The Judge of the court has to send workload data periodically to the administrative judge. The above discussion shows that, the workload of court can be drawn by judge only. The manager may assist to collect statistical data. But actual mind has to be applied by the Judge only.

Following are some material points for caseload management :-

- 1) To verify physically the number of Pending cases in the court.
- 2) To verify the quality of the case, its type, nature and required method for trial.
- 3) To find out required staff to handle the cases.
- 4) Find out way to allocate cases properly to other courts.
- 5) To make a balance between the categories of cases.
- 6) It can ascertain the actual stage of the case and reason for pendency.

(iii) Judge (for his own court):

The National Court Management System speaks that, the planning system will include individual court development plans for all the courts^[1].

Following are material tasks to be carried out by Judge for his own court :

- 1) He has to execute the plan or mission as directed.



- 2) He has to reduce backlog, identify the causes for delay in trials.
- 3) He has to co-ordinate with the working of court manager.
- 4) He has to regularly collect data for pending cases, its stages for pending. He has to prepare his own schedule for listing the cases in the future so that he could fix a target to reduce backlog and may give speedy justice.
- 5) Control to grant adjournments and to reschedule his own cause list.
- 6) Maximum use of Videoconferencing for the under trial cases and for that purpose to prepare schedules for such trial.
- 7) Concentrate towards ADR mechanism to motivate the parties to resolve their dispute.
- 8) For accomplishing the goals of any system or plan, he must make efforts to find out the necessary tools as provided in the plan or mission.
- 9) He has to control and monitor the cases throughout the life cycle of the case.
- 10) To monitor the unnecessary delay in court business .
- 11) He has to find out need of resources (including Human resources) to execute the plan/system.
- 12) He has to find out need of a short-term court development plan and send the proposal to the principle district judge through principle/administrative Judge.

Use of CIS in Court Business: CIS is useful for court's all business process as it has covered life cycle, court circulars, rules and Court Manuals.

Following are example for an illustration of its use:

Example: When the user of CIS is open . It shows the undated cases pending in the court. There were 40 cases undated. On physical verification of cases and daily cause list , only 20 cases were dated (means data for next date was feed). Rest of 20 cases were not in the physical balance Sheet of the court. Those cases were checked at the master balance sheet of District Court/Taluqa place. Out of them, 10 cases were pending in other courts. Said data was corrected. But the rest of 10 cases were not traceable. Then the list for disposal off cases and record of disposal of cases were checked. Five cases were disposed off long before. It means data was not updated in CIS. For rest of five cases, the record from record room was checked. Cases were disposed off and were deposited in the record room. Thus the undated alert was complied.



Example: - Application for certified copies was pending wherein the name of the party (plaintiff) was different. The defendant was company. There were many cases pending against the said company. The applicant was illiterate. He failed to mention the correct number of the case. When the record was physically verified, it revealed that, during the pendency of the case the original plaintiff was died. His legal heirs were brought on record. The amendment was carried out. It means the data in CIS was not corrected.

Judicial Magistrate court have jurisdiction for attached police station area. In some of the police stations the workload observed is much more as compare to the other police station. Therefore the filing of criminal cases at court by the police station depends upon crime rate, rate of filing charge sheets, nature of crimes in that area, bail applications, Remand work, property disposal and other factors.

For civil judge, though pecuniary and territorial area is given but it also depends upon the type of litigations in that area. Speed to dispose off case depends upon the number of advocates in the Bar and their frequency to appear. Waiting period for litigants, witnesses etc.

Thus the CIS is a very useful tool to ascertain the workload of the court. The Judge has to supply information for the workload of his court to the administrative judge.

Case-flow Management: Previously there was system for physical verification of cases by quantitative method only at the interval of four months. The number of (physically) pending cases has to be counted. Then it has to verify from the physical balance sheet of the court.

Case-flow does not mean the flow of cases from institution to till disposal of cases only. Flow means continuous progression. It includes the flow of case trial for each case (independently).

Therefore, Case flow management is the supervision or management of the time and events necessary to move a case from initiation to disposition or adjudication. It includes management of the time and events necessary to move a case from the point of initiation (filing, date of the contest, or arrest) through disposition, regardless of the type of disposition. Case flow management is dependent upon time guidelines to provide the goals for reducing delay in case processing. Without such guidelines, the courts have no uniform goals for case processing and litigants and their advocates have no predictable, uniform time frames from one court to the next within which to expect their cases to be processed.



Therefore it is necessary to frame a case flow management plan that will be actively overseeing the progress of all cases filed in the courts.

The primary purpose of case flow management is to prevent delay in case processing and it is used to implement and maintain case flow management. It is necessary to find out the obstruction in that flow and way to dissolve such obstructions. It requires trial court performance standard plan.

Example: Group of complaints with prayer to reinstate in service were filed in the year 2009. There are 17 cases. The age of complaints was about 25 to 27 years old. In the year 2012 issues were framed. Since then the cases were pending for evidence because of adjournments.

Another group of 84 cases under the Payment of Gratuity Act was pending. Those were pending since year 2012. Since 2007, the applicants have been retired person.

At the point of priority, it was discussed with counsel for both sides. There is a circular from superior court that, priority shall be given to the cases pending by/against senior citizens. Here the applicants in the group of cases for Payment of Gratuity Act were retired long before. There was a serious question about the future of the young complainants for their reinstatement in the service.

Both groups were kept for expeditious trial. But first priority was given to the cases young complainants. Both trials were fixed for the day to day hearing.

Thus it clearly shows that the case flow management is advanced and systematic method so that the trial schedule can be managed effectively. But such process requires commitment, continuous monitoring progress of cases to achieve the goals of the plan. It requires to fix schedule for the trial. There should be complete control over the entire pending cases. It requires good relations with the bar. While doing this it is necessary to keep in mind the difference between administrative independence and judicial independence.

Following are material points:

1. Check the balance sheet and take physical verification of cases by qualitatively and quantitatively.
2. Find out the reason for pending of the case. Reason for adjournments. It is nothing but to identify to ascertain, Who is causing delay ?.
3. Find out nature of case whether it is simple /complex cases.



4. Go through disposed off cases to ascertain for the reason for the delay in disposal of cases. It may be useful for framing baseline for trial of pending cases .
5. Verify the record for more disposal of certain types of cases. Eg. Plead guilty cases for petty offences.
6. Compare the reason for its delay in disposing within the prescribed time or as per plan.
7. Review the summons service practice, time for evidence recording and court business process.

Thus the judge has to monitor and control over the movements of all cases from its institution to till disposal. He has to prepare the schedule for time to decide the case as the effective case flow management is helpful to enhance due process and timeliness while reducing delays. Adjournments should be under control. He has to monitor such case flow through the CIS. Software developed by NIC known as CIS that displays the number of cases, its type etc.

The manager may help to submit statistical data but the judge is only person who possess judicial knowledge for the actual flow of cases and its seriousness. He can decide to give priority for deciding the case as per its seriousness without committing a breach of any circular issued by the superior court. For the reduction of trial time or early resolution of disputes, the judge has to take more efforts for effective use of judicial resources.

Time Management: For time management, it is necessary to calculate Judge Calender, Judge Year etc.

Following are material points :

- 1) From time management to decide number of cases on the daily board (cause list).
- 2) Time for recording evidence.
- 3) Time for granting adjournments.
- 4) Time hearing of the case.
- 5) He has to identify the complexity of case for effective management.
- 6) Time for case management.
- 7) Time for core functions and ADR. Time for the administrative work.

In time management, the time has to be managed for the case flow. It means time has to be scheduled so that, the trial of a case should flow smoothly. The manager may help in



collecting data and approximate calculation for them. But in fact, the judge has to manage his own time with the help of such approximate calculated time.

Access to Justice : It is necessary to ensure by the Judge that, the legal representative is available to plead or defend by the litigants. He should be continuously connected to Legal Services Cell and Court manager. The Secretary for Legal Services Cell may be busy in his planning for Lok Adalat, Seminars etc. Now the court manager is one of the best channel to remain in continuous touch/contact with the legal aid cell. Detailed information is available [4].

Example: If the accused made complaint of ill-treatment by the police. The police moved an application for police custody remand. Then it is necessary to see , whether the accused is represented through counsel or he desires to legal aid.

Access to justice is a main object of any system. For access to justice it is necessary to focus on the technology and strong leadership. It is necessary to encourage to improve and develop e-courts, e-filing and use of modern technology from all fields . Judges and court staff should actively work together to find ways of improving communication to deal with specific problem areas or issues that are in need of reform. Therefore Judge has to regularly review the execution of plans for his own court , so that he could identify the needs of resources, gaps in the service delivery system, problems of stakeholders.

Leadership by Judge: Judge is a leader of his own court. So he should possess the ability to influence a group toward the achievement of goals. He may use his power for the success of the missions. Now due to coordination with court manager, the judge may use more advanced methods for playing role as leader. There are various theories of leadership , like Great Man Theory, Trait Theory, Behavioral Theories, Participative leadership, Situational Leadership, Contingency Theory, Transactional Leadership, Transformational Leadership. There are assumptions, description and implication for each theory.

There are lady Judicial officers also. Both are effective leaders and are committed to the judicial system. So on this aspect more study is necessary.

Few examples for court management are also discussed in the pilot project [24].

C) E-Court System Monitoring :

(i) Principle District Judge :

As per the e-court plan , the following are the responsibilities of the Principle District Judge:-



- 1) The district court e-court committee to perform overall monitoring of the project under supervision of the Principal District Judge.
- 2) The court staff, technicians, vendors and other agencies to act as per the direction of the Judge. The other agencies would work as per the directions and supervision of the e-committee[5].
- 3) He has to monitor the compliance of IT systems of the court with standards established by the High Court and its full function.
- 4) He has to Send the proposed National Arrears Grid to be set up to monitor the disposal of cases in all the courts , as and when it is set up.
- 5) He has to monitor the maintenance of computer system and other electronic instruments properly.
- 6) He has to monitor the actual working of Judicial service center.

(ii) Principle Judge at Taluqa Places/ Administrative Judge at District Place:

The Taluqa court team to perform the various tasks of monitoring the project implementation at the Taluqa Level as per plan [5]. He has to monitor the maintenance of computer system and other electronic instruments properly. He has to monitor the actual working of Judicial service center.

(iii) Judge (for his own court):

- 1) He has to monitor the maintenance of computer system and other electronic instruments properly from his own court.
- 2) He has to monitor the actual data supplied for working on the Judicial service center.
- 3) He has to identify the court staff who possesses technical knowledge useful for the e-court system.
- 4) He has to identify the court staff that possesses the skill and capabilities to execute the e-court system more effectively.

D) How to Monitor the e-court System: System maintenance is a very important responsibility over the judge. Unless the system runs properly, it can not be monitored properly. Daily monitoring may require maximum ten minutes time.

Material Points for System Monitoring:

- 1) To read e-court mission plan, court mission plan and read CIS Manual.
- 2) Judge has to read the User Manuals for Hardware and software for relevant



electronic instruments.

- 3) To check the user for the court and its Internet connectivity. Regular monitoring of the system working with network connectivity.
- 4) Check desktop that specifies data feeding, data for undated cases, old cases etc. with alert flag(the CIS software has provided automatic system monitoring for court business and process like Regular data feeding and updating ,Regular monitoring for the backlog and the reason for pendency) .
- 5) Check whether judgments are uploaded .
- 6) Check data feeding for amended pleading/address of the parties.

The actual reason for non feeding of data is known to the court staff and Judge has direct control over the working of court staff. The court manager has also responsibility to monitor the task. But he can collect statistical data only. Therefore , there is need of documentation showing that the implementation of the guidelines is being monitored with a checklist. The documents should show the achieved output. Manager to take effective steps to improve regular scheduling and monitoring[6]. Detailed information for the project monitoring is already provided by NIC at webstie[7] [5]. The current position of district court information is available at <http://lobis.nic.in/> .

E) Assistance from the Court Manager:

The duties and responsibilities for the court manager [2] shows that the court manager is a professional person so there should be co-ordination and good relations between the judges,court staff and other stakeholders. The responsibility of the manager speaks that, he has to play a role in both plans and to co-ordinate with court staff and other stakeholders. His work is just like a catalyst to give speed to the entire system by providing his professional knowledge in management.

The responsibilities of court manager also speaks that :-

(XII) Without prejudice to the generality of the foregoing sub-rules,-

- (1) The High Court and Principal District Judge, with the prior approval of the High Court, may prescribe the duties of the Court Manager , by general or special order, from time to time and likewise , may provide for the subordination of , and internal relatively amongst, the staff of the district Court viz-a-viz Court Manager.
- (2) The High Court and Principal District Judge may further specify, modify, add to or



delete from, the duties of the Court Manager, from time to time[2].

the court manager for the effective management of both missions. It is necessary to give duties to the court manager so that it creates a healthy environment to maintain his relations with stakeholders[8].

(F) Trial Monitoring: For trial monitoring , it is necessary to set trial monitoring program because , it may contribute to enhancing the knowledge of judges, prosecutors, counsel and other stakeholders . It should contain, Purpose, objectives, methodology, time to implement it. There are a number of methods for trial monitoring. It gives opportunity to the manager to make team of court staff for workload management . On this aspect more detailed study is necessary.

The centralized registration for newly instituted cases at Judicial Service Center will be helpful for caseload management.

SUGGESTIONS:

Monitoring court by Principle District Judge: For monitoring the court working with judges , it is better to fix CCTV. The principle district judge may monitor the dais timing of the judges. Such recorded Compact Disc would be available so that the principle district judge may watch it at any time.

Evidence Recording: - Audio Voice Recording is necessary to save the time for recording evidence.

Trial on Video conferencing: It is necessary to keep records of trials conducted through videoconferencing.

For Human Resources and Succession :Succession planning and management is necessary to achieve the goals of both missions.

Training: Training for Information Technology relating to maintenance of e-court, court administration, court-room management is necessary to Judges.

At present there is no provision of training to the court staff in the court business. According to me, only judges or senior court staff member can play a good role of trainer to the court staff. Therefore it is necessary to give training to court staff at district level.

Additional Suggestion in Administration:

- 1) Uniform policy for Promotion & Transfer of court staff applicable to all districts .
- 2) If the website of the High Court is regularly checked. It shows that, there is a good



administrative system at High Court. It has responsible judicial officers with sections like Inspection, Vigilance, Judicial, Personnel, Legal & Research, Finance & Budget. The judicial officers are responsible for the working of those sections. There is system to maintain accurate and accessible records. They take every caution for entering data in the system. There is regular monitoring, review for all alerts. There may be a good system for effective communication to supply material information. They always ensure that problems are not overlooked. It is good a example for strong administrative control.

The above good administrative system is already available. If it is possible to apply to district court then the judicial officer will be responsible for each section. However more study is necessary for adopting the above administrative system wherein it is also possible to construct the court staff portal.

CONCLUSION:

The active participation in court management may facilitate the development of the management system and methods to monitor the execution of the mission / plan. Computerization and court manager is not substitute to the mind of the judge. But with the help of the computer and court manager , it becomes easy for analyses data, monitor the progress and improve in court management.

Thus both plans shows that, it is expected that , courts should be seen as a an organization. Any system should run and developed with the help of Judges, court staff, professional managers and all stakeholders. The principle district judge has to play pivotal role in court management with the adequate support from all stakeholders.

Each judge must be competent in using the CIS . The use of CIS is the key element in the positive improvement of in the administration of justice. Most of the court management works have to be carried out by the judge, as it requires a judicial mind. The judge has to apply his judicial mind in cases from his court.

A judge may possess less managerial training like a professional manager but he is controlling authority for his own court. The court manager is not for the comfort of the judge. Manager has to assist to the Judge by applying his professional knowledge to make the business process fast and as desired by court management mission/plan or system. Therefore choosing the right people to be court managers is very important factor .



ABBREVIATION:

CIS : Case Information System

CDP : Court Development Plan

CCTV : Closed-circuit television

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IN THE SUPREME COURT OF INDIA

1. **Imtiyaz Ahmad v State Of Uttar Pradesh & Ors**

Decided on: 01 February 2012

(2012) 2 SCC 688

Criminal - Practice & Procedure - Code of Criminal Procedure, 1973, ss. 482 and 397 - Registration of FIR - Stay orders - Sustainability - Magistrate directed for registration of case filed against respondent - FIR was registered, HC passed stay order on application filed by respondent - Investigation, framing of charges or Trial remained pending for a long period of time - Whether Stay granted by HC was sustainable- Held, authority of HC to order stay of investigation pursuant to lodging of FIR, or trial in deserving cases was unquestionable, but exercise of that authority carried with it responsibility to expeditiously dispose of case - Power to grant stay of investigation and trial was a very extraordinary power given to HC and same power was to be exercised sparingly only to prevent an abuse of process and promote ends of justice - It was true that SC had no power of superintendence over HC as HC had over District Courts u/art. 227 of Constitution, like SC, HC was equally a Superior Court of Record with plenary jurisdiction - Under Constitution, HC was not a Court subordinate to SC, SC, however, enjoyed appellate powers over HC as also some other incidental powers, but as last court and in exercise of SC's power to do complete justice which included within its power to improve administration of justice in public interest, SC laid down guidelines for sustaining common man's faith in rule of law and justice delivery system, both being inextricably linked - Matter referred to larger Bench for further consideration on recommendations of Law Commission - Appeals disposed of.

2. **All India Judges Association and others v Union of India and others**

Dated: 2 August 2018

Interlocutory Application No. 279 of 2010 in Writ Petition (Civil) No. 1022 of 1989

This interlocutory application basically relates to infrastructure of the courts especially in subordinate courts. A detailed order was passed on 24.01.2011 which pertained to various projects of court buildings, residential quarters and all other aspects. On 04.04.2011, the following order came to be passed:-

"By our Order dated 21st February, 2011, we had directed States of Maharashtra, Gujarat and Uttarakhand to answer five questions, which, for the sake of brevity, are reiterated hereinbelow:

[1] Since when Proposals/Projects are pending and reasons why they have not been cleared till today?

[2] For how long and why Proposals pending for acquisition of land have not been cleared by the Collectors?

[3] Why Government lands, which are available, are not being urgently made available for Court Buildings and Residential Quarters?

[4] What steps are being taken to expeditiously complete Projects which are under construction?

[5] How many pending Proposals would receive administrative and financial sanction during the next Financial Year?

States of Gujarat and Maharashtra have sought time to put in their response. Request is granted. Hence, four weeks' time is granted. No further adjournment will be granted.

As far as State of Uttarakhand is concerned, we have examined the affidavits filed on 1st April, 2011. The affidavits are vague. The State of Uttarakhand was required to answer each of the above five questions project-wise and format-wise but they have not done so.

In the circumstances, we direct the State of Uttarakhand to file a proper detailed and accurate affidavit to the questions posed. In addition, we direct the State to answer those questions project-wise and format-wise.

We may further add that vide Order dated 24th January, 2011, we had requested various States, including States of Gujarat, Maharashtra and Uttarakhand, to furnish details of the nature of the work, the place at which the project is located as well as the amount to be spent in respect of each of the project. Pursuant to the said order, we had also forwarded the requisite format in the form of Annexures I and II to all the three States. Since we are adjourning the matter by four weeks, we also direct the States of Uttarakhand, Gujarat and Maharashtra to give details duly filled in the formats Annexures I and II.

Place the matter on 9th May, 2011."

Thereafter, the matter was listed on many an occasion but it stood adjourned. In the meantime, it has been brought to the notice of the Court that there has been progress in the field of infrastructure inasmuch as the court projects (court rooms) have been constructed and other steps have been taken. But there are certain other spheres where immediate attention is required so that things are set right.

A sound infrastructure is the linchpin of a strong and stable judicial system. The responsibility for securing justice to the citizenry of our country rests upon the judiciary which makes it imperative upon the State to provide the judicial wing the requisite infrastructure commensurate with the constitutional obligation of the judiciary. It needs to be understood that without a robust infrastructure, the judiciary would not be able to function at its optimum level and, in turn, would fail to deliver the desired results.

The court development plan should comprise of three components - a short term (or annual plan); a medium term plan (or a five year plan); and a long term plan (ten year plan). The annual plans so prepared shall be incorporated into the five year plan which, in turn, rolls into the ten year plan. While focusing on judicial infrastructure, due regard has to be given to adequate and model court building, furniture, fixture, judges chamber, record/file storage, adequate sitting and recreation arrangement for staff and officers, sitting/waiting room for litigants and bar members, latest gadgets and technology. In other words, the core factors in the design of a court complex must reckon - a) optimum working conditions facilitating increased efficiency of judicial officers and

the administrative staff; b) easy access to justice to all and particularly to the underprivileged, persons with disability, women and senior citizens; c) safety and security of judges, administrative staff, litigants, witnesses and under-trial prisoners. The court complex must consist of: -

I. COURT BUILDING

- Court rooms
- Judges' chambers
- Judges' residential complex
- Litigants' waiting area
- Administrative offices
- Conference Hall/Meeting Room
- Video conferencing rooms
- Mediation centre/Legal Services Authority
- Common rooms for male/female staff
- Staff canteen
- De-stress rooms for male/female staff
- Office space for Government pleader/Public prosecutor/Advocate General/Standing Counsel for Union of India with separate cubicles for conducting conferences and including space for accommodating their Secretarial staff and files
- Support facilities like ramp, creche, etc.

II. SPACE FOR LAWYERS/LITIGANTS

- Bar rooms for ladies and gents
- Consultation rooms and cubicles
- Stamp vendors and notary public/oath commissioner/typist/photocopy/business centre
- Library
- Canteen for lawyers and litigants
- Facilitation counter for litigants/visitors
- Support facilities

III. FACILITY CENTRE providing for common facilities for functioning of the complex unrelated to courts such as bank, post office, medical facility, disaster management, etc.

IV. UTILITY BLOCK for accommodating the utility services such as A.C. plant, electrical sub-station, DG set/Solar panel, STP, Repair workshop, storage, garage, etc.

V. JUDICIAL LOCK-UPS.

VI. STRONG ROOM FOR RECORD PRESERVATION.

VII. ADEQUATE PARKING SPACE for judges, lawyers, litigants and other visitors.

VIII. IT INFRASTRUCTURE FOR COMPUTERISATION AND eCOURTS

The finance needed for court infrastructure should be ideally placed under the head of planned expenditure which will be more specific, better managed and obviate any cut by the Governments. The budgeting must be from the demand side and cannot be from the supply side.

Apart from what we have stated above, we think it appropriate to issue the following directions which are the most fundamental and vital features to be provided at the earliest in all court complexes:-

(i) Basic amenities such as adequate seating space for litigant public as well as lawyers, sufficient waiting area with seating arrangements, proper lighting and electricity, functional air-conditioning/air-cooling/heating, accessible clean drinking water with Reverse Osmosis (RO) facility, clean and hygienic washrooms separate for men, women, transgenders and physically handicapped persons, kiosk and functional canteens selling beverages and eatables at nominal rates, preferably managed by court staff are some amenities and facilities which ought to be ensured at court complexes throughout the country. If these are missing in our court complexes, it would be an appalling situation which requires immediate rectification.

(ii) We must further ensure that all our court complexes are conducive and friendly for the differently-abled and towards this end, the Court complexes must have certain features for the benefit of the vulnerable persons such as persons with disability or visually impaired persons. We have to move from disabled friendly buildings to workable and implementable differently-abled friendly court infrastructure. Ramps for such categories of persons must be operable, feasible, tried and tested. Such ramps should definitely have steel railings and handles. The court infrastructure must also keep in view the accessibility for visually impaired persons and, therefore, court complexes must have tactile pavements and signage in braille for the benefit of visually impaired citizens. That apart, for ensuring easy movement of common citizens in the court complexes, there must be maps and floor plans of the entire court complex at entry and exit points and visible signage and directional arrows with colour coding throughout the court premises.

(iii) For saving the litigant public and other citizens from running one end to the other without any guidance in the Court complexes and for assisting them to reach their desired place, it is necessary that all court premises must establish a working and fully operational help desk at major alighting points with trained court staff to brief and guide the citizens about the layout of the court premises.

(iv) Court premises must also have sufficient number of functional electronic case display systems for litigants and lawyers with the feature of automatic update in every ten seconds.

(v) With the increase in motor vehicles, including cars and two-wheelers, it is imperative that court premises have sufficient and proper parking space to ease vehicular traffic and avoid crowding. All upcoming court complexes must have provision for both sufficient underground and surface parking facilities segregated into four broad categories - for judges, court staff, lawyers and litigants. As far as the existing court complexes are concerned, the possibility and feasibility of constructing underground or multi level parking facilities must be explored.

(vi) The court premises must have easy access at both entry and exit points. End to end connectivity of public transport systems must be ensured for court premises by starting feeder bus service and other dedicated transport services between major public transport points and court complexes. Access to justice will forever remain an illusory notion if access to courts is not ensured.

(vii) Court premises must be armed with better crowd management arrangements along with adequate security measures. It has been seen, time and again, that at the time of court proceedings

of cases which are well covered by the media, the crowd management in court premises runs into utter chaos. Measures must be taken to ensure that whenever court premises are thronged with heightened crowds, there is smooth ingress and egress of both vehicular traffic as well as citizens in the court premises.

(viii) Creche facility at nominal rates for toddlers, falling within the age group of 6 months to 6 years, of lawyers, clerks of lawyers, bar association staff and officers and employees of court registry must also be constructed. The said creche facility must not be just for the namesake, it has to be both functional as well as effective with proper space and equipment such as baby proofing and other toddler-friendly provisions. That apart, the courts should have a proper atmosphere for children and vulnerable witnesses.

(ix) Professionally qualified court managers, preferably with an MBA degree, must also be appointed to render assistance in performing the court administration. The said post of Court managers must be created in each judicial district for assisting Principal District and Sessions Judges. Such Court Managers would enable the District Judges to devote more time to their core work, that is, judicial functions. This, in turn, would enhance the efficiency of the District Judicial System. These court managers would also help in identifying the weaknesses in the court management systems and recommending workable steps under the supervision of their respective judges for rectifying the same. The services of any person already working as a Court Manager in any district should be regularised by the State Government as we are of the considered view that their assistance is needed for a proper administrative set up in a Court.

(x) Adequate residential accommodation for judicial officers and court staff is another infrastructural aspect which requires immediate attention. The productivity of judicial officers and court staff who are not provided with residential quarters in and/or around the court premises gets negatively hampered. Thus, residential accommodation in proximity of court complexes for judicial officers and court staff must also be provided.

(xi) There shall be solar power installation in each of the district court premises initially and thereafter, the same should spread to all other courts.

(xii) Keeping in view the obtaining scenario, CCTV cameras should be placed at proper locations within the court complex.

(xiii) To enhance the quality of speedy justice, video conferencing equipments and connectivity to jails shall be provided at the earliest.

(xiv) The district court complex should have a dispensary with adequate medical staff and equipments.

It is clear that judicial infrastructure not only needs attention and budgeting but also effective utilization of the funds towards specific and proper ends so that the primary goal of access to justice for all is realized. Prompt measures are to be undertaken and procrastination in these matters cannot brook delay where Rule of Law is supreme.

Let a copy of this order be sent to the Chief Secretaries of each of the States by the Registry requiring them to constitute a committee of which the Secretary of the Department of Law should be a Member to formulate the development plan as per the directions issued by us and present the

status report so that further directions can be issued. The committee shall invite an officer from the High Court to be nominated by the Chief Justice of the High Court. Copies of the order passed today be sent to the Registrar Generals of all the High Courts.

3. Ramrameshwari Devi And Ors v Nirmala Devi And Ors.

Decided on: 04 July 2011
(2011) 8 SCC 249

Civil Procedure - Code of Civil Procedure, 1908 - Whether the prevailing delay in civil litigation could be curbed? - Held, Court suggested few steps by which existing system could be drastically changed or improved if those steps were taken by the trial courts while dealing with the civil trials - Steps were; (i) trial judge to carefully scrutinize, check and verify the pleadings and the documents filed by the parties immediately after civil suits were filed; (ii) Court should resort to discovery and production of documents and interrogatories at the earliest according to the object of the Act; (iii) imposition of actual, realistic or proper costs and or ordering prosecution for introduction of false pleadings and forged and fabricated documents by the litigants; (iv) Court must adopt realistic and pragmatic approach in granting mesne profits; (v) courts should be extremely careful and cautious in granting ex-parte ad interim injunctions or stay orders; (vi) litigants who obtained ex-parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished (vii) no one should be allowed to abuse the process of the court; (viii) principle of restitution be fully applied in a pragmatic manner - Appeals disposed of.

4. Surjit Singh and others v Gurwant Kaur and others

Decided on: 27 August 2014
(2015) 1 SCC 665

Civil Procedure - Code of Civil Procedure, 1908, O. 41 r. 27 - Additional documents - Admissibility - Respondent No. 1 filed civil suit for specific performance of contract entered into between him and the appellant No. 1 for sale of land - Suit was dismissed - Appeal was filed - During the pendency of the appeal, the appellant filed an application under O. 41 r. 27 of CPC for production of pass books and the statement of bank accounts as additional evidence - Additional District Judge held that the evidence being in nature of documentary evidence and being admissible, it was appropriate to allow the same - Single Judge declined to interfere with said order - Hence, instant appeal - Whether when such an order passed by the Trial Judge had been affirmed by the HC in exercise of supervisory jurisdiction, would it still be permissible from the view of

propriety on the part of the First Appellate Court to accept the documents in exercise of power under O. 41 r. 27 of the CPC -

Held, documents are not so clinching to be accepted as additional evidence in exercise of jurisdiction under O. 41 r. 27 of the CPC. Therefore, appellate court erred in taking recourse to the said clause and allowing the application for taking additional evidence and similarly the HC committed illegality opining that the order passed by the lower appellate court does not suffer from any infirmity. Appeal allowed.

Ratio - When documents are not so clinching to be accepted as additional evidence, jurisdiction not to be exercise under O. 41 r. 27 of the CPC.

APPELLATE JURISDICTION* **(First Appeal under C.P.C.)**

1. **Provisions under which First Appeals are preferred:**

Against decree, as defined under Section 2(2), regular First Appeal is provided under Section 96, C.P.C.

Normally suit concludes by pronouncement of (final) judgment under Order 20 Rule 1. (Such judgment in view of its definition given under Section 2(10) means the statement given by the Judge on the grounds of the decree.) Thereafter, by virtue of Order 20 Rules 6 and 7 the decree shall be drawn which shall agree and be in accordance with the judgment and shall be signed by the judge on being satisfied about its correctness as such. The decree shall bear date, the day on which the judgment was pronounced (even though its preparation and drawing up may take some time, within 15 days as per Order 20 Rule 6-A). The main ingredient of the decree is operative portion of the judgment. According to Order 20 Rule 6 decree shall contain particulars of the claim and shall specify clearly the relief granted or other determination of the suit. Amount of costs are also to be stated therein. (Rules 6, 6-A and 7 of order 20 quoted at the end)

* By Justice S.U. Khan, Former Judge Allahabad High Court and at present Chairman, JTRI,UP, Lucknow

Section 2(2), 2(9) and Section 96 C.P.C. are quoted below:

"2 (2) *"Decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include-*

a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

2 (9) *"Judgment" means the statement given by the Judge on the grounds of a decree or order."*

96. *Appeal from original decree. - (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.*

(2) An appeal may lie from an original decree passed ex parte.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Court of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed (ten) thousand rupees."

Combined reading of both the above provisions

shows that against certain adjudications regular First Appeal is maintainable and against certain adjudications it is not. Both are given below:-

A. Appeal maintainable

- a. Against a decree
- b. Against preliminary decree
- c. Against final decree
- d. Rejection of plaint under Order 7 Rule 11 C.P.C.
- e. Determination of any question within Section 144 (restitution)
- f. Original decree passed ex-parte.

B. Adjudication against which regular first appeal does not lie:

- a. Dismissal of suit in default
- b. Determination of any question within Section 47 [prior to the amendment of 1976-77 against such determination regular first appeal was maintainable as it was included in the definition of decree under Section 2(2)]
- c. Decree passed by the Court with the consent of the parties.
- d. From a decree in any suit of the nature cognizable by JSCC when the amount or valuation of the subject matter of the suit does not exceed Rs. 10,000/ - except on a question of law.
- e. Against decree passed by the JSCC in view

of Section 7, through which Section 96 relating to appeal is not extended to courts constituted under Provincial Small Causes Courts Act, 1887. Section 25 of the PSCC Act provides revision against decree passed by the JSCCs on a question of law.

Against certain orders passed in a suit before its final decision also appeal is provided under Section 104 read with Order 43, Rule 1 C.P.C. These appeals in the District Courts are called Miscellaneous Appeals and in Allahabad High Court as First Appeals from Orders (F AFO). Section 104 specifically provides Miscellaneous Appeals against orders granting compensatory costs in respect of false or vexatious claims or defences (Section 35-A), an order under Section 91 or 92 of C.P.C. refusing leave to institute a suit in respect of public nuisance and other wrongful acts affecting public; and public charities, an order under Section 95 C.P.C regarding compensation for obtaining arrest, attachment or injunction on insufficient grounds or against certain orders imposing fine or directing the arrest or detention in civil prison. Thereafter, under Section 104 (1)(i) C.P.C. it is provided that miscellaneous appeals may also be filed against those order which under the rules are made appealable. This refers to Order 43, Rule 1 C.P.C. under which 18 types of orders are made appealable (some orders which were earlier appealable, were deleted from Order 43 Rule

1 C.P.C. through amendment by Act No. 104 of 1976 w.e.f. 1.2.1977, hereinafter referred to as amendment of 1976-77).

Under C.P.C. third type of appeal is provided under Order 21, Rule 103 by virtue of which orders passed on the applications for dispossession of third party in execution of decree have been conferred the status of decree and made appealable. The rule is quoted below:-

O.21, R. 103

“Where any application has been adjudicated upon under Rule 98 or Rule 100, the order made thereon shall have the same force and be subject to the same condition as to an appeal or otherwise as if it were a decree”.

Rules 98 to 103 were substituted through amendment of 1976- 77, prior to that such types of orders were not appealable but subject to the result of the suit.

Similar is the position under O. 21 R. 58 (4) in respect of attachment.

C. Appeals under, other Acts

Sometimes First Appeal is provided to the District Judge or the High Court under other Acts like appeal under Section 22 of U.P. Rent Control Act (U.P. Act no. 13 of 1972), before the District Judge against order passed under Section 21 of the Act on the application of landlord for eviction / release of the tenanted building on the ground of bonafide need. Section 30 Workmen’s Compensation Act

provides appeal to the High Court against certain orders of Commissioner but only on question of law. First appeal to the High Court is provided under Section 173 of Motor Vehicles Act against orders passed by District Judge/Additional District Judge for compensation in case of death or injury under the same Act.

2. **Right of Appeal vested right**

Right of appeal is vested right and accrues on the date on which first proceedings (suit, application, objection etc.) are initiated. If the right of appeal is taken away or restricted thereafter, it does not affect right of appeal in respect of pending proceedings, unless expressly so expressed vide *Videocon v. SEBI* AIR 2015 SC 1042. However this principle does not apply to revision.

3. **Appeal, statutory right, can be made conditional by Statute:**

In *Ganga Bai v. Vijay Kumar*, AIR 1974 SC 1126 it has been held that suit is inherent, general or common law right and it need not be provided by any statute, however, appeal is a statutory right and is maintainable only when some statute provides the remedy of appeal. Following this authority it has been held in *Gujarat Agro Industry v. Municipal Corporation Ahmadabad* AIR 1999 SC 1818 that statute providing right of appeal can make the right conditional like deposit of tax or its part in case of appeal against assessment/

imposition of tax.

Right of appeal under Section 96 C.P.C. is not conditional. Accordingly admission of such appeal cannot be conditional e.g. it cannot be ordered along with admission of appeal that in case certain amount is not deposited within certain time order of admission of appeal shall stand withdrawn or recalled vide Management of M/s *Devi Theatre v. Vishwanath Raju AIR 2004SC332* and *G.L. Vijain v. K. Shankar AIR 2007 SC 1103* (Such condition may be attached with stay order.)

4. Appeal against Preliminary and Final Decrees:

In certain suits, two decrees are passed, one is preliminary and the other is final, like partition suit, in which, in the preliminary decree shares of the parties are determined and in final decree actual partition is done by metes and bounds. Appeal is provided against both the decrees i.e. preliminary as well as final. However, if against the preliminary decree appeal is not filed then its correctness cannot be questioned in an appeal which is preferred against final decree as provided under Section 97 C.P.C.

5. Appeal not to be allowed on trivial defects in decree:

Section 99 CPC is quoted below-

“99. No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction- No decree shall be reversed or substantially varied,

nor shall any case be remanded, in appeal on account of any misjoinder or non-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court:

Provided that nothing in this section shall apply to non-joinder of a necessary party

It has been held in *Kuldip Kumar Dubey v. Ramesh Chandra Goyal AIR 2015 SC 1135* that in appeal decree cannot be set aside on the ground of minor discrepancies in it, in view of section 99 CPC.

6. Withdrawal of appeal and its effect on restoration application:

Against ex-parte decree in a suit restoration application may be filed under Order 9 Rule 13 and appeal may also be preferred. Both the remedies may be pursued simultaneously. Even if restoration application is rejected, regular appeal will have to be decided on merit but the point that suit was wrongly decided ex parte as defendant had sufficient cause for non appearance would no more be open in appeal vide *Bhanu Kumar Jain v. Archana Kumar AIR 2005 SC 626 (3 judges)* However, if restoration is allowed then appeal becomes infructuous as the decree against which it was passed having been set aside does not remain in existence.

If appeal is disposed of first the restoration application becomes infructuous as the ex-parte decree sought to be set aside merges in the

decree of appeal. Explanation to Order 9 Rule 13 provides as under:

"Explanation.-Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree."

It has been held by the Supreme Court in *Shyam Sunder Sharma v. Pannalal Jaiswal* AIR 2005 SC 226 (3 judges) that even if the appeal is dismissed in default or as barred by time, restoration application in suit becomes infructuous and it is only and only withdrawal of appeal which keeps the restoration application alive and maintainable.

7. **Appeal against decree, challenge to other orders:**

"Section. 105. Other orders .-(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand [* *] from which an appeal lies*

does not appeal there from, he shall thereafter be precluded from disputing its correctness."

Accordingly any order passed in suit before final judgment and decree, if it affects ultimate judgment and decree, its correctness can be questioned in appeal against decree otherwise not. To illustrate orders passed on temporary injunction application do not affect the ultimate judgment and decree hence there is no question of challenging their correctness in the appeal against decree. However order passed on application seeking amendment in the pleading may affect the ultimate judgment and decree hence if it is not immediately challenged then its correctness can be questioned in appeal against the decree. Under Sections 12 and 16 of the U.P. Rent Control Act (U.P. Act No. 13 of 1972) first vacancy declaration order is passed and thereafter the building is either released in favour of the landlord or allotted to someone else. Against release or allotment order revision to the District Judge is provided under section 18 of the Act. The Supreme Court in *Ganpat Roy v. ADM*, AIR 1985 SC 1635 has held that vacancy declaration order can at once be challenged through writ petition in the High Court. However if vacancy declaration order is not immediately challenged through writ petition still its correctness can be questioned in revision which is filed against ultimate order of release or allotment on the principle of Section 105 C.P.C.

vide *Achal Misra v. Rama Shanker Singh* 2005 (5) SCC 531 (3 judges) (paras 11 to 13)

8. **Powers of First Appellate Court:**

First Appellate Court has got power to judge the correctness of findings of facts as well as of law recorded by the Trial Court. However, Second Appeal to the High Court under Section 100 C.P.C. lies only if the case involves substantial question of law.

Section 107 C.P.C. provides as under:-

"107. Powers of Appellate Court- (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power-

- (a) to determine a case finally;*
- (b) to remand a case;*
- (c) to frame issues and refer them for trial;*
- (d) to take additional evidence or to require such evidence to be taken.*

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein."

Accordingly most of the things which may be done by the Trial Court can also be done by the Appellate Court.

Under **Order 6 Rule 17 C.P.C.** plaint or written statement may be amended. The rule itself provides that the Court may, at any stage of the proceedings, allow either party to alter or amend his pleading. Accordingly, amendment in plaint or

written statement may be sought even during pendency of appeal. However, in this regard great caution must be taken and the first thing which is to be seen is as to why amendment application was not filed before the trial court during continuance of the suit. Further, by virtue of the Amendment in C.P.C. w.e.f. 1.7.2002 a proviso has been added to Order 6 Rule 17 to the following effect:

"Provided that no application for amendment shall be allowed after the trial has commenced unless the court comes to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of trial."

After decision of the suit trial not only commences but stands concluded.

9. Subsequent events of facts & law:

Under Order 7 Rule 7 C.P.C., in a suit, the Trial Court is required to take into consideration events coming into existence after institution of the suit and court may also grant general or other reliefs which may not even have been asked for. Similarly, subsequent event coming into existence during pendency of appeal shall be taken into consideration. Vide *Gaivdinshaw Irani v. Tehmtan Irani*, AIR 2014 SC 2326 and the authorities relied upon therein. The leading authority on this point is reported in *L. Prasad Shukla v. K.L. Chaudhary* AIR 1941 FC 5.

10. Appeal by Some of the Parties:-

Order 41 Rule 4 provides as under:-

"One of several plaintiff or defendants may obtain reversal of whole decree where it proceeds on ground common to all. - Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, anyone of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be."

Even if other plaintiffs or defendants as the case may be, are not made proforma respondents it will not make any difference. Similarly even if other plaintiffs or respondents as the case may be are made proforma respondents and some of them die and substitution application is not filed, appeal will not abate vide *B. S. Ruia v. S. N. Ruia AIR 2004 SC 2546*.

11. Conditional Stay order:

Stay order in appeal can be made conditional and if condition is not complied with stay order will stand revoked/ discharged but appeal will remain intact and will have to be heard on merits vide *Devi Theatre supra* under synopsis 3.

In *Atma Ram Properties (P) Ltd. v. M/ s. Federal Motors Pvt. Ltd., 2005 (1) SCC 705* it has been held that in Rent Control matters in appeal and revision against order of eviction conditional stay order may be granted and condition for payment of more

amount than the rent may be attached with stay order. Reason is that after order of eviction tenant remains in possession not by virtue of any right under Rent Control Act but by virtue of stay order and along with the stay order reasonable condition can always be attached. Following the said authority Allahabad High Court in *Ganga Prasad v. Hanif Opticians 2005(2) ARC 723* has issued general directions to the effect that in revision or appeal against order of eviction passed under U.P. Rent Control Act stay order must always be made conditional and the reasonable condition may be of payment / deposit of roughly 50% of the current market rent.

11A. Admission of appeal:

Under Order 41 R. 11 C.P.C. appeal is heard in admission. Prior to 2002 Amendment of C.P.C. records of the Court below could be called for before such hearing. However after 1.7.2002 when relevant Amendment of 1999 was enforced such power is not there. First Appeal under Section 96 C.P.C. shall normally be admitted and not dismissed in limine vide *Union of India v. K. V. Lakshman AIR 2016 SC 3139*.

12. Dismissal in default of appeal Ex-parte hearing and restoration:-

Before 1976-77 Amendment of Order 41 Rule 17 C.P.C. there was conflict of opinion among different High Courts regarding power of the court in case the appellant does not appear and only

respondent appears, There has never been any doubt that in such situation appeal may be dismissed in default, however, the difference of opinion was as to whether in such situation appeal could be dismissed on merit or not. Allahabad High Court was of the opinion that appeal could not be dismissed on merit in such situation. In 1976-77 approving the view of Allahabad High Court and of some other High Courts the following explanation has been added to Order 41 Rule 17:

"Explanation.-Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits."

Accordingly in the absence of appellant either appeal may be adjourned or it may be dismissed in default, however it cannot be dismissed on merit. If it is dismissed on merit in the absence of appellant still order will be treated to be dismissal in default and if the appellant shows good cause for his absence, order will have to be set aside vide Harbans Prasad Jaiswal, infra.

Under the same rule it is provided under Sub Rule 2 as follows:-

"(2) Hearing appeal ex parte-Where the appellant appears and the respondent does not appear the appeal shall be heard ex parte,"

If appeal is allowed after hearing the appellant ex-parte in absence of respondent then the respondent under order 41 Rule 21 may apply for

rehearing of appeal after setting aside of ex-parte decree of appeal. If respondent shows good ground for his absence then the judgment even though on merit has to be set aside and appeal has to be readmitted and heard afresh. However, in such rehearing application merit of the ex-parte judgment cannot be seen. If respondent wants to challenge ex parte judgment, allowing the appeal, he can only apply for review vide *Harbans Pershad Jaiswal v. Urmila Devi Jaiswal AIR 2014 SC 3032*.

13. Remand to be avoided:

Under Order 41 Rule 23 and 23A matter may be remanded by the appellate court (under Rule 25 also remand is made). However, under Rule 24 it is provided as under:

24. Where evidence on record sufficient, Appellate Court may determine case finally. - Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which Appellate Court proceeds."

Similarly under Section 107 Appellate Court has got same powers as of the trial Court.

In the following authorities it has been provided that as far as possible remand must be avoided:

1. *Zarif Ahmad (D) v. Mohd. Farooq* AIR 2015 SC 1236
2. *G.C. Kapoor v. Nand Kumar Bhasin* AIR 2002 SC 200 (In this case release application of the landlord under Section 21 of U.P. Rent Control Act was dismissed by prescribed authority, appeal was dismissed by the District Judge and writ petition was also dismissed by the High Court. The Supreme Court set aside all the three judgments and instead of remanding the matter allowed the release application by itself.)
3. *R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple*, AIR 2003 SC 4548 (towards the end of para 10 it was held that even though remand was desirable but as the suit had been instituted 25 years before (in 1978) hence it was avoided)

14. Cross objection, whether necessary:

Order 41 Rule 22 (1) and 33 are quoted below-

"22. Upon hearing respondent may object to decree as if he had preferred separate appeal.- (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within

such further time as the Appellate Court may see fit to allow.

Explanation.- A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.

33. Power of Court of appeal.- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.”

Cross objection is necessary only if some direction has been issued against the respondent or respondent wants to challenge the finding on the basis

of which part relief has been granted to the plaintiff otherwise even without cross objection, finding against him may be challenged in appeal by the respondent.

In *S. Nazeer Ahmad v. State Bank of Mysore* AIR, 2007 SC 989 (para 7) suit was dismissed as barred by time but the issue of bar of O. 2 Rule 2 C.P.C. was decided in favour of plaintiff. Plaintiff filed appeal. It was held that the defendant respondent in the appeal could argue that the issue of bar of Order 2, Rule 2 was wrongly decided in favour of plaintiff appellant by the trial Court, without filing any cross objection.

However in *Laxman T. Kankate v. T. H. Dhattrak* AIR 2010 SC 3025 in a suit for specific performance of agreement for sale, relief of specific performance was disallowed and suit was decreed for return of earnest money. In appeal by plaintiff, respondent defendant sought to argue that the finding of the trial court that the agreement was genuine was erroneous and must be set aside. It was held that it could not be done in the absence of cross objection.

In *M/s S.K.L. Co. v. Chief Commercial Officer*, AIR 2016 SC 193 (para 2) it has been held that respondent cannot question in appeal a direction issued against him by the Court below without cross objection.

Same principle applies to revision vide *Nalakath. Sainuddin v. Koorikadan Sulaiman*, AIR

2002 SC 2562.

15. Additional Evidence:

Order 41 Rule 27 is quoted below:

“27. Production of additional evidence in Appellate Court. - (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

In *Union of India v. Ibrahimuddin* 2012 (8) SCC 148, scope of order 41 Rule 27 has been discussed in detail and it has also been held that application for additional evidence shall be considered along with hearing of appeal.

In *Union of India v. K.V. Lakshman* AIR 2016 SC 3139 it has been held that the High Court in

First Appeal wrongly rejected the application and it ought to have taken on record additional evidence sought to be adduced by appellant as inter alia it was Union of India deserving more indulgence in such procedural matter and documents sought to be adduced were public documents.

16. **How to Write judgment and discuss**

Evidence:

Order 41 Rule 31 is quoted below:

"31. Contents, date and signature of judgment. - *The judgment of the Appellate Court shall be in writing and shall state-*

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

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

(e) and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

This is an area which requires special care and attention. Sometimes judges, even High Court judges, ignore the requisite requirements. In the following cases Supreme Court set aside the judgments of different High Courts passed in appeals U/s 96 CPC on the grounds that evidence had not been reassessed and points for determination were not framed. The matters were

remanded to do the needful.

In *M/s United Engineers & Contractors v. Secretary to Govt. of A.P.* AIR 2013 SC 2239, High Court while deciding First Appeal u/s 96 CPC only mentioned facts and issues and came rather abruptly to the ultimate conclusion. The Supreme Court set aside the judgment and remanded the matter. It was observed in para 9 as follows:

“9. This Court has considered the scope of Order 41 Rule 31 Code of Civil Procedure in H. Siddiqui (dead) by L.Rs. v. A. Ramalingam, AIR 2011 SC 1492 and held as under:

“18. The said provisions provide guidelines for the Appellate court as to how the court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the Appellate court that the court has properly appreciated the facts/ evidence, applied its mind and decided the case considering the material on record. It would amount to substantial compliance of the said provisions if the Appellate court's judgment is based on the independent assessment of the relevant evidence on all important aspect of the matter and the findings of the Appellate court are well founded and quite convincing. It is mandatory for the Appellate court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final court of fact, the first Appellate court must not record mere general

expression of concurrence with the trial court judgment rather it must give reasons for its decision on each point independently to that of the trial court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the court must proceed in adherence to the requirements of the said statutory provisions. (Vide: Thakur ukhpal Singh v. Thakur Kalyan Singh and Anr., AIR 1963 SC 146; Girijanandini Devi and Ors. v. Bijendra Narain Choudhary, AIR 1967 SC 1124; G. Amalorpavam and Ors. v. R.C. Diocese of Madurai and Ors., (2006) 3 SCC 224; Shiv Kumar Sharma v. Santosh Kumari, 2008 SC 171: (2007 AIR SCW 6384); and Gannmani Anasuya and Ors. v. Parvatini Amarendra Chowdhary and Ors., AIR 2007 SC 2380.

19. in B. V. Nagesh and Anr. v. H. V. Sreenivasa Murthy, (2010) 113 SCC 530 : AIR 2010 SCW 6184 , while dealing with the issue, this Court held as under (Para 4 of AIR SCW):

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

the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. [Vide: Santosh Hazari v. Purushottam Tiwari, AIR 2001 SC 965 and Madhukar and Ors. v. Sangram and Ors., AIR 2001 SC 2171].

Thus, it is evident that the First Appellate Court must decide the appeal giving adherence to the statutory provisions of Order 41 Rule 31 Code of Civil Procedure.”

Same thing has been emphasized in *Vinod Kumar v. Gangadhar 2015(1) SCC 391*.

In *Leela K. Pansare v. B.B. Ithape AIR 2014 SC 2867* (paras 5 and 6) it has been held that High Court in First Appeal should discuss evidence in detail.

In *Shasidrar v. A.U. Mathad AIR 2015 SC 1139* also same thing was said after referring to seven earlier judgments of Supreme Court. Paras 24 and 25 are quoted below:

“24. We may consider it apposite to state being a well settled principle of law that in a suit filed by a' co-sharerer, coparcener, co- owner or joint owner, as the case may be, for partition and separate possession of his/ her share qua

others, it is necessary for the Court to examine, in the first instance, the nature and character of the properties in suit such as who was the original owner of the suit properties, how and by which source he/ she acquired such properties, whether it was his/ her self-acquired property or ancestral property, or joint property or coparcenery property in his/ her hand and, if so, who are/ were the coparceners or joint owners with him/her as the case may be. Secondly, how the devolution of his/her interest in the property took place consequent upon his/ her death on surviving members of the family and in what proportion, whether he/she died intestate or left behind any testamentary succession in favour of any family member or outsider to inherit his/ her share in properties and if so, its effect. Thirdly whether the properties in suit are capable of being partitioned effectively and if so, in what manner? Lastly, whether all properties are included in the suit and all co-sharers, coparceners, co-owners or joint-owners, as the case may be, are made parties to the suit? These issues, being material for proper disposal of the partition suit, have to be answered by the Court on the basis of family tree, inter se relations of family members, evidence adduced and the principles of law applicable to the case. (see "Hindu Law" by Mulla 17th Edition, Chapter XVI Partition and Reunion - Mitakshara Law pages 493-547).

25. Being the first appellate Court, it was, therefore, the duty of the High Court to decide the first appeal keeping in view the scope and powers conferred on it under Section 96 read with Order 41, Rule 31 of the Code mentioned above. It was unfortunately not done, thereby,

accordance with law. "

Same thing has been emphasized in *Vinod Kumar v. Gangadhar 2015 (1) SCC 391*.

In *U.P. S.R. T.C. v. Mamta AIR 2016 SC 948* High Court had decided appeal U/s 173 of Motor Vehicles Act in a cryptic manner. It neither set out the facts, nor took note of grounds of appeal nor appreciated evidence. The judgment of the High Court did not contain concise statement of points for determination, decision thereupon and reasons therefor. The Supreme Court set aside the judgment and remanded the matter for decision of appeal in accordance with order 41 Rule 31 CPC. Para 24 is quoted below-

"24. An appeal under Section 173 of M. V. Act is essentially in the nature of first appeal alike section 96 of the Code and, therefore, the High Court is equally under legal obligation to decide all issues arising in the case both on facts and law after appreciating the entire evidence. [See National Insurance Company Ltd. v. Naresh Kumar & Ors. (2000) 10 SCC 198 and State of Punjab & Anr. V. Navdeep Kuur & Ors. (2004) 13 SCC 680]"

All the points/ issues must be decided:

In a First Appeal under Section 96 C.P.C. High Court decided only the issue of limitation and after holding the suit to be barred by limitation, dismissed the appeal without deciding merit of the

case. Supreme Court in *Madina Begam v. Shiv Murti Prasad Pandey* AIR 2016 SC 3554 (paras 24 to 26) after placing reliance upon *Vinod Kumar v. Gangadhar* 2015 (1) SCC 391 wherein reference had been made to large number of decisions, held that what the High Court had done was impermissible and it ought to have decided all the issues/ points involved. The Supreme Court after reversing the judgment of the High Court on question of limitation had to remand the matter to the High Court for decision of appeal on other points, which would not have been required if High Court had decided all the points.

Order 20 Rules 6, 6A and 7:

“6. Contents of decree.-(1) The decree shall agree with the judgment; it shall contain the number of the suit, the [names and descriptions of the parties, their registered addresses,] and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid At that the costs payable to one party by the other

(3) The Court may direct that the costs payable to one party by the other, shall be set off against any sum which is admitted or found to be due from the former to the latter.

[6-A. Preparation of decree.-(1) Every

endeavour shall be made to ensure that the decree is drawn up as expeditiously as possible and, in any case, within fifteen days from the date on which the judgment is pronounced.

(2) An appeal may be preferred against the decree without filing a copy of the decree and in such a case the copy made available to the party by the Court shall for the purposes of rule 1 of Order XLI be treated as the decree. But as soon as the decree is drawn, the judgment shall cease to have the effect of a decree for the purposes of execution or for any other purpose.

7. Date of decree. - The decree shall bear the day on which the judgment was pronounced, and when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.”

Appeals

ORDER XXI

Right of appeal. No litigant has any inherent right of appeal. It is a creature of statute; unless such right is given by the statute the party cannot exercise any such right. There is also no question of any statutory right of appeal being inferred by implication.¹ Both ss. 96 and 100 provide for an appeal against decree and not against judgment. No appeal lies against a mere finding.² But when an appeal is filed in High Court against the judgment and not against the decree, the High Court erred in dismissing the appeal on the ground that the appellant has challenged the judgment and not the decree. All that was required to be done in a case like that was to remove the technicality by permitting amendment of the memo of appeal.³

When appeal and second appeal are provided in the statute, then the legal proceedings continue till all the remedies are exhausted and the appeal is the continuation of the same legal proceeding. Right of appeal is not only a rule of procedure but a substantive right. The right of appeal on being conferred by statute is a vested right and exists as from the date the lis commences and is governed by the law prevailing at the date of institution of the suit and not on the date on which the decision is given or on the date when the appeal is filed. This vested right of appeal can be taken away only by a subsequent enactment either expressly or by implication and not otherwise.⁴ But this rule does not apply to the execution case because execution case is not continuation of the original lis. Therefore the right to file appeal against the execution case accrues on the date when the execution case is filed and not from the date when the original suit was filed.⁵ When the statute granting the right of appeal imposes the condition such condition is not invalid and *ultra vires*.⁶ The Supreme Court has held that imposition of a more onerous condition is an impairment of the right of appeal granted by the statute. Therefore such impairment cannot retrospectively impair the right of appeal.⁷

The Supreme Court has also made it clear that the extent and scope of appeal would depend upon how it is conferred by the statute.⁸

1. *M. Narayan v. S.T.C.* AIR 1983 SC 786; *Shri Suktai Co-op. Housing Society Ltd. v. Suktai Developers* AIR 2003 SC 2434; (2003)6 SCC 659; (2003)2 KLT 503.

2. *Banarasi v. Ram Phal* AIR 2005 SC 1989; (2005)9 SCC 606.

3. *State of MP v. State Bank of Indore* (2002)10 SCC 441; (2002)108 Comp Cas 622; (2002)10 STC 1.

4. *Md. Meera v. Thirumalaya* AIR 1966 SC 430.

5. *Protap v. Ramarain* AIR 1950 All 42; 1979 ALJ 1335 (FB).

6. *C.S. Baid v. Corporation of Calcutta* 88 CWN 89.

7. *State of Bombay v. Supreme Film Exchange* AIR 1960 SC 980; (1960)3 SCR 640.

8. *Hari Singh v. Kanniah Pal* (1999)7 SCC 298.

An appeal does not lie against mere finding recorded by the court unless the findings amount to a decree or order. Therefore, when the suit is dismissed but an adverse finding is recorded against the defendant he cannot prefer appeal against such adverse finding.⁹

Where a legal right of a party in a dispute has to be adjudicated by courts of ordinary civil jurisdiction then the rules of civil procedure become applicable and an appeal lies against such an order passed by the civil court if not otherwise provided for in such rules, that is to say, notwithstanding that the legal right claimed arises under a special statute which does not specifically confer a right of appeal yet appeal arises from such an order for which the right conferred on a civil court to prefer appeal against original decree in s. 96, CPC is attracted.¹⁰

Appellant may prosecute the appeal even after execution. When the appeal has been preferred against the decree of the trial court and the same is pending merely because the decree under appeal has been executed by the trial court for want of stay order from the appellate court the right of the judgment-debtor to prosecute the appeal is not lost unless there is something to show that the judgment-debtor has waived or consciously given up the right of prosecuting the appeal.¹¹

Decree passed against one defendant alone and right of appeal by the plaintiff. The plaintiff has prayed for the decree against both the defendants. But the trial court has granted the decree against one of them. Against the dismissal of appeal against the other defendant the plaintiff has the right of appeal.¹²

Who can file appeal. Section 96 of C.P. Code does not provide as to who can file the appeal. But it is a fundamental principle of law that a party can only file appeal if he is a person aggrieved by the decree or order.¹³ A person disappointed is not a person aggrieved. In order to claim the right the person must have a legal grievance.¹⁴ The party in whose favour the ultimate decision in the suit goes cannot file appeal even if there is some adverse finding against him in the judgment.¹⁵ No appeal lies against a mere finding.¹⁶ However if the adverse finding against the party operates as *res judicata* he can file appeal against such finding even though the ultimate decision is in his favour.¹⁷ When the plaintiff is given alternative relief and his main relief is refused, he can file appeal against the decree denying the main relief.¹⁸ A person not being the party to the suit may file appeal with the leave of the court if the decree or order adversely affects him.¹⁹ An intervener who is a person interested in the public trust may appeal against the decree even though he was not a party to the suit.

Appeal from original decree. Section 96 of C.P. Code is the specific provision of appeals from original decree. Section 96 is reproduced below:

96. Appeal from original decree. (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed

9. *Devi Bai v. Ishwar Chaud* (1905) 5 SCC 733.

10. *Dey Chaud v. L.A.O.* AIR 1994 SC 190; (1994) 4 SCC 98.

11. *Ram Kumar Agarwall v. Thanaswar* (1999) 7 SCC 303.

12. *Ishwar Bhai Phule v. Harinar Debero* AIR 1999 SC 1341; (1999) 13 SCC 457.

13. *Vijayalakshmi v. Baldev* AIR 1965 SC 1874; *State v. Ram Srs* AIR 1976 All 121; *Baldev Singh v. Surinder Mohan* AIR 2003 SC 225; (2003) 1 SCC 34; *Ramnarai v. Ram Phal* AIR 2003 SC 1989; (2003) 9 SCC 106.

14. *Purmozilath Ganoli v. H.M. Seeriyal* AIR 1971 SC 385; (1971) 1 SCR 803.

15. *Gulab Chaud v. Noorbeg* AIR 1980 Bom 307; AIR 1977 Mad 25; AIR 1974 Raj 21.

16. *Ganga Bai v. Vday Kumar* AIR 1974 SC 1126; 1974 Mah LJ 602; AIR 1978 All 88.

17. *Arjun Singh v. Tarulati* AIR 1974 Pat 1; AIR 1982 All 414.

18. *Smriti Bai v. Anandlal* AIR 1983 All 23.

19. *United Commercial Bank v. Hanuman Srinivas* AIR 1965 Cal 90; AIR 1970 SC 1354.

by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed *ex parte*.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by the Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed ten thousand rupees.²⁰

Consent decrees. Sub-section (3) of s. 96 interdicts exclusion of appeal against consent decrees. Bar to appeal against consent decree is based on the broad principle of estoppel. It presupposes that the parties to an action can expressly or by implication waive or forego their right of appeal by any lawful agreement or compromise. However, it is only when the decree of compromise shows that the decree is a valid compromise decree that only the appeal is not maintainable.²¹ But a compromise decree against minor for which no leave was taken from the court is not valid as under Or. 34, r. 7, C.P. Code the leave of the court by the guardian before compromising a suit on behalf of a minor is mandatory. When a compromise decree is invalid because of not obtaining the leave from the court before entering into compromise an appeal at the instance of the minor is entertainable.²² Prior to 1976 Amendment of the C.P. Code, cl. (a) of r. 1 of Or. 43 provided that an appeal was maintainable against the order recording or refusing to record compromise. But the Amendment Act of 1976 has taken away that right. But new r. 1A has been added to Or. 43 inserted by the same 1976 Amendment Act provides that against a decree passed in a suit after recording a compromise it shall be open to the party aggrieved to challenge the consent decree on the ground that the compromise should not have been recorded. In view of the above change in law Supreme Court has held that s. 96(3) bars an appeal against the compromise decree implies that such decree is valid and binding on the parties unless set aside by the procedure prescribed or available to the parties and that in view of the interdiction of r. 1A of Or. 43 the parties aggrieved can challenge the validity of the compromise decree on the ground that the compromise should not have been recorded and that consequently s. 96(3), C.P. Code shall be no bar to such an appeal because s. 96(3) is applicable to cases where the factum of compromise or agreement is not in dispute.²³ Bombay High Court has also held that when a party challenges the signature of his advocate on the compromise petition as not genuine he can prefer appeal against such compromise decree.²⁴

It has, however, been rightly pointed out by Andhra Pradesh High Court that where in a suit the defendant admitted all the material facts in the plaint and consent decree is passed appeal against such consent decree is not maintainable in view of s. 96(3), C.P. Code.²⁵

Decree for costs. An appeal lies from a decree for costs only. When the court refuses costs and directs the parties to bear their own costs, an appeal may be filed against such part of decree alone.²⁶

Decree passed by court of small causes. Sub-section (4) of s. 96, CPC prohibits an appeal against the decree of the court of small causes when the amount or the value of the

20 *Kewal Krishna v. Shih Kumar* AIR 1970 Punj 176; *K.C. Dora v. Guateddy* AIR 1974 SC 1001; (1974) 1 SCC 561.

1 *Mathura Singh v. Demdhar Singh* AIR 1972 Pat 17.

2 *Bomwardlal v. Chandra Devi* AIR 1993 SC 1134; (1993) 1 SCC 581; *Anand Deep Singh v. Ranjit Kaur* 2000 AHC 3083; (2000) 54 DRJ 284.

3 *Deoran v. Devkumbar* AIR 1984 Bom 474; 86 Bom LR 264.

4 *Devi Kaulat v. H. Co-operative Marketing Society* AIR 1994 AP 301 (DB).

5 *Srinannamma v. B. Mukunda* AIR 1979 Kant 150.

subject-matter does not exceed Rs. 10,000. Originally this sub-sec. (4) was incorporated by CPC (Amendment) Act 1976 which came into force with effect from 1st April 1977. The Amendment Act 1977 debarred the appeal when the amount of value of the subject-matter of original suit did not exceed 3,000 rupees. However, by CPC (Amendment) Act 1999 the words "three thousand rupees" have been substituted by "ten thousand rupees". This amendment has come into force with effect from 1.7.2002. Therefore, in view of this amended provision of CPC (Amendment) Act 1999 no appeal from a decree in any suit of the nature of cognizable by courts of small causes shall not lie when the amount or value of the subject-matter of the original suit does not exceed 10,000 rupees. However, sub-sec. (4) excludes from its operation the appeal on a question of law.

Therefore, the appeal shall lie against the decree of small causes court only on the question of law whatever may be the amount or value of the suit. Sub-section (4) as it originally stood according to Rajasthan High Court would have attracted to a decree even if passed prior to 1st February 1977 when the appeal was preferred after 1st February 1977.⁶

But Madhya Pradesh High Court has held that sub-sec. (4) as inserted by 1976 Amendment would not be attracted when the suit was filed prior to 1st February 1977.⁷

Appeal from final decree where no appeal from preliminary decree. Section 97, C.P. Code provides that where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree. It is clear, therefore, that if any party is aggrieved by the preliminary decree he must prefer appeal against such preliminary decree. If he does not prefer any appeal against such preliminary decree the preliminary decree should be taken to be conclusive as regards the findings arrived therein if no appeal is preferred therefrom.⁸ It has been held by Supreme Court that this bar is enacted because a preliminary decree passed whether in a partition suit or mortgage suit is not a tentative decree but operates as conclusive as regards the facts decided therein.⁹

Hearing of appeal by Bench of Judges. Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges. Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed: Provided that where the Bench hearing the appeal is composed of two or other even number of Judges belonging to a court consisting of more Judges than those constituting the Bench, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it. Nothing in this section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court (s. 94, CPC). Under the proviso to sub-sec. (2) of s. 98 the reference to third Judge is on the point of law only. The third Judge cannot go behind the finding of fact arrived at by the differing Judges. Such finding of fact is binding on the third Judge.¹⁰

6. *Dharwad v Solankar* AIR 1981 Raj 14.

7. *Lakshmi Chand v Mittal* AIR 1984 MP 112; 1984 MPLJ 145.

8. *Chittrani Subbanna v Kadappa Subbanna* AIR 1965 SC 1325; (1965)2 SCR 661; (1966)1 SCJ 269; *Moyl Chand v D.D.C.* AIR 1995 SC 2493; *M.G. Jaitpalan v Sonjit Kumar Dey* 1997 AIR HC 1132 (Cal).

9. *Venkat Reddy v Putha Reddy* AIR 1963 SC 992; *Kanawtya Devi v Bajrath* AIR 1961 SC 790; *Venkatrao v Mahati Bai* AIR 2003 SC 267; (2003)1 SCC 722.

10. *Pulin Behari v Mahadev* AIR 1981 Cal 61.

By the 1976 Amendment to the Code proviso to sub-sec. (2) has been amended and for the existing words the words, namely, "composed of two or other even number of Judges belonging to a court consisting of more Judges than those constituting the Bench" has been substituted. It has been held that this amendment is not retrospective in operation and the amended provisions of s. 98, C.P. Code shall not apply to or affect any appeal against the decree passed in any suit instituted before the commencement of the Amendment Act of 1976 i.e. before 1st February 1977. It has been held that the amended provisions would not also apply to suits pending on 1st February 1977 from which an appeal arises in the long run. Thus when a suit has been filed before the amendment of 1976 appeal filed even after 1st February 1977 is to be governed by the unamended s. 98.¹¹ In *Tez Kaur v Kripal Singh*¹² the Supreme Court has also laid down what should be the proper course when the opinion of the High Court Judges hearing an appeal is equally divided on a question of fact. It has been observed by Supreme Court that the difference of opinion between Judges who constituted the Bench hearing the appeal on a point of law alone would be referred to a third Bench of other Judges according to rules of that High Court and by implication, on question of fact when there is no majority opinion varying or reversing that decree, appeal from such decree should be confirmed and the disputed question of fact should not be referred to a third Judge.

Sub-section (3) of s. 98 provides that nothing in s. 98 shall be deemed to alter or otherwise affect any provision of the Letters Patent of the High Court. When the High Court of Punjab and Haryana is governed by Letters Patent and cl. (26) of which provides that in case of difference between the two Judges of High Court even on the question of fact the same can be referred to the third Judge, then that clause of Letters Patent shall prevail and even question of fact can be referred to the third Judge.¹³

The post of third Judge vacant. The Supreme Court has held that the words "consisting of" in the proviso to s. 98(2), CPC mean and have relevance only to the sanctioned strength of the High Court. Hence, when the sanctioned strength of the High Court was three but only two Judges were in position who differed from each other and referred the matter to the third Judge, then the matter should await the arrival of the third Judge.¹⁴

Decree not be reversed or modified when. No decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any misjoinder or non-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the court. Nothing in this section shall apply to non-joinder of a necessary party (s. 99, CPC). When a case has been decided on merits and judgment rendered it should not be varied or reversed purely on technical grounds unless such technical defects occasion a failure of justice.¹⁵ In case of procedural irregularity the appellate court can interfere only if the procedural irregularity occasions a failure of justice.¹⁶ When there is no non-joinder of necessary parties it is not fatal. It causes no injustice. So in such a case appellate court cannot interfere.¹⁷

11 *Lakshmi Chand v Mithu* AIR 1984 MP 112; 1984 MPLJ 145; 1984 Jhb.LJ 511.

12 AIR 1995 SC 1681; (1995)5 SCC 119.

13 *S.J.P. Committee v M.P. Das Chela* AIR 1998 SC 1978; (1998)5 SCC 157.

14 *Sikkim Sahitya Associates v State of Sikkim* AIR 2001 SC 2062; (2001)5 SCC 629.

15 *Satyendra v Balaran* AIR 1981 Cal 206; *Kiran Singh v Chaman Patman* AIR 1954 SC 340; (1955)1 SCR 117.

16 *George v Thekkakara* AIR 1979 Ker 1.

17 *V.A. Setty v M.G. Brothers* AIR 1981 AP 250.

If the trial court improperly admitted some inadmissible evidence but there are other legal evidence to justify the finding the appellate court will not interfere with that finding.¹⁸

No order under s. 47 to be reversed or modified unless decision of the case is prejudicially affected. Section 99A inserted in the Code by 1976 Amendment Act provides that without prejudice to the generality of the provision of s. 99 an order under s. 47 shall be reversed or substantially varied, on account of any error, defect or irregularity in any proceeding relating to such order, unless such error, defect or irregularity has prejudicially affected the decision of the case.

It is to be noted that s. 2(2), C.P. Code which defines a decree also stands amended by the Amendment Act of 1976 because of which an adjudication by the execution court under s. 47, C.P. Code is no longer a decree and as such since the above Amendment Act comes into force the same is no longer appealable. But this amendment does not affect appeals against the order under s. 47, C.P. Code pending from before the above Amendment. However, s. 99A introduced by the same Amendment Act of 1976 now provides that even in such pending appeals unless the error, defect or irregularity prejudicially affects the decision, an order under s. 47, C.P. Code can neither be reversed or varied. When the substitution of the legal representatives of the decree-holder after the execution case were challenged on the ground that the execution case was barred by limitation as 12 years had already been passed from the date of the decree, the said objection was overruled and it has been held that when against the decree passed there was an appeal and the decree of the appellate court got merged with the decree of the trial court the substitution application having been filed within 12 years of the date of the appellate decree the execution was not barred by limitation. It was also held that no prejudice having been caused to judgment-debtors by the substitution, in an objection under s. 47 such order of substitution cannot be set aside in view of s. 99A, C.P. Code.¹⁹ It has been observed by Punjab High Court that in view of Or. 21, r. 58(4), C.P. Code the decision in a claim case is appealable as a decree despite s. 2(2), C.P. Code putting an embargo on appealability of an order in a case arising out of an execution case. It has, however, been observed that in such a case s. 99A would operate to such appeals and no such order shall be reversed or modified unless the error, defect or irregularity of the case had prejudicially affected the decision of the case.²⁰

Power of the appellate court hearing the first appeal. The appellate court hearing the first appeal is the final court of facts. It has the power to reassess and re-appreciate the findings of fact to arrive at a finding of fact different that of the trial court.¹ The appellate court can reverse the finding of fact of trial court but three things must appear in the judgment of the appellate court if it interferes with the finding of fact of the trial court, namely, (1) that the appellate court applies its mind to the reasons given by the trial court; (2) that it was present in the mind of the appellate court that it had no advantage to watch the demeanour of the witnesses; (3) and that the appellate court has given cogent reasons for disagreeing with the trial court.² But the appellate court agreeing with the finding of the trial court need not re-state the reasons and the expression of general agreement with the reasons of the trial court would be sufficient.³ When the court of appeal without considering the questions whether the plaintiff respondent had proved his title to the property in dispute or not proceeded to examine whether the respondent

18 *Hulas v. Mubhan Lal* AIR 1950 Raj 94

19 *Asantlal v. Gouri Prasad* AIR 1979 Pat 202.

20 *Avinash Chandra v. Mohanlal* AIR 1984 Patj 39.

1 *Narhanda Devi Gupta v. Jirendra Jaiwal* (2003)8 SCC 745; *Madarimal v. Yojna Bai* AIR 2003 SC 1880; (2003)5 SCC 89.

2 *Madhusudan v. Narayani* AIR 1983 SC 114; *Sudheshwar v. Bagnangi* AIR 1984 Pat 287.

3 *Balaji v. Nara Singh* AIR 1978 Ori 199.

was in possession thereof, in a suit for ejection based on title it was incumbent on the part of the court of appeal to record a finding on the claim of title to the suit land made on behalf of the plaintiff-respondent. When the appellate court never enquired or investigated into the title of the plaintiff at all a serious error occurred and the judgment and decree is liable to be set aside only on that ground.⁴

When the trial court after elaborate discussion of the evidence on record has come to a definite finding, the first appellate court without focussing its attention on the mighty reasons advanced by the trial court and without examining the materials on record in that respect did not set aside the finding but reversed the decree. Such action of the appellate court was not proper and the High Court in second appeal should not have dismissed the second appeal *in limine*.⁵

But when the plaintiff claimed the decree against both the defendants jointly and severally but the trial court granted the decree against one and dismissed the suit against the other, the High Court as the appellate court was justified in modifying the decree and decreeing the suit against both when the defendants were found to be liable jointly and severally.⁶

The appellate court must examine the evidence on record. In the absence of such examination a doubt as to the correctness of the conclusion of the appellate court would remain.⁷

The appellate court in first appeal is duty bound to make a critical analysis of the matter before it. It cannot mechanically affirm the finding of the trial court without due and proper application of mind.⁸

In the light of s. 100 being amended by 1976 Amendment the first appellate court under s. 96 is not only the final court of facts but also the final court of law in that its decision on question of law is no longer assailable before the High Court in second appeal unless such a question is substantial question of law.⁹

So the first court of appeal must record its findings only after dealing with all issues of law and of facts and the appellate court must give reasons for its findings. It cannot set aside the findings of the trial court without even considering the grounds on which the trial court had dismissed the suit and without discussing the evidence on record.¹⁰

Power to consider subsequent events. At the appeal stage subsequent events cannot be taken indiscriminately into account. The appeal court may be permitted to take into account by way of amendment of pleadings subsequent events in order to avoid multiplicity of proceedings, but not where such amendment would cause prejudice to the vested right of the plaintiff and render him remediless.¹¹

However, in a suit or proceeding for eviction on the ground of personal requirement the personal requirement must subsist till the passing of the decree. The landlord must satisfy that the need subsists till that date. The need may be available at the time of filing of the petition for eviction but at the time of granting of decree it may not subsist. In that event the decree for

4 *Nagar Palika v Jagat Singh* AIR 1995 SC 1377; (1995)3 SCC 426.

5 *Sowarni v Buler Kaur* AIR 1996 SC 2823; (1996)6 SCC 223.

6 *Ishwar Bhai Patel v Harihar Behera* AIR 1999 SC 1341; (1999)3 SCC 457.

7 *Devnam v Indumati* (2000)10 SCC 540.

8 *State of Rajasthan v Harphool Singh* (2000)5 SCC 652; JT 2000(5) SC 546.

9 *Santosh Hazari v Purushottam Tiwari* AIR 2001 SC 965; (2001)3 SCC 179.

10 *Madhukar v Sangram* AIR 2001 SC 2171; (2001)4 SCC 756.

11 *Shyam Sundar v Ram Kumar* AIR 2001 SC 2472; (2001)8 SCC 24.

eviction cannot be made. Similarly pending appeal the need may have become more acute. So the court should take into account to all subsequent events to grant the relief.¹²

When Supreme Court has found that the need ceased to be sustainable it took the subsequent event into account to set aside the decree for eviction of a premises tenant.¹³

Change of law. Both the trial court as well as the appellate court shall take note of any change of law affecting pending action, and to give effect to the same.¹⁴

The ground on which the second appeal shall lie to High Court. Prior to the amendment of s. 100, C.P. Code by the C.P. Code (Amendment) Act 1976 a second appeal to High Court could be filed on the following grounds, namely:

- (1) The decision being contrary to law or usage having the force of law;
- (2) the decision having failed to determine some material issue of law or usage having the force of law;
- (3) a substantial error or defect in the procedure provided by the C.P. Code or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits.

The interpretation of the above six (1), (2) and (3) led to plethora of decisions of different High Courts which contradicted one another. The joint committee of Parliament on considering the report of Law Commission and the other evidence produced before it have recommended the restriction of the scope of second appeal and accordingly s. 100, C.P. Code has been amended by the C.P. Code (Amendment) Act 1976 providing that the right of second appeal shall be confined to cases where a substantial question of law is involved between the parties. The intention of the new amendment is definitely to restrict the period of litigation so that the cases are not dragged unnecessarily for a long period.

Substantial question of law. The Division Bench of Calcutta High Court interpreted the expression "substantial question of law" used in amended s. 100 in the light of Supreme Court's decision in *Chandil Mehta & Sons Ltd. v Century Spinning Manufacturing Co.*¹⁵ and *Mahindra & Mahindra's Union of India*¹⁶ that no second appeal would lie after the amendment of s. 100, C.P. Code by 1976 Amendment Act solely on the ground that the finding of the first appellate court has been arrived at no evidence or was such as could not be arrived at on the evidence on record by any reasonable manner or even on the ground of finding arrived at on an erroneous application of law which was otherwise settled.¹⁷ The Division Bench in arriving at such finding had drawn its inspiration from the following observation of Supreme Court in *Chandil Mehta's* case:

"The proper test for determining whether a question of law raised in the case is substantial, would, in our opinion, be whether it is of general public importance or whether it directly or substantially affects the rights of the parties and if so, whether it is an open question in the sense that it is not finally settled by this court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the question are well settled and there is mere question of applying these

12. *Babu Kachinath Bhinge v Samrat* 1994 Supp (3) SCC 696.

13. *Sionni Transport (P) Ltd. v Rajamattikun* 1994 Supp (2) SCC 483.

14. *United Bank of India v Ahijit Tea Co. (P) Ltd.* (2000) 7 SCC 357.

15. AIR 1963 SC 1514.

16. AIR 1979 SC 398.

17. *Deokinandan Baidya v Harasumbhar* (1988) 1 Cal LJ 278; 1988(1) CHN 180.

principles or that plea raised is palpably absurd the question would not be a substantial question of law.¹⁸

However, a later Division Bench of the Calcutta High Court differed with the earlier division bench laying down the scope of interference by the High Court in second appeal in the light of the amended provisions of law and the matter has been referred to Full Bench of five Judges and the Full Bench has reviewed all the decisions on the point has reversed the Division Bench judgment in *Deokanandan Poddar's case*.

The Full Bench (per majority) has held that where the appeal court or both the trial and appeal courts arrive at a conclusion on no evidence, the judiciary of this land and also abroad has always been consistent with the view that where no evidence goes into the question, that question would not be a question of fact but would raise a question of law and that a question of law becomes a substantial one if the question affects rights of or before the parties. The Full Bench has also held that the fact that s. 103, C.P. Code still exists after amendment of s. 100 and that Or. 42 read with Or. 41 have been left unaffected or untouched is an eloquent testimony that at the final stage the Law Commission found that judicial review of evidence and materials and conduct of the proceedings at the courts below cannot altogether be ruled out. So, overruling the Division Bench the Full Bench has concluded that second appeal would lie from a finding of fact arrived at on no evidence or arrived at perversely or on an erroneous application of law which is otherwise well-settled.¹⁹

The Full Bench has observed that the interpretation of the expression of "substantial question of law" by the Supreme Court in *Chunilal Metha's case* is to be limited to the provisions of Art. 133 of the Constitution and cannot be relevant in interpreting the similar expression used in s. 100, C.P. Code as amended.

The Full Bench has laid stress on the interpretation of the provisions of s. 100, C.P. Code made by the Supreme Court in *Dilbagrai v Sharad Chandra*¹⁹ wherein the Supreme Court has held that where in a suit the lower court without considering any part of evidence, oral or documentary, came to a finding of fact the High Court in second appeal would be right in reversing the finding. In that decision the Supreme Court has also observed that the court is under a duty to examine the entire relevant evidence on record and if it refuses to consider important evidence having direct bearing with the respective issue and the error which has arisen is of magnitude it definitely gives rise to a substantial question of law and the High Court in second appeal is fully authorised to set aside that finding in which the finding of fact is vitiated by non consideration of relevant evidence or by an essentially erroneous approach in the matter.

In a later decision also the Supreme Court has re-iterated the principles laid down in *Dilbagrai's case* which has strengthened the views expressed by full bench of Calcutta High Court.

In *Jagdish Singh v Nathu Singh*²⁰ the Supreme Court has held that when the finding of courts of fact is vitiated by non consideration of relevant evidence or by erroneous approach to the matter the High Court in second appeal even under the amended s. 100, C.P. Code is not precluded from arriving at a proper finding.

It has also been held by the Supreme Court that when the finding of fact is vitiated in law, the High Court in second appeal can re-appreciate and re-examine the evidence.¹

18. *Ratimal v Keshorilal* AIR 1993 Cal 144, (1993) Cal LJ 193; 1993(1) CHN 307; 97 Cal WN 227 (FB).

19. AIR 1988 SC 1858.

20. AIR 1992 SC 1604; (1992)4 SCC 647.

1. *Srichand Gupta v Guljar Singh* AIR 1992 SC 123; (1992)1 SCC 143.

When the finding on possession is made ignoring important documentary evidence, it is vulnerable in second appeal.² When there is a gross misappreciation of evidence which goes to the root of the matter, certainly the second appellate court can exercise its jurisdiction to interfere with the findings of the fact.³

However, the Supreme Court has pointed out that the interference by the High Court in the second appeal should be based on formulation of substantial question of law. Otherwise interference on the ground of erroneous appreciation of law and evidence by the courts below is not sustainable in second appeal.⁴

When the courts below had rejected and disbelieved the evidence on the ground that the propounder had not properly discharged his duties it is the duty of the High Court in second appeal to test whether the reasons given by the courts below were sustainable in law. So the High Court did not commit any illegality by deciding to test the reasons and rightly hold that the reasons given were flimsy. So there was a substantial question of law that had arisen for the High Court to interfere.⁵

But the question of *bona fide* requirement in a suit for eviction of a premises tenant by the landlord does not give rise to any substantial question of law. It is entirely a matter to be decided on appreciation of evidence. So the interference of such finding by High Court in second appeal is not sustainable.⁶

When the High Court in second appeal allowed the tenant's appeal challenging his eviction on the ground of sub-letting and committing nuisance without formulating substantial question of law and also by re-appreciating the evidence the interference of the findings of fact in second appeal is illegal in view of s. 100 as amended in 1976 Amendment Act.⁷

When the question of title arises on the basis of interpretation of proved document it is a question of law and High Court in second appeal is justified in interfering with such interpretation when it involved substantial question of law.⁸

When the first appellate court can be said to have assumed jurisdiction which it did not really have, the High Court in second appeal can interfere as it involves substantial question of law.⁹ But when the question of maintainability of the suit has attained finality and operates as *res judicata* the High Court rightly refused to interfere with such finding in second appeal.¹⁰

Similarly when the substantial question of law has already been decided by a larger bench of the High Court or by the Privy Council or by Federal Court or by Supreme Court, mere wrong application of facts of a particular case does not create another substantial question of law to be decided by High Court in second appeal.¹¹

2. *J.N. Valliath v Nomanwanji* AIR 1994 SC 532; 1995 Supp (4) SCC 534.

3. *Md. Fuzar v Gurudax Singh* 1995 Supp (1) SCC 418.

4. *Rambir Singh v Ashrafulla* (1985)6 SCC 580.

5. *Mujar Singh v Ratan Singh* AIR 1997 SC 1906.

6. *Ram Prasad Rajot v Nand Kumar & Bros.* AIR 1998 SC 2130; (1998)6 SCC 748.

7. *Hari Singh v Kamrajada* (1991)7 SCC 288.

8. *Neelâ Narayani v Lakshmanan* (1999)9 SCC 237; *Santa Kumar v Lakshmi Aruna Janki Aruna* (2001)7 SCC 60.

9. *K.D. Kadam v Savaribai* AIR 1999 SC 2213; (1999)3 SCC 722.

10. *Ashok Kumar Srivastava v National Insurance Co. Ltd.* (1998)4 SCC 361; (1998 SCC (L&S) 157); (1998)11 LLJ 699; (1998)2 LLN 987.

11. *K.D. Kadam v Savaribai* AIR 1999 SC 2213; (1999)3 SCC 722.

The High Court was not justified in allowing second appeal on the basis of surmises and conjectures contrary to those findings of the lower appellate court without considering the pleadings or the findings of the first appellate court based on materials on record.¹²

When there is some evidence for the findings but the appreciation of evidence is an erroneous, a second appeal will not lie.¹³

But when misreading of evidence by appellate court would lead to miscarriage of justice or its findings are based on no evidence and it is perverse the High Court would be justified in interfering in second appeal.¹⁴

When there are conflicting decisions of different High Courts on the issue then a substantial question of law is necessarily involved.¹⁵

If in recording a finding the court does not bear in mind the statutory mandate such finding would not be a finding of fact. Such an erroneous finding involves a substantial question of law.¹⁶

Whether the plaintiff has established that he was ready and willing to perform his part of the contract or not is not a substantial question of law to be decided by High Court in second appeal.¹⁷

However, substantial question of law under s. 100 need not, however, be one "of general importance" as the legislature has not chosen to qualify the scope of "substantial question of law" in s. 100 by suffixing the words "of general importance" as has been done in many other provisions such as s. 109, CPC or Art. 133(1)(a) of the Constitution.¹⁸

When first appellate court while reversing the finding of the trial court dismissing the suit on the ground of non-joinder of necessary party, examined pleadings and the evidence on record, no interference of such finding is called for in second appeal as no question of law and not to speak of substantial question of law is involved.¹⁹

But when in second appeal against the dismissal of eviction suit the High Court in second appeal treated the denial title of landlord by tenant as primary ground for eviction though it was not at all an issue before the trial court, the High Court's decision suffers from violation of procedure adopted by civil court but also violation of principles of justice and fair play.²⁰

This is because the High Court in second appeal has no jurisdiction to make out a new case and render findings thereon.¹

Bombay High Court relying on the Full Bench judgment of Calcutta High Court and the relevant decisions of the Supreme Court has held that when the finding is recorded against the plaintiff without considering important admission, notice, reports and actual photographs, it is concurrent finding fact reached completely ignoring material evidence and consequently the finding is liable to be interfered with in the second appeal.² Kerala High Court has also held that finding of fact even also though seldom gives rise to a substantial question of law if a finding

12. *Saxli Kanta Bua v Ind Minerals* AIR 2000 SC 2745; (2000)6 SCC 604.

13. *Thimmiah v Nivvanma* (2000)7 SCC 409; JT 2000(9) SC 516.

14. *Rohini Prasad v Kasturchevi* AIR 2000 SC 1283; (2000)3 SCC 668.

15. *D.B. Vasava v Ramchhobhai Zinabhai* AIR 2000 SC 1000; (2000)3 SCC 22.

16. *Deema Nath v Pooran Lal* AIR 2001 SC 2655; (2001)5 SCC 705.

17. *V. Anand v Seenu Anand* AIR 2001 SC 2920; (2002)1 SCC 134.

18. *Santosh Huzari v Purushottam Tivari* AIR 2001 SC 965; (2001)3 SCC 179.

19. *Kulsoma Bibi v Abdul Mannan* AIR 2002 Cal 1.

20. *J.J. Lal Pvt. Ltd. v M.R. Murali* AIR 2002 SC 1061.

1. *Babu Ram v Indra Pal Singh* AIR 1998 SC 3021; (1998)6 SCC 358.

2. *Saria Devi v Shalesh* AIR 1996 Bom 98.

finding material bearing on the rights of the parties is vitiated for any reason that can give rise to substantial questions of law.³

Allahabad High Court has held that when the lower courts ignore the weight of evidence altogether and record a finding of fact, the High Court in second appeal is competent to re-appreciate the evidence and give its own finding.⁴

Madhya Pradesh High Court has held that when the landlord claimed eviction on the ground of *bona fide* requirement and it was dismissed by discarding a vital evidence, it is a fit case for the High Court in second appeal to re-appreciate the evidence and grant the landlord the decree for eviction.⁵

Substantial question of law as between parties. It has been held by the Patna High Court that under s. 100 C.P. Code, the substantial question of law obviously means the substantial question of law as between the parties and not merely a question of law of general importance.⁶

Concurrent finding of fact, when not vulnerable in second appeal. A concurrent finding of fact of the courts below regarding sub-letting based on evidence on record cannot be interfered with in second appeal.⁷

When both the trial court and lower appellate court concurrently upheld the defence contenting that the sale deed and the agreement for re-purchase were created to secure loan from the vendee, in the absence of any material irregularity in the finding, no question of law involved in the case for the High Court to interfere in second appeal on re-appreciation of evidence.⁸

It is therefore settled law that when the concurrent findings of fact of the courts below are based on evidence, they cannot be interfered with in second appeal.⁹

Concurrent findings of facts of both the courts below that the possession of the defendant was permissive cannot be interfered with in second appeal.¹⁰

When there is a concurrent finding of fact that from the inception of the lease the object and purpose of lease was composite one the High Court in second appeal cannot interfere with such finding of fact.¹¹

Where there was concurrent findings of both the courts below that the alternative accommodation was in the distant place and does not disentitle the landlord to evict the tenant on the ground of reasonable requirement the same cannot be interfered with in second appeal.¹²

Finding of fact when can be interfered with in second appeal. When non-examination of one of the respondents as a witness by the appellant goes to the root of the whole case and no explanation was given for his non-examination, the High Court in second appeal was justified in interfering with the findings of fact on drawing adverse inference for such non-examination and can come to the finding that the finding of the first appellate court is based on no evidence.¹³

3 *State of Kerala v Suroja* AIR 1987 Ker 239.

4 *Ajab Singh v Sital Pari* AIR 1993 All 138; 1993 All LJ 54E.

5 *Ramesh v Prem Kumar* AIR 1991 MP 94.

6 *Syantam Singh v Jamuna Devi* (1987)1 Cur Civ Cas 9 (Pat).

7 *Keshav Singh v Yash Pal* AIR 1990 SC 2212.

8 *Mari Uthairar v S.P. Arumuga Naicker* 1995 Supp (1) SCC 152.

9 *Kashibai v Parwaribai* (1995)6 SCC 213; *Gavigowda v Kallegowda* AIR 1996 Kar 131; *Shyamur Devi v Premrasi* AIR 1996 All 57.

10 *Roop Singh v Ram Singh* AIR 2000 SC 1485.

11 *Rammohan & Co. v M/s. Ganeswar Ginning Co. (P) Ltd.* AIR 2000 Mad 1.

12 *Sellendro Kumar Deb v Pramila Bhow* AIR 2000 Cal 1.

13 *Rajappa v Mahadev* AIR 2000 SC 2108.

When finding on possession was rendered by courts below ignoring important documentary evidence the said finding is vulnerable in second appeal.¹⁴

When the court's misappreciation of evidence goes to the root of the case, certainly the High Court in second appeal can interfere with such finding of fact.¹⁵

So concurrent finding of fact ignoring material evidence can be interfered with in second appeal.¹⁶

When the courts below did not consider relevant documents in their proper perspective and effect of those document on the right of the parties, the High Court in second appeal is entitled to reconsider the evidence by drawing inferences from the admitted documents.¹⁷

When the finding of fact is found to be perverse interference with such finding second appeal is permissible because substantial question of law includes within its ambit, the issue of perversity.¹⁸

If the first appellate court has not determined the relevant issues in a case on account of an erroneous approach resulting from misreading of the provisions of law, wrongful placing of burden of proof etc. the High Court in second appeal is justified in recording its own finding of fact under s. 100 read with s. 103, CPC.¹⁹

In second appeal a finding even if erroneous will not generally be disturbed but when it is found that the findings stand vitiated on wrong test and on the basis of surmises and conjectures and resultanty there is an element of perversity involved therein, then the High Court can interfere with finding of fact under s. 100 read with s. 103, CPC.²⁰

It is therefore well settled that concurrent finding affect cannot be interference with by High Court in second appeal without sufficient and just reasons.¹ Reasons for interference just be consistent with the limitation provided under s. 100, CPC.²

Plea not raised or abandoned. When the plea is abandoned in lower court, it cannot be raised either in the first appeal or in second appeal.³ When the courts below came with findings on the basis of the evidence that the landlord *bona fide* required the premises, the tenant for the first time in second appeal cannot take the plea that the landlord inducted a few tenants on the ground floor of the premises immediately before the filing the eviction suit.⁴ When the new question raised in second appeal is a mixed question of law and fact, the party cannot urge such plea in second appeal for the first time.⁵ When in the first appellate court the plea that on the death of the defendant No. 2 during the first appeal, the first appeal had abated wholly was not raised in the first appeal, the appellant in second appeal cannot raise that plea.⁶

14. *S.N. Vadiyar v Ramawamy* AIR 1994 SC 532; 1995 Supp (4) SCC 534.

15. *Md. Yunus v Gur Bux Singh* 1995 Supp (1) SCC 418.

16. *Sarela Devi v Suresh* AIR 1996 Bom 98.

17. *Kachukada Aboobacker v Atta Kashmir* (1996)7 SCC 289.

18. *Kulwant Kaur v Gardial Singh Mann* AIR 2001 SC 1273; (2001)4 SCC 262.

19. *Leela Sani v Rajesh Goyal* (2001)7 SCC 494.

20. *Kulwant Kaur v Gardial Singh Mann* AIR 2001 SC 1273; (2001)4 SCC 262.

1. *Sayeda Akhtar v Abida* 4 had AIR 2003 SC 2985; (2003)7 SCC 52.

2. *Chandkumari v Kamal* (2002)10 SCC 489.

3. *Mahesh Chand v Raj Kumari* AIR 1996 SC 889.

4. *Pal Singh v Sarwar Singh* AIR 1989 SC 258; (1989)1 SCC 444.

5. *Pathan Murtaza Khan v Pathan Pir Khan* AIR 1993 SC 1750.

6. *Chaya v. Banumatheb* (1994)2 SCC 41.

Formulation of substantial question of law. Sub-section (4) of s. 100, CPC provides that during admission the substantial question of law has to be formulated by the High Court. So the High Court has the duty in second appeal to formulate the substantial question of law and put the opposite party on notice and give fair and proper opportunity to the point. In the absence of such formulation of substantial question of law to be decided by the High Court in second appeal and hearing of second appeal without formulating such substantial question of law would be illegal.⁷

So it is clear that interference in second appeal should be based on the formulation of substantial question of law by High Court as required by sub-sec. (4) of s. 100, CPC.⁸ The High Court can exercise its jurisdiction only on the basis of the substantial question of law which is to be framed at the time of admission of appeal and the second appeal has to be heard and decided only on the basis of such duly framed question of law. So the High Court acquires jurisdiction to decide the second appeal on merits only after the substantial question of law involved in the second appeal is formulated by the High Court at the time of admission of second appeal. The decision of High Court in second appeal without framing such substantial question of law must be set aside.⁹

However, formulation may be held to be inferred from the kind of questions actually considered and decided by second appellate court, even though the substantial question of law was not specifically and separately formulated.¹⁰

But when the High Court in second appeal did not make any effort to ascertain whether any substantial question of law is involved in the second appeal, the Supreme Court remanded the second appeal to consider this aspect of the matter and to find out itself if any substantial question of law is involved in the second appeal or not.¹¹

However, the High Court is not bound to confine itself to dealing with the question initially formulated. But the High Court can hear the appeal on any other such question so long it is satisfied that the case involved that question and records its reason for such satisfaction.¹²

Sub-section (5) of s. 100—new legal plea. The parameter within which a new legal plea could be permitted to be raised is specifically stated in sub-sec. (5) of s. 100. Under sub-sec. (4) of s. 100 the duty is cast upon the court to formulate the substantial question of law involved in the second appeal initially. In view of sub-sec. (5) of s. 100, in exceptional cases, at a later point of time, the High Court may allow such question to be raised under the proviso to sub-sec. (5) of s. 100, but the opposite party has to be put to notice thereof. But when the High Court at the time of hearing the second appeal allowed the appellant to raise a new plea and decided the second appeal on such new plea, the High Court abdicated its mandatory duty cast upon it and exceeded its jurisdiction.¹³

A judgment rendered by High Court in second appeal without following the provisions of sub-secs. (3), (4), and (5) of s. 100, CPC cannot be sustained.¹⁴

7. *Khatish v Santosh* AIR 1997 SC 2517; *Kambayyalal v Anup Kumar* (2003)1 SCC 430.

8. *Kashibai v Parvati Bai* (1995)6 SCC 213; *Ranbir Singh (Dr.) v Ashrifi Lal* (1995)6 SCC 580.

9. *Rameshwarson v N. S.S. Karayagam* AIR 2000 SC 2058; *Ishwar Das Jain v Sohanlal* AIR 2000 SC 426; *Hardev v Jaidar* AIR 2000 Raj 142; *Garanjia v Hanumanthappa* (2003)10 SCC 281.

10. *M.S.V. Raju v Seoni Thevar* (2001)6 SCC 652.

11. *K. Raj v Mathamma* AIR 2001 SC 1720; (2001)6 SCC 270; *State of HP v Chamber Dev* 2004 AIR SCW 4352.

12. *Santosh Hazari v Purshattam Tiwari* AIR 2001 SC 965; (2001)3 SCC 179.

13. *Khatish v Santosh* AIR 1997 SC 2517.

14. *D.B. Sharma v Maroti Bhaurao Marnoe* AIR 1999 SC 864; (1999)2 SCC 471.

New plea in second appeal. A new plea, namely, pleading part performance of contract cannot be taken for the first time in second appeal.¹⁵

Scrutiny of evidence in second appeal not totally prohibited. It is only in very exceptional cases and on extreme perversity that the High Court in second appeal is permitted to scrutinise the evidence. But it is an exception rather than a rule. Thus it can be safely concluded that while there is no prohibition as such but the power to scrutinise can only be had in the exceptional circumstances and upon proper circumspection.¹⁶

Section 100A. Section 100A which has been incorporated in CPC (Amendment) Act 2002 has restored the said section which was what it contained when it was incorporated for the first time by the CPC (Amendment) Act 1976 with effect from 1.2.1977. However, a new s. 100A was substituted by CPC (Amendment) Act 1999. But by s. 4 of CPC (Amendment) Act 2002 the section has been restored to what it was there when it was first incorporated by CPC (Amendment) Act 1976. In view of s. 100A no appeal would be entertainable from the judgment or decree or order of a single Judge in second appeal.¹⁷

Letters patent appeal against the judgment of a single Judge sitting in appellate side is maintainable if the Judge delivering the judgment declares it as fit for appeal.¹⁸

When the single Judge of High Court under s. 218D of the Bombay Municipal Corporation Act 1888 heard second appeal against the appellate order passed by the Chief Judge, the Small Causes Court, Bombay and no further appeal is provided under the Act against such order passed by the single Judge of High Court under s. 218D, then s. 100A is attracted.¹⁹ The Supreme Court has held that s. 100A would not cause any prejudice to litigants.²⁰

Appeals from Orders. Section 104 of the C.P. Code as amended by the C.P. Code (Amendment) Act 1976 reads as follows:

(1) An appeal shall lie from the following orders and save as otherwise expressly provided in the body of the C.P. Code or by any law for the time being in force from no other orders:

(f) An order under s. 35(A).

(fa) An order under s. 91 or s. 92 refusing leave to institute a suit of the nature referred to in s. 91 or s. 92, as the case may be.

(g) An order under s. 95.

(h) An order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree.

(i) Any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under s. 104.

Orders which are appealable. No appeal lies against the order returning the plaint when the court complies with the provisions of r. 10A of Or. 7. The order rejecting a plaint is a decree.

15 *Snyomlat v Matha* AIR 2002 HP 66.

16 *Jay-Singh v Sukantala* AIR 2002 SC 1428.

17 *A.D. Kamakia v P.K. Bhanerjee* (1977)2 Cal LJ 305; *Sonja Dagda v Manish Dagda* AIR 1979 Bom 62; 1980 Mub LJ 17.

18 *Jethuram v Parmanand Agarwall* (1988)1 Cur Crv Cas 338 (MP).

19 *Municipal Corporation v State Bank of India* (1999)1 SCC 123.

20 *Salam Advocates Bar Association v Union of India* AIR 2003 SC 189; (2003)1 SCC 49; 2004(2) ICC 608 (SC).

and is appealable as a decree.²¹ An order rejecting an application for cessation of suit or setting aside *ex parte* decree is appealable but not an order allowing such application.²² When the order under Cr. 9, r. 9 or r. 13 is dismissed for default such an order is appealable.²³ As the provisions of Cr. 9, r. 9 are amended for setting aside an order dismissing the application for probate for default, then an appeal lies from such an order.¹ According to Calcutta High Court the scope of appeal against the order dismissing the application under Cr. 9, r. 9 or r. 13, C.P. Code for default being very limited, the court can invoke the inherent power to restore such an application.² An order for dismissal of an application under Or. 21, r. 90 or under Or. 21, r. 105, C.P. Code is appealable.³ The order rejecting an application to sue as an indigent person is appealable under cl. (a).⁴ The order refusing the prayer of the defendant to release the property from attachment on his furnishing security is appealable.⁵ An order under r. 6 of Or. 38 is appealable.⁶ An appeal lies against an *ex parte* order of temporary injunction with notice to show cause.⁷ According to some High Courts remedy lies in a application under Or. 39, r. 4.⁸ According to Calcutta High Court the remedy is concurrent.⁹ Any order passed under Cr. 39, r. 1 or r. 2 interim or temporary is appealable.¹⁰ An order directing maintenance of *status quo* in an application under Or. 39, r. 1 or 2 is appealable.¹¹ Any order under Or. 39, r. 2A either inflicting punishment or refusing to take action is appealable.¹² An order appointing a receiver is appealable.¹³ Similarly an order directing to furnish security as a condition precedent to the appointment of receiver is appealable.¹⁴ When an order of appointment of receiver is made by the High Court in its original side it is a judgment and is appealable under the Letters Patent.¹⁵ The order granting review is appealable but not an order rejecting the application for review. Under the provisions as amended by 1976 amendment the order granting review on any ground is appealable. But prior to 1st February 1977 no appeal lay when the review was allowed on the ground of error apparent on the face of the record. Therefore when an order has been passed prior to 1st February 1977 granting review on the ground of error apparent on the face record it has been held that such order is not appealable.¹⁶

Orders not appealable. Order rejecting the memo of appeal for non-payment of court-fee is not appealable.¹⁷ An order under Or. 8, r. 10 is not appealable, but the decree drawn on the basis

21 *Alex. D'Souza v. M.S.R.T. Corporation* AIR 1975 Kant 122; ILR (1974) Kant 809. (Memo of appeal dismissed being barred by limitation. No appeal—*Balkrishna v. Tulsia* AIR 1987 MP 120).

22 *Bodha Krishna v. Bhakta* 1971 Andh WR 38.

23 *Gomati Ram v. Sachindar* AIR 1982 NOC 51 (Cal); AIR 1970 Tr 56.

1 *Nitya v. Beadi* AIR 1977 Gau 70 (FB).

2 *Salmita Datta v. Terabala* AIR 1970 Cal 210.

3 *V.A. Nathram Raja v. M. Chennir* AIR 1975 Mad 36, (1974) 2 MLJ 116; 87 MLW 328.

4 *Prabhat v. Santosh* AIR 1983 All 40; 1983 All WC 469.

5 *Firm Singh v. Bank of India* AIR 1981 NOC 71 (Pat).

6 *Union Bank v. Andhra Technocor* AIR 1982 AP 408.

7 *Firm Hwar Exr v. Parkash* AIR 1969 SC 938; AIR 1963 Gau 46; AIR 1982 Gau 264; *Zilla Puzasand v. Brahma Reda* AIR 1970 All 376.

8 *Abdul Shukor v. Dhanubhai* AIR 1976 Mad 350; AIR 1982 Kant 105.

9 *Shankar Kumar Ghosh, re* AIR 1983 Cal 250; 87 CWN 400.

10 *Alex v. Thimman* 1983 Ker LT 97.

11 *Kamaldas v. Dair* AIR 1982 NOC 5 (Cal).

12 *Inda Dewa v. Bhattaramulu* AIR 1988 OH 154.

13 *Srinivasa Rao v. Balurao* AIR 1970 Mys 141.

14 *Rajnarai v. Jaynarai* AIR 1973 Del 244.

15 *Shah Bahadur Khatri v. Jayaben* AIR 1981 SC 1786, (1981) 4 SCC 8.

16 *Bar Council of India v. Nehru Law Centre* AIR 1983 All 357.

17 *Hanumanth v. L.A. Officer* AIR 1985 Kant 276.

of such order is appealable.¹⁸ When the auction sale is confirmed on the failure of the judgment-debtor not to apply for setting aside the sale under Or. 21, r. 90, C.P. Code the order confirming such sale is not appealable.¹⁹ No appeal lies against the order upholding the objection of the third party against the execution of the decree for possession.²⁰ The order of *ad-interim* attachment or show cause under Or. 38, r. 5, C.P. Code is not appealable.²¹ In an application for temporary injunction only notice to show cause is issued. The order is not appealable.²² No appeal lies against an order appointing the commissioner under Or. 39, r. 7, C.P. Code.²³ Even though appointing or refusing to appoint a receiver under Or. 40, r. 1, C.P. Code is appealable yet the order permitting the receiver appointed by the court to be a party in a suit is not appealable.²⁴ When the court directs the receiver to render proper and complete accounts and his properties are attached till such final settlement such an order is not appealable.²⁵ An order confirming sale is not appealable.¹

Scope of s. 105. It is provided in sub-sec. (1) of s. 105 that an interlocutory order which had not been appealed from either because no appeal lay or even though appeal was not taken can be challenged in the appeal from the final decree.²

But an interlocutory order affirmed in revision by the High Court under s. 115, CPC is conclusive and operates as *res judicata* and cannot be raised in the appeal against final decree.³

Sub-section (2). Sub-section of s. 105 is an exception of the sub-sec. (1). An order of remand is appealable under Or. 43, r. 1(4), CPC and if a party does not prefer appeal against that order, he is precluded from agitating it in the appeal against the main decree.⁴

Section 107, CPC. Section 107, CPC specifies the powers of the appellate court. It reads as follows:

107. Powers of Appellate Court. (1) Subject to such conditions and limitations as may be prescribed, and Appellate Court shall have power—

- (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein.

Scope. It is clear from the provisions of s. 107, CPC that the appellate court shall exercise all such power as conferred on an authority exercising original jurisdiction. Since the single Judge

18 *Anur Chandra v Patilal* AIR 1985 Gau 67.

19 *Bokshi v Pakhar Singh* AIR 1985 P&H 322; TLR (1985)2 P&H 152.

20 *Balkashi v S. Mohanlal* AIR 1974 Guj 110.

21 *Palghar Rolling Mills v Visvesvaraya Iron and Steel* AIR 1985 Kant 282; *Union Bank v Anilima Technocrat* AIR 1982 AP 408.

22 *Khusal v Gavatal* AIR 1986 MP 47.

23 *Bithu Huzar v Bimal Sahu* AIR 1985 Cal 220.

24 *Prahlad Kumar v Anur Kumar* AIR 1978 Panj 23.

25 *Vijay Kumar v Benares Bank* AIR 1983 All 77.

1 *L. Balu v Periasami* AIR 1988 Mad 114.

2 *Kalutish v Commissioner* AIR 1981 SC 787; *Satyadhan v Deorajni* AIR 1960 SC 941.

3 *Ramasingh v Pyare* AIR 1974 Pat 153; *Shankar v Krishnaji* AIR 1970 SC 1.

4 *Sitaram v Sukhmani* AIR 1972 SC 1612; *Krishnarajany v Mathu* AIR 1979 Mad 173.

of High Court could pass an order of admission of a document as original court the appellate court being the Division Bench of High Court while remanding the matter to the single Judge can direct the trial Judge to treat the petition as admitted.⁵

Before reversing the finding of fact the appellate court is to bear in mind the reason given by the trial court to arrive at such finding. If he fails to do so then the order of appellate court is not proper.⁶

However, the appellate court on approving the finding of the trial court that the sale was for legal necessity cannot send the suit back on remand to the trial court to record further evidence to prove that the sale proceeds have been invested in immovable property.⁷

The appellate court could take judicial notice of the law prevailing at the time of the order or judgment and could grant relief accordingly.⁸

However, when the tenant can get the suit for eviction on the ground of default dismissed if he approaches the court and deposits arrears of rent etc. on the first day of hearing of the suit and on or before such other date as the court may fix, the first date of hearing cannot be stretched beyond the date before issues are framed in the suit. Therefore, the orders "such other dates as the court may fix" in s. 12(2) of the Bombay Rent Act 1947 do not include the date fixed by the appellate court in terms of s. 107, CPC. Therefore, the tenant having failed to deposit arrears of rent before trial court cannot take advantage of this provision at the appellate stage and the appellate court cannot give him further opportunity to deposit arrears of rent.⁹

Whether additional evidence shall be permitted to be adduced or not is a matter entirely within the discretion of the appellate court.¹⁰

When the document was not put to the plaintiff-respondent when it was deposing as a witness in the suit but the same was sought to be admitted as additional evidence before the High Court in second appeal High Court rightly refused to admit such additional evidence in second appeal.¹¹

Procedure in appeals from appellate decrees and orders. The provisions of this Part relating to appeals from original decree shall, so far as may be, apply to appeals—

- (a) from appellate decrees, and
- (b) from orders made under this Code or under any special or local law in which a different procedure is not provided (s. 108).

Appeals to the Supreme Court

When appeals lie to the Supreme Court. Subject to the provisions in Chapter IV of Part V of the Constitution and such rules as may, from time to time, be made by the Supreme Court regarding appeals from the Courts of India, and to the provisions hereinafter contained, an appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court, if the High Court certifies—

- (i) that the case involves a substantial question of law of general importance;
- (ii) that in the opinion of the High Court the said question needs to be decided by the Supreme Court (s. 109, CPC).

⁵ *Asaramdas v State of Rajasthan* AIR 2000 Raj 196 (FB).

⁶ *J.N. Mehta v Palani* AIR 1995 SC 1607; (1995)4 SCC 15.

⁷ *Thatchan Anna v M.K. Marudai* (1999)1 SCC 298.

⁸ *Karan Singh v Bhagwan Singh* AIR 1996 SC 2249; (1996)7 SCC 559.

⁹ *Vasani v Shokan* AIR 2002 SC 1243.

¹⁰ *Mahesh Singh v Naresh Chandra* AIR 2001 SC 134; (2001)1 SCC 209.

¹¹ *Kannan Varadachari v S.K. Eswarwar* (2001)5 SCC 123.

Article 134A inserted in the Constitution by the Constitution (44th Amendment) Act 1978 containing the provision for certificate to be granted by High Court certifying the fitness for appeal to the Supreme Court under cl. (1) of Art. 132 or cl. (1) of Art. 133 or sub-cl. (c) of cl. (1) of Art. 134 being very relevant is also reproduced below:

"Every High Court, passing or making a judgment, decree, final order, or sentence, referred to in clause (1) of Article 132 or clause (1) of Article 133, or clause (1) of Article 134,

- (a) may, if it deems fit so to do, on its own motion; and
- (b) shall, if an oral application is made, by or on behalf of the party aggrieved, immediately after the passing or making of such judgment, decree, final order or sentence,

determine, as soon as may be after such passing or making, the question whether a certificate of the nature referred to in clause (1) of Article 132, or clause (1) of Article 133 or, as the case may be, sub-clause (c) of clause (1) of Article 134, may be given in respect of that case".

Where the High Court does not grant or refuses to grant the certificate under Art. 134A of the Constitution the Supreme Court has power under Art. 136 of the Constitution to grant special leave to appeal and the said provision reads as follows:

- "136. (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or Tribunal in the territory of India.
- (2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any Court or Tribunal constituted by or under any law relating to the Armed Forces."

Appeals from original decrees

Form of appeal—What to accompany memorandum. (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the judgment.

Provided that where two or more suits have been tried together and a common judgment has been delivered therefor and two or more appeals are filed against any decree covered by that judgment, whether by the same appellant or by different appellants, the Appellate Court may dispense with the filing of more than one copy of the judgment.

(2) *Contents of memorandum.* The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.

(3) Where the appeal is against a decree for payment of money, the appellant shall, within such time as the Appellate Court may allow, deposit the amount disputed in the appeal or furnish such security in respect thereof as the Court may think fit (Or. 41, r. 1).

Grounds which may be taken in appeal. The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal, but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objections set forth in the memorandum of appeal or taken by leave of the Court under this rule:

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground (Or. 41, r. 2).

Legislative changes. By CPC (Amendment) Act 1999 which has come into force with effect from 1st July 2002, in sub-rule (1) for the words "decree appealed from and (unless the appellate court dispenses therewith) of the judgment on which it is founded", the word "judgment" has been substituted. The effect of this amendment is very significant, because with effect from 1st July 2002 only the copy of the judgment has to be accompanied with the memorandum of appeal. However, every appeal filed prior to 1st July 2002 was required to be accompanied by not only the certified copy of the judgment but also of the decree appealed from. Sub-rule (3) has been inserted in r. 1 by CPC (Amendment) Act 1976 with effect from 1st February 1977.

Scope and application. Rule 1 of Or. 41 mandates that every appeal has to be preferred in the form of memorandum of appeal signed by the appellant or his pleader. The advocate authorised to file the suit can also sign the memo of appeal.¹⁴ The failure of the appellant or his pleader to sign the memorandum of appeal is a curable defect and can be corrected by putting the signature subsequently.¹⁵ The certified copy of the judgment and decree of the lower court or courts have to be filed along with memorandum of appeal. If the certified copy of judgment or decree is filed after the expiry of the period of limitation the appeal is barred by limitation and it cannot be entertained until the delay is condoned under s. 5 of the Limitation Act. But Supreme Court has held that when the memo of second appeal was filed in time and certified copy of the judgment of lower court was filed beyond time the defect being merely technical the delay should have been condoned and second appeal should have been disposed of on merits.¹⁶ In another decision it has been observed by Supreme Court that when the High Court grants time to appellant to file certified copy as soon as it is available during admission of appeal and the appellant files it before High Court within seven days of the receiving the same and files it with a petition for condoning the delay the High Court should not have dismissed the appeal but should have extended the time for filing the certified copy under s. 148, C.P. Code.¹⁷ Both the certified copy of the judgment and the decree had to be filed. If the certified copy of the decree has not been furnished when the memorandum of appeal is presented the court may adjourn the hearing till the appellant gets certified copy and file it.¹⁸ The appeal may be premature without the certified copy of the decree and when the certified copy of decree is filed it becomes competent and thereafter the question of limitation may be gone into.¹⁹ When under the Original Side Rules of Calcutta High Court the appellant is permitted to file memorandum of appeal without certified copy of the decree on the undertaking to file it within the period of limitation the appeal is liable to be dismissed by barred by limitation when the appellant commits breach of undertaking. But the interlocutory orders already passed do not become *non est*.²⁰

When in a second appeal, the trial court's judgment had not been produced, along with the memorandum of appeal and the same has been filed after the expiry of the period of limitation, the appeal is time-barred. The fact that it was admitted without the certified copy of the judgment filed, is not tantamount to condonation of delay under s. 5 of the Limitation Act.²¹ Under the Kerala rules the printed copy of the judgment is required to be filed along with the

14. *O.N.G.C. v T.N. Sanyal* (1981) 1 Cal LJ 156; 85 CWN 419.

15. *Duasti v Mulla* AIR 1966 SC 1119; (1966) 5 SCR 242.

16. *Dipu v Waqar Singh* AIR 1983 SC 846.

17. *Jogithayan v Baburam* AIR 1983 SC 57.

18. AIR 1980 MP 204; AIR 1967 SC 1470; AIR 1961 SC 832.

19. *Ranjit Kaur v Indradev* AIR 1985 Pat 148; 1985 Pat LJ 138.

20. *Anand Sundari v Manohararam* AIR 1981 Cal 365.

21. *Saradha Kaur v Iqbal Singh* AIR 1975 Patj 194; 77 Patj LR 7.

memorandum of appeal. The appellate court granted time to the appellant, to file it within a specified time. But he having failed the appeal was dismissed for default. The appellant has filed a fresh appeal with the printed copy of the judgment and the certified copy of the decree within the period of limitation, the said appeal has been dismissed as not maintainable on the ground that the earlier appeal has been dismissed for default and the remedy of the appellant lay in making an application for restoration of the appeal dismissed for default. The Kerala High Court did not find favour with that order. It has been held that the acceptance of the first appeal was subject to the production of the printed copy of the judgment and when it was not produced the provisional acceptance was withdrawn and this would not debar the appellant to file a fresh appeal within time along with printed copy of the judgment and certified copy of the decree.²² It has been held by the Punjab High Court that when an appeal filed without the certified copy of the decree had been accepted, subsequent dismissal of the appeal on the ground of non furnishing the certified copy of the decree without giving opportunity to the appellant to furnish such copy is not proper.²³ Even though time required for obtaining certified copy of the judgment and the decree is to be excluded for the purpose of computing the period of limitations for filing the appeal, it has been held by the Madras High Court that when different persons have preferred appeals against the common judgment, the time required by one appellant of an appeal cannot enure to the benefit of the appellant of the other appeals for computing their period of limitation when that appellant made delay in filing appeal.²⁴

Impact of CPC (Amendment) Act 1999. The sub-rule (1) of r. 1 of Or. 41 has been amended by CPC (Amendment) Act with effect from 1st July 2002, the effect of which is that with effect from 1st July 2002, the memorandum of appeal has to be accompanied by a certified copy of the judgment. It is not necessary to annex the certified copy of the decree with the memorandum of appeal. If, however, the certified copy of the judgment is not accompanied by the memorandum of appeal but it is filed beyond the period within which the appeal is to be presented, the appeal shall be treated to be barred by limitation unless the delay is condoned by filing an application under s. 5 of the Limitation Act 1963.

Effect of proviso to r. 1 of Or. 41 of C.P. Code. The Supreme Court explained the object behind introducing the proviso to r. 1 of Or. 41, C.P. Code by 1976 Amendment Act. The purpose of dispensing with filing certified copies of the judgments when more than an appeal has been presented from the common judgment rendered in several cases is to avoid extra expenses where more cases than one were disposed of by a common judgment and the appellate court has been authorised to dispense with the necessity of filing more than one copy of the judgment. It has been observed that the proviso to r. 1 made it clear that the filing of the certified copies of the judgments could be dispensed with where two or more appeals are filed against the common judgment by the same appellant or by different appellants. It has however been pointed out that Or. 41, r. 1, C.P. Code deals with the provision as to what documents should be accompanied along with the memorandum of appeal but that provision cannot control the provisions of limitation for filing appeal which are contained separately under the Limitation Act.²⁵

Memorandum of appeal signed by all but vakalatnama filed by two. When all the appellants signed the memorandum of appeal but the appellant Nos. 1 and 2 signed the vakalatnama of the advocate, the question arose as to whether the appeal should be treated to have been filed by two appellants only. But the Delhi High Court has held that the officer has to treat the appeal

22. *Vediyeri v Akira* AIR 1995 Ker 334.

23. *Puran Singh v Tughar Singh* AIR 1986 Punj 84.

24. *Daisy v Spl. Tehsildar* AIR 1983 Mad 274; (1983)1 MLJ 325.

25. *P.A. Oommen v Morus* AIR 1992 SC 1977; (1992)3 SCC 503.

as it is filed and if there be defect in the *vakalatnama*, the memorandum of appeal should be returned for representation after curing the defect.²⁶

Appeal dismissed as time-barred, effect on interlocutory order. When the appellant was given liberty to furnish the certified copy of the decree within the period of limitation and the same was not so filed, the appeal is to be dismissed being barred by the limitation. But even in such of dismissal of the appeal any interlocutory order before it is dismissed would not be rendered *non est*.²⁷

Contents of memorandum of appeal. A memorandum of appeal must contain numbered paragraphs stating in each paragraph the ground of objection without stating any argument. But so far as the memorandum of second appeal is concerned in view of s. 100(3), C.P. Code as amended by 1976 Amendment to the Code substantial question of law involved must be stated in the grounds of appeal.¹ It has been held by the Supreme Court that the High Court cannot re-appreciate evidence and interfere with the concurrent findings of fact of courts below without formulating any substantial question of law.²

Money appeal. In case of money appeal the appellant is to deposit the amount disputed in appeal or furnish such security in respect thereof as the court may think fit within such time as may be allowed by court.³ Even if the appellant furnishes a security without court's approval, the court may accept it tentatively and can subsequently direct the appellant to furnish proper security on hearing the objection of the respondent.⁴ According to Bombay High Court the failure to deposit the decretal dues on furnishing the security does not affect the maintainability of the appeal yet the court should direct the appellant to comply with r. 1(3).⁵

Sub-rule (1) of r. 1 of Or. 41 is mandatory. The question arises if the provision of sub-rule (3) of r. 1 is mandatory or not. It has been held that the same is not mandatory. Then further question arises as to what shall be effect of the appeal presented if the appellant preferring appeal against the money decree fails to deposit the decretal dues in court or to furnish such security as the court may think fit within the time specified. It has been held by the Himachal Pradesh High Court that as there is no specific provision in Or. 41, C.P. Code for rejecting the memorandum of appeal or dismissing it *in limine* for such failure, the appeal cannot be rejected on such failure to comply with the order of the court. A sub-rule (1A) to r. 3 of Or. 41, C.P. Code sought to be introduced in Code by 1976 Amendment providing for rejecting the memorandum of appeal for failure to deposit the decretal dues or furnishing the court has been deleted from the Amendment Bill on the recommendation of the Joint Committee. So, it cannot be urged that the memorandum of appeal can be rejected for failure to comply with r. 3 of Or. 41, C.P. Code. The only provision that is provided in sub-rule (5) of r. 5 of Or. 41, C.P. Code is that in such a case stay of execution shall not be granted. So, the decree holder would be competent to execute the decree in spite of the appeal being presented against the money decree. Himachal Pradesh High Court has, however, held that the disobedience to the order of the court if proved to be wilful the appellant may be proceeded against under the Contempt of Courts Act 1971. It has also been observed that over and above the wilful default being in respect of an order made in exercise of a procedural law the rule that the party in contempt may not be heard till he purges himself of the contempt comes into operation.⁶

26. *Poojati v Anand Parbath* AIR 1987 Del 90; (1986) 1 Cur Civ Cas 946.

27. *Ananda Sankari v Menacharam* AIR 1981 Cal 365.

1. *Ilu Prakash v Vidya Bhasin* AIR 1980 NOC 156 (All); 1979 All LR 457.

2. *Kashibhai v Parvatibai* (1993) 6 SCC 213.

3. *Himachal Road Transport v Gurdas Kaur* AIR 1983 HP 74.

4. *Saravali v Manaji* AIR 1976 Cal 52.

5. *Prabhakar v Vinayak Rao* AIR 1983 Bom 301.

6. *Himachal Road Transport v Sachida Devi* AIR 1986 HP 78; ILR (1984) HP 882.

Certificate by a lawyer. In any case in which the memorandum is presented by a pleader the grounds of appeal shall be drawn up and signed by a pleader, who at the foot of the memorandum of appeal should subscribe the following statement: "I certify that I have examined the record in this case and that in my opinion there are good grounds as above set forth for this appeal and having prepared them I undertake to appear and support the appeal before the appellate court". When the memorandum is presented by a party and a pleader is afterwards retained to support the appeal, the pleader should subscribe and file in court the following statement: "I certify that I have examined the record and the grounds of appeal in this case and that in my opinion the grounds of appeal are good and I undertake to appear and support them before the appellate court".

Grounds. Rule 1(2) lays down that a memorandum of appeal shall set forth under distinct heads the grounds of appeal. Provisions of r. 1(2) have been further clarified in r. 2 of Or. 41, C.P. Code. It states that the appellant shall not, except with the leave of the court, be urged or be heard in support of the ground of objection not set forth in the memorandum of appeal, but the appellate court in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule. This is, however, subject to the proviso that the court shall not rest its decision on any other ground, unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on this ground. When the memorandum of appeal has not been drawn up in the manner prescribed in r. 1(2) and r. 2 of Or. 41, C.P. Code the appellate court has been given the power under r. 3 either to reject the memorandum of appeal or to return it to the appellant for the purpose of being amended within a time to be fixed by the court or to be amended then and there. If the memorandum of appeal is amended the Judge or such officer as is appointed in this behalf, shall sign or initial the amendment. Before a memorandum of appeal is rejected under r. 3 the appellate court has to give reasons for such rejection. It is clear from r. 2 that even if the appellant is not permitted to urge any ground not taken in the memorandum of appeal or on a ground for which leave has not been taken from the court, that limitation does apply to the appellate court. The decision of the appellate court may, however, travel beyond the grounds set forth in the memorandum of appeal. This is, however, subject to the limitation that when the appellate court wants to travel beyond the grounds of appeal sufficient opportunity is given to the respondent to meet it.

However, the appellate court can grant leave to the appellant to urge a ground not taken in the grounds, if it does not require investigation of new facts not disclosed in the suit. But plea of *res judicata* which needs facts to be proved cannot be allowed to be taken.⁷ Even the plea of 'act of state' cannot be taken being a mixed question of law and fact.⁸ Even the plea that the agreement is hit by Art. 299 of the Constitution cannot be taken in the appeal for the first time when no such plea was taken in the written statement.⁹ The appellant cannot urge an absolutely new case in appeal not urged in the trial court.¹⁰ But a plea which is impliedly covered by the issues can be taken in appeal even though not specifically raised in trial court.¹¹ But the existence of custom cannot be taken for the first time in appeal.¹² Plea of non-joinder when not taken in

7 *Modammai v Glory Chambers* AIR 1977 Mad 209.

8 *Gulam Hassan v Md. Raja* AIR 1984 J&K 26; *State of Gujarat v Ramji Mandir Trust* AIR 1979 Guj 113.

9 *Nirode Barua v Deputy Commissioner* AIR 1980 SC 727; (1980)3 SCC 5.

10 *Satyam Narayan v Birendra* AIR 1979 Cal 197.

11 *Thakur Bhoon Singh v Thakur Kan Singh* AIR 1980 SC 727; AIR 1984 P&H 288.

12 *Shriram v Sejabai* AIR 1979 Bom 301.

written statement cannot be taken for the first time in second appeal.¹³ When the defendant did not take the plea that the minor defendant was not properly represented he cannot urge that point in appeal at the time of hearing when even in memorandum of appeal he did not raise that point.¹⁴ The point that plaint was signed by an incompetent person cannot be taken for the first time in appeal.¹⁵ But a pure question of law can be taken for the first time even in second appeal.¹⁶ Thus appellant can take the plea in appeal that the agreement is a nullity.¹⁷

However the question would be otherwise when a plea was not taken in the trial court which required investigation into facts but sought to be taken for the first time in the appeal. A customer of a bank has a cash credit key loan account with the bank and there was damage or loss to the goods entrusted with the bank. In a suit by the customer for damages, the bank did not take the plea of contracting out of its liabilities on account of loss or destruction of the goods due to negligence of the bank. So, in the appellate court the bank cannot take that plea for the first time.¹⁸ A point of law which goes to the root of the matter can be raised in appeal for the first time. But when that point of law has been specifically abandoned in the trial court, the party cannot take up that point in the court of appeal again.¹⁹ But there is a distinction between a point of law omitted to be taken in the lower court and that deliberately abandoned. In the former case the point can be urged in appeal but not in the case of the latter when the point of law has been deliberately abandoned.²⁰ When the party does not raise a issue before the trial court, he is deemed to have given up that issue and cannot raise the same again in appeal.¹ When a new plea is a question of fact, the defendant not taking that plea in the written statement nor did he urge it before the trial court cannot take that plea in the appellate court.² When the plea of want of notice was not raised in the trial court, it cannot be raised for the first time in the appellate court.³

A pure question of law. A pure question of law is one which is not dependant on any question of fact. Such pure question of law by way of addition of ground has been sought to be raised before the Income Tax Appellate Tribunal, it can be allowed to be raised.⁴

In a suit for perpetual injunction, pleas as to non-inclusion of the relief of declaration of title being a pure question of law can be raised in appeal for the first time.⁵ The plea that the agreement is hit by Art. 299 of the Constitution cannot be taken for the first time in appeal when no such plea was taken in the written statement.⁶

Limitation. An appeal shall be presented within the period prescribed (30 days for appeal to District Court and 90 days for appeal to High Court) by the Limitation Act (see Art. 1) 16 of the

13 *Jyotsnawati v Jitramohan* AIR 1981 Cal 23.

14 *Shankar v Urshibeta* AIR 1971 Cal 525.

15 *Chau v Sybau* AIR 1985 Bom 372.

16 *Munik Lal Seal v K.P. Chaudhary* AIR 1976 Cal 115.

17 *Ranji Mondli v Narsinji* (1970)20 Guj LR 801.

18 *Central Bank of India v Ganga & Ganga Agencies* AIR 1989 MP 38.

19 *Pran Chand Malik Choudh v Fort Fluoride Jute Mills* 64 CWN 113.

20 *Dinesh Kumar v Kamal Rani* 1987(1) CHN 369; 91 CWN 1085.

1 *Sargulch Group of Firm Pancharat v Damsulal* AIR 1984 Guj 140 (FB), *Mahadev v Basmal* AIR 1981 Cal 9.

2 *K. Shrivatsaniah v B.V. Chandraiah* AIR 1992 Kant 29; ILR (1992) Kant 1976.

3 *Biji v Ganga Mahtab* AIR 1982 NOC 87 (Or); 52 Cal LT 389.

4 *Additional Commissioner, I.T. v East Coast Flour* AIR 1994 SC 1519; *C.K. Nair v Sethuraj Nair* 2000 AHC 2384 (AP).

5 *Khandi Babu v Gopi Gonda* 2000 AHC 2384 (AP).

6 *Nived Bhatia v Deputy Commissioner* AIR 1980 SC 727; (1980)3 SCC 5.

Limitation Act 1963). Time requisite for taking copies is excluded. It is the decree which is challenged in an appeal. Hence the time requisite for taking copies of the decree is excluded. Where on the passing of the judgment a party, who is desirous of preferring an appeal therefrom, applies for copies of judgment and decree, even though the decree was not prepared and signed then and the decree is prepared and signed after a considerable lapse of time thereafter, the party is entitled to exclude the entire period as the time requisite for taking copies, even though the certified copies of the judgment was supplied to him before the decree was prepared and signed.⁷

Application for condonation of delay. Rule 3A inserted in the Code by the C.P. Code (Amendment) of 1976 provides that when an appeal is presented after the expiry of the period of limitation specified therefor, it has to be accompanied by an application for condonation of delay setting forth the facts on which the appellant relies to satisfy the court for not preferring the appeal in time. If the court sees no reason to reject the application without the issue of a notice to the respondent notice of such application shall be given to the respondent and the matter shall be finally decided before the court proceeds to deal with the appeal under r. 11 or r. 13, as the case may be. Unless admitted on delay being condoned, the execution of the decree appealed cannot be stayed. This rule has come into force with effect from 1st February 1977 and it does not attract pending appeals.

Judicial decisions are not uniform as to whether the application for condonation of delay if filed after the presentation of memo of appeal is liable to be rejected on the ground that it has not been filed along with the memo of appeal. Some of the High Courts have expressed the view that such an application must accompany the memo of appeal.⁸ But other High Courts have taken the lenient view that even if the application for condonation of delay is filed subsequent to the filing of the memo of appeal it cannot be rejected only on that ground.⁹ According to division bench of Karnataka High Court r. 3A is mandatory but opportunity should be given to the appellant to remedy the defect.¹⁰

Object of r. 3A, C.P. Code. Object of inserting r. 3A of Or. 41 by the 1976 Amendment Act is to put an end to the practice of admitting of appeal subject to a decision on the question of limitation. This practice was disapproved by the Privy Council and it stretched expediency of adopting procedure under which the final determination of the question as to limitation could be possible before the appeal is admitted for hearing. Therefore, in order to see that the question of limitation does not remain lingering till the disposal of the appeal, the provisions of r. 3A has been incorporated in Or. 41, C.P. Code.¹¹

The Supreme Court has, however, settled the law in this respect. In *State of M.P. v Pradip Kumar*¹² the Supreme Court has observed that there is no such rule prescribing for rejection of Memorandum of Appeal in a case where the appeal is not accompanied by an application for condoning the delay, that if the Memorandum of Appeal is filed in such appeal without accompanying the application to condone the delay, the consequence cannot be fatal, and the

7. AIR 1961 SC 852; AIR 1964 Patj 448.

8. *Padmavathi v Kullu* AIR 1980 Ker 173; *Mudhakar v Anant* AIR 1984 Knt 40; *Nirmala v Besevaral* AIR 1979 Del 26.

9. *M. Desaiji v Prakash Shah* AIR 1984 Bom 390; *State of Bihar v Roy Chandi Nish* AIR 1983 Pat 189; AIR 1986 Ori 38; *Narain Anupma Shethi v Jayantilal Chaital Shah* AIR 1987 Guj 205; *Siroo v Aji* AIR 1988 Cal 28; *Dilip Bhai v Contractor* AIR 1996 Raj 119 (FB).

10. *State of Karnataka v Nagappa* AIR 1986 Kant 199.

11. *Narayan v Jayantilal* AIR 1987 Guj 205.

12. (2000)7 SCC 372.

court can regard in such a case that there was no valid presentation of the appeal and that if the appellant subsequently files an application to condone the delay before the appeal is rejected, the same should be taken up along with already filed Memorandum of Appeal and it is only then the court can treat the appeal as lawfully presented. It is, therefore, pointed out by the Supreme Court that there is nothing wrong if the court returns the Memorandum of Appeal which was not accompanied by an application explaining the delay as defective. Such defect can be cured by the party concerned by putting in an application for condoning the delay. The Supreme Court has also in that decision indicated the object of enacting r. 3A in Or. 41, CPC. According to the Supreme Court, its object is two-fold—first is to inform the appellant himself who filed a time-barred appeal that it would not be entertained unless it is accompanied by an application explaining the delay, second is to communicate to a respondent a message that it may not be necessary for him to get ready to meet the ground taken up in a Memorandum of Appeal because the court has to deal with an application for delay as a condition precedent. It is, therefore, observed that barring the above object, r. 3A is not intended to operate irretrievably or irredeemably fatal against the appellant if the Memorandum of Appeal is not accompanied by such application at the first instance. The Gujarat High Court has also laid down the object of inserting r. 3A of Or. 41, CPC as to put an end to the practice of admitting the appeal subject to a decision on question of limitation which practice was disapproved by the aggrieved Council and it is stressed that the expediency of adopting the procedure under which the final determination of the question of limitation could be possible before the appeal is admitted for hearing. It is pointed out that in order to see that the question of limitation does not remain lingering till the disposal of the appeal, provision of r. 3A have been included by CPC (Amendment) Act 1976. The Gujarat High Court has also expressed similar view that when an appeal is presented beyond the period of limitation but without an application for condonation of delay, there is no provision in the rule that such appeal is required to straightway dismissed and at most the appellant would be required to explain the delay till the date of filing the application.¹³

This decision of Gujarat High Court is also in accord with the later Supreme Court decision in *State of M.P. v Pradip Kumar Gupta*. Therefore, it is now the settled law that if the application for condonation of the delay is not filed along with the Memorandum of Appeal in case the appeal is barred by limitation, the appeal shall not straightway be dismissed being barred by limitation. An opportunity has to be given to the appellant's Learned Advocate to take back the Memorandum of Appeal and file it along with the application for condonation of delay; even if no such step is taken, the application for the condonation of the delay may be filed at any time before the appeal is rejected under r. 3 of Or. 41, CPC on the ground that the same is defective.

Affidavit. Where an appeal is presented beyond the time with an application for condonation of the delay, it should be accompanied by an affidavit set forth the cause for the delay. Even though the rule is mandatory, the appellate court is to return the appeal to be presented with such an affidavit if no such affidavit is filed along with the application for condonation of delay.¹⁴

Kerala High Court has held that there is no bar for an Advocate filing affidavit in support of the application for condonation of the delay.¹⁵

Appeal presented beyond time—if appeal. It has been held by the Supreme Court in *Meliam v Commissioner of Income Tax*¹⁶ that even if an appeal is presented beyond time, it does not

13. *Narayan v. Brahmil* AIR 1957 Guj 205.

14. *Parag Singh Rajput v. Indira Rajni* (1977) AIR 1075 (MP).

15. *Pioneer Shopping Complex (Pvt.) Ltd. v. Pioneer Tower Owners' Association* (2001) 2 Ker LT 11.

16. AIR 1956 SC 367.

cease to be an appeal. It has, therefore, been held by the Supreme Court that even if an order is passed before the delay is condoned, it has to be deemed to be an order passed in appeal. In another decision, the Supreme Court has held that there can be no dispute that an appeal presented out of time is also an appeal and when such an appeal is dismissed on the ground of limitation, the order dismissing it as time-barred is one passed in appeal.¹⁷

However, views have been expressed in some decisions that when an appeal is taken up for trial and disposed of without delay being condoned when such an appeal was presented beyond the period of limitation prescribed, the order in appeal is a nullity.¹⁸ It has been observed by the Kerala High Court that even if the appeal that has been presented may have many defects or irregularities, some of them may be fatal, but even in such cases, such an appeal presented even if still born would not have an effect of obliterating the factual existence of the appeal.¹⁹

Sufficient cause of condonation of delay. Delay is to be condoned under s. 5 of the Limitation Act and the appellant has to satisfy the appellate court that there was sufficient cause for the delay. However, explanation to s. 5 of the Limitation Act 1963 lays down that the fact that the appellant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of s. 5. It has been held by the Supreme Court that when the petition shows that the delay was due to any of the facts mentioned in the explanation that would be treated as a sufficient cause and after it is so treated, the question may then arise whether the discretion to condone the delay in filing the appeal should be exercised in favour of the appellant or not.²⁰ The expression "sufficient cause" may be given a liberal interpretation so as to advance substantial justice when neither ignorance nor inaction nor want of *bona fide* is imputable to the appellant.¹ In another decision, the Supreme Court has observed that when substantial justice and technical consideration are pitted against each other cause of substantial justice deserved to be preferred for the other side cannot claim to have a vested right in injustice being done because of non-deliberate delay, that ordinarily litigation does not stand to benefit by lodging of appeal late and that in such a case the refusing to condone the delay can result in a meritorious matter being thrown out at the very threshold and cause justice being defeated and that is against this, when the delay is condoned the highest that can happen is that a case would be decided on merit after hearing the parties.² When the matter relates to public charity in which the public in general is interested laches on the part of a dealing assistant in preferring an appeal by the official trustee should be condoned, when the official trustee was in no way guilty for the laches.³ When the cause of delay was failure of the appellant for not contacting his advocate who had gone away due to impending summer vacation, Bombay High Court has held that there was sufficient cause for the delay.⁴ However, according to the Bombay High Court when the Government seeks to condone the delay on the ground that the department took time to furnish the relevant documents and to

17. *Rani Chowdhury v Lt. Col. Suraj Jeet* AIR 1982 SC 1397.

18. *Chitra v Mathur Lal* AIR 1981 MP 13; *Deshraj v Om Parkash* AIR 1986 Pwaj 3.

19. *Thambappan v Trivandrum District Co-op. Bank* AIR 1987 Ker 1; *Thambji v Mathew* AIR 1988 Ker 48 (FB).

20. *Ranjit v Rewa Carrfield Ltd.* AIR 1962 SC 361.

1. *Shukantala v Kuntal Kesari* AIR 1967 SC 575; *State of W.B. v Administrator, Howrah Municipality* AIR 1972 SC 749; (1972)1 SCC 366.

2. *Collector, Land Acquisition v Katti* AIR 1987 SC 1253; (1987)2 SCC 107; *G. Ramaswami v Special L.A. Officer* AIR 1988 SC 897.

3. *Official Trustee v Lalchand* AIR 1982 Cal 2103.

4. *Vashram v Trimbak Rao* (1988)1 Cur Civ Cas 188.

arrange for court fees, the same was not held to be a sufficient cause.⁵ In the matter of condonation of delay in filing appeal the courts should take a justice-oriented approach.⁶

Rejection of appeal on the ground of limitation. When a memorandum of appeal is rejected following the rejection of an application under s. 5 of the Limitation Act in condoning of delay in filing the appeal the matter must be treated to be disposal of the appeal which can only be done under Or. 41, r. 11, C.P. Code. Therefore, it has been held by the Kerala High Court that the order dismissing the appeal on the ground of limitation is a decree against which the second appeal may be filed.⁷ Contrary view has been rendered by Punjab High Court.⁸

Rejection or amendment of memorandum. (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.

(3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment (Or. 41, r. 3).

Scope. When a memorandum of appeal is returned, the court should fix a time for it being refiled. Rejection of appeal is not confined to r. 3. It may also be rejected under Or. 7, r. 11, CPC.⁹ An appeal even after admission can be rejected on a ground which it could be rejected before admission.¹⁰ Once one appeal has been duly entertained without production of certified copy of the decree sheet with it and neither the memorandum of appeal is rejected nor returned as provided in r. 3, then subsequently the appeal cannot be dismissed on the ground that at the time of presentation of appeal, the memorandum of appeal was not accompanied by a certified copy of the decree sheet.¹¹ Rejection of appeal under r. 3 is not appealable.

Application for condonation of delay. (1) When an appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period.

(2) If the Court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under rule 11 or rule 13, as the case may be.

(3) Where an application has been made under sub-rule (1), the Court shall not make an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under rule 11, decide to hear the appeal (Or. 41, r. 3A).

Inordinate delay was caused in pushing the file from one section to another section of the department and the delay was not explained, such delay in filing the appeal within the time cannot be condoned.¹² However, when a notice of motion was moved by the defendant for

5 *Union of India v Mangal* (1989) 1 Car Civ Cas 108.

6 *State of Haryana v Chand Mani* AIR 1996 SC 1623.

7 *Thambi v Mathew* AIR 1988 Ker 48.

8 *Deshraj v Om Parkash* AIR 1986 Panj 3.

9 *Phulian Bank v Baburao* AIR 1954 Bom 43; *Acharya v Sibram* ILR (1962) Cal 818.

10 *Bakson v Financial Commissioner* AIR 1975 P&H 1 (FB).

11 *Purani Singh v Jagtar Singh* AIR 1986 P&H 84.

12 *Bihar State Electricity Board v Bazi S.R.P. Sinha* AIR 1999 Pat 203.

setting aside the *ex parte* decree passed against them was refused by the court stating that the remedy lay only in filing the appeal, then the appeal was preferred by the defendant and the appeal was filed beyond the period of limitation and application for condoning the delay was made. But the same was dismissed. It is held by the Supreme Court that when a case for setting aside the decree was earlier made out in the facts and circumstances of the case, the appellate court ought to have taken a liberal view of the events and entertain the appeal for consideration on merits by condoning the delay in filing the same.¹³

Time-barred appeal disposed of on merits. When an appeal is taken up for hearing and disposed of without delay being condoned when the appeal was presented beyond the period of limitation, it is held that the judgment and decree passed in such appeal is a nullity.¹⁴

One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all. Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be (Or. 41, r. 4).

Scope and application. Rule 4 applies only when one of the parties aggrieved prefers the appeal against a decree passed on a ground common to all.¹⁵ The power of the appellate court under r. 4 is open when other persons interested in the joint decree are either not impleaded as party to the appeal or are impleaded as respondent.¹⁶ However, if all the plaintiffs or all the defendants preferred an appeal against the decree, r. 4 has no application.¹⁷ Where there is a joint decree against all the defendants and any one of them dies, the filing of appeal by the remaining defendants is maintainable and the court can set aside the whole decree.¹⁸ But when all the parties aggrieved have preferred appeal against a joint decree and one of them dies, then it is necessary to substitute legal heirs of the said appellants and failure to do so results in the abatement of the whole appeal and r. 4 of Or. 41, CPC has no application to such a case.¹⁹ Three legal heirs of the deceased had filed execution petition and after execution petition was ordered by the court of District Munsiff the respondents filed revision to the High Court wherein one of the legal heirs was omitted. The Supreme Court in appeal against the order passed by the High Court held that since the order of delivery of possession in favour of the decree-holders is common and inseparable and since it has become final as against the heir who has not been impleaded, the High Court was not right in setting aside the order of the executing court in revision.²⁰ In case of a decree which is joint and inseparable in nature, appeal is abated if the decree has become final against one of the defendants.¹

In order to avoid inconsistent situation and possibility of incongruous order, the Supreme Court dismissed the suit not only against the appellant purchaser, but also against the other purchasers who had not appealed by exercising the powers under Or. 41, r. 4, CPC read with

13. *Plains Park v Ratnakar Bank Limited* (2001) 6 SCC 683.

14. *Omrav Bai v Sardar Lal Khatri* AIR 1997 MP 62; *Deshraj v Omprakash* AIR 1986 P&H 3.

15. *Govindan v Sethramaniam* (2000) 9 SCC 510.

16. *Mahabir v Jage* AIR 1971 SC 742.

17. *Prithvi v State of Bihar* AIR 1976 Pat 100.

18. *Lalchand v Rudha Kishan* AIR 1977 SC 789; (1977) 2 SCC 88; (1977) 2 SCR 527.

19. *Rameswar v Shivam Dehuri* AIR 1963 SC 1901; (1964) 3 SCR 549; *Jagan Ram v Sujan Singh* AIR 1973 Pat 440.

20. *Rajeswari Anand v Joseph* 1995 (1) SCALE 49.

1. *Sheela v Central Bank of India* (1998) 11 Mah LJ 928 (Bom) (DB).

Art. 142 of the Constitution.² Rule 4 is to be read with r. 33 of Or. 41, CPC. Both these rules provide exception to the general rule that in case of appeal by one of several plaintiffs or defendants, the appellate court can reverse or vary the decree only in favour of the party appealing only. Of course, if appealed, decree entres to the benefit of the non-appealing parties, they also need to be impleaded in second appeal in order to avoid inconsistent decrees.³ Where though the decree of the trial court was one and three appeals were filed by three sets of parties, if in one appeal one *N* was impleaded as a party had not been impleaded in other two appeals, it was possible by the application of the provisions of r. 4 and r. 33 of Or. 41, CPC to have allowed the appeal in full and given relief not merely to the appellants in one appeal but also to the appeals in other appellants assuming that they had not filed these appeals.⁴ Where in a suit of dissolution of partnership firm, the decree is passed against the defendant Nos. 2 and 3 managing partners of the firm, but the defendant No. 3 only files first and second appeal, it is not open to the plaintiff to raise objection for the first time in second appeal that the other defendant being the defendant No. 2 has not been arrayed as a party in the first appeal.⁵

Stay of proceedings of execution.

Stay by Appellate Court. (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree, but the Appellate Court may for sufficient cause order stay of execution of such decree.

Explanation: An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance.

(2) *Stay by court which passed the decree.* Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied—

- (a) that substantial loss may result to the party applying for stay of execution unless the order is made;
- (b) that the application has been made without unreasonable delay; and
- (c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) Subject to the provisions of sub-rule (3), the Court may make an *ex parte* order for stay of execution pending the hearing of the application.

(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of rule 1, the Court shall not make an order staying the execution of the decree (Or. 41, r. 5).

² *S. Hussain Chaud v. Jado Lalji Jaimal* AIR 1968 SC 3470.

³ *Kannan Sankaranarayanan v. Padmanaban* AIR 1987 Ker 94.

⁴ *Hirflax v. Vaidhiki* AIR 1975 SC 733.

⁵ *K. Seshu Reddy v. K. Dhanraj* AIR 2000 AP 263; (2000)2 Andh LT 234.

Stay of execution. Rule 5 as amended by CPC (Amendment) Act 1976 applies to stay of execution (1) by the appellate court of the decree appealed from and (2) stay execution by the trial court of an appealable decree.

No automatic stay of execution on filing appeal. Mere filing of appeal does not operate as stay of execution proceedings on the basis of the decree passed by the trial court. An application for stay has to be filed before the appellate court on filing the appeal and the appellate court may grant stay for sufficient cause.⁶

Stay by appellate court and interim order. Even after the stay of execution of the decree is passed by the appellate court the trial court can pass order on the urgent application for injunction or appointment of receiver.⁷

Appeal against money decree. Ordinarily in an appeal against money decree the stay of execution is granted on the appellant depositing the decretal dues in court or furnishing security.

Even though it is an universal practice that in case of appeal against money decree the court grants stay subject to the deposit of money in court yet it is merely a rule of prudence but this rule cannot be applied mechanically. In suitable case when the court is satisfied that substantial injustice would be caused if no stay is granted the court may grant stay either with or without condition.⁸ The Gujarat High Court's above decision in the AIR 1987 Guj 113 so far as it relates to the return of the amount deposited in court to the judgment-debtor has been set aside by the Supreme Court observing that once the judgment-debtor deposited the decretal dues in court prior to stay of execution there was no justification for the refund of the said money to the judgment-debtor.⁹ The power of execution court to order stay of execution under r. 6(2) is not subject to r. 5. Even if the stay under r. 5 is rejected the execution court can order stay of sale under r. 6(2).¹⁰

Rule 5(2) vis-a-vis r. 5. The power of executing court to order stay of execution is not subject to r. 5 of Or. 41, CPC. Even if stay under r. 5 is rejected the executing court can order stay of execution.¹⁰

Oral application. An oral application for stay is not maintainable. In case of urgency a skeletal application setting out bare facts and the question involved should be insisted upon by the appellate court.¹¹

Stay in time-barred appeal. No stay of execution can be granted in a time-barred appeal unless the delay is condoned by r. 3A of Or. 41, CPC.¹²

However, Madras High Court has expressed the view that in such a case a stay may be granted by invoking inherent prayer if stay at such a stage becomes absolutely necessary.¹³

Second application not barred. When the first application for stay was not rejected on merits, the second application is not barred.¹⁴

6 *R. Kishorlal v. Mohummad Iqbal* AIR 1999 Kant 337.

7 *Dhiraj Kumar v. Kamabendu* AIR 1987 Cal 172.

8 *State of Gujarat v. Central Bank* AIR 1987 Guj 113.

9 *Central Bank of India v. State of Gujarat* AIR 1987 SC 2320.

10 *Firm S.V. Glass Works v. Firm S.V.C. Glass Bangles Merchant* AIR 1986 All 2.

11 *Somavatia Trading v. S. Samuel* AIR 1985 SC 61; (1984)4 SCC 666; (1985)2 SCR 24.

12 *K. Lakshminath v. M. Tulamma* AIR 1981 NOC 174 (AP).

13 *Gouse Di v. Solim Bi* AIR 1974 Mad 220.

14 *Nand Singh v. Shankar Dass* AIR 2000 P&H 294.

Power of High Court to stay when the party aggrieved intends to move Supreme Court. The High Court has inherent power to grant stay of the execution of its order for a limited period on terms in order to enable a party aggrieved to move Supreme Court against its order.¹⁵

But the High Court cannot exercise the power of stay in such a case under r. 5 of Or. 41, CPC.¹⁶

Stay when not to be granted. When stay application has been filed two years after the filing of the appeal against the money decree, the prayer for stay should be refused when there is nothing to show that the refusal to stay would result in substantial loss to the applicant. Non-appearance of the other side will not be taken to be a case for mechanically allowing prayer for stay.¹⁷

When stay order belongs effective. The stay order becomes effective only on communication to the Supreme Court. The Supreme Court has, however, made it clear that even after stay order is brought to the notice of the trial court, it has power to set aside proceedings taken between time when the stay was issued and the time when it was brought to its notice, if it is asked to do so and if it considers to be necessary in the interest of justice.¹⁸

This view of the Supreme Court has been incorporated in the Explanation to sub-rule (1) as inserted by CPC (Amendment) Act 1976.

No stay unless security furnished. Sub-rule (3) of r. 5 of Or. 41, C.P. Code makes it clear that no order for stay of execution shall be made under sub-rule (1) or sub-rule (2) of r. 5, C.P. Code unless the court making it is satisfied about the pre-conditions stipulated therein. One of the conditions to be imposed upon the appellant is for the due performance of such decree or order as may ultimately be binding upon him. The provision is mandatory and there is nothing in sub-rule (3) or r. 5 to suggest that the security has to be furnished only when the decree is a money decree. It applies to all the decrees. However, the court may either direct cash security or property security depending upon the nature of the dispute.¹⁹ But application for stay may be tenable even in case of money decree without depositing the decretal costs or for furnishing security.²⁰ Moreover, as the rule regarding furnishing security is for due performance of the decree that may eventually be passed against the appellant, no security for the relief which is not subject of the suit wherein the impugned decree has been recorded cannot be demanded from the appellant.¹ A security for costs cannot be utilised for any other purposes.²

As the provision for furnishing security in sub-rule (3) of r. 5 is mandatory, there is nothing to suggest that sub-rule (3) applies only to money decrees. It applies to all decrees.³

The object of stay is that while passing order of stay both the parties are to be protected.⁴

However, application for stay may be tenable in appropriate case even in the case of a money decree even without furnishing security.⁵

15. *Munnil Kothari v Shree Shree Radha Ramon* (1991) 1 CHN 74 (DB).

16. *Sudhangshu Mohan Deb v Nirude Sundari Dhipi* AIR 1998 Gau 8.

17. *Shah Keshar Chund Gulab Chund Charity Trust v Kewal Babulalji Shah* AIR 1999 Guj 207.

18. *Mulraj v Murl* AIR 1967 SC 1586.

19. *Hudhatarulla v Changananni* AIR 1986 Or 84.

20. *State of A.P. v Md. Huzar* AIR 1983 AP 227; (1983) 1 Andh WR 106; *State of Gujarat v Central Bank of India* AIR 1987 Guj 372.

1. *Narasing Singh v Tej Singh* (1970) 78 Patj LR 96.

2. *State of Maharashtra v B.N. Kmal* AIR 1967 SC 1364; (1968) 1 SCJ 280.

3. *Hartbandhu v Champa Mami* AIR 1986 Or 84.

4. *L.A. Collector v Sannoush Desi* AIR 1993 Or 123.

5. *State of Gujarat v Central Bank of India* AIR 1987 Guj 372; *State of A.P. v Md. Huzar* AIR 1983 AP 227; (1983) 1 Andh WR 106.

When the value of the property under attachment exceeds the decretal amount no security should be called for.⁶

A decree has been passed in terms of the arbitration award and execution has been filed to enforce the decree. The judgment-debtor pending appeal against the dismissal of the petition for setting aside the award filed an application for stay and deposited the decretal dues. In the meantime the executing court appointed a receiver over the membership card of the stock exchange held by the judgment-debtor and gave direction for the sale of the card. But as the decretal dues had been deposited the executing court directed the receiver to return the membership card to the judgment-debtor. The decree-holder has also been permitted to withdraw the decretal amount on furnishing the bank guarantee.⁷

Stay on condition—non-compliance effect. When the execution of a decree is stayed on condition of the appellam complying with some mandate, neither the appellam complies with the mandate nor does the decree-holder take any step to execute the decree, then the appellam at the time of hearing of the appeal cannot be refused to be heard on the ground of appellam's committing a contempt. The respondent could have approached the executing court to execute the decree because the stay became imperative. But when he did not do that it did not debar the appellam from pressing the appeal at the final hearing of the appeal.⁸

No restoration of possession. When the appellate authority did not stay the execution pending the appeal filed and the respondent took delivery of possession through court, the appellam cannot apply before the appellate court for restoration of possession.⁹

Stay of execution by trial court. Rule 5(2) of Or. 41, C.P. Code contemplates stay of execution by the court which passed the decree provided there is sufficient cause for the same and the said power can be exercised despite refusal of stay by the appellate court.¹⁰ Even the executing court can order stay of execution on taking sufficient security even after the appellate court refuses stay.¹¹

Security in case of order for execution of decree appealed from. (1) Where an order is made for the execution of a decree from which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellam, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security.

(2) Where an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of (Or. 41, r. 6).

Sub-rule (1). Under sub-rule (1) of r. 6 the court may call upon the decree-holder to furnish security for the restitution of any party which may be or has been taken in execution or for the due performance of any decree which may be passed in appeal. The word "restitution" in sub-rule (1) of r. 6 has no reference to restitution under s. 144, CPC. It contemplates cases

6 *Laxmi Plastics v Bank of Baroda* AIR 1996 Raj 216.

7 *K. Saroja Nishantri v Sadanikh Kabra & Co.* AIR 1995 Cal 80.

8 *Uma Devi v Maharaj Sir Prunp Singh* AIR 1990 HP 62; (1989)2 Sim LC 309.

9 *Sharwan Singh v State of Rajasthan* AIR 1994 NOC 378 (Raj).

10 *Firm S.V. Glaz v Firm V.C. Glaz* AIR 1986 All 2.

11 *Baldev Krishan v P.S. Agricultural Marketing Board* AIR 1985 Punj 356.

where the decree-holder seeks to draw out moneys deposited by the other party to avert execution.¹²

When the judgment debtors preferred appeal against the decree for specific performance of contract the appellate court directed stay of execution subject to deposit Rs. 5,000 by way of security and permitted the decree-holder to withdraw it on furnishing security. But after the appeal is finally disposed of no judicial order was passed forfeiture such deposit. In that case the same should be refused to the judgment debtor.¹³

Sub-rule (2). Sub-rule (2) of r. 6 is attracted after an order for sale. So an order for final decree is not an order for sale of property in execution and sub-rule (2) of r. 6 is not attracted.¹⁴

So prayer for stay of sale can be entertained even after stay of execution is refused by the appellate court under r. 5.¹⁵

However, it is only the judgment-debtor, who has preferred appeal, is entitled to invoke the stay of sale under r. 6(2).¹⁶

Under r. 6(2) the executing court is conferred a limited power of stay execution by sale of immovable property on condition to obtain security for such period only during which the appeal against the decree remains pending.¹⁷

So far as the application for stay of the order of sale is concerned, it is to be filed before the sale has been actually knocked down in favour of the highest bidder and 25% of the sale money has been deposited by the auction purchasers.¹⁸ On the judgment-debtor giving sufficient security or otherwise, the executing court should stay the sale under execution of the decree till the disposal of the appeal.¹⁹ But when the value of the property under attachment exceeds decretal amount, no security should be called for.²⁰

There are conflicting decisions as to whether the security bond for performance of the decree executed by the judgment-debtor should be registered or not. Andhra Pradesh High Court holds the view that if the value of the suit property exceeds Rs. 100, the bond must be registered.¹ But according to Delhi and Madhya Pradesh High Courts, security bond for the due performance of the decree is not to be compulsorily registered.²

Exercise of powers in appeal from order made in execution of decree. The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree (Or. 41, r. 5).

Procedure on admission of appeal

Registry of memorandum of appeal. (1) The Court from whose decree an appeal lies shall entertain the memorandum of appeal and shall endorse thereon the date of presentation and shall register the appeal in a book of appeal kept for that purpose.

12. *Muthuswami v Ramalinga* AIR 1958 Mad 366.

13. *Pratim Singh v Shanti Devi* AIR 2003 SC 643, (2003)2 SCC 330.

14. *Haldimata v Angurbala* AIR 1976 Cal 321.

15. *Jangir v Nihal* AIR 1965 Panj 428; *Laxman v Ram Chandra* AIR 1964 Mys 232.

16. *Narasim v Mangesh* AIR 1972 Mys 206.

17. *Firm Shree Veer Glass Works v Firm Gagan Vilva Charan Glass Bangia Merchant* AIR 1986 All 2.

18. *Karimnadi v Lakshmal Ram Pralip* AIR 1978 Raj 120.

19. *Ranjit Singh v Kishan Kumar* (1977)79 Panj LR 734.

20. *Laxmi Plastics (M) v Bank of Baroda* AIR 1996 Raj 218.

1. *F. Pentlak v M. Paulan* AIR 1980 AP 290.

2. *Label Net Press v Indo-European Machinery* AIR 1974 Del 176; *M. Hussain v Rahim Bhai* AIR 1978 MP 182.

(2) Such book shall be called the register of appeal (Or. 41, r. 9).

Legislative change. An important legislative change has been made by CPC (Amendment) Act 1999 which comes into force with effect from 1st July 2002. Under this substituted r. 9 the memorandum of appeal has to be presented to the trial court from whose decree an appeal lies. The duty is cast upon the trial court to endorse thereon the date of presentation and to register the appeal in a book of appeal to be kept for that purpose and that book shall be known as the register of appeal. The note on this clause of the CPC (Amendment) Bill 1999 indicates that to avoid delay it is proposed that an appeal may be filed in the same court which passed the judgment and that court shall direct the parties to appear before the appellate court. Repeal and saving clause of r. 9 as provided in s. 32(2)(v) of CPC (Amendment) Act 1999 makes substituted r. 9 to have only prospective application and it shall not affect any appeal presented to the appellate court in accordance of r. 9 which was in force prior to 1st July 2002.

Scope of new r. 9. Rule 9 as substituted by CPC (Amendment) Act 1999 makes a new provision for presentation of memorandum of appeal to the court which passed the judgment against which the appeal is preferred. This is provided to avoid delay in the matter of presentation of appeal if the appellate court is not at the same place where the trial court is situated. However, an appeal has to be registered and numbered only after payment of full court fees. Till then the memorandum of appeal cannot be treated as an appeal.³

An appeal filed out of time cannot also be registered unless the appellant files an application for condonation of delay and the appellate court condones the delay. Prior to such condonation of delay the appeal is *non est* according to Calcutta High Court.⁴

But according to Andhra Pradesh⁵ and Madras⁶ High Courts such an appeal is an appeal in the eye of law and not *non est*.

Appellate Court may require appellant to furnish security for costs. (1) The Appellate Court may, in its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both:

Where appellant resides out of India. Provided that the Court shall demand such security in all cases in which the appellant is residing out of India, and is not possessed of any sufficient immovable property within India other than the property (if any) to which the appeal relates.

(2) Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal (Or. 41, r. 10).

Order for furnishing security. Rule 10 is not ordinarily invoked unless the appellant is guilty of laches and the appeal is a frivolous one. Therefore, only on the ground of the appellant's poverty the appellant cannot be called upon to furnish security for costs of the appeal.⁷

However, when the appellant resides out of India and has no property within India except that, if any, for which the appeal is preferred, the appellate court may call upon the appellant to furnish security for the costs of the appeal.

Power to dismiss appeal without sending notice to Lower Court. (1) The Appellate Court after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day may dismiss the appeal.

3 *Manthani v Special Tahsildar* AIR 1976 AP 81

4 *Mamuda v Bexyal* AIR 1976 Cal 415 (DB).

5 *Musulu v Bagurappa* AIR 1975 AP 73.

6 *Gouse v Salima* AIR 1974 Mad 220.

7 *Radhika Devi v Lalita Saran* AIR 1985 Pat 278.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

(4) Where an Appellate Court, not being the High Court, dismisses an appeal under sub-rule (1), it shall deliver a judgment, recording in brief its grounds for doing so, and a decree shall be drawn up in accordance with the judgment (Or. 41, r. 11).

Time within which hearing under rule 11 should be concluded. Every appeal shall be heard under rule 11 as expeditiously as possible and endeavour shall be made to conclude such hearing within sixty days from the date on which the memorandum of appeal is filed (Or. 41, r. 11A).

Legislative history. Sub-rule (1) of r. 11 has been substituted for original sub-rule (1) by CPC (Amendment) Act 1999 which has come into force with effect from 1st July 2002. Under the new r. 1 the appeal may be dismissed summarily without sending any notice to the trial court. Prior to this amendment sub-rule (1) provided that the appellate court after sending for the record if it thought fit so to do and after fixing a date of hearing for the appellant or his pleader might dismiss the appeal without sending notice to the trial court or to the respondent or his pleader. The present sub-rule (1) enables an appellate court to dismiss the appeal summarily (or hearing the appellant or his pleader if he appears on that day fixed for such purpose, without issuing any notice to the trial court or without sending for any record from the trial court or without issuing notice to the respondent or his pleader.

Sub-rule (4) has been inserted in CPC (Amendment) Act 1976 with effect from 1st February 1977 which calls upon the appellate court other than a High Court to deliver a judgment recording in brief its grounds for so doing if it decides to dismiss an appeal summarily under r. 11.

Sub-rule (1). The appellate court under r. 11(1) on coming to the finding that there is no arguable point in the appeal may dismiss the appeal on hearing the appellant alone without sending notice to the respondent. However, sub-rule (4) of r. 11 inserted in the Code by 1976 Amendment specifically provides for delivering a judgment by the appellate court other than a High Court giving brief reasons for dismissal *in limine*. The legislative object of sub-rule (4) is to do at once two things to effectuate the constitutional imperative of Art. 39A of the Constitution, namely—(1) to make the process of justice rational, reasonable and accountable and (2) to short circuit litigation process by mandating the appellate court to render reasoned judgment so that the unsuccessful appellant is enabled, thereby to make its mind whether to impugn the judgment or be satisfied therewith but to enable also second appellate court to make its mind on the perusal of the reasons given to the impugned judgment of the appellate court as to whether the appellate court's judgment warrants any interference or not.⁸ But dismissing the appeal summarily in respect of one item of property and admitting the appeal in respect of other items of property is not legal. The appeal is to be dismissed summarily or admitted either in entirety or not at all.⁹ When the appellate court exercises the power under r. 11(1), it must express its own reasons for summarily rejecting the first appeal. Therefore, when the appellate court has not chosen to assess the merits of the case in first appeal by giving reasons of its own, the dismissal of the first appeal on the reasons mentioned in the judgment of the first court would not be proper.¹⁰ It has

8. *Munchoo v State of M.P.* AIR 1987 Muz 202.

9. *Rangji Bhagata v Krishna Rao* AIR 1982 SC 1223; (1982) 1 SCC 433.

10. *Hargaji Bhanabhai Divalkar v Kheda Gram Panchayat* AIR 1994 Guj 1.

been held by the Delhi High Court that even though so far as the High Court is concerned there is no requirement for giving reasons, it might be very desirable to give reasons. But the fact that the High Court when acting under Or. 41, r. 11 has not given reasons does not vitiate a judgment, nor can an appellant whose appeal is so dismissed claim that it is no judgment.¹¹

A reference may be made to the observation of Supreme Court in *Shankar v Gangabai*¹² when in a case the Bombay High Court summarily dismissed a first appeal without assigning any reason and the party aggrieved has moved Supreme Court. Supreme Court observes: "We would have been saved the futile exercise of looking at the pleadings and considering the evidence if only the High Court would have given us the benefit of its views. A brief statement of reasons would have served that purpose." In view of the above observation of Supreme Court made even before sub-rule (4) of r. 4 was inserted with effect from 1st February 1977. It appears that a High Court will be under an obligation to give a brief statement of reasons while dismissing a first appeal summarily.

Rule 11 applies to appeals under Provincial Insolvency Act. As the provisions of r. 11 of Or. 41, CPC are not contrary to the provisions of Provincial Insolvency Act, then r. 11 of Or. 41, CPC will be attracted to appeals under that Act.¹³

Bombay Rent Act. Any appeals to the appellate court under s. 2A of Bombay Rent Act 1947 attract r. 11 of Or. 41, CPC and the appellate court can exercise the power to dismiss the appeal summarily under r. 11(1) of Or. 41, CPC.¹⁴

Appeal under s. 173 of Motor Vehicles Act 1988. In an appeal under s. 173 of the Motor Vehicles Act 1988 the High Court can in accordance with Chapter II, r. 9(4) of Allahabad High Court Rules, dismiss the appeal summarily under r. 11(1) of Or. 41, CPC without notice to the trial court and notice to respondent or his pleader.¹⁵

Appeal under s. 183(3) of Calcutta Municipal Corporation Act. Appeals under s. 183(3) of Calcutta Municipal Corporation attract Or. 41, r. 11, CPC and such appeals in appropriate cases may be dismissed summarily.¹⁶

Summarily dismissal when. An appeal raising a triable issue cannot be dismissed summarily under r. 11(1).¹⁷

The court must be chary in dismissing a first appeal summarily and if it chooses to do so it must express its own reason as an appellate forum in dismissing the first appeal summarily.¹⁸

But if the appellate court on hearing the appellant finds no ground to interfere with the judgment appealed against it can dismiss the appeal summarily at admission stage itself without notice to the respondent.¹⁹

Dismissal of appeal on hearing the respondent. When the appellate court dismisses the appeal on hearing the respondent, it is not a dismissal under r. 11(1) of Or. 41, CPC.²⁰

11. *Hari Singh v S. Sat* AIR 1996 Del 21 (DB).

12. AIR 1976 SC 2508.

13. *Lalit Chandra v Abul Haq* AIR 1988 Cal 15.

14. *Narendras Rajaram Shinde v Rukmini Bai* AIR 1992 Bom 509.

15. *New India Assurance Co. Ltd. v Shukantala Devi* AIR 1996 All 188 (DB).

16. *Corporation of Calcutta v Soumen Roy* 97 CWN 457 (DB).

17. *Mahadev v Sagamtha* AIR 1972 SC 1932.

18. *Harejan v Khoda Gram Panchayat* (1994)1 Guj LR 159 (DB).

19. *Asst. Commissioner and L.A.O. v Rutaramani Swamy* (1997)3 Kant LJ 48 (DB).

20. *Mehar Suraya v United Investment Corporation* AIR 2002 Cal 108.

Admission of appeal subject to condition—not justified. Admission of appeal, subject to condition of deposit of some given amount, is not envisaged in the provision contained in s. 96 and Or. 41, r. 11, CPC. It is only when the appellant prays for stay, a condition may be imposed.²¹

Sub-rule (2)—dismissal of appeal on merits when the appellant is in default. When the appellants' counsel was not appearing before High Court at the hearing of second appeal, in spite of repeated notice, the High Court cannot dismiss the second appeal on merits. Only course left to High Court is to dismiss it for non-prosecution or default under r. 11(2) of Or. 41, CPC.²²

Day for hearing appeal. (1) Unless the Appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal.

(2) Such day shall be fixed with reference to the current business of the Court (Or. 41, r. 12).

Legislative changes. Sub-rule (2) of r. 12 has been substituted for the original sub-rule (2). Under the unamended sub-rule (2), the date of hearing of the appeal was required to be fixed with reference to the current business of the court and also with reference to the place of residence of the respondent, and the time necessary for the service of notice of appeal so as to allow the respondent sufficient time to appear and answer the appeal on such day. After the amendment which comes into force with effect from 1st July 2002, the appellate court while fixing the date of hearing of the appeal if it does not dismiss the appeal under r. 11 shall take into consideration only the current business of the court to fix the date of hearing of the appeal.

Appellate Court to give notice to court whose decree appealed from. Deleted by CPC (Amendment) Act, 1999 with effect from 1.7.2002.

Prior to deletion, rule 13 read as follows:

"13(1). Where the appeal is not dismissed under rule 11, the appellate court shall send notice of the appeal to the Court from whose decree the appeal is preferred.

(2) *Transmission of papers to Appellate Court.* When the appeal is from the decree of a Court, the records of which are not deposited in the Appellate Court, the Court receiving such appeal shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the Appellate Court.

(3) *Copies of exhibits in court whose decree appealed from.* Either party may apply in writing to the Court from whose decree the appeal is preferred specifying any of the papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of, and given to, the applicant."

As the Rule 11(1), as amended by CPC (Amendment) Act, 1999 empowers the Appellate Court to dismiss the appeal summarily on hearing the appellant without issuing notice to the trial court, or to the respondent or his pleader, this rule has been omitted by the same Amendment Act with effect from 1.7.2002.

Publication and service of notice of day for hearing appeal. (1) Notice of the day fixed under rule 12 shall be affixed in the Appellate Court-house, and a like notice shall be sent by the Appellate Court to the Court from whose decree the appeal is preferred, and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided for the service on a defendant of a summons to appear and answer; and all the provisions applicable to such

21. *AGART of M/s. Devi Theatre v. Viswanath Rao* 2004 AIR SCW 3102, 2004(3) Supreme 444; 2004(3) Scale 100.

1. *Ajit Kumar Singh v. Chiranjibi Lal* AIR 2002 SC 1447(2); (2002)5 SCC 609.

summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice.

(2) *Appellate Court may itself cause notice to be served.* Instead of sending the notice to the Court from whose decree the appeal is preferred, the Appellate Court may itself cause the notice to be served on the respondent or his pleader under the provisions above referred to.

(3) The notice to be served on the respondent shall be accompanied by a copy of the memorandum of appeal.

(4) Notwithstanding anything to the contrary contained in sub-rule (1), it shall not be necessary to serve notice of any proceeding incidental to an appeal on any respondent other than a person impleaded for the first time in the Appellate Court, unless he has appeared and filed an address for the service in the Court of first instance or has appeared in the appeal.

(5) Nothing in sub-rule (4) shall bar the respondent referred to in the appeal from defending it (Or. 41, r. 14).

Scope and application. Sub-rule (1) is a mandatory provision relating to the service of notice on the respondent or on his pleader. The exception to the mandatory requirement as to service of notice of the appeal on the respondent as envisaged in sub-rule (1) of r. 14 is only in respect of any notice incidental to an appeal and not to the main appeal i.e. the appeal itself.²

In an appeal against compensation awarded under the Motor Vehicles Act, even if the owner of the vehicle remained *ex parte* before the M.A.C.C. Tribunal, notice of appeal should be served upon the owner.³

Notice issued relating to stay application. When a notice was issued to the respondent containing only the tentative date for hearing the stay matter, such a notice is not the notice of the date of hearing of appeal to the respondent. So, cross-objections filed within 30 days from the date on which the appeal was listed for the first time in the appellate court will not be barred by limitation.⁴

Dismissal of the appeal for appellant's default. Rule 17(1) provides that where on the day fixed or any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the court may make an order that the appeal may be dismissed. When such an appeal is dismissed for default of the appellant, the explanation to r. 17(1) added to the sub-rule by the 1976 Amendment specifically provides that such dismissal shall not be on merits. It has, therefore, been held by the Karnataka High Court that when in an appeal before the Deputy Commissioner the appellant is absent on the date of hearing, the Deputy Commissioner cannot dismiss the appeal on merits.⁵

Contents of notice. Omitted by CPC (Amendment) Act, 1999 with effect from 1.7.2002. Rule 15 prior to its omission read as follows:

Contents of notice. The notice to the respondent shall declare that, if he does not appear in the Appellate Court on the day so fixed, the appeal shall be heard *ex parte*.

In view of omission of rule 15 it is not necessary for the Appellate Court to indicate in the notice that if the respondent failed to appear on the date fixed for hearing of the appeal, it shall be heard *ex parte*.

2. *Sushila v Rajveer Singh* AIR 2000 MP 121 (DB).

3. *M. Saryanarayana v H. Jayarama Rao* AIR 1990 AP 160.

4. *Rashida Begum v Union of India* AIR 2001 NDC 81 (Del); 2001 AIHC 2507.

5. *Azizulmi Commissioner, Slumaga v M.R. Ramachandrappa* AIR 1976 Kam 160 (DB).

Rule 17(2) makes specific provision of the appeal being heard *ex parte* if the respondent did not appear on the date of hearing. So such intimation in the office to the respondent that in default of his appearance the appeal would be heard *ex parte* is considered by the legislature to be irrelevant and hence r. 15 has been deleted.

Procedure on hearing

Right to begin. (1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply (Or. 41, r. 10).

Dismissal of appeal for appellant's default. (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

Explanation. Nothing in this sub-rule shall be construed as empowering the Court to dismiss the appeal on the merits.

(2) *Hearing appeal ex parte.* Where the appellant appears and the respondent does not appear, the appeal shall be heard *ex parte* (Or. 41, r. 17).

Hearing of the appeal ex parte. Where the appellant appears but the respondent does not appear, the appeal shall be heard *ex parte*. Any respondent being aggrieved by the disposal of the appeal *ex parte* may apply under r. 21 of Or. 41, C.P. Code to the appellate court to rehear the appeal and if he satisfies the court that the notice has not been duly served or that he was prevented by sufficient cause from appearing on the date of hearing when the appeal was called on for hearing, the court shall rehear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.

In view of the Explanation to r. 17(1) of Or. 41, CPC, it is now clear that when the appellant does not appear, the court is authorised to dismiss the appeal for default, but it has no power to decide it on merits.⁶ So, when the counsel for the appellant seeks permission to withdraw from the appeal and the court on rejecting the permission decides the appeal on merits, it acts in violation of the Explanation to r. 17 and the order is erroneous.⁷ But when the matter is treated as part heard and the counsel who agreed to argue the case on the adjourned date did not appear to argue the appeal and the argument of the respondent was heard and the appeal was disposed of on merits, it is not a case of failure of appearance contemplated by r. 17.⁸

Both parties fail to appear. When on the date of hearing of the title appeal none of the parties appeared, only course open to the appellate court is to dismiss the appeal for default under Or. 41, r. 17(1) and the appellate court could not have disposed of the appeal on merits which would be in contravention of provisions of r. 11(1) of Or. 41, CPC.⁹

No instruction of pleader and duty of the court. Even when an advocate reports no instruction and takes no further part in the hearing of the appeal on behalf of the respondent, a duty is cast on the court to call on the case for hearing so that any of the parties can appear in person and attend the court at the time of hearing.¹⁰

6 *Abdur Rahman v Ashifa Begum* (1996) 6 SCC 62; *J&K Bank Ltd. v Abdul Kamil Chishti* AIR 2001 J&K 4 (DB); *Digambar v Kisan* (2001) 94 Bom LR 938 (Bom).

7 *Rakesh Chandra Sood v Amarnath* 2001 AHC 2558 (HP).

8 *K. Mathurani v Abdul Razack* 1997 AHC 109 (Mad).

9 *Chambhikala Desai v Mister Doshi* AIR 2002 NOC 183 (Or); 2002 AHC 2212.

10 *Takshar Sahu v Ambira Sahu* AIR 1997 Or 185.

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs. [Omitted by CPC (Amendment) Act, 1999 with effect from 1.7.2002].

Rule 18 as it stood prior to 1.7.2002 read as follows:

"Where on the day fixed, or on any other day to which the hearing may be adjourned, it is found that notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice, or if the notice is returned unserved, and, it is found that the notice to the respondent has not been issued in consequence of the failure of the appellant to deposit, within any subsequent period fixed, the sum required to defray the cost of any further attempt to serve the notice, the court may make an order that the appeal be dismissed.

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day, the respondent appears when the appeal is called on for hearing."

Re-admission of appeal dismissed for default. Where an appeal is dismissed under rule 11, sub-rule (2) or rule 17, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit (Or. 41, r. 19).

Sufficient cause. *Bona fide* mistake on the part of the lawyer is held to be sufficient cause.¹¹ Unless there is gross negligence of the part of the appellant the court shall allow the prayer even if there is negligence of the lawyer.¹² When the appeal was dismissed for default for absence of lawyer, the Supreme Court restored appeal but on criticising the role of advocate directed that costs awarded shall be recovered from the advocate.¹³ If the party takes effective steps in the hearing of the appeal he shall not suffer for the laches of his advocate when he has no duty or obligation to remain personally present at the time of hearing of the appeal.¹⁴

Even though omission of the lawyer to determine the date of hearing was pleaded as sufficient cause, yet when the court disbelieved such story the court is justified in refusing to condone the delay in filing the application for readmission of the appeal under r. 19. The application for condonation of the delay was also not filed along with the application for readmission.¹⁵ It is true that when an appeal is transferred to another court for disposal it is the duty of the transferee court to give notice to the parties. But restoration of the appeal dismissed for default was not allowed when it is disclosed that the counsel had the knowledge of the transfer.¹⁶ However, a party is not to suffer for the negligence of the court. In a Calcutta High Court case the suit was valued at Rs. 8,000 but in the final decree the clerk of the court put the value of the suit as Rs. 24,000. Two appeals were filed. One in High Court and another in District Court treating the value of the suit to be Rs. 8,000. The appeal in District Court was dismissed for non-prosecution. Thereafter High Court held that the value of the suit being Rs. 8,000 District Court was the forum of the appeal and the High Court appeal has been

11. *O.N.G.C. v Tridimath* AIR 1983 Cal 124.

12. *Chandni Kaur v S.C. Sumar* (1978)80 Pwaj LR 423; *Teju v Bhudhar* AIR 1987 HP 25.

13. *Rafiq v Munshidaf* AIR 1981 SC 1400.

14. *Lachi Tewari v Director of Land Records* AIR 1984 SC 41; *Nirankar v Shri A. D.J., Moreadabad* AIR 1984 SC 1268.

15. *Union of India v Firm Dhannolal Dulichand* (1987)1 Civ Crv Cas 13 (MP).

16. *Lal Bahadur Shah v Ram Narain* AIR 1988 Pwaj 150; 1987 BLJ 152; 1987 Pwaj LJR (HC) 622.

dismissed. The appellant then filed an application for restoration of the appeal disposed of by the District Judge under r. 19. But in the meantime the time for making the prayer for readmission had been barred by time. It has been held by Calcutta High Court that the appeal in the court of District Judge should be restored to file under inherent power as act of the court should cause no harm to the party.¹⁷

In the case of appeal being dismissed for default, the Calcutta High Court has held that a lay client should not be made to suffer for the negligence of the lawyer. So when the lawyer is negligent but not the client the court should take liberal view in the matter of restoration.¹⁸

It has been held that in a country inhabited by poor, illiterate or semi-literate people unaware of the basic knowledge of substantive and procedural laws, enough opportunities should be given to the litigants to fight the litigation in a fair manner and subject to the constraints of law, a litigant should be given a free and fair opportunity to contest the action in court.¹⁹

Sufficient cause or not. Lawyer's absence due to call of strike by Advocates' Association was held to be sufficient cause.²⁰ When the sufficient cause for non-appearance is not shown, the provisions of r. 19 of Or. 41, CPC are not attracted.¹ When there was unrebutted affidavit on behalf of Municipal Board that the counsel for the Board did not give information about the dismissal of appeal for default, delay of two years in filing restoration application was condoned under s. 5 of the Limitation Act and the appeal was re-admitted for hearing.² When there was sufficient cause for not appearing before the appellate court, the petition should not be dismissed only on the ground that the application has been filed under a wrong provision of law.³ When the ground of illness is alleged but in the same date the appellant filed *hazira* in the criminal court, no sufficient cause is proved.⁴

Applicability of r. 19. Rule 19 is attracted only when the dismissal is for default either under r. 11(2) or r. 17(1) or r. 18 (since repealed). Re-admission of appeal under r. 19 is not allowable when the appellate court dismisses the appeal summarily under r. 11(1) of Or. 41, CPC.⁵ When an appeal under the Hindu Marriage Act 1955 is dismissed for default, r. 19 of Or. 41, CPC is attracted to restore it to file.⁶

Limitation. The application for setting aside the dismissal of appeal for default is to be filed within 30 days of the date of dismissal under Art. 122 of the Limitation Act 1963.⁷ The delay in filing the petition may be condoned under s. 5 of the Limitation Act.

Appeal. An appeal lies only against refusal to re-admit the appeal. Against the order re-admitting the appeal under r. 19, no appeal lies. Only revision lies. But where the lower appellate court has re-admitted the appeal and condoned the delay on taking into consideration the circumstances of the case, the High Court would not interfere with the order in revision.⁸

Power to adjourn hearing and direct persons appearing interested to be made respondents.

(1) Where it appears to the Court at the hearing that any person who was a party to the suit in

17 *Anisapuram v Kohli* 83 CWN 783.

18 *Rustinet Chemicals v Shantik Stainless Steel* AIR 1986 Cal 76; (1986) 1 Cal Civ Cas 491 (Cal).

19 *Bisnoi v Ramul* AIR 1987 Gau 7; *Gloria Chemicals v R.K. Caples* AIR 1988 Del 213.

20 *Laxmi Kishan v Jai Dev* 2000(3) CCC 274 (Raj).

1 *Santosh Kumar Jain v Firm Suganchand Radhey Shyam* AIR 2000 Raj 226; (2000) 3 RLW 1714.

2 *Jai Kishan v Municipal Board* 2002 AHC 1524 (Raj).

3 *Laxmi v Palna Bai* 2001 AHC 2509 (Kan).

4 *Ram Akhtar Prasad v Kumar Jain* AIR 2001 Pat 141.

5 *Karunakarum v Thangarajani Amma* 2000 AHC 1880 (Ker).

6 *V.G. Shanmugasel Shah v Sumitra Bai* AIR 1994 NDC 82 (Mad).

7 *Baldevwar Mishi v Kusum Devi* (2001) 3 BLJR 1649.

8 *Dakshayani v Kamala* 2000 AHC 3255 (Kan).

the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.

(2) No respondent shall be added under this rule, after the expiry of the period of limitation for appeal, unless the Court, for reasons to be recorded, allows that to be done, on such terms as to costs as it thinks fit (Or. 4), r. 20).

Scope. Power under r. 20 is resorted to seldom and only in those cases when the court feels that unnecessary technical objection should not stand in the way of the court doing proper justice between the parties without causing prejudice to any of the parties. However, power is not exhaustive in r. 20 of Or. 41, C.P. Code but such power can also be exercised under s. 107 read with Or. 1, r. 10(2), C.P. Code.⁹

The expression "person interested in the result of the appeal" indicates that the interest of the defendant who was not made a party in the appeal by the appellant is likely to be prejudiced by the determination of the appeal as constituted without making the said defendant a party in the appeal. But omission of the plaintiff to implead a proforma defendant from whom the plaintiff has purchased the property is not fatal as he is not a person interested in the appeal and such a party cannot be impleaded under r. 20.¹⁰

But even if the party was an interested party the effort to implead him on the date of judgment long after the expiry of the period of limitation should not be allowed.¹¹ When the impleadment of a necessary party within the period of limitation was not made the addition of such respondent long after limitation after the respondent has acquired a valuable right because of such non-impleadment should not be allowed.¹² The court can apart from r. 20 of Or. 41, C.P. Code invoke inherent power to permit parties to be added in appropriate cases. So a transferee or assignee pending appeal may be impleaded.¹³

The plaintiff filed a suit against the State in respect of a tank and obtained a decree. The State asserted before the trial court that the Gram Panchayat was in possession of the tank under a development scheme. In appeal the Gram Panchayat was added as a party to a suit who was interested in the result of the appeal but was left out.¹⁴ An interested party was left out and he should be joined specially when in this case omission to include that person in the appeal was due to inadvertent typing mistake.¹⁵ However, it is not necessary to implead a party in appeal against whom no decree was passed and such non-impleadment would render the appeal not maintainable.¹⁶ So, when particular defendants are not necessary parties in the suit and they cannot challenge the appeal to be maintainable as they have not been impleaded in the appeal.¹⁷

Limitation no bar when sufficient cause is proved. It is clear that Or. 41, r. 20 can be invoked even after the addition is sought for after the period for filing the appeal has expired. It is provided in sub-rule (2) of r. 20 of Or. 41, CPC that a party can be added after expiry of the period of limitation if sufficient cause is shown for the delay.¹⁸ So, where the name of the party was

9. *Mohini Mohan v Seishi Chandra* AIR 1978 Cal 434.

10. *Paral v Nilhal* (1988)2 Cur Civ Cas 915 (Gau).

11. *Sarai Singh v Monohar Lal* AIR 1971 SC 240, (1971)3 SCC 889; *Vasant v Gangadhar* AIR 1983 NOC 110 (Karn), ILR (1982)1 Kam 575, (1982)1 Kam LJ 473.

12. *Hikarim Sabha v Dr. Mongal Wadi* (1988)1 Cur Civ Cas 469 (MP).

13. *C. Suggarayudu v Eluri Brahmaiah* AIR 1970 AP 211; ILR (1970) AP 557.

14. *State of West Bengal v Sudhanshu* (1992)2 Cur Civ Cas 281 (Cal).

15. *Sugruba v State* AIR 1996 MP 170.

16. *Prasadi v Madhuri Bai* AIR 1996 MP 240.

17. *State Bank of India v Ramo Krishna* AIR 1990 SC 1981.

18. *E. Madhesi Amma v E. Indrasekaran* AIR 1992 Ker 290.

Revision

Revision. (1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

- (a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity.

the High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where—

- (a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings;
- (b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

Explanation. In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding (s. 115).

Grounds of revision. A revision petition under this section will not be entertained by the High Court except on any of the three above mentioned grounds. It can, however, issue writs of certiorari and other prerogative writs under Art. 226 of the Constitution. The powers conferred on the High Courts under s. 115, C.P. Code is entirely discretionary.¹ There was a conflict of opinion amongst the different High Courts on the point whether a revision lies to the High Court when an appeal against a decision lies to a subordinate court and a second appeal lies to the High Court. The Supreme Court has since decided² that the High Court has no power to exercise revisional jurisdiction in such a case but it can exercise such jurisdiction where the decision itself is not appealable directly or indirectly to the High Court. Guahati High Court has also held

1 *Venubai v. Prabhu* AIR 1984 Bom 403; *Somnagar Jena v. Mina Jena* AIR 1984 Ori 213.

2 *S.S. Khanna v. F.F.J. Dhillon* AIR 1964 SC 497.

3 *Churn Deka v. Umeshwari Nath* AIR 1995 Gau 9.

that the High Court is not competent to exercise its power under s. 115, C.P. Code in respect of an order from which an appeal lies to the court subordinate to it.⁴

When a discretionary order passed by the court has not been challenged for long and the High Court refused to entertain revision against such an order, the Supreme Court has upheld the order of High Court.⁵

The Court is not justified in dismissing a petition of revision summarily without passing the reasoned order. So the Supreme Court set it aside and directed the High Court to hear it on merits.⁶

However, a court of revision can reject a revision petition without entering into merits when the petition is defective and all the parties interested have not been impleaded in the petition.⁷

In exercising the power of revision the revision court must limit its decision to the question before it. When the revision petition is filed challenging the admissibility of a document by the trial court, the High Court on the finding that the trial court's reason for not admitting the document was not sustainable cannot enter into merits of such document to declare it that it was not a valid agreement.⁸

Revisional jurisdiction is very limited and can be exercised only in case of illegality or material irregularity committed by the subordinate courts and not when the case is wrongly decided by trial court.⁹

When the lower appellate court takes a different view of evidence from the trial court there is no material irregularity or jurisdictional error of the appellate court. So such an order cannot be interfered with in revision.¹⁰

But when the appellate court fails to exercise jurisdiction under wrong impression of law, the appellate court also failed to consider the reasons given by the trial court, there is scope to interfere with such order of appellate court under s. 115, CPC.¹¹

Article 227 of the Constitution and revision. The jurisdiction of the High Court under Art. 227 of the Constitution is a separate and distinct proceeding from one under s. 115, C.P. Code and the remedy under Art. 227 is an alternative one. But when an application is styled as one under s. 115, C.P. Code and under Art. 227 of the Constitution, the petition under s. 115, C.P. Code having been found to be not maintainable, the petitioner cannot say that the said petition may be treated as one under Art. 227 of the Constitution when the rules of the High Court for filing such petition has not been complied with.¹² Moreover, the petition under s. 115, C.P. Code cannot be converted into one under Art. 227 of the Constitution *suo motu*.¹³

However, Rajasthan High Court has held that a petition under s. 115, CPC may be converted into a writ petition even *suo motu* if proper cause for that purpose is disclosed.¹⁴

Suo motu power of High Court. Even though the High Court can exercise power of revision *suo motu* yet such power can be exercised only in any case which has been decided by any court

4. *Mirza Asquid Hassan v State of MP* AIR 1995 SC 2243; (1995)2 SCC 422.

5. *Fauja Singh v Jarnal Kaur* (1916)4 SCC 461.

6. *Rajawari Amin v Joseph* AIR 1995 SC 719.

7. *Nawal Kishore Tulara v Dinesh Chand Gupta* AIR 2001 SC 2542; (2001)6 SCC 110.

8. *Singh C. Maluagan v Sarojy Radheshyam Jaiswal* AIR 2002 Bom 211.

9. *Sunil Bohidar v Pralokp Kumar Bohidar* AIR 2002 Or 161.

10. *Suresh Choud v Ashwarratan* AIR 2002 Raj 76.

11. *Jyoti Chhabra v Bura-Ghiani Tea Co. Ltd.* AIR 1993 Gau 89.

12. *Santosh Kumar v Sarojon Kaur* AIR 2002 Raj 152.

subordinate to High Court and the court should have decided the case in contravention of any of the cls. (a) to (c) of sub-sec. (1) of s. 115, C.P. Code. Unless there is a decided matter, there is no necessity of the High Court to invoke this *suo motu* power. Therefore, revision filed not against any order or decision of the court would not be maintainable.¹³

Illegality or irregularity of subordinate court. Section 115, C.P. Code lays down that only when some illegality or material irregularity is committed by the subordinate court in the matter of exercise of jurisdiction the High Court can interfere in revision. By the amendment of the section by 1976 amendment a proviso has been added to sub-sec. (1). In view of such proviso only such order may be interfered with which is not appealable and which attracts either proviso (a) or (b) of the proviso and any of the clauses of s. 115(1).¹⁴ Even if the order falls under any of the clauses of s. 115(1) the High Court will have no jurisdiction unless the order is such that had it been made in favour of the party applying for it, it would have disposed of the suit or proceeding or if allowed to stand it would occasion a failure of justice or would cause irreparable loss to the party against whom such an order is made.¹⁵ It has been held that High Court in revision should not set aside an illegal order when its effect would be to restore another illegal order.¹⁶ It has also been held that it is only when the trial court commits wrong interpretation of some law, such as, the law of limitation or the principle of *res judicata* that a question of jurisdiction arises for the High Court to interfere.¹⁷ In order to entertain a revision against the interlocutory order the order should either cause an irreparable injury or should occasion a failure of justice.¹⁸ The explanation added to Amending Act of 1976 defines "any case decided" as including any order deciding an issue in any suit or proceeding. This includes an order of stay made under the inherent power.¹⁹ Even an erroneous decision on a question of law cannot be interfered with unless such an order comes under the purview of any of the cls. (a), (b) or (c) of s. 115(1), C.P. Code.²⁰ However the revision petition once admitted has to be disposed of on merits and cannot be dismissed on the ground that the applicant did not deposit rent as ordered by court.¹

When the trial court makes grave error, such as, making erroneous presumption and non-consideration of evidence on record the High Court can interfere with that order under s. 115, CPC.²

The High Court commits error of law if it decides a case on the basis of statutory provision in respect of which there is no foundation in the pleading.³

When the executing court exceeded its jurisdiction the High Court interfered in revision.⁴

But the executing court's order on the prayer of the decree-holder directing to break upon the lock for execution of the decree for possession is within its jurisdiction and such an order cannot be interfered with in revision.⁵

13. *K. Arjunana v Chanchal Dasgupta* AIR 1994 AP 44.

14. *Kanti Mohi v Bhagwant* AIR 1985 Pat 174.

15. *Ramdeo Jha v Chandar Thakur* AIR 1982 Pat 172, AIR 1979 Raj 118; *Haridwarilal v Pukharnal* AIR 1978 Punj 230.

16. *Saraj Deo v Board of Revenue* AIR 1982 All 23.

17. *V.B. Raju Gopalanah v Basba Krishna* AIR 1984 Kant 128; *State of Orissa v Puri Municipality* AIR 1984 Ori 132.

18. *F.C.I v Bircandra* AIR 1978 Cal 264.

19. *D.N.G.C. v Ganesh Prasad* AIR 1983 Gau 8.

20. *State of Haryana v O.P. Singhal* AIR 1984 P&H 358.

1. *Hakim Chand v Madhava* AIR 1983 SC 698.

2. *Mahabir Prasad Jain v Ganga Singh* (1999)8 SCC 274.

3. *Omprakash v Basanthilal* (1999)6 SCC 618.

4. *Rameshwar Das Gupta v State of UP* (1996)5 SCC 728.

5. *Smt. Appamma v Lawrence D'Souza* AIR 2000 Kant 246.

The property was under lease of the respondent and a mortgage deed was created in respect of the same property by the appellant. In the decree for redemption the appellant, the mortgagor paid the decretal dues and the executing court directed delivery of possession.

But the High Court in revision set aside the order in revision on the plea of the respondent that he had acquired tenancy right therein. But such plea of tenancy right was negatived by the Land Tribunal. The Supreme Court has held that executing court did not commit any illegality in directing delivery of possession and the interference of such an order by High Court in revision was not justified.⁶

When there was sufficient cause for delay in applying for restoration application and the court condoned delay and restored the suit to file, there was no jurisdictional error for the High Court to interfere.⁷

When the sole defendant died during the pendency of suit for injunction but his legal representatives have not been substituted, the suit was dismissed and one appeal was filed by the plaintiff against the dead defendant. The dismissal of appeal on the ground that the appeal was filed against a dead person without taking steps for substitution of heirs was a valid order. It cannot be interfered with in revision as no jurisdictional error was committed by appellate court in dismissing the appeal.⁸

Appeal and revision. The Supreme Court has clearly made the distinction between the appeal and revision. The appeal is a continuation of a suit or proceedings wherein the entire proceedings are again left open for consideration before the appellate authority which has the power of reviewing the entire evidence subject, of course, to the prescribed statutory limitations. But in the case of revision whatever power the revisional authority may have, it has no power to reassess and reappreciate the evidence unless the statute expressly conferred on it that power. That limitation is implicit in the concept of revision.⁹

Even though sub-sec. (2) of s. 115, C.P. Code is a bar to the exercise of power of revision when the appeal lies to the High Court or to a court subordinate to High Court against the impugned order, it is no bar to the High Court exercising power of revision against an appellate order passed by the appellate court.¹⁰

When the appeal as well as revision has been filed before the same court against the same order, withdrawal of the appeal even though without reserving the right to pursue the revision would not affect the maintainability of the revision. Unless the court comes to the conclusion that the appeal was the proper remedy and not revision, the withdrawal of the appeal and its consequential dismissal would not merge the decree of the trial court in the order of the appellate court and hence the revision would be competent.¹¹

The revision power can be exercised in respect of the order passed by a court subordinate to the High Court. So, no revision lies against the order of Special Land Acquisition Officer vs Collector refusing to make a reference because such officer is not a court subordinate to the High Court and also because the officer was not discharging any judicial function.¹² An order confirming sale under Or. 21, r. 92(1), C.P. Code is appealable. So no revision lies against such

6. *Narajames Thiruthamizhavar v Madhavan Kutty* AIR 2000 SC 904.

7. *Davinder Pal Singh v M/s. Parraj Steel Rolling Mills (P) Ltd.* AIR 2002 SC 451.

8. *Rajh Lal Prasad v Biju Subanta Khatoon* AIR 2002 Pat 56.

9. *Lachman Dass v Samokh Singh* (1995) 4 SCC 301.

10. *Mahilal v Pune Municipal Corporation* (1995) 3 SCC 33.

11. *Chitramanjun Crochet (P) Ltd. v Lachman Dass* 1994 Supp (1) SCC 101.

12. *Ramandul v Anir of General* AIR 1996 Guj 33.

order.¹³ Revision against injunction order against the defendant is not maintainable when the defendant-petitioner has failed to show that the impugned order would occasion failure of justice or it would cause irreparable injury to him.¹⁴

Extent of jurisdiction. There is great distinction between the appellate power and revisional power of High Court. While exercising appellate power the High Court decides the case both on law and on facts. But the power of revision is given to High Court so that it may satisfy itself that the trial court has decided the case according to law.¹⁵ The High Court can interfere only for the purpose of rectifying an error of the court below. This is part of general appellate jurisdiction no doubt.¹⁶ But the power is discretionary. Even though all the conditions have been fulfilled the High Court may still refuse to interfere when the order challenged has not resulted in substantial failure of justice.¹⁷

When the court of revision entering into evidence reversed a finding of fact of the lower court, it assumes jurisdiction as a court of appeal.¹⁸ The expression "revision" conveys the idea of a much narrower jurisdiction than that conveyed by the expression "appeal".¹⁹ When the court directs the plaintiff bank to give the break up of the principal and interest of the suit claim, the order can easily be complied with and the plaintiff has not in any way been prejudiced by such order. So, the revision against such order is not maintainable.²⁰ The revision petition must show how the impugned order would occasion a failure of justice. Unless the court of revision is satisfied that the order challenged would occasion a failure of justice the revision court would not interfere.¹ Where the civil judge exercised jurisdiction not vested in him by statute and had not followed the procedure laid down by the statute and thus committed illegality in the exercise of his jurisdiction, the High Court must rectify the error in exercise of its revisional jurisdiction.² When the trial court permitted withdrawal without allowing the plaintiff to restore the benefit accrued to the plaintiff by the interim order, the High Court can entertain revision against the order of the trial court but cannot itself direct the plaintiff to restore such benefit of the interim order. It can only direct the trial court to pass fresh order.³ The court of revision can give relief according to subsequent change of circumstances during the pendency of the revision petition provided the subsequent events are not disputed by any party.⁴ When the order refusing to correct the number of exhibits is likely to cause prejudice to the party the court of revision should interfere. When the refusal to admit a document is contrary to law the said order is revisable under s. 115, C.P. Code.⁵

Even in respect of the order allowing amendment passed by a court having no pecuniary jurisdiction the court of revision would refuse to interfere when such order does not result in failure of justice.⁶ When the trial court has set aside the order rejecting the plaint under Or. 7,

13 *Taheri v Daddappa* AIR 1996 Kant 128.

14 *Urban Improvement Trust, Jodhpur v Sohni Devi* AIR 1996 Raj 73.

15 *Hari Shankar v Girdharilal* AIR 1963 SC 698; *Mamik v Debdas* AIR 1986 SC 446; see also AIR 1982 Del 280; AIR 1977 MP 110.

16 *Shankar v Krishnaji* AIR 1970 SC 1; *Sarat Kumari v Shantibata* AIR 1983 NOC 63 (Ori).

17 *Brij Gopal v Kishan Gopal* AIR 1973 SC 1096, (1973)1 SCC 635.

18 *Mamik v Debdas* AIR 1986 SC 446.

19 *Sri Raja Lakshmi v Rangarwami* AIR 1980 SC 1253; (1980)4 SCC 259.

20 *State Bank of India v Avtar Singh* (1987)1 Car Civ Cas 13 (Punj).

1 *Ashok Kumar v Sangita Bai* AIR 1988 MP 59.

2 *Ramdeo Jha v Chandan Thakur* AIR 1982 Pat 172.

3 *Kishore Kumar v Md. Akbar Siddiqui* AIR 1994 NOC 194 (AP).

4 *Sanjay Mitra v Bhupendra* AIR 1994 Gau 31.

5 *Lakshmi Kozta v Achinta* AIR 1994 Cal 227.

6 *Laxmi Bai v Kamalaksha* AIR 1994 Kant 174.

r. 11, C.P. Code for default court fees by invoking inherent power on being satisfied that because of advocate's laches, the proper court fees were not deposited, the order is proper and cannot be interfered in revision even if there was remedy in appeal against the order rejecting the plaint.⁷ When the trial court allowed appointment of handwriting expert for comparing disputed signature of executant of the deed of gift with that of his admitted signature, the court does not exercise its jurisdiction illegally for the High Court to interfere with it in revision.⁸

But when the trial court allowed temporary injunction on being satisfied with the plaintiff's *prima facie* possession based on defendant's admission regarding delivery of possession of land other than the suit land the order suffers from material irregularity calling for interference by the court of revision.⁹ When the court allowed belated production of documents on being satisfied about the delay under Or. 13, r. 2, C.P. Code the order does not result in violation of justice or cause prejudice to any party for the revision court to interfere.¹⁰

When the auction sale is held violating provisions of Or. 21, r. 89, C.P. Code, it amounts to exercise of jurisdiction illegally with material irregularity and the court of revision can set aside such sale.¹¹ When the trial court decided the preliminary issue erroneously that the document is a promissory note and is inadmissible in evidence as it is insufficiently stamped the order can be interfered with in revision.¹² Refusal to accept document filed late cannot be set aside in revision.¹³

The order of trial court declining to set aside the report of the Commissioner is not revisable because the order would not result in failure of justice if allowed to stand nor will it cause any irreparable injury to the revision petitioner only because an inventory has been prepared by the Commissioner.¹⁴

When in execution of money decree a compromise took place between the parties to settle the decretal amount, the executing court by enforcing such compromise and recording such adjustment under Or. 21, r. 2, CPC did not exceed its jurisdiction. So no interference is called for by revision court.¹⁵

Whether jurisdictional facts have been erroneously decided or not by the District Judge can be examined in revision by High Court.¹⁶

Finding of fact. High Court in revision cannot make reappraisal of evidence.¹⁷ It cannot interfere with a finding of fact unless the same is perverse.¹⁸ It cannot interfere with the finding of fact on the ground that a different view on the appreciation of evidence is possible.¹⁹ But a finding of fact overlooking material evidence is an error in law and if such finding occasions

7. *M/s. Narayan Agricultural Corporation v Allamabad Bank* AIR 1995 All 225.

8. *G. Gargash v The Deity Shree Shant Mahatma* AIR 1995 Kant 287.

9. *Melagiriappa v Tamilappa* AIR 1996 Kant 150; see also *B.S. Gudi v Deb* AIR 2002 Kant 1.

10. *K. Sarathy Devi v S. Sornumappa* AIR 1995 AP 291.

11. *Annapurna Reddy v S. Suresh* AIR 1995 Kant 119.

12. *Mangal v L.Rs. of Lal Chand* AIR 1995 Raj 189.

13. *Gopal v Hara Chand* AIR 1994 Raj 110.

14. *C.K. Venkataswami Naidu v C.R. Vashanthi* AIR 2000 Ker 27.

15. *Singhi Bank Ltd. v M/s. Tumbis Pvt. Ltd.* AIR 2000 Bom 195.

16. *Executive Officer v R. Sathya Moorthy* AIR 1990 SC 958, (1990) 3 SCC 115.

17. *Sachdev v Manoharlal* AIR 1985 All 78; *Prabhu Dayal v Banuideo* AIR 1985 Pat 240; *Manupatru v Rajya Bhaskar Mahapatra* AIR 1985 NOC 151 (Or); *Dastagir Khan v S.N.B. Muzdar* AIR 1985 NOC 67 (Kant).

18. *Neer Md. v Qadir Mir* AIR 1983 NOC 181 (J&K).

19. *Ujjayji v Yograj* AIR 1984 SC 1894.

failure of justice the High Court can interfere in revision.²⁰ Even if the conclusion of fact or law is erroneous unless such conclusion affects the jurisdiction it cannot be interfered with in revision.¹

Reappreciation or reappraisal of evidence is out of bounds with revisional court unless the finding can be demonstrated to be perverse.² Rejection of application for condonation of delay in filing appeal being a finding of fact cannot be interfered with in revision.³ When the court on being satisfied about the sufficiency of the cause for non-appearance set aside the order and restored the suit, the finding of fact cannot be set aside in revision.⁴

When in a matrimonial proceeding both the parties claimed interim maintenance the finding of the court that both the spouse did not have sufficient means being a finding of fact is not vulnerable in revision.⁵

Interference with the finding of fact is justified only if the said finding is perverse or on account of non consideration of material evidence on record.⁶ Finding of the execution court in executing a decree for mandatory and prohibitory injunctions that the judgment debtor made encroachment despite prohibition being a finding of fact cannot be set aside in revision.⁷ Finding of the execution court about the property that has been sold in execution of the decree is a finding of fact and is not revisable.⁸ Finding of the trial court about the service of summons being a finding of fact is not revisable in revision.⁹

When the trial court not only misunderstood the law but also there was error apparent in the finding of fact, there is justification to interfere with such finding of fact in revision.¹⁰

Findings recorded by the courts below that the applicant is not the widow and legal representative of the deceased is not revisable when both the courts below came to that finding of fact on proper evidence.¹¹

So concurrent findings of fact based on materials on record coupled with the absence of perversity cannot be interfered with in revision.¹²

A suit was filed challenging the disclaimer of the suit property as Wakf Property. The plea of the defendant was based on the extract of Muntakhah. But original Wakf deed was not produced. So the courts below held that the property was not Wakf property. No interference is called for.¹³

Case decided. The expression 'case decided' was not originally defined in the Code and there were plethora of decisions on the point. However the expression has now been defined in the

20. *Rajesh Chandra v. Sm. Vinod* AIR 1982 J&K 95; *Brij Krishna Gupta v. Chandra Krishna* AIR 1981 NOC 43 (Del); *Harithi Chandra v. Krishan Kumar* (1985) 1 RCI 106; *Dansulhar Lenka v. Kuntur Bantik* AIR 1986 Ori 11.

1. *M.L. Sethi v. R.K. Kaur* AIR 1972 SC 2379, AIR 1978 Kant 117.

2. *Inda Devi v. Bhairananda Chaudhury* AIR 1988 Ori 154.

3. *Derry v. Om Parkash* AIR 1986 Punj 3.

4. *State of U.P. v. 3rd A.D.J., Azongarh* AIR 1988 All 14.

5. *Urmila Devi v. Hari Parkash* AIR 1988 Punj 84, 91 Punj LR 553.

6. *Masjid Kachia Tank v. Tuffail Mohammed* AIR 1991 SC 553.

7. *L.R. of Marga Ram v. Kana Ram* AIR 1993 Raj 208.

8. *P. Udayani Devi v. V.V. Rajeswar Prasad Rao* AIR 1995 SC 1357.

9. *Md. Isha Haque v. Md. Azadur Rahuman* AIR 1993 Gau 72.

10. *H. Mavegowda v. Thippamma* AIR 2001 Kant 169.

11. *Dulna Devi v. Dulna Devi* AIR 2001 All 195.

12. *Rakhi v. Adil, District Judge, Ferozabad* AIR 2000 All 166.

13. *Marathiwada Wakf Board v. Ragnam* AIR 2002 Bom 144.

explanation to s. 115 by the Amending Act of 1976: Even when during the course of proceeding some order is passed which conclusively determines some rights or obligations of a party to the dispute the order is a case decided. But orders passed merely for the progress of the proceeding are only steps towards the final adjudication of the case and only regulate the procedure and do not adjudicate upon the rights and obligations of parties. So such orders do not come within the purview of "case decided". The following are case decided:

- (1) Decision on a preliminary point on maintainability of the suit;¹⁴
- (2) order refusing to take additional evidence;¹⁵
- (3) order refusing to admit admissible evidence when such evidence is material for decision;¹⁶
- (4) when a controversy is settled by interlocutory order which cannot be agitated against the final order or otherwise;¹⁷
- (5) the decision of the issue on *res-judicata*;¹⁸
- (6) any order staying the suit under s. 10¹⁹ or refusing to stay suit;²⁰
- (7) any order refusing to amend plaint;¹
- (8) an order refusing to adduce further evidence to prove a document;²
- (9) directing production of document involving jurisdictional point and satisfying conditions of either of the cls. (a), (b) or (c) of s. 115, C.P. Code.³

Following are not case decided:

- (1) Any order relating to admission of document;⁴
- (2) an order refusing to recall a witness for further cross-examination;⁵
- (3) an order allowing a party to file document after issue being framed;⁶
- (4) an order refusing to put a question to the witness in a pending suit;⁷
- (5) an order refusing to grant leave to deliver interrogatory;⁸
- (6) an order under Or. 41, r. 5;⁹
- (7) order refusing to appoint a commissioner under Or. 26, r. 9, C.P. Code;¹⁰
- (8) order accepting written statement even at the end of the trial;¹¹

14 *S.S. Khanna v F.F.J. Dhillon* AIR 1964 SC 497, AIR 1970 SC 406.

15 *Weaver Proof Industries v Bihar Saus Industrial* 1979 BLJR 406.

16 *P. Subbar Rao v U. Ganga Ram* AIR 1985 Ori 140.

17 *Sri Ram v Arvind Kumar* AIR 1976 J&K 76.

18 *Sreenivash v Kalayapremal* AIR 1966 Mad 321, (1965)2 MLJ 526.

19 *Raguchand v Basant Lal* AIR 1975 Punj 171.

20 *Mughl v Khalid* AIR 1979 J&K 84.

1 *Roopnarayan v Prenchand* AIR 1974 Raj 29; 1973 RLW 594.

2 *Doshai Dei v Ramakant* (1985)1 Cur Civ Cas 485 (Or).

3 *F.C.I. v Birendra* AIR 1978 Cal 264; 82 CWN 811.

4 *British India Corporation v G.S. Nigam* 1983 All LJ 1001.

5 *Mamoharlal v Valerios* AIR 1980 All 327.

6 *Kalash Singh v Agarwal Export* 1984 All 30.

7 *Kalibhala v Sanitha* AIR 1981 NOC 80; (1980)1 Cal LJ 290.

8 *Maheshwari v Govindraj* AIR 1980 All 265.

9 *Ganesh v J.J.C. Paragran* AIR 1976 Goa 24.

10 *Harindar Kaur v Girdhar Ram* AIR 1978 Punj 76.

11 *Hansraj v Ghora* AIR 1982 Pat 156.

(9) an order refusing to send a document to an expert.¹²

Case decided—meaning. Sub-section (1) of s. 115, C.P. Code empowers the High Court to revise the order amounting to any case decided. The proviso creates an exception to the power of revision created by sub-sec. (1) which *inter alia* means that the power of revision available in respect of 'case decided' shall not be exercised unless the 'case decided' falls within the cases set out in cls. (a) and (b) of the proviso. Thus, the proviso is but a limitation on the exercise of the power of revision created by sub-sec. (1) of s. 115, C.P. Code and there is no enlargement of the meaning of the expression "any case which has been decided". Explanation as a rule merely makes clear or intelligible what is enacted. In this view the explanation below sub-sec. (2) of s. 115 of the C.P. Code does not suggest even remotely that the meaning of the expression "any case which has been decided" has been so enlarged as to cover cases which do not decide any right or obligation of a party. Therefore, when the order appointing Commissioner does not decide or adjudicate upon any right, such order does not come within the expression "case decided".¹³ But the expression "case decided" includes not only orders by which an issue is decided but every order passed by the subordinate court in a suit or proceeding. Therefore, the order debaring the plaintiff from allowing him to examine the defendant as a witness on his behalf is a "case decided" and the impugned order suffers from jurisdictional error and is liable to be interfered with in revision.¹⁴ But admission of a document in evidence or refusal to send a document to an expert for an examination does not decide or adjudicate any right or obligation to a party. The opinion of the handwriting expert is but one mode of proving handwriting of a person. Another mode of proving handwriting of a person is through the evidence of a person acquainted with the disputed handwriting. So, when the court rejects an application for sending documents for examination by an expert, it merely denies to the applicant an opportunity of tendering of documents of a particular kind and by a particular mode. So, the order is not a case decided and revision does not lie against that order.¹⁵ So, revision against the order declining permission to the plaintiff to produce additional evidence is not maintainable in view of the proviso (a) of s. 115(1), C.P. Code. Even if the said order were made in favour of the applicant, it would not have finally disposed of the suit. So, it is not a case decided for the court of revision to interfere.¹⁶ When a party files documents after arguments are over and the court allows it by an order, such an order is not a "case decided" under s. 115, C.P. Code, because the court even at that stage has discretion to admit documents.¹⁷

The order of the trial court rejecting the prayer for remitting the report to the Commissioner appointed by it is not a "case decided" as no final adjudication of any right has been made relating to the right of any party. Moreover the party aggrieved has the right to challenge such an order in the same proceedings at a later stage as provided in sub-rules (2) and (3) of r. 10 of Or. 26, CPC.¹⁸

But when the court takes the view that he has right to direct any party to subject himself or herself to medical examination involving blood group test, it is held that the order is a case decided within the meaning of that expression in s. 115, CPC.¹⁹

12 *Sabitu v Baikuntha* AIR 1979 Or 140.

13 *Mythien v P.A. Azeez Kunju* AIR 1994 NOC 287 (Ker).

14 *Arcadi Kishore Singh v Bij Behari Singh* AIR 1993 Pat 122.

15 *Arinbikal v K. Raja* AIR 1994 Ker 67.

16 *Sarjan Singh v Parash Ram* AIR 1995 P&H 120.

17 *Hemendra Chaudhary v Punjab National Bank* AIR 1993 All 49.

18 *Mohammed v C.V. Ali Hajer* AIR 2000 NOC 40 (Ker).

19 *Ninganou v Chikkaiiah* AIR 2000 Kar 50.

jurisdictional error or not, illustrative cases. No jurisdictional error is involved when a prayer for attachment before judgment is revised.¹⁰ But a failure to decide the rule issued tantamounts to jurisdictional error and the revision court has jurisdiction to interfere with such an order.¹ When the trial court having found that the plaintiff was not in possession rejected the temporary injunction but the High Court in revision despite the findings that the plaintiff was not in possession granted the injunction, the Supreme Court has held that the order refusing injunction by the trial court was not a jurisdictional error and the High Court was not justified in interfering with such an order in revision.² When the civil court refused to exercise discretion to grant temporary injunction in favour of the plaintiff only because a proceeding under s. 145 Cr. P.C. is pending, it has been held that the court has only to exercise the power vested in him under the law and the order is revisible.³ When the court rejects documents produced at the belated stage, no jurisdictional error is involved but when the plaintiff seeks to produce a document in answer to a case set up by the defendant then no prior leave is necessary for belated production of such document. If in such a case the court refused to admit such document in evidence, the order of refusal amounts to a jurisdictional error to be corrected in revision.⁴ When in a proceeding for setting aside an *ex parte* decree the delay in filing the application for 505 days was condoned under s. 5 of Limitation Act on giving proper reasons, no jurisdictional error is involved for the High Court to interfere with such order.⁵ The trial court's order on interpretation of a deed that it is no instrument of partition and cannot be admitted without payment of stamp duty and penalty does not involve a jurisdictional error.⁶ When in spite of the objection of the plaintiff two opposite parties to whom the plaintiff agreed to transfer the disputed property pending the plaintiff's suit for declaration and permanent injunction against the CIT have been added as parties to the suit the plaintiff cannot challenge such an order because there is no jurisdictional error involved in the case and the opposite party Nos. 1 and 2 being proper parties, their addition in the suit cannot be objected to.⁷

When the court was satisfied that the petitioner was justified in making delay in filing the petition for restoration of suit dismissed for default, the restoration of the suit on condoning the delay did not constitute any jurisdictional error to be interfered with in revision.⁸

When on being satisfied about the *prima facie* case interim injunction is granted, no jurisdictional error is involved to interfere with it.⁹

When the executing court on the basis of the compromise between the parties setting the decretal dues recorded the settlement under Or. 21, r. 2, CPC, it did not exceed the jurisdiction. So no jurisdictional error was involved.¹⁶

No jurisdictional error is involved when the trial court refused to set aside the Commissioner's report making inventory in terms of the order of the court.¹¹

10. *R. Cambrey v. Bishnu Banerjee* AIR 1988 Cal 400; (1988) 1 Cal LJ 160.

1. *Magan Lal v. Laxmi Das* AIR 1988 Guj 48.

2. *Teena Teodora v. Ramesh Chandra* AIR 1987 SC 1492.

3. *R.B.I. Employees v. R.B.I.* AIR 1983 AP 246.

4. *Repetition Spinning and Weaving v. Rajasthan Textile Industries* AIR 1987 Raj 60; 1987 Raj LW 518.

5. *K. Subbarayan v. Paschimani* AIR 1988 Mad 228.

6. *Rajawat Prasad Verma v. Mahulal* AIR 1987 HP 51.

7. *Tarbar Bivona v. Bhaba Prasad Pal* (1988) 1 Cal LJ 325.

8. *Dawoodul Hal Seligal v. M/s. Punjab Steel Rolling Mills (P) Ltd.* AIR 2002 SC 451.

9. *B.S. Gudi v. D.V. Deb* AIR 2002 Kar 1.

10. *Sanyal Bank Ltd. v. M/s. Textile Fin. Ltd.* AIR 2000 Bom 195.

11. *C.R. Venkatarao Naidu v. C.R. Vachani* AIR 2000 Ker 27.

When the trial court commits grave error as making erroneous presumption and refusing to consider the evidence on record it commits jurisdictional error for the High Court to interfere. So the High Court failed in its duty to interfere with it in revision by confirming such an order.¹²

Revision against discretionary power. When the court has the discretion to pass an order and uses such discretion properly and not arbitrarily, such order is not revisable. When the rejection of reference under s. 18 of the Land Acquisition Act was not challenged for five years, the High Court rightly declined to interfere with such order by invoking s. 115, C.P. Code and the Supreme Court has held that the High Court has rightly exercised its discretionary jurisdiction after inordinate delay of more than five years from the date of the order of the District Judge and more than ten years from the date of order of the Land Acquisition Collector.¹³

Failure to implead a necessary party in revision petition. When the execution court ordered delivery of possession of property in favour of the decree-holders and the properties have divided between them, the revision filed by the judgment-debtor impleading only one of decree-holders is not maintainable. So, the revisional court cannot set aside the order of the execution court which was common, inseparable and has become final against the decree-holder which are joined in the revision. The Supreme Court has, therefore, set aside the order of the High Court allowing the revision of the judgment-debtor.¹⁴

Appeal may be converted into revision and vice versa. When an appeal is filed against an order from which no appeal lies it can be converted into revision even after the period for filing the revision expires when the order is passed.¹⁵

Similarly when it is found that an appeal lies against the impugned order before the same court it can be converted into appeal. Otherwise it can be returned for being presented as an appeal.¹⁶

Jurisdictional error—what it constitutes. When the order passed by the subordinate court is not a jurisdictional error affecting the jurisdiction to try the dispute no revision under s. 115 lies.¹⁷ If the court has jurisdiction his taking erroneous view is no ground to invoke the High Court's power of revision.¹⁸ A plea of limitation or *res judicata* affects the jurisdiction of the court and any decision on such point of law affects jurisdiction of the court and attracts the revisional jurisdiction of the court.¹⁹ Section 115 applies to irregular exercise or non-exercise or illegal assumption of jurisdiction and it is not attracted against the conclusion of law or fact in which the question of jurisdiction is not involved.²⁰ Acceptance of the report of the commissioner even though there was violation of the provisions of Or. 26, r. 18, C.P. Code is revisable.¹ An order passed by the executing court issuing a warrant for delivery of possession under Or. 21, r. 35(e),

12 *Mahabir Prasad Jain v Ganju Singh* (1999)8 SCC 274.

13 *Mirza Majid Hussain v State of M.P.* AIR 1995 SC 2243.

14 *Rajawari Anna v Josep* AIR 1995 SC 719.

15 *Jivan v Narayan* AIR 1981 Del 291.

16 *N. Bamsinhôr v Dwarakulal* AIR 1974 Kant 117; AIR 1977 All 103 (FB).

17 *Pandurang v Maruti* AIR 1966 SC 153; *Madhurilata v Gourapada* AIR 1985 NOC 18 (Gau); *Sindh Construction v Union of India* AIR 1983 All 462; *Chandulal v Delhi Municipality* AIR 1978 Del 174; *Sholapur Municipality v U.S. Bhagawati* AIR 1974 Bom 174; AIR 1986 Ori 74.

18 *Chanchal Dax v Sajjan Singh* AIR 1983 Punj 442.

19 *Manindra Land and Building v Bhutnath* AIR 1964 SC 1336; *Joychand Lal v Kamalaksha Chowdhury* AIR 1949 PC 239; AIR 1976 Cal 229; *J.M.A. Raju v K. Bhatt* AIR 1976 Gau 72 (FB).

20 *Sk. Jafar v Md. Pasha* AIR 1975 SC 794; *Managing Director, Hindusthan Aeronautics v Ajit Prasad* AIR 1973 SC 76; AIR 1972 SC 379; AIR 1981 Cal 360; AIR 1981 All 361; *Raja Ram v Mani Ram* AIR 1975 Bom 1.

1. *Chaitan Dax v Purnabati* AIR 1988 Ori 52.

C.P. Code in a suit for mandatory injunction being illegal revision, lies against such an order.² Refusal of temporary injunction on the ground that the plaintiff has failed to prove *prima facie* case does not amount to any jurisdictional error, and is not reversible.³ Trial court accepting commissioner's report and rejecting the objection of the defendant against such report does not commit any jurisdictional error.⁴ When concurrent findings of facts suffer from inherent defect revision is justified.⁵ When the trial court on perusing the document does not admit on the ground that it being an instrument of partition is not admissible without stamp and registration the order is not reversible.⁶ If however the remedy is doubtful, the High Court may interfere in revision.⁷ It has also been held by the different High Courts that in exceptional cases the High Court may interfere in revision under this section⁸ and a Full Bench of the Allahabad High Court has held that by way of general proposition it cannot be said that where there is another remedy by way of a suit the High Court cannot interfere in revision—each case must be considered on its own merits.⁹ The same view has been taken by the Calcutta and the Gujarat High Courts.¹⁰

A memorandum of appeal, wrongly presented in a case where no appeal lies, may be treated as an application for revision by the High Court.¹¹

Under this section on its own motion the High Court may call for any record and it is not necessary that the party aggrieved should put it into motion.¹²

A court is said to *exercise jurisdiction not vested in it by law*, when it assumes jurisdiction in a suit which it is not entitled to try by reason of pecuniary jurisdiction or territorial limits of its jurisdiction or subject-matter of the suit. In such a case the High Court in which such court is subordinate may interfere in revision. The fact from which absence of jurisdiction may be inferred must be patent upon the face of the record.¹³ Even though parties choose to restrict the dispute to be presented to a particular court it does not oust the jurisdiction of the court which is competent. So this is no error of jurisdiction.¹⁴

A court does not *exercise its jurisdiction illegally or with material irregularity*, if it assumes jurisdiction *rightly*, simply because a question of law or fact is decided erroneously but the High Court may interfere if in its conclusion (of fact and law) a question of jurisdiction is involved and such conclusion is erroneous thereby causing a failure to exercise the jurisdiction.¹⁵

2. *Kudiy v Chaman* AIR 1960 Del 297.

3. *Nilesh v Ramdas* AIR 1987 Bom 279.

4. *Balaji v Radhakrishni* AIR 1986 Cal 396.

5. *Bhagat Kumar v Surjit Kumar* AIR 1987 SC 2179.

6. *Bhagwant Prasad v Mahabul* AIR 1987 HP 51.

7. AIR 1957 Hyd 4.

8. 51 All 338; AIR 1928 All 588; 12 CWN 16; AIR 1948 Nag 362; AIR 1946 Mad 190; *Sarajitil Krishna Das v Paranna R.K. Sugar Works* AIR 1961 All 371; 62 CWN 361; AIR 1959 Cal 623.

9. *Lila v Mahantje* AIR 1931 All 632 FB.

10. *Achuldas Mirra v A.D. Vij* AIR 1956 Cal 311; AIR 1963 Guj 147.

11. *Narasimha v Narasimhawa* AIR 1957 Ker 18; *Patel v C.M. Milligan & Clarke Ltd* AIR 1956 Bom 598; *Chapperaiah v Kopal Mulla* AIR 1943 Cal 244; *Ram Ravi (Jy. Singh) v Krishan Singh* AIR 1944 Pat 54 (FB); *Mohini v Ramdas* 28 CWN 271; AIR 1958 Raj 287.

12. AIR 1943 Nag 333; *Gulam Mohammad v Sarada* 4 CWN 695; *Ramesh v Venkatesh* AIR 1954 Mad 864 (FB); *Rameshchandra v Pannalal* AIR 1954 Ra 191; *Jaimala Kumar v Collector of Sibirangpur* AIR 1934 All 4.

13. *Mirza Ali v Muhammad Hussain* 14 All 413.

14. *State v Gujarat State Construction Corporation* AIR 1988 Cal 73.

15. *Jey Chandra v Kaminakrishna Chowdhury* 53 CWN 562; *Mahadeo Gopal v Hari Waman* AIR 1943 Bom 136; *Kamala Devi v Kameshwar Singh* AIR 1946 Pat 316; see also *Kasturi & Sons v Sultantevaraya* AIR 1958 SC 502; AIR 1959 Assam 13.

In *Jagdish Prasad v Ganga Prasad*¹⁶ the Supreme Court, repelling the contention that it was not competent for the High Court to interfere in revision with a finding of fact, has held—“if an erroneous decision of a subordinate court, resulted in its exercising jurisdiction not vested in it by law, or failing to exercise the jurisdiction so vested, or acting, with material irregularity or illegality in the exercise of its jurisdiction, a case for the exercise of powers of revision by the High Court is made out”.

Petition dismissed as withdrawn. Even though a revision petition dismissed for default may be restored to file under Or. 9, r. 9, CPC yet the rule will not apply when the revision petition has been dismissed as withdrawn on compromise. So restoration of such petition under Or. 9, r. 9, CPC is not called for.¹⁷

Interference by Supreme Court. When the High Court dismissed the revision petition on cogent ground then the Supreme Court does not interfere. In that case as the documents were filed by the defendant after the close of the plaintiff's evidence and reference of those documents were not mentioned in the written statement, rejection of such documents by the trial court when the cause shown by him for late production was not found by trial court to be satisfactory under Or. 13, r. 2, CPC, the dismissal of the revision petition by High Court against such rejection of document did not call for any interference by Supreme Court.¹⁸

But when the trial court committed grave error, such as, making erroneous presumption and non-consideration of the evidence on record, it is the duty of High Court to correct such error. But when the High Court fails in its duty in ignoring such error, then order of the High Court is liable to be set aside by Supreme Court.¹⁹

Miscellaneous proceedings. The procedure provided in this Code in regard to suit shall be followed, as far as it can be made applicable, in all proceedings in any court of civil jurisdiction.

Explanation. In this section, the expression “proceedings” includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution (s. 141, CPC).

Scope. In view of the explanation to s. 141 the procedure in respect of the suit does not apply to proceedings under Art. 226 of the Constitution.¹

However, this section does not apply to execution proceedings.²

Section also does not apply to proceedings before a custodian under the Administration of Evacuee Property Act because the custodian is not a civil court.³

But provision of the Code shall apply to the application for grant of succession certificate under the Indian Succession Act 1925.⁴

16. AIR 1959 SC 492; see also AIR 1962 SC 646.

17. *Livibin v Rajendrabhai* AIR 2000 Guj 121.

18. *Madan Lal v Sheamul* AIR 2002 SC 100.

19. *Mahabir Prasad Jain v Ganga Singh* (1999)8 SCC 274.

1. *Government of India v National Tobacco* AIR 1977 AP 250 (FB); *Sulendra Nath Mullick v State of West Bengal* (1981)2 Cal LJ 29.

2. *D. Bhushayya v K. Ramia Krishnayya* AIR 1962 SC 1868; (1963)2 SCR 499.

3. *Ibrahim Aboobaker v Tek Chand Dohani* AIR 1953 SC 298; 1953 SCR 691; 1953 SCJ 1121.

4. *Ranjit Sao v Jageshwari* AIR 1964 Pat 272.

The expression "proceedings in court of civil jurisdiction" refer only to original matters in the nature of the suit.⁵

It also applies to proceedings under Guardians and Wards Act.⁶

The expression "civil proceedings" is not confined to proceedings arising out of the civil suit only. Even proceedings arising out of a reference under s. 146(1), Cr PC constitute a civil proceeding attracting s. 141, CPC.⁷

When an application for setting aside the suit is dismissed for default, Or. 9, r. 9, CPC is attracted to restore such application in view of s. 141, CPC.⁸

Similar will be the case when the petition for setting aside *ex parte* decree is dismissed for default.⁹

But the limitation for filing such application is not one month from the date of order under Art. 123 of the Limitation Act 1963 but Art. 137 of the Limitation Act 1963.¹⁰

FORM OF REVISION PETITION

Form of Petition under section 115 of the Code of Civil Procedure

District.....

In the High Court at

(Civil Revisional Jurisdiction)

In the matter of

An application under s. 115 of the Code of Civil Procedure

and

In the matter of

An order passed by Shri

..... Judge Court

at dated

in

and

In the matter of

(1) S/O resident

of P.S. Dt.

5 *Sold Kumar v S.N. Ghosh* AIR 1960 Cal 203; 63 CWN 883.

6 *Kiran Devi v Abdul Wahid* AIR 1966 All 105.

7 *Ram Chandra Agarwala v State of UP* AIR 1966 SC 1888.

8 *Narnidra Bewa v Rabindra Nath* AIR 1988 Cal 358; (1988)1 Cal LJ 479; 1988(T)CHN 461; *And v. Union of India* AIR 1985 NOC 1 (Gau); (1984)1 Gau LR 442.

9 *Krishnaswamy v Madrasom* AIR 2001 AP 37.

10 *Narnidra Bewa v Rabindra Nath* AIR 1988 Cal 358; (1988)1 Cal LJ 479; 1988(T)CHN 461.

Plaintiff Petitioner
Defendant

Vs.

(1)..... S/O..... resident
of..... P.S..... Dt.....

Plaintiff Opposite party
Defendant

Application valued at Rs.

To

The Hon'ble Mr. Chief Justice and His Companion Justices of the said
Hon'ble court.

The humble petition of the petitioner above-named

Most respectfully sheweth:

[State facts in different Paragraphs]

That being aggrieved by and dissatisfied with the Judgment and order of the dated
..... In of your petitioner begs to move Your Lordships for
amongst other on the following:

GROUNDS:

- (i) For that
- (ii) For that
- (iii) For that etc.

Under the circumstances your petitioner humbly prays that Your Lordships may be graciously pleased to issue a rule calling upon the opposite party above named to show cause why the order complained of should not be set aside; call for the records of the case and on hearing the parties make the rule absolute or to pass such other or further orders as Your Lordships may deem fit and proper.

And your petitioner further prays for an order staying the proceeding pending before the court below pending the hearing of this rule [an *ad interim* order] staying the operation of the order complained of

And your petitioner as in duty bound shall ever pray

Affidavit

Civil Appeal No. 17486 of 2017

State of A.P. v. B. Ranga Reddy

2019 SCC OnLine SC 1009

In the Supreme Court of India

(BEFORE L. NAGESWARA RAO AND HEMANT GUPTA, JJ.)

Civil Appeal No. 17486 of 2017

State of Andhra Pradesh and Others Appellant(s);

v.

B. Ranga Reddy (D) By Lrs and Others Respondent(s).

With

Civil Appeal No. 17487 of 2017

And

Contempt Petition (Civil) No. 204 of 2014

Decided on August 9, 2019.

The Judgment of the Court was delivered by

HEMANT GUPTA, J.:— The challenge in the present appeals is to an order passed by the High Court of Judicature of Andhra Pradesh at Hyderabad on October 01, 2012 whereby an appeal filed by the appellants was found to be hit by the principle of *res judicata* and was dismissed.

2. The brief facts leading to the present appeals are that three separate suits were filed against the defendants including the State: first, Original Suit No. 274 of 1983 in respect of 6.08 guntas of land comprising in Survey No. 9 of 2013 of Khairatabad Village; second suit bears Original Suit No. 274 of 1983 in respect of 3 guntas of land comprising in Survey No. 9 of 2013 of Khairatabad Village; and third suit bears Original Suit No. 141 of 1984 which has been filed in respect of land measuring 19.23 guntas in respect of land falling in Survey Nos. 49 and 50 in Rasoolpura Village. The stand of the State in all the suits is that the land in all the three suits falls in Survey No. 43 of Village Bholakpur, which is a Government Shikkam Talab measuring 145 acres 35 guntas, popularly known as Hussain Sagar Talab. All three suits were tried together. The evidence was recorded in Original Suit No. 274 of 1983. The issues and the findings recorded by the learned trial court on issues of title are as under:

ORIGINAL SUIT NO. 274 OF 1983 - FIRST SUIT

Issues

1) Whether the suit property is part of Sy. No. 9/13 of Khairatabad Village as claimed by the plaintiff or whether it is a part of Sy. Nos. 49 and 50 of Rasoolpura Village as claimed by the defendants 1 to 4 or whether it is the part of Sy. No. 43 of Bholakpur Village as claimed by the Government?

Finding

Para 40. The plaintiff miserably failed to establish that the suit property forms part of Sy. No. 9/13 of Khairatabad Village. But the defendants 1 to 4 clearly established that it forms part of Sy. Nos. 49 and 50 of Rasoolpura. However, the Government also failed to establish that the suit land forms part of Sy. No. 43 of Bholakpur Village.

2) Whether the plaintiff is entitled for declaration of his title to the suit property and whether he is entitled for the consequential relief of permanent injunction or in

the alternative for possession of the suit property?

Finding

Para 41. The plaintiff miserably failed to establish his title and possession in the suit property and as such, he is not entitled for the relief of declaration or permanent injunction or possession.

3) To what relief?

Finding

Para 44. In the result, the suit is dismissed with costs.

ORIGINAL SUIT NO. 276 OF 1983 - SECOND SUIT

Issues

1) Whether the suit property is part of Sy. No. 9/13 of Khairatabad Village as claimed by the plaintiff or whether it is a part of Sy. No. 49 and 50 of Rasoolpura village as claimed by the defendants 1 and 2 or whether it is the part of Sy. No. 43 of Bholakpur Village as claimed by the Government?

Finding

Para 45. Issue No. 1 in Original Suit No. 274 of 1983 and this issue are practically one and the same and as such the finding on issue No. 1 in Original Suit No. 274 of 1983 holds good for this issue also.

2) Whether the plaintiff is entitled for declaration of his title to the suit property and Whether he is entitled for the consequential relief of permanent injunction or in the alternative for possession of the suit property?

Finding

Para 46. The plaintiff in this suit also failed to establish his title and possession in the suit property and as such, he is not entitled for the reliefs of declaration or permanent injunction or alternative relief of possession.

3) To what relief?

Finding

Para 49. In the result, the suit is dismissed with costs.

ORIGINAL SUIT NO. 141 OF 1984 - THIRD SUIT

Issues

1) Whether the suit property is part of Sy. Nos. 49 and 50 of Rasoolpura Village as claimed by the plaintiffs or Whether it is part of Sy. No. 9/13 of Khairatabad Village as claimed by the defendants 1 and 2 or Whether it is part of Sy. No. 43 of Bholakpur Village as claimed by the Government?

Finding

Para 50. The finding on issue No. 1 in Original Suit No. 274 of 1983 holds good for this issue also.

2) Whether the plaintiff are entitled for declaration of their title to the suit property and Whether they are entitled for the consequential relief of permanent injunction or in the alternative for possession of the suit property?

Finding

Para 52. The plaintiffs could establish their title in the suit property and as such they are entitled for the reliefs of declaration and possession. Though they were in possession of the property originally, the Special Executive Magistrate took possession of the property after the initiation of Section 145 Cr.P.C. proceedings. So the Government is bound to surrender possession to the plaintiffs in this Suit.

3) To what relief?

Finding

Para 56. In the result, the suit is decreed with costs, as prayed for. The

Government is directed to deliver possession of the suit property to the plaintiffs within 2 months. However, this finding shall not come in the way of the Urban Land Ceiling authorities to initiate proceedings to take possession of the excess land, if any, from the plaintiffs (in Original Suit No. 141 of 1984). Similarly, the Government is also at liberty to acquire any portion of the suit land for public purposes by following the necessary procedure and by paying the adequate compensation to the plaintiffs."

3. The State filed appeal arising out of judgment and decree in Original Suit No. 141 of 1984 (Third Suit). In the said appeal, an objection was raised that the findings recorded on Issue No. 1 in Original Suit Nos. 274 of 1983 and 276 of 1983 have to be treated as decree and would operate as *res judicata*. The High Court while hearing such objections in appeal framed the following two points for consideration:

"1) Whether the findings of the lower Court on Issue No. 1 in O.S. Nos. 274 and 276 of 1983 have to be treated as decree and whether they operate as *res judicata* against the Government, since the Government have not filed any appeals challenging the said findings?

2) Whether the Government of Andhra Pradesh was not required to file appeals on the ground that no enforceable decree was passed against it?"

4. The High Court held that decision on issues or any matter in controversy shall be deemed to be decree in view of reading of Order XIV Rule 1 of the Code of Civil Procedure, 1908. The High Court noticed the fact that in the third suit, there was a specific direction to deliver possession of the suit property to the plaintiff within two months but there is no specific direction against the Government in the first and the second suit but the fact remains that specific finding is given in those cases that Government failed to establish that the suit land forms part of Survey No. 43 of Bholakpur Village. Thus, there is clear declaration of right and title of the parties. The High Court held as under:

"In the present case, there is clear finding against the Government. When there is a clear finding that the suit land does not form part of Survey No. 43 of Bholakpur Village as claimed by the Government, it was obligatory on the part of the Government to file cross-objections. What Government can do is it can support the findings of the lower court. The findings of the lower court are that the suit land forms part of Survey No. 49 and 50 of Rasoolpura Village. Obviously, the Government cannot support such finding, because its case is that the suit land forms part of Survey No. 43 of Bholakpur Village.

In the appeals filed by the plaintiffs, the main question that falls for consideration is whether the suit properties form part of Survey No. 9/13 of Khairatabad village or it forms part of Survey Nos. 49 and 50 of Rasoolpura village. The question whether the suit land forms part of Survey No. 43 of Bholakpur village as claimed by the Government does not fall for consideration in the appeals in CCCA 1 of 1999 or CCCA No. 9 of 1999 i.e., appeals filed by the plaintiffs in O.S. Nos. 274 and 276 of 1983. Therefore, without filing cross-objections the Government cannot challenge the findings of the trial court."

5. Mr. Vaidyanathan, learned senior counsel for the State relied upon judgments of this Court in *Narhari v. Shankar*², *Ganga Bai v. Vijay Kumar*³, *Banarsi v. Ram Phall*⁴, *Hardevinder Singh v. Paramjit Singh*⁵, *Sri Gangal Vinayagar Temple v. Meenakshi Ammal*⁶, *Chitavalasa Jute Mills v. Jaypee Rewa Cement*⁷, *Ramesh Chandra v. Shiv Charan Dass*⁸ and *S. Nazeer Ahmed v. State Bank of Mysore*⁹ to contend that the defendants in the first and the second suit had no right to file an appeal against the decree of dismissal of suits passed in such suits. The appeal would not lie against the findings recorded when the decree is only of dismissal of the suits. It is argued that the effect of amendment in Order XXI Rule 22 of the Code vide Central Act No. 104 of

1976 is only to enable an aggrieved person to file cross objections but that does not take away the right of an aggrieved person to support the decree of dismissal of the suit in appeal on the grounds other than what weighed with the learned trial court in dismissing the suit. It is contended that appeal lies against the decree passed and not the judgment giving the reasons to pass a decree. It is further contended that the State has a right to agitate the findings on Issue No. 1 in terms of the provisions of Order XXI Rule 33 of the Code as well, therefore, the findings recorded on Issue No. 1 are not final so as to operate *res judicata* against the decree in the third suit which is the subject matter of challenge by the State. It is contended that the State has filed cross objections before hearing of the appeal though after the order of the High Court, thus, the findings recorded on Issue No. 1 have not attained finality which can operate as *res judicata*. It is contended that the judgments referred to by the learned counsel for the respondents are in the cases where the decree had attained finality. But none of the judgments referred to by the learned counsel for the respondents pertains to a finding recorded in a civil suit which was dismissed and is subject matter of challenge in appeal by the plaintiff himself.

6. On the other hand, Mr. Dushyant Dave, learned senior counsel for the respondents argued that there is a categorical finding recorded by the trial court that land does not fall in part of Survey No. 43 of Bholakpur Village, as per the stand of the Appellants in all three suits, therefore, it was mandatory for the defendants to impugn such findings by way of an appeal in the first and second suit as well. Since the State has not filed any appeal against the findings recorded in the first and the second suit, the findings recorded therein will operate as *res judicata* and the appeal arising out of the third suit is barred by *res judicata*. Learned counsel for the respondents relied upon the judgments of this Court in *Bafri Narayan Singh v. Kamdeo Prasad Singh*¹², *Sheedan Singh v. Daryao Kunwar (Smt.)*¹³, *Lonankutty v. Thomman*¹⁴, *Premier Tyres Limited v. Kerala State Road Transport Corporation*¹⁵, *Harbans Singh v. Sant Hari Singh*¹⁶, *Ashok Nagar Welfare Association v. R.K. Sharma*¹⁷, *Nirmala Bala Ghose v. Balaj Chand Ghose*¹⁸, *Bhanu Kumar Jain v. Archana Kumar*¹⁹.

7. Mr. Dave submits that the judgments referred to by the learned counsel for the appellants are not applicable to the facts of the present case. He argued that *res judicata* applies not only to the decree but it bars the Court to try any suit or issue in which the matter has been directly and substantially in issue in former suit. It is, thus, contended that principle of *res judicata* are not only against the final judgment and decree but also in respect of any finding recorded in the suit.

8. Mr. Jai Sayla, learned senior counsel, relied upon another judgment of this Court in *Govindammal (D) by LRs v. Vaidyanathan*²⁰ to contend that plea of *res judicata* is applicable even in respect of co-defendants.

9. Respondent No. 8 in the written submissions relies upon *Sri Gangai Vinayagar Temple* to contend that the filing of a Single Appeal would lead to entire dispute becoming *sub judice* only if suits are consolidated. Since, three suits in question were not consolidated, therefore, non-filing of the appeal by the appellants in first and second suit will operate as *res judicata*.

10. Learned counsel for the appellants has produced a photocopy of the decree in the Original Suit No. 274 of 1983 which is to the effect "that the suit be and the same is hereby dismissed".

11. To appreciate arguments of the learned counsel for the parties, certain statutory provisions from the Code need to be extracted before the judgments referred to by the learned counsel for the parties are considered.

"2(9) "judgment" means the statement given by the Judge on the grounds of a decree or order;

2(2) "decree" means the formal expression of an adjudication which, so far as

regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include -

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.

95. Appeal from original decree

(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

Order XLI Rule 22. Upon hearing, respondent may object to decree as if he had preferred a separate appeal (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree ²⁴[but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal:

Provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

²⁴[Explanation.- A respondent aggrieved by a finding of the Court in the judgement on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.]

Order XLI Rule 33. Power of Court of Appeal

The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.

Section 11 - res judicata

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

Explanation I - The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto."

12. The High Court referred to various judgments in respect of applicability of the

principle of *res judicata*, therefore, non-filing of the appeal by the State in the other two suits operates as *res judicata*. The High Court referred to a judgment of this Court in *Sheodan Singh* wherein, this Court held that once a decree passed in the suit attains finality, it cannot be disturbed indirectly by adjudicating the very same questions in another appeal. We find that the findings recorded by the High Court are patently erroneous for the reasons recorded hereinafter. Therefore, non-filing of the appeal by the State in the other two suits operates as *res judicata* in the third suit.

13. The learned trial court had clubbed all the three suits and that common evidence was recorded, when it recorded the following fact:

"All the above three suits have been clubbed and a joint trial has been held. O.S. No. 274/83 has been taken as the leading suit and the evidence recorded in that suit has been taken as the evidence for the remaining two suits also. The parties to all the three suits can be divided into three groups....."

14. Learned counsel for the respondents has tried to draw distinction between an order of consolidation of suits and the order where a common judgment is rendered in different suits. In *Sri Ganga Vinayagar Temple*, the Court referred to judgment in *Chitivalasa Jute Mills*. However, we find that distinction drawn by learned counsel for the respondents is not tenable in law. *Chitivalasa Jute Mills* is a case where one suit was filed at Reva in Madhya Pradesh and another in Vishakhapatnam. The Court noticed that claim in one suit is a defense in another suit, therefore, the order was passed for transfer of a subsequent suit filed at Reva to Vishakhapatnam.

15. In the present case, evidence have been recorded only in one suit as all the three suits have been clubbed together. In view of the said fact, we find that merely the word consolidation has not been used by the learned trial court, therefore, it will not be a case of consolidation of suits but of separate trials.

16. In *Banarsi*, the provisions of Order XLI Rule 22 of the Code as it existed before and after the amendment in 1976 as well as Order XLI Rule 33 of the Code have been considered. The said judgment arises out of a fact where a suit for specific performance of an agreement was filed by the respondent in appeal before this Court. The appellants also filed a suit seeking cancellation of the agreement, the basis of the suit for specific performance. The learned trial court ordered the appellants to deposit a sum of Rs. 2,40,000/- but the decree for specific performance was not granted. Two appeals were taken up for hearing preferred by the appellants by the learned Additional District Judge. Both the appeals were dismissed but without any cross objections or an appeal, the Court decreed the suit for specific performance filed by the plaintiffs. The second appeal before the High Court was dismissed. It was held that the First Appellate Court committed no error of law exercising the powers under Order XLI Rule 33 of the Code to pass a decree for specific performance.

17. This Court examined the question as to whether decree for specific performance could be granted once declined by the trial court without filing any appeal or cross-objections. The Court held as under:

"8. Sections 96 and 100 CPC make provision for an appeal being preferred from every original decree or from every decree passed in appeal respectively; none of the provisions enumerates the person who can file an appeal. However, it is settled by a long catena of decisions that to be entitled to file an appeal the person must be one aggrieved by the decree. Unless a person is prejudicially or adversely affected by the decree he is not entitled to file an appeal. (See *Phoolchand v. Gopal Lal*, [AIR 1967 SC 1470 : (1967) 3 SCR 153], *Jatan Kumar Golcha v. Golcha Properties (P) Ltd.*, [(1970) 3 SCC 573] and *Ganga Bai v. Vijay Kumar*, [(1974) 2 SCC 393].) No appeal lies against a mere finding. It is significant to note that both Sections 96 and 100 CPC provide for an appeal against decree and not against judgment.

9. Any respondent though he may not have filed an appeal from any part of the decree may still support the decree to the extent to which it is already in his favour by laying challenge to a *finding* recorded in the impugned judgment against him. A party who has fully succeeded in the suit can and needs to neither prefer an appeal nor take any cross-objection though certain finding may be against him. Appeal and cross-objection — both are filed against decree and not against *judgment* and certainly not against any finding recorded in a judgment. This was the well-settled position of law under the unamended CPC.*

18. This Court while considering the amendments made in the Code in the year 1976, held that even under the amended provisions of Order XLI Rule 22 of the Code, a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross objections. However, by an amendment in Order XLI Rule 22 of the Code, it is permissible to file cross objections against the finding. The respondent may defend himself without filing any cross objections to the extent to which decree is in his favour. The Court held as under:

*10. The CPC amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross-objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross-objection against a *finding*. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross-objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross-objection. The amendment inserted by the 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:

- (i) The impugned decree is *partly* in favour of the appellant and *partly* in favour of the respondent.
- (ii) The decree is *entirely* in favour of the respondent though an *issue* has been decided against the respondent.
- (iii) The decree is *entirely* in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a *finding* in the judgment which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross-objection. The law remains so post-amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross-objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross-objection laying challenge to any *finding* adverse to him as the decree is *entirely* in his favour and he may support the decree without cross-objection, the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross-objections to a *finding* recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross-objection is spelt out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default, the cross-objection taken to any *finding* by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In the pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any *finding*

recorded against the respondent.”

19. The present is a case where the decree is of dismissal of suit therefore, entirely in favour of the State and not executable. Though an issue has been decided against the State as falling within second and third situation delineated by this Court. This Court held that in the absence of cross appeals or cross objections, the First Appellate Court did not have the jurisdiction to modify the decree that is to grant decree for specific performance which was not granted by the trial court.

20. The Court did not find any merit in the argument that the Appellate Court was not powerless to grant decree as such decree has been granted in terms of Order XLI Rule 33 of the Code. The Court held as under:

“15. ... While allowing the appeal or otherwise interfering with the decree or order appealed against, the appellate court may pass or make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the appellate court. The object sought to be achieved by conferment of such power on the appellate court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care while exercising the power. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate court exercising power under Rule 33 of Order 41.”

21. Such view of the Court has been followed in a judgment in *Hardevinder Singh*. The said judgment arises out of a suit filed for possession of the suit land, challenging the Will said to be executed in favour of the defendants. The suit for joint possession was decreed holding that the Will is surrounded by suspicious circumstances and that the suit land was joint Hindu family property. In an appeal, the First Appellate Court recorded a finding that the property of the deceased Shiv Singh was self-acquired and that the Will in favour of defendant Nos. 1 to 4 was validly executed. The First Appellate Court dismissed the suit for the reason that there is a settlement between the parties. The defendant No. 5, brother of the Plaintiff who had similar interest as that of the plaintiff, aggrieved against the said judgment and decree passed by the First Appellate Court filed the second appeal, which was dismissed as not maintainable. In these circumstances, this Court held that a person has a right to maintain an appeal if such person is prejudicially or adversely affected by a decree. It was held that defendant No. 5, brother of the plaintiff benefited from the decree granted by the trial court but the plaintiff has settled the dispute with defendant Nos. 1 to 4, the rights of defendant No. 5 were unsettled and the benefit accrued in his favour became extinct, therefore, he had suffered a legal injury which could be challenged in second appeal. With the said finding, the judgment of the High Court was set aside and the matter was remitted to the High Court to decide afresh. This Court held as under:

"21. After the 1976 Amendment of Order 41 Rule 22, the insertion made in sub-rule (1) makes it permissible to file a cross-objection against a finding. The difference is basically that a respondent may defend himself without taking recourse to file a cross-objection to the extent the decree stands in his favour, but if he intends to assail any part of the decree, it is obligatory on his part to file the cross-objection. In *Banarsi v. Ram Phal*, [(2003) 9 SCC 606 : AIR 2003 SC 1989], it has been observed that the amendment inserted in 1976 is clarificatory and three situations have been adverted to therein. Category 1 deals with the impugned decree which is partly in favour of the appellant and partly in favour of the respondent. Dealing with such a situation, the Bench observed that in such a case, the respondent must file an appeal or take cross-objection against that part of the decree which is against him if he seeks to get rid of the same though he is entitled to support that part of the decree which is in his favour without taking any cross-objection. In respect of two other categories which deal with a decree entirely in favour of the respondent though an issue had been decided against him or a decree entirely in favour of the respondent where all the issues had been answered in his favour but there is a finding in the judgment which goes against him, in the pre-amendment stage, he could not take any cross-objection as he was not a person aggrieved by the decree. *But post-amendment, read in the light of the Explanation to sub-rule (1), though it is still not necessary for the respondent to take any cross-objection laying challenge to any finding adverse to him as the decree is entirely in his favour, yet he may support the decree without cross-objection. It gives him the right to take cross-objection to a finding recorded against him either while answering an issue or while dealing with an issue.* It is apt to note that after the amendment in the Code, if the appeal stands withdrawn or dismissed for default, the cross-objection taken to a finding by the respondent would still be adjudicated upon on merits which remedy was not available to the respondent under the unamended Code."

(emphasis Supplied)

22. The judgment in *Sri Gargal Vinayagar Temple* is relied upon by both the parties. Learned counsel for the appellants relies upon para 25 of the order whereas, counsel for the respondents relies upon para 27 of the order. Both the paragraphs read as under:

"25. On the issue of applicability of res judicata in cases where two or more suits have been disposed of by one common judgment but separate decrees, and where the decree in one suit has been appealed against but not against the others, various High Courts have given divergent and conflicting opinions and decisions..... Without adverting to the details of those cases, it is sufficient to note that the hesitancy or reluctance to the applicability of the rigorous of res judicata flowed from the notion that Section 11 of the Code refers only to "suits" and as such does not include "appeals" within its ambit; that since the decisions arrived in the connected suits were articulated simultaneously, there could be no "former suit" as stipulated by the said section; that substance, issues and finding being common or substantially similar in the connected suits tried together, non-filing of an appeal against one or more of those suits ought not to preclude the consideration of other appeals on merits; and that the principle of res judicata would be applicable to the judgment, which is common, and not to the decrees drawn on the basis of that common judgment.

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27. Procedural norms, technicalities and processal law evolve after years of empirical experience, and to ignore them or give them short shrift inevitably defeats justice. Where a common judgment has been delivered in cases in which

consolidation orders have specifically been passed, we think it irresistible that the filing of a single appeal leads to the entire dispute becoming *sub judice* once again. Consolidation orders are passed by virtue of the bestowal of inherent powers on the courts by Section 151 CPC, as clarified by this Court in *Chitavalasa Jute Mills v. Jaypee Rewa Cement*, (2004) 3 SCC 85. In the instance of suits in which common issues have been framed and a common trial has been conducted, the losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgments. While so opining we do not intend to whittle down the principle that appeals are not expected to be filed against every inconvenient or disagreeable or unpropitious or unfavourable finding or observation contained in a judgment, but that this can be done by way of cross-objections if the occasion arises. The decree not assailed thereupon metamorphoses into the character of a "former suit". If this is not to be so viewed, it would be possible to set at naught a decree passed in Suit A by only challenging the decree in Suit B. Law considers it an anathema to allow a party to achieve a result indirectly when it has deliberately or negligently failed to directly initiate proceedings towards this purpose. Laws of procedure have picturesquely been referred to as handmaidens to justice, but this does not mean that they can be wantonly ignored because, if so done, a miscarriage of justice inevitably and inexorably ensues. Statutory law and processual law are two sides of the judicial drachma, each being the obverse of the other. In the case in hand, had the tenant diligently filed an appeal against the decree at least in respect of DS No. 5 of 1978, the legal conundrum that has manifested itself and exhausted so much judicial time, would not have arisen at all."

23. It may be noticed that separate decree is required to be preferred in each suit even though the suits are consolidated. The three-Judge Bench in *Sri Ganga Vinayagar Temple* has categorically held that where a common judgment has been delivered in cases in which consolidation orders have been passed, the filing of an appeal leads to the entire dispute becoming *sub judice* again. The aforesaid judgment arises out of the fact whether tenant has filed a suit to protect its possession during the lease period which was coming to an end on January 1, 1983, claiming injunction not specifically challenging the alienation by the trustees of a public trust. The trustees have filed two separate suits for claiming arrears of rent, one for claiming Rs. 268/- and another for Rs. 2600/-.

24. The tenant's suit and the suit for the recovery of Rs. 2600/- were dismissed. Only one appeal was preferred by the tenant against the decree passed in the suit for recovery of Rs. 268/-. In these circumstances, it was held that since the claim of the tenant in his suit was substantially in respect of the right of the trustees to alienate the property of the trust as alleged by the tenant, which is the issue in the other suits as well, therefore, the decree in the suit for injunction filed by the plaintiff would operate as *res judicata*. But in the present case, an appeal in the first and second suit is pending in which the appellant has right to support decree in terms of Order XLI Rules 22 and 33 of the Code.

25. Learned counsel for the respondents strongly relies upon a Constitution Bench judgment of this Court in *Sadri Narayan Singh* to contend that the findings recorded in one appeal operate as *res judicata* in the second appeal. To appreciate such argument, some facts leading to the said judgment need to be mentioned. The election of the appellant was challenged before the Election Tribunal on the ground that the appellant was holding an office of profit and, therefore, it is against the provisions of Section 7 of the Representation of the People Act, 1951. There was allegation that appellant had also committed corrupt practices. On the other hand, respondent filed a petition praying for the declaration that the election of the appellant was void and also claimed declaration that he was duly elected having polled more votes after appellant-elected candidate. The Election Tribunal found that the appellant was not holder of office of

profit but held that he is guilty of corrupt practices. The election of the appellant was set aside but did not grant the declaration that the respondent was duly elected candidate. The appellant filed Election Appeal No. 7 of 1958 whereas the respondent filed Election Appeal No. 8 of 1958 in the High Court against the order of the Election Tribunal. The appeal filed by the appellant was dismissed holding that he was holding office of profit but has not indulged in corrupt practice whereas the appeal filed by the respondent was allowed by a common judgment declaring the respondent to be duly elected. The appellant filed appeal before this Court only against the order in Appeal No. 8 of 1958. All the grounds of the appeal relate to the finding of the High Court in Appeal No. 7 of 1958. In appeal before this Court, a preliminary objection was taken that no appeal was preferred by the appellant against the order of the High Court in Appeal No. 7 of 1958. The Court distinguished the earlier judgment in *Narhari*. It held that though Appeal Nos. 7 and 8 of 1958 arose out of one proceeding but subject matter of each appeal was different, therefore, the final judgment would operate as *res judicata*. The relevant findings read as under:

"14. It is true that both the Appeals Nos. 7 and 8 before the High Court arose out of one proceeding before the Election Tribunal. The subject-matter of each appeal was, however, different. The subject-matter of Appeal No. 7 filed by the appellant related to the question of his election being bad or good, in view of the pleadings raised before the Election Tribunal. It had nothing to do with the question of right of Respondent 1 to be declared as duly elected candidate..... *The finding about his holding an office of profit served the purpose of both the appeals, but merely because of this the decision of the High Court in each appeal cannot be said to be one decision.* The High Court came to two decisions. It came to one decision in respect of the invalidity of the appellant's election in Appeal No. 7. It came to another decision in Appeal No. 8 with respect to the justification of the claim of Respondent 1 to be declared as a duly elected candidate, a decision which had to follow the decision that the election of the appellant was invalid and also the finding that Respondent 2, as *Ghatwal*, was not a properly nominated candidate. We are therefore of opinion that so long as the order in the appellant's appeal No. 7 confirming the order setting aside his election on the ground that he was a holder of an office of profit under the Bihar Government and therefore could not have been a properly nominated candidate stands, he cannot question the finding about his holding an office of profit, in the present appeal, which is founded on the contention that that finding is incorrect."

(Emphasis Supplied)

26. The said judgment has no applicability to the facts of the present case as the decree in Civil Suit No. 274 of 1983 or 276 of 1983 has not attained finality and the same are still subject matter of appeal before the First Appellate Court wherein, the findings recorded by the trial court can be set aside while maintaining ultimate decree of dismissal of the suit. In *Badri Narayan Singh*, the decision in an appeal became final, holding the appellant to be not duly elected candidate. The Appeal No. 8 of 1958 was in respect of declaration that the respondent shall be deemed to be elected candidate. Therefore, in the absence of finality of judgments, there cannot be any question of such finding binding in the third suit.

27. The *Narhari* arises out of a suit for possession of 1/3 share of land from the 2 sets of defendants. The suit was partly decreed. The trial court decreed the suit; however, two appeals were preferred by two sets of defendants. Both the appeals were allowed and the suit was dismissed. The plaintiff filed one appeal after filing the consolidated court fee for the whole suit and by impleading all the defendants as respondents. The argument raised was that the plaintiff has filed only one appeal, therefore, the findings recorded in the other appeal will operate *res judicata* in the second appeal preferred by the plaintiff. The Court held as under:

"5.The question of *res judicata* arises only when there are two suits. Even when there are two suits, it has been held that a decision given simultaneously cannot be a decision in the former suit. When there is only one suit, the question of *res judicata* does not arise at all and in the present case, both the decrees are in the same case and based on the same judgment, and the matter decided concerns the entire suit. As such, there is no question of the application of the principle of *res judicata*. The same judgment cannot remain effective just because it was ap-pealed against with a different number or a copy of it was attached to a different appeal. The two decrees in sub-stance are one. Besides, the High Court was wrong in not giving to the appellants the benefit of section 5 of the Limitation Act because there was conflict of decisions regarding this question not only in the High Court of the State but also among the different High Courts in India...."

28. *Ganga Bai* is the judgment arising out of the proceeding prior to amendment of Order XLI Rule 22 of the Code. The High Court held that the first appeal filed by defendant Nos. 2 and 3 was not maintainable even though the suit was wholly dismissed against them. The Court held that right of appeal is a creature of statute and that it is not inherent right. It was held as under:

"17. These provisions show that under the Code of Civil Procedure, an appeal lies only as against a decree or as against an order passed under rules from which an appeal is expressly allowed by Order 43 Rule 1. No appeal can lie against a mere finding for the simple reason that the Code does not provide for any such appeal. It must follow that First Appeal No. 72 of 1959 filed by Defendants 2 and 3 was not maintainable as it was directed against a mere finding recorded by the trial court.

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21. Thus, the appeal filed by Defendants 2 and 3 being directed against a mere finding given by the trial court was not maintainable...."

29. In *Ramesh Chandra*, the Court held that one of the tests to ascertain if a finding operates as *res judicata* is that the party aggrieved could challenge it by way of an appeal. The Court held as under:

"3. One of the tests to ascertain if a finding operates as *res judicata* is if the party aggrieved could challenge it. Since the dismissal of appeal or the appellate decree was not against defendants 2 and 3 they could not challenge it by way of appeal. Even assuming that defendant 1 could challenge the finding that liability of rent was of defendants 2 and 3 as they were in possession, he did not file any written statement in the trial court raising any dispute between himself and defendants 2 and 3. There was thus no occasion for the appellate court to make the observation when there was neither pleading nor evidence...."

30. In another judgment reported as *S. Nazeer Ahmed*, it has been held that the appellant without filing a memorandum of cross-objections in terms of Order XLI Rule 22 of the Code, could challenge the finding of the trial court. The respondent in an appeal is entitled to support the decree of the trial court even by challenging any of the findings that might have been rendered by the trial court against himself. For supporting the decree passed by the trial court, it is not necessary for a respondent in the appeal, to file a memorandum of cross-objections challenging a particular finding that is rendered by the trial court against him when the ultimate decree itself is in his favour. The court held as under:

"7. The High Court, in our view, was clearly in error in holding that the appellant not having filed a memorandum of cross-objections in terms of Order 41 Rule 22 of the Code, could not challenge the finding of the trial court that the suit was not barred by Order 2 Rule 2 of the Code. The respondent in an appeal is entitled to support the decree of the trial court even by challenging any of the findings that might have been rendered by the trial court against himself. For supporting the

decree passed by the trial court, it is not necessary for a respondent in the appeal, to file a memorandum of cross-objections challenging a particular finding that is rendered by the trial court against him when the ultimate decree itself is in his favour. A memorandum of cross-objections is needed only if the respondent claims any relief which had been negatived to him by the trial court and in addition to what he has already been given by the decree under challenge. We have therefore no hesitation in accepting the submission of the learned counsel for the appellant that the High Court was in error in proceeding on the basis that the appellant not having filed a memorandum of cross-objections, was not entitled to canvas the correctness of the finding on the bar of Order 2 Rule 2 rendered by the trial court."

31. Mr. Dave vehemently argued that *res judicata* in terms of Section 11 of the Code is not about a decree but to a finding in the former suit. It is argued that the first suit and second suit are the former suits in which the findings were written against the State, therefore, such findings will operate *res judicata*. The said argument proceeds on the basis that the Court would mean the High Court and, therefore, finding in the first and second suit would bar the subsequent proceedings arising out of the third suit in appeal. We find that such an argument is not tenable. As mentioned above, that the decree of dismissal of the first and second suit has not attained finality which are under challenge by the plaintiffs and the defendants-State are entitled to dispute findings on Issue No. 1 even without filing cross objections or in terms of Order XXI Rule 33 of the Code that the decree of dismissal of suit on the grounds other than what weighed with the learned trial court. All the issues are open for consideration before the First Appellate Court.

32. Section 11 and Explanation I of the Code would be applicable in subsequent proceedings between the same parties or between the parties under whom they or any of them claimed under the same title. But the findings in the first and second suit will not operate as *res judicata* as such findings are subject matter of challenge in the appeals filed by the plaintiffs in their respective suits. All the three suits have been decided together and the three appeals pending against such judgment and decrees. Therefore, it cannot be said that the first and the second suit are the former suits as the decree passed therein has not attained finality. The findings recorded therein will not, therefore, operate as *res judicata* as the State is not obliged to challenge findings on Issue No. 1 in the first and second suit even after the amendment of Order XXI Rule 22 of the Code.

33. This Court in *Lonankutty* has examined the applicability of the principles of Section 11 in a matter wherein two suits were filed. Civil Suit No. 666 of 1954 was filed by the appellant for an injunction from taking water from Survey No. 673 and discharge the water back through Survey No. 673 and for a mandatory injunction directing them to demolish the bund and close the sluice gates. The respondents filed Civil Suit No. 5 of 1957 for an injunction restraining the appellant from trespassing on the bund constructed by them and for preventing the appellant from interfering with their right to take water from Survey No. 673 and to discharge the water back through that land. The second was subsequent suit. The suit of the appellant was decreed. However, the suit of the respondents was dismissed but decreed to the extent of the right claimed regarding the agriculture use. The result of decrees passed in two suits was that the respondents could take water from the land of the appellant and discharge for agricultural purposes only and not for fishing. Both filed two appeals arising out of two suits. However, all the appeals were dismissed. No appeal came to be filed arising out of second suit filed by the respondents. It is in these circumstances it was held that the suit filed by the respondents, though after the suits of the plaintiff, would be deemed to be former suits as the decree in the said suit has attained finality. The Court held as under:

*19. Respondents did not file any further appeal against the decree passed by the District Court in the appeals arising out of their suit. They filed a second appeal in the High Court, only as against the decree passed by the District Court in AS No. 66 of 1958 which arose out of the decree passed by the trial court in the appellant's suit. Thus, the decision of the District Court rendered in the appeal arising out of the respondents' suit became final and conclusive. That decision, not having been appealed against, could not be reopened in the second appeal arising out of the appellant's suit.

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21. In its remanding judgment dated July 8, 1964, by which the plea of res judicata was repelled, the High Court relied principally on the decision of this Court in *Narhari v. Shankar*, [AIR 1953 SC 419 : 1950 SCR 754;]. That decision is in our opinion distinguishable because in that case only one suit was filed giving rise to 2 appeals. A filed a suit against B and C which was decreed. B and C preferred separate appeals which were allowed by a common judgment, but the appellate court drew 2 separate decrees. A preferred an appeal against one of the decrees only and after the period of limitation was over, he preferred an appeal against the other decree on insufficient court fee. The High Court held that A should have filed 2 separate appeals and since one of the appeals was time barred, the appeal filed within time was barred by res judicata. This Court held that "there is no question of the application of the principle of res judicata", because "when there is only one suit, the question of res judicata does not arise at all". This was put on the ground that "where there has been one trial, one finding, and one decision, there need not be two appeals even though two decrees may have been drawn up". In our case, there were 2 suits and since the appellate decree in one of the suits had become final, the issues decided therein could not be reopened in the second appeal filed against the decree passed in an appeal arising out of another suit. This precisely is the ground on which *Narhari* case was distinguished by this Court in *Sheodan Singh v. Smt Daryao Kunwar*, [AIR 1966 SC 1332 : (1966) 3 SCR 300]. It was held therein that where the trial court has decided 2 suits having common issues on the merits and there are two appeals therefrom the decision in one appeal will operate as res judicata in the other appeal."

34. The reliance of Mr. Dave on the judgment in *Ashok Nagar Welfare Association* is not relevant for the present case as question examined was the scope of interference in the Special Leave Petition. That was a case whether an ex parte decree granted in two suits by the trial court was set aside in appeal. The Special Leave Petition was directed against such order. This Court has rightly not interfered with the setting aside the ex parte judgment. *Bhanu Kumar Jain* is also a case delineating the remedies available to a defendant in the event of an ex parte decree granted. The said judgment is not applicable to the facts of the present case.

35. Another judgment referred to by Mr. Dave is *Nirmala Bala Ghose*. In the said case, the decree against deity had attained finality in two suits. It was held that it is not open to another defendant to challenge the decree insofar as it is against deities. The Court has held as under:

*23. In this appeal, the two deities are also impleaded as party respondents. But the deities have not taken part in the proceeding before this Court, as they did not in the High Court. The decree against the two deities has become final, no appeal having been preferred to the High Court by the deities. It is not open to Nirmala to challenge the decree insofar as it is against the deities, because she does not represent the deities. The rights conferred by the deed Ext. 11 upon Nirmala are not affected by the decree of the trial court. She is not seeking in this appeal to claim a mere exalted right under the deed for herself, which may require re-examination

even incidentally of the correctness of the decision of the trial court and the High Court insofar as it relates to the title of the deities. It was urged, however, that apart from the claim which Nimata has made for herself, the Court has power and is indeed bound under Order 41 Rule 33 Code of Civil Procedure to pass a decree, if on a consideration of the relevant provisions of the deed, this Court comes to the conclusion that the deed operates as an absolute dedication in favour of the two deities. Order 41 Rule 33, insofar as it is material, provides:

"The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection."

The rule is undoubtedly expressed in terms which are wide, but it has to be applied with discretion, and to cases where interference in favour of the appellant necessitates interference also with a decree which has by acceptance or acquiescence become final so as to enable the Court to adjust the rights of the parties. Where in an appeal the Court reaches a conclusion which is inconsistent with the opinion of the Court appealed from and in adjusting the right claimed by the appellant it is necessary to grant relief to a person who has not appealed, the power conferred by Order 41 Rule 33 may properly be invoked. The rule however does not confer an unrestricted right to re-open decrees which have become final merely because the appellate Court does not agree with the opinion of the Court appealed from."

36. We find that the High Court has failed to draw the distinction between the decree and a finding on an issue. It is the decree against which an appeal lies in terms of Section 96 of the Code. Decree in terms of Section 2(2) of the Code means formal expression of an adjudication conclusively determining the rights of the parties. The defendants-State could not file an appeal against a decree which was of a dismissal of a suit simpliciter. The findings on Issue No. 1 against the State could be challenged by way of cross-objections in terms of amended provisions of Order XLI Rule 22 of the Code but such filing of cross-objections is not necessary to dispute the findings recorded on Issue No. 1 as the defendants have a right to support the ultimate decree passed by the trial court of dismissal of suit on grounds other than which weighed with the learned trial court. Even in terms of Order XLI Rule 33 of the Code, the Appellate Court has the jurisdiction to pass any order which ought to have been passed or made in proceedings before it.

37. As per facts on record, Original Suit Nos. 274 of 1983 and 276 of 1983 have been dismissed. The plaintiffs are in appeal in both the suits before the First Appellate Court. Therefore, such decree including the finding on Issue No. 1 has not attained finality as the Appellate Court is seized of the entire controversy including the findings of fact on Issue No. 1. The defendants have a right to dispute such findings by filing cross-objections under Order XLI Rule 22 of the Code as amended in the year 1976 or even in the exercise of the powers conferred on the Appellate Court under Order XLI Rule 33 of the Code.

38. The decree is of dismissal of the suit, whereas, the reasons for passing such decree is judgment as defined in Section 2(9) of the Code. In terms of Section 11 read with Explanation 1, the issue in a former suit will operate as *res judicata* only if such issue is raised in a subsequent suit. Since, the issue of title has not attained finality, therefore, it is not a former suit to which there can be any application of Section 11.

39. In view of the above, we allow the present appeals, set aside the order passed by the High Court in the first appeal filed by the State, as the findings on Issue Nos. 1

Union of India v K. V. Lakshman

AIR 2016 SC 3139

Bench: A.M. Sapre, Ashok Bhushan, JJ.

The Judgment was delivered by: A.M. Sapre, J.

1. This appeal is filed against the final judgment and order dated 24.06.2003 of the High Court of Karnataka at Bangalore in R.F.A. No. 933 of 2002 whereby the High Court dismissed the appeal filed by the appellant herein, in consequence, affirmed the judgment and decree dated 11.12.2001 passed by the Ist Additional City Civil and Sessions Judge, Bangalore in O.S. No. 5588 of 1976.

3. The appellant - Union of India (Divisional Railway Manager, Bangalore) is the plaintiff whereas the respondents are the defendants in the suit.

4. The dispute in this case relates to a plot of land situated near Krishnarajapuram Railway Station, which is around 14 KMs away from Bangalore city- details of which are mentioned in the plaint (herein after referred to as "the suit land").

5. The appellant filed the suit bearing Civil Suit No. 5588/1976 against the respondents in the Court of Ist Additional City Civil and Session Judge, Bangalore for a declaration that they (appellant) are the owners of the suit land and that the respondents whose ancestral claims to have interest in the suit land have no right, title and interest in the suit land. The appellant in order to prove their title over the suit land filed certain documents.

6. The respondents filed their written statements and while denying the appellant's title asserted their own title over the suit land through their predecessors. According to them, their predecessors acquired occupancy rights under the State Tenancy Laws over the suit land in revenue proceedings. It was contended that by virtue of these proceedings, their ancestral acquired superior title over the suit land to the exclusion of every one including the appellant and the same devolved on them after the death of their predecessor in title. The respondents also raised a plea that the suit is barred by limitation. The Trial Court on the basis of the pleading framed issues arising in the civil suit. Parties adduced evidence.

7. Therefore, the dispute that essentially arose between the parties was who is the owner of the suit land- the appellant (Union of India-Railways) or the respondents' predecessor in title?

8. The Trial Court vide judgment/decree dated 11.12.2001 dismissed the suit on two grounds. It was held that the suit is barred by limitation. It was further held that the plaintiff (the appellant) failed to prove their title over the suit land for want of adequate evidence whereas the defendants (respondents) were able to prove their title over the suit land.

9. The appellant, felt aggrieved, filed first appeal before the High Court. In the appeal, the appellant filed an application under Order 41 Rule 27 of the Code of Civil Procedure, 1908 ("the Code") and sought permission to adduce additional evidence in support of their case. The additional evidence inter alia consisted of documents issued by the State Land Revenue department in relation to the suit land. According to the appellant, these documents were relevant and material for deciding the ownership issue and if properly examined along with the documents already filed in the suit, would establish the appellant's title over the suit land to the exclusion of every one including the respondents. It was further alleged that the appellant was not able to file these documents in the Trial Court because firstly, these documents were old; Secondly, the appellants came to know of these documents after the decision was rendered in the civil suit; and lastly, since the documents were traced recently with great difficulty and being in the nature of public documents, the appellant be allowed to file them so as to enable the Court to properly decide the issue of ownership in relation to the suit land.

10. The learned Single Judge, by impugned judgment running into 50 pages, dismissed the appellant's first appeal in limine and, in consequence, upheld the judgment/decree of the Trial Court. The learned Single Judge also dismissed the application filed by the appellant under Order 41 Rule 27 of the Code holding that firstly, the cause mentioned in the application as to why the additional evidence could not be filed in the civil suit before the

Trial Court is not sufficient cause and secondly, the additional evidence sought to be tendered is neither material nor relevant. Felt aggrieved, the plaintiff has filed this appeal by way of special leave before this Court.

12. Learned counsel for the appellant while assailing the legality and correctness of the impugned judgment urged several grounds and submitted that the High Court (Single Judge) erred in dismissing the appellant's first appeal in limine, so also erred in dismissing the application filed under Order 41 Rule 27 of the Code.

20. As rightly argued by the learned counsel for the appellant, the High Court should not have dismissed the appeal in limine but in the first instance should have admitted the appeal and then decided finally after serving notice of the appeal on the respondents.

21. We also find from the record that on the one hand, the learned Judge observed that the appeal has "absolutely no arguable point" and on the other hand to support these observations, the learned Judge devoted 50 pages. This itself indicated that the appeal involved arguable points.

22. It is a settled principle of law that a right to file first appeal against the decree under Section 96 of the Code is a valuable legal right of the litigant. The jurisdiction of the first appellate Court while hearing the first appeal is very wide like that of the Trial Court and it is open to the appellant to attack all findings of fact or/and of law in first appeal. It is the duty of the first appellate Court to appreciate the entire evidence and may come to a conclusion different from that of the Trial Court.

33. This takes us to the next question in relation to the application filed under Order 41 Rule 27 of the Code. In our considered view, the High Court committed another error when it rejected the application filed by the appellant under Order 41 Rule 27 of the Code. This application, in our opinion, should have been allowed for more than one reason.

34. First, there was no one to oppose the application. In other words, the respondents were neither served with the notice of appeal and nor served with the application and hence they did not oppose the application. Second, the appellant averred in the application as to why they could not file the additional evidence earlier in civil suit and why there was delay on their part in filing such evidence at the appellate stage. Third, the averments in the application were supported with an affidavit, which remained unrebutted. Fourth, the application also contained necessary averment as to why the additional evidence was necessary to decide the real controversy involved in appeal. Fifth, the additional evidence being in the nature of public documents and pertained to suit land, the same should have been taken on record and lastly, the appellant being the Union of India was entitled to legitimately claim more indulgence in such procedural matters due to their peculiar set up and way of working.

35. It was for all these reasons, we are of the view that the application filed by the appellant under Order 41 Rule 27 of the Code deserved to be allowed and is accordingly allowed by permitting the appellant to file additional evidence.

36. Learned counsel for the respondents, however, contended that the additional evidence is not relevant for deciding the appeal/suit. He also urged that the appellant has not pleaded any cause as required under Order 41 Rule 27 to file such evidence at the appellate stage. We are not impressed by this submission in the light of the reasons given supra. This submission is accordingly rejected.

37. Order 41 Rule 27 of the Code is a provision which enables the party to file additional evidence at the first and second appellate stage. If the party to appeal is able to satisfy the appellate Court that there is justifiable reason for not filing such evidence at the trial stage and that the additional evidence is relevant and material for deciding the rights of the parties which are the subject matter of the lis, the Court should allow the party to file such additional evidence. After all, the Court has to do substantial justice to the parties. Merely because the Court allowed one party to file additional evidence in appeal would not by itself mean that the Court has also decided the entire case in his favour and accepted such evidence. Indeed once the additional evidence is allowed to be taken on record, the appellate Court is under obligation to give opportunity to the other side to file additional evidence by way of rebuttal.

38. Coming to the case, since we have allowed the application made by the appellant under Order 41 Rule 27 of the Code and has permitted the appellant to file additional evidence then as a necessary consequence, the impugned order has to be set aside and respondents are granted an opportunity to file additional evidence in rebuttal, if they so wish to file.

39. The other inevitable consequence is that the case has to be remanded either to the High Court for deciding the appeal afresh on merits or to the Trial Court for deciding the civil suit afresh on merits in accordance with law.

40. Having regard to the nature of controversy and the manner in which the suit/appeal was decided, we consider it appropriate, in the interest of parties, to remand the case to the Trial Court (District and Sessions Judge, Bengaluru) for deciding the civil suit afresh on merits in accordance with law.

41. In view of foregoing discussion, the appeal succeeds and is allowed. The impugned judgment and also the judgment/decreed passed by the Trial Court are set aside. The civil suit is now restored to its file. The Trial Court, i.e., District and Sessions Judge Bengaluru, is directed to retry the civil suit on merits. The additional evidence filed by the appellant is taken on record. The respondents are afforded an opportunity to file additional evidence in support of their case in rebuttal. The parties are at liberty to amend their pleadings in case, if they so wish and further adduce additional oral evidence in support of their respective case in addition to what has already been adduced and prove the documents filed at the appellate stage.

43. While trying the civil suit, the Court may in its discretion or at the instance of any party, as the case may be, consider appointing Court Commissioner preferably any retired government revenue official by taking recourse to the provisions of Order 26 of the Code to undertake spot inspection of the suit land with a view to verify its exact location, area, boundaries etc. keeping in view the evidence on record in relation to the suit land.

44. The Trial Court shall decide the civil suit strictly in accordance with law on the basis of pleadings and the evidence adduced by the parties uninfluenced by any observations, reasoning and the findings of the two Courts below which stand now set aside. We may also clarify that we have refrained from recording any finding either way on the merits.

46. Since the civil suit is quite old, we direct the District and Sessions Judge Bengaluru to decide the civil suit expeditiously and preferably within 6 months from the date of party's appearance before him. Parties to appear before the District and Sessions Judge Bengaluru on 01.08.2016. The original record of the case, if requisitioned, be sent forthwith to the Trial Court (District and Sessions Judge, Bengaluru) so as to reach to the Court concerned before the date of parties appearance.

Shashidhar v Ashwini Uma Mathad
AIR 2015 SC 1139

Bench: A.M. Sapre, Fakkir Mohamed Ibrahim Kalifulla, JJ.

The Judgment was delivered by: Abhay Manohar Sapre, J.

2. This appeal is filed by the defendants against the judgment and order dated 06.12.2012 passed by the Division Bench of the High Court of Karnataka Circuit Bench at Dharwad in Regular First Appeal No. 3052 of 2010, which in turn arises out of the judgment and decree dated 10.02.2010 passed by the 1st Additional Civil Judge (Sr. Division) at Hubli in Original Suit No. 73 of 2004.

4. One Basavantayya Revanayya Mathad was married to Shantakka Mathad (defendant no. 2). Out of this wedlock, three children were born - one son Shashidhar (defendant no.1) and two daughters - Rajeshwari (Died in 2003) and - Gayatri (Died in 2004) - defendant no.3. Shashidhar was married to Uma and out of this wedlock, three daughters were born - Ashwini (plaintiff no. 1), Nivedita (plaintiff no.2) and Puja who was given in adoption to Uma's sister. Shashidhar divorced to Uma and re-married to Manjula (defendant no.4). Out of this second marriage, two daughters were born - Aishwarya (defendant no.5) and Vaishnavi (defendant no.6).

5. Basavantayya had extensive properties. On 21.07.1991, Basavantayya died leaving behind him the aforementioned members of his family. On his death and also on the death of his one unmarried daughter Rajeshwari, disputes arose between his legal representatives regarding their respective shares in the properties and also regarding ownership of some members of his family in relation to certain properties standing in the name of members of his family. The disputes unfortunately could not be settled amicably which led to filing of civil suit by the daughters of defendant No.1 from his first wife Uma (deceased) against the other members of the family, i.e., their father, step-mother and step-sisters for determination of their respective shares, partition by meets and bounds and separate possession in the suit properties held and possessed by the members of the family of late Basavantayya.

The defendants contested the civil suit by denying the plaintiffs' claim. The trial Court framed issues. Parties adduced evidence.

6. By judgment and decree dated 10.02.2010, the trial Court partly decreed the plaintiffs' suit and accordingly passed preliminary decree in relation to the suit properties. It was held that plaintiffs are entitled for partition and separate possession of their 1/6th share each in some properties specified in the decree whereas 1/10th share each in other suit properties as specified in the decree.

7. Dissatisfied with the preliminary decree, the defendants filed first appeal being R.F.A. No. 3052 of 2010 and the plaintiffs filed cross objections being R.F.A. CROB No. 103 of 2011 under Order XLI Rule 22 of the Civil Procedure Code, 1908 (in short "the Code"). This is how the entire preliminary decree became the subject-matter of first appeal filed by the defendants.

8. By impugned judgment and order dated 06.12.2012, the Division Bench of the High Court disposed of the appeal and cross objections and modified the judgment and decree of the trial court to the detriment of the defendants. It is against this judgment and order, the defendants have filed this appeal by way of special leave.

12. The powers of the first appellate Court, while deciding the first appeal u/s. 96 read with Order XLI Rule 31 of the Code, are indeed well defined by various judicial pronouncements of this Court and are, therefore, no more res integra.

22. Applying the principle to the facts of the case, we find that the High Court while deciding the first appeal failed to keep the principle in consideration and rendered the impugned decision. **In our considered opinion, the High Court did not deal with any of the submissions urged by the appellants and/or respondents nor it took note of the grounds taken by the appellants in grounds of appeal nor took note of cross objections filed by plaintiffs under Order XLI Rule 22 of the Code and nor made any attempt to appreciate the evidence adduced by the parties in the light of the settled legal principles and decided case laws applicable to the issues arising in the case with a view to find out as to whether the judgment of the trial Court can be sustained or not and if so, how, and if not, why?**

24. We may consider it apposite to state being a well settled principle of law that in a suit filed by a

co-sharerer, coparcener, co-owner or joint owner, as the case may be, for partition and separate possession of his/her share qua others, it is necessary for the Court to examine, in the first instance, the nature and character of the properties in suit such as who was the original owner of the suit properties, how and by which source he/she acquired such properties, whether it was his/her self-acquired property or ancestral property, or joint property or coparcenary property in his/her hand and, if so, who are/were the coparceners or joint owners with him/her as the case may be.

Secondly, how the devolution of his/her interest in the property took place consequent upon his/her death on surviving members of the family and in what proportion, whether he/she died intestate or left behind any testamentary succession in favour of any family member or outsider to inherit his/her share in properties and if so, its effect.

Thirdly whether the properties in suit are capable of being partitioned effectively and if so, in what manner? Lastly, whether all properties are included in the suit and all co-sharerers, coparceners, co-owners or joint-owners, as the case may be, are made parties to the suit? These issues, being material for proper disposal of the partition

suit, have to be answered by the Court on the basis of family tree, inter se relations of family members, evidence adduced and the principles of law applicable to the case. ("Hindu Law" by Mulla 17th Edition, Chapter XVI Partition and Reunion - Mitakshara Law pages 493547).

25. **Being the first appellate Court, it was, therefore, the duty of the High Court to decide the first appeal keeping in view the scope and powers conferred on it u/s. 96 read with Order XLI Rule 31 of the Code mentioned above. It was unfortunately not done, thereby, causing prejudice to the appellants whose valuable right to prosecute the first appeal on facts and law was adversely affected which, in turn, deprived them of a hearing in the appeal in accordance with law.**

26. We are not inclined to accept the submission of the learned counsel for the respondents when he urged that the impugned judgment is based on concession given by the appellants and hence no discussion on merits on any of the issues was called for. In the first place, the appellants did not make any application for settlement of the dispute in relation to any of the suit property in writing and secondly, there is nothing on record to show that the appellants wanted to give up their claim or/and wished to settle the matter in relation to some properties. In the light of this, we are of the view that the High Court ought to have gone into the merits of the claim of the respective parties in its proper perspective and then recorded a finding regarding extent of shares received by each coparcener/co-owner keeping in view the nature of properties such as whether it was self-acquired property or ancestral property and, if so, in whose hands, its source of acquisition by such person, the manner of devolution on the legal representatives of such person etc. As observed supra, these findings were required to be recorded after appreciating the evidence keeping in view the provisions of the Hindu Succession Act and other related laws applicable to the issues arising in the case.

27. It is for these reasons, we are unable to uphold the impugned judgment of the High Court.

28. The appeal thus succeeds and is, accordingly, allowed. The impugned judgment is set aside and the case is remanded to the High Court for deciding the first appeal and cross-objections afresh, keeping in view the principle of law laid down by this Court as mentioned above.

29. However, we make it clear that we have not applied our mind to the merits of the issues involved in the case and hence, the High Court would decide the appeal strictly in accordance with law on merits uninfluenced by any of our observations, which we have refrained from making on merits. Needless to observe, the High Court will do so after affording an opportunity of hearing to all the parties.

30. Since the case is quite old, we request the High Court to expedite its hearing and dispose of the case preferably within six months. Appeal allowed

Vinod Kumar v Gangadhar

(2015) 1 SCC 391

Bench : A.M. Sapre, Fakkir Mohamed Ibrahim Kalifulla

The Judgment was delivered by : Abhay Manohar Sapre, J.

1. We have perused the Office Report dated 10.10.2014. It discloses that despite last opportunity granted to the respondent, he has not filed any counter affidavit till date. Today, when the matter was taken up for hearing, there was no representation for the respondent. Therefore, we proceed to decide the appeal on merits.

3. This is a civil appeal filed by the plaintiff against the judgment/decree dated 21.03.2013 passed by the single Judge of the High Court of M. P., Indore Bench in First Appeal No. 173 of 1999, which in turn arises out of the judgment and decree dated 27.02.1999 passed by the second Additional District Judge, Mandsaur in Civil Suit No. 36A/97.

5. The appellant (plaintiff) filed a civil suit in the Court of second Additional District Judge, Mandsore being Civil Suit no. 36A/97 against the respondent (defendant) for specific performance of the contract for purchase of house bearing no. 9, situated at Madhavganj Mandsaur ("the suit house").

According to the appellant, the respondent was the owner of the suit house and he entered into a written agreement dated 05.01.1992 with the appellant to sell the suit house to the appellant for a total sum of Rs.1,48,000/-. It was alleged in the plaint that the appellant, in terms of the agreement, offered/tendered Rs.9,989/- to the respondent towards part payment of the sale consideration, but he declined to accept the amount and avoided to perform his part of the agreement. This led to the serving of notice by the appellant to the respondent calling upon him to perform his part of the agreement and execute the sale deed of the suit house in the appellant's favour. Since the respondent failed to ensure compliance of the legal notice, the appellant filed the aforementioned civil suit against the respondent seeking specific performance of the agreement in question. It was alleged that the appellant was ready and willing to perform his part of the agreement but it was respondent who failed to perform his part and hence this suit.

6. The respondent filed the written statement denying allegations made in the plaint. According to the respondent, there was no concluded agreement between the parties and in any event, the appellant having failed to perform his obligations, which were agreed upon in the alleged agreement, he was not entitled to seek enforcement of such agreement against the respondent in relation to the suit house.

7. Thereafter, the trial Court framed the issues. Parties then adduced evidence in support of their pleadings. The trial Court vide its judgment/decree dismissed the suit and declined to grant any relief to the appellant. Feeling aggrieved with the said judgment/decree, the appellant filed First Appeal No. 173 of 1999 u/s. 96 of the Code of Civil Procedure, 1908 in the High Court of M.P. at Indore Bench.

8. The learned Single Judge, by impugned judgment, dismissed the first appeal filed by the appellant and in consequence confirmed the judgment/decree passed by the trial court, which had dismissed appellant's civil suit. It is against this confirmation of the dismissal of the suit by the High Court, the appellant felt aggrieved and filed this appeal.

11. The powers of the first appellate court while deciding the first appeal u/s. 96 read with Order 41 Rule 31 of the Code of Civil Procedure, 1908 are indeed well defined by various judicial

pronouncements of this Court and are, therefore, no more res integra.

13. This Court in number of cases while affirming and then reiterating the aforesaid principle has laid down the scope and powers of the first appellate court u/s. 96 ibid.

21. Applying the aforesaid principle to the facts of the case, we find that the High Court while deciding the first appeal failed to keep the principle in consideration and rendered the impugned decision. Indeed, it is clear by mere reading of para 4 of the impugned order quoted below:

"After hearing learned counsel for the parties and going through the evidence, I do not find any justification to throw over board findings recorded by the trial court. After due appreciation of evidence, I do not find any merit and substance in this appeal. Same stands dismissed with costs. Counsel fee Rs.1000/-, if certified. Ordered accordingly."

22. In our considered opinion, the High Court did not deal with any of the submissions urged by the appellant and/or respondent nor it took note of the grounds taken by the appellant in grounds of appeal nor made any attempt to appreciate the evidence adduced by the parties in the light of the settled legal principles and decided case law applicable to the issues arising in the case with a view to find out as to whether judgment of the trial court can be sustained or not and if so, how, and if not, why?

23. Being the first appellate court, it was the duty of the High Court to have decided the first appeal keeping in view the scope and powers conferred on it u/s. 96 read with Order 41 Rule 31 ibid mentioned above. It was unfortunately not done, thereby, resulting in causing prejudice to the appellant whose valuable right to prosecute in the first appeal on facts and law was adversely affected which, in turn, deprived him of a hearing in the appeal in accordance with law.

24. It is for this reason, we are unable to uphold the impugned judgment of the High Court. The appeal thus succeeds and is accordingly allowed. The impugned judgment is set aside. The case is remanded to the High Court for deciding the first appeal afresh, keeping in view the principle of law laid down by this Court quoted supra.

27. However, we make it clear that we have not applied our mind to the merits of the issues involved in the case and hence, the High Court would decide the appeal strictly in accordance with law on merits uninfluenced by any of our observations, which we have refrained from making on merits. Needless to observe, the High Court will do so after affording an opportunity of hearing to both the parties and especially to the respondent because no one appeared today for him and hence, the High Court would send the respondent a fresh notice of the final hearing of the appeal. Since the case is quite old, we request the High Court to expedite its hearing.

2010 SCC OnLine Pat 1996 : (2010) 2 PLJR 980

In the High Court of Patna
(BEFORE DR. RAVI RAMAN, J.)

Durga Devi (in 1067) – Petitioners;
Bishwanath Das & Ors. (in 1512)

Versus

Vijay Kumar Poddar & Ors. (in 1067)
Sushil Kumar Gupta & Ors. (in 1512) – Respondents.

C.R. Nos. 1067, 1512 of 2009

Decided on January 27, 2010

ORDER

1. In both these Civil Revisions common question with regard to their maintainability has cropped up, thus, both have been heard and considered together on the question;

2. It is well settled that an appeal and revision are creatures of statute. Section 115 of the Code of Civil Procedure (hereinafter referred to as "the Code"), as amended and substituted by the Code (Amendment Act, 1999, w.e.f. 1.7.2002) reads as follows:—

"115. *Revision*.— (1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such Subordinate Court appears—

- (a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

[Provided that the High Court shall not, under this Section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.]

[(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

[(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.]

Explanation.—In this Section, the expression, "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.]"

3. Now, question crops up as to whether in view of newly substituted proviso to the

sub-section (1) of Section 115 of the Code, whether a Civil Revision would be maintainable against such orders which would not have given finality to the suit or proceeding, if the same would have been passed in favour of the parties applying for revision. This very question was considered by the Supreme Court in *Shiv Shakti Coop. Housing Society, Nagpur v. Swaraj Developers*, reported in (2003) 6 SCC 659 (at page 674 paragraph-32) and answered in this regard. After a detailed discussion of Section 115 of the Code as stood before the 1999 Amendment and thereafter, Rules of statutory interpretation, distinction between appeal and revisional powers, the recommendations made by the Law Commission of India and the legislative intent for 1999 Amendment, the Supreme Court held as under:—

"32. A plain reading of Section 115 as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is "yes" then the revision is maintainable. But on the contrary, if the answer is "no" then the revision is not maintainable. Therefore, if the impugned order is interim in nature or does not finally decide the *lis*, the revision is not maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject-matter of revision under Section 115. There is marked distinction in the language of Section 97(3) of the Old Amendment Act and Section 32(2)(i) of the Amendment Act. While in the former, there was a clear legislative intent to save applications admitted or pending before the amendment came into force. Such an intent is significantly absent in Section 32(2)(i). The amendment relates to procedures. No person has a vested right in a course of procedure. He has only the right of proceeding in the manner prescribed. If by a statutory change the mode of procedure is altered, the parties are to proceed according to the altered mode, without exception, unless there is a different stipulation."

4. In view of what has been stated above, the inevitable conclusion would be that forum of civil revision would not be available against any interlocutory/interim order. Section 115 of the Code was again considered by the Supreme Court in the case of *Surya Dev Rai v. Ram Chancier Rai*, reported in (2003) 6 SCC 675 (at pages 682-683, paragraph-4) and it was held as follows:—

"4. Section 115 of the Code of Civil Procedure, as amended, does not

now permit a revision petition being filed against an order disposing of an appeal against the order of the trial court whether confirming, reversing or modifying the order of injunction granted by the trial court. The reason is that the order of the High Court passed either way would not have the effect of finally disposing of the suit or other proceedings. The exercise of revisional jurisdiction in such a case is taken away by the proviso inserted under sub-section (1) of Section 115 CPC. The amendment is based on the Malimath Committee's recommendations. The Committee was of the opinion that the expression employed in Section 115 CPC, which enables interference in revision on the ground that the order if allowed to stand would occasion a failure of justice or cause irreparable injury to the party against whom it was made, left open wide scope for the exercise of the revisional power with all types of interlocutory orders and this was substantially contributing towards delay in the disposal of cases. The Committee did not favour denuding the High Court of the power of revision but strongly felt that the power should be suitably curtailed. The effect of the erstwhile, clause (b) of the proviso, being deleted, and a new proviso having been inserted, is that the revisional jurisdiction in respect of an interlocutory order passed in a trial or

other proceedings, is substantially curtailed. A revisional jurisdiction cannot be exercised unless the requirement of the proviso is satisfied.”

5. However, in the case of *Sadhana Lodhi v. National Insurance Co. Ltd.*, reported in (2003) 3 SCC 524 : [2005 (2) PLJR (SC) 43], a three Judges Division Bench of the Supreme Court has held as under:—

“6. xxxxxx. Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court under Section 115 of the Code of Civil Procedure. Where remedy for filing a revision before the High Court under Section 115 CPC has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution, xxxxxxx”

6. Though the Supreme Court in the aforesaid decision has held that unless a revision under Section 115 of the Code has been expressly barred by State enactment, the same would lie where a remedy by way of an appeal has not been provided, in the opinion of this Court, the same principle would be applicable, if specific bar has been created by Parliamentary enactment also.

7. However, in the case of *Joydeb Banerjee v. Subodh Choudhary*, reported in 2005 (1) PLJR 440 also, a learned Single Judge of this Court placing reliance upon a decision of the three Judges Division Bench of the Apex Court in *Sadhana Lodhi* (supra) has held that if the remedy of filing civil revision before High Court under Section 115 has been specifically barred by State enactment, only in such cases, petition, under Article 226 of the Constitution of India would lie otherwise in the absence of such State enactment, it has been held, that the civil revision would be maintainable specially when the question of jurisdiction is involved.

8. In yet another decision, the learned Single Judge of this Court, while considering a Civil Revision filed against an order allowing intervention, in the suit upon a petition filed under Order I Rule 10(2) of the Code, in *Raghubans Mani v. Mahabir Babu Marwari*, reported in 2005 (4) PLJR 135, after referring the decision of the Apex Court rendered in *Shiv Shakti Coop. Housing Society, Nagpur* (supra), has held that according to the aforesaid decision of the Apex Court itself

the orders passed upon a petition filed under Order I Rule 10 of the Code were revisible under Section 115. It would be apt to quote the relevant passage of the aforesaid decision which is as follows:—

“8. After hearing the learned counsel for the parties and after perusing the materials on record specially the impugned order, it is quite apparent that due to the objection of the intervenor-opposite party no. 2, a *lis* had arisen as to whether opposite party no. 2 was a necessary party for the proper adjudication of the suit and the said *lis* has been decided by the learned court below vide the impugned orders. Hence, in my view, according to the decision of the Hon'ble Apex Court in case of *Shiv Shakti Coop. Housing Society, Nagpur* (supra), the said orders were revisible under Section 115 C.P.C. after its recent amendment which came into force on 1.7.2002. Even according to another decision of the Hon'ble Apex Court in case of *Sadhana Lodhi v. National Insurance Co. Ltd.*, reported in AIR 2003 SC 1516 equivalent to (2003) 3 SCC 524 : [2005 (2) PLJR (SC) 43], the provision of Section 115 C.P.C. would be attracted in such matters. Hence, it is hereby held that these Civil Revisions are maintainable.”

9. In yet another decision rendered in *Prem Shankar Chaudhary v. Special Officer, now President, Bihar State Board of Religious Trust* [2005 (4) PLJR 487], the learned Single Judge, after referring the case of *Shiv Shakti Coop. Housing Society, Nagpur* (supra) held as follows:—

"19) So far the question of maintainability of this civil revision is concerned, the Hon'ble Apex Court has specifically held in the case of *Neelakantan v. Mallika Begum* reported in (2002) 2 SCC 440 that in cases where finding is recorded by courts below without any legal evidence on the record or on misreading the evidence or suffers from any legal infirmity which materially prejudices the case of one of the parties or the finding, is perverse, it would be open for the High Court to set aside such finding and to take a different view. In another decision of a Bench of three Hon'ble Judges, the Hon'ble Supreme Court in the case of *Sadhana Lath v. National Insurance Company Limited* reported in (2003) 3 SCC 524 has also held that only in such cases where remedy for filing civil revision is expressly barred by State enactment a petition under Article 227 of the Constitution would lie. Hence where there are such perversities in the findings and such legal infirmities in the impugned order which materially prejudices the case and leads to clear violation of law and abuse of the process of the court, the High Court has to interfere under its revisional jurisdiction to uphold the dignity of legal procedure and proper functioning of the judicial system. Furthermore, Section 115 of the Code of Civil Procedure specifically provides that where the subordinate court fails to exercise a jurisdiction vested in it or where it has acted in exercise of its jurisdiction illegally or with material irregularity, this Court can interfere in its revisional jurisdiction. Here in the instance case the lower court has not only failed to exercise the jurisdiction vested in it but has also failed in its basic duty to uphold the dignity, respectability and effectiveness of the orders and proceeding of the Court of Law. Hence, this civil revision is maintainable."

10. Some learned Members of the Bar pointed out few decisions of the Supreme Court to show that even after the law laid down in *Shiv Shakti Coop. Housing Society, Nagpur* (supra) and *Surya Dev Rai* (supra), the Supreme Court has not set aside the orders passed by the High Courts, allowing Civil Revisions filed against interlocutory orders, as not maintainable

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rather had adjudicated the issues on their merits. Apart from the above, it has also been pointed out that in the case of *Sajjan Kumar v. Ram Kishan*, reported in (2005) 13 SCC 89, a three Judges Bench of the Supreme Court had held that if the trial court failed to exercise jurisdiction vested in it, such error was liable to be corrected by the High Court in exercise of its supervisory jurisdiction, even if Section 115 would not have been strictly applicable. Relevant passage of the aforesaid decision is quoted as under:—

"5. Having heard the learned counsel for the parties, we are satisfied that the appeal deserves to be allowed as the trial court, while rejecting the prayer for amendment has failed to exercise the jurisdiction vested in it by law and by the failure to so exercise it, has occasioned a possible failure of justice. Such an error committed by the trial court was liable to be corrected by the High Court in exercise of its supervisory jurisdiction, even if Section 115 CPC would not have been strictly applicable. It is true that the plaintiff-appellant ought to have been diligent in promptly seeking the amendment in the plaint at an early stage of the suit, more so

when the error on the part of the plaintiff was pointed out by the defendant in the written statement itself. Still, we are of the opinion that the proposed amendment was necessary for the purpose of bringing to the fore the real question in controversy between the parties and the refusal to permit the amendment would create needless complications at the stage of execution in the event of the plaintiff-appellant succeeding in the suit."

11. However, it would be pertinent to point out that in *Sajjan Kumar* (supra) the decisions rendered in *Shiv Shakti Coop. Housing Society, Nagpur* (supra) and *Surya Dev Rai* (supra) do not stand referred.

12. Another decision of the Supreme Court in the case of *Col. Anil Kak (Retd.) v. Municipal Corporation, Indore*, reported in AIR 2007 SC 1130 has also been referred: The relevant passage of the aforesaid decision is reproduced as under:—

"2. All that the High Court has done is to treat the petition filed before it, under Section 115 of the Code as a proceeding initiated under Article 227 of the Constitution of India. The respondents had filed the revision originally and during the pendency of that revision the High Court appears to have taken a view that an order in an appeal arising from a proceeding under Order 39, Rules 1 and 2 of the Code, could not be challenged under Section 115 of the Code since the order was in the nature of an interlocutory order. In such a situation, in our view, the High Court rightly decided to permit the revision petitioners before it, to convert the same as a proceeding under Article 227 of the Constitution of India. After all, the court could have done it on its own, even without a motion in that behalf by the petitioner. We see absolutely no ground to interfere with the said order on the grounds raised in this special leave petition. Hence, this special leave petition is dismissed."

13. In view of the decision of the Apex Court rendered in *Col. Anil Kak (Retd.)* (supra) and in the case of *Nawab Shafiqath Ali Khan v. Nawab Imdad Jah*, reported in (2009) 5 SCC 162 (Paragraph 48), it has been urged on behalf of the Bar that Civil Revision application concerned, alternatively, could be treated as a petition under Article 227 of the Constitution of India. However, it would further be pertinent to point out that in the case of *Vishesh Kumar v. Shanti Prasad*, reported in (1980) 2 SCC 378, it was urged that in case a revision under Section 115 C.P.C. was not maintainable, the case should be remitted to the High

Court for consideration as a petition under Article 227 of the Constitution. In answer, the Supreme Court held as under:—

"17. It has been urged by the appellant in *Vishesh Kumar v. Shanti Prasad* (Civil Appeal No. 2844 of 1979) that in case this Court is of the opinion that a revision petition under Section 115, Code of Civil Procedure, is not maintainable, the case should be remitted to the High Court for consideration as a petition under Article 227 of the Constitution. We are unable to accept that prayer. A revision petition under Section 115 is a separate and distinct proceeding from a petition under Article 227 of the Constitution, and one cannot be identified with the other."

14. Further, it would be relevant to point out that in all the aforesaid subsequent decisions on this issue, the earlier decision rendered in *Vishesh Kumar* (supra) does not stand referred. I, therefore, deem it proper to refer these Civil Revisions for their adjudication by an appropriate Division Bench on the following issues:—

(i) Whether the Civil Revision against an interlocutory order (an order which could not have finally decided the suit or proceedings in favour of the party applying

for revision, if same had been passed by the court concerned in his favour) is maintainable in view of the newly substituted proviso to the sub-section (1) of Section 115 of the Code?

- (ii) Whether, even assuming that there is such a bar, still the High Court can interfere with such orders under "Civil Supervisory Jurisdiction"?
- (iii) Whether in each and every such Civil Revision, even if a petition has been filed under Section 115 of the Code, the High Court can hear and decide the same in exercise of its power under Article 227 of the Constitution of India?
- (iv) Whether all such revisions filed under Section 115 of the Code of Civil Procedure should be allowed to be converted into a writ petition under Article 227 of the Constitution of India?

15. The office is directed to place the records of these cases before the Hon'ble the Chief Justice.

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some of the beneficiaries considered to be said said was as to what Mr. A had expressed an intention to give the said residential property to the family members (including the appellant) by means and mode to be specified in the appellant's share of share of the said residential property. It is to be noted that the said parties were also engaged in the transaction of sale of the said residential property to the appellant's family and thus, the appellant had derived the benefit and interest in the said residential property by succession, if otherwise. However, the appellant's engagement in the said transaction was also well known to the beneficiaries of the said residential property and the appellant's family members. It was stated that the appellant became entitled to certain half share by the said deed and partition, the said Court set aside the said deed and partition passed by the said appellate court and set the matter afresh.

Discussing the law, the Supreme Court said:

If law there exists a presumption in regard to the ownership of a certain property, the party who raises a plea of partition is to prove the same. The separate possession of portion of the property by certain persons itself would not lead to a presumption of partition. Several other cases are required to be considered thereon.

In the present family, the parties claimed their respective shares in the property and also sought to make the declaration of the witnesses in regard to the contents of the deed and all other documents being put in as a family property and not as the share of the appellant and his family members. It is to be noted that the appellant had also stated the contents of the said statement by itself and also that Mr. A had made a declaration that he intended to separate the said residential property of the same with only a certain portion of the said residential property. It was stated that such a declaration was made in presence of all the appellants. It was also stated that in the absence of making such a declaration in front of the appellants were present.

It was stated that if such a declaration had been made and the respondents affirm accepted the same, and if only part of the residential property was to be given to the property by partition by means and mode to be specified in the appellant's share of the residential property, and if the same had been possessed as a family property, it was held that the appellant's share in the residential property was not to be given to the appellant's family members. It was stated that the appellant's share in the residential property was not to be given to the appellant's family members.

It was stated that the appellant claimed the property as a lease. When the appellant claimed the residential property by the witnesses, then, the presumption in regard to the share of the family both backward and forward must be raised as no evidence was brought forward to establish an exact declaration of the appellant's share in the residential property. It was stated that the appellant's share in the residential property was not to be given to the appellant's family members.

It was stated that the appellant's share in the residential property was not to be given to the appellant's family members. It was stated that the appellant's share in the residential property was not to be given to the appellant's family members.



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the said property when left in the share of the appellant. Majority dependent was required to look to the fact only and not their property. The property, although, continued to be possessed as joint property, it was never partitioned by a court and hence, the appeal must be put on its own separately. No award of costs was proper in the facts.

16. Even the material of the appeal, contains the property as a usucapio. When the properties continued to be possessed jointly by the owners under a presumption in regard to the status of joint family with backwash and removal does, by nature, as no evidence was brought in relation to partition, inquiry and declaration of the parties, be said founded to separately handed to in the partition of having regard to the nature of and evidence adduced. But as the learned trial judge came to the conclusion that the appellant had failed to prove her case, the first appellate court, in its opinion, as has rightly been held by the High Court, could not have reversed its said finding without assigning sufficient and cogent reasons therefor.

17. In law there exists a presumption in regard to the continuance of a joint family. The party which raises a plea of partition is to prove the same even separate possession of portion of the property by the co-shares used would not lead to a presumption of partition. Several other factors are required to be considered under:

18. In *Chandrasekhar v. Chandrasekhar*, a general rule that in regard to the cases of separation of a joint family, the first appellate court, while reviewing the same, only on assigning sufficient reasons to order. Several exceptions as a statement of DW 3, in learned judge, did not consist any other factor, showing that it was by the parties.

19. In *M. S. Srinivas v. B. B. Srinivas and P. Prasad*, it was observed that in 3, para 3, it

“It is true that a judge of first instance can never be treated as infallible in determining on whom one or the other and like other tribunals he may go wrong on findings of fact, but on such matters if the evidence is a whole can reasonably be regarded as resulting the conclusion arrived at the appeal court should not lightly interfere with the judgment.”

20. In *Chandrasekhar v. Chandrasekhar* (supra) it was observed:

21. In *M. S. Srinivas v. B. B. Srinivas and P. Prasad* (supra) it was observed: (SCC 1954) 11, para 18-20.

“As a rule, evidence on the point could also usually be made by Ad. Chandrasekhar, in which the learned judge, para 18, it was observed:

“When going to the point, the party must put forward a statement. The case further consists in the establishment of the same. The party who is to be proved, the principle of burden, it is who is to be proved.”

22. In *M. S. Srinivas v. B. B. Srinivas and P. Prasad* (supra) it was observed:

23. In *M. S. Srinivas v. B. B. Srinivas and P. Prasad* (supra) it was observed:

24. In *M. S. Srinivas v. B. B. Srinivas and P. Prasad* (supra) it was observed:



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get to the merits. But it is not the advantage which the judge
has in having the witnesses before him and observing the manner
in which they exposed to view. This is not only a disadvantage
when an appeal is taken but it is equally a disadvantage competent to
reversal of the finding of fact made by the trial judge. The facts
are that something may be true in the practice that when there is
evidence of the professional matter, and the
evidence is upon the credibility of the witness, then unless
there is some special feature in the evidence of a particular
witness which has escaped the trial judge's notice, it is not as a
general principle of propriety to require the appellate court to
when the majority has the opportunity to separate the opinion as to
whether the majority has the opportunity to separate the opinion as to
whether the majority has the opportunity to separate the opinion as to

21. The area at which the question lies in the present case is the area
of the respective functions of the trial judge where the possibility of
errors of inference is so that a substantial question whether
the statement of the witnesses in regard to what was actually
perceived by sensual experience as to what they saw and heard is
acceptable or not is the area in which the well known limitation on the
powers of an appellate court is approached. The evidence falls like
appellate court. It seeks to reverse these findings of fact, and give
certain reasons to demonstrate how the trial court fell into an error.

22. With respect to the High Court, we think that what the High
Court did was what perhaps even an appellate court with full fledged
appellate jurisdiction would, in the circumstances of the present case,
have felt compelled to abstain from and reluctant to do. Contentions
would also require to be upheld.

23. In *Jaganath v. Anupama* this Court was concerned with the scope
Section 30 of the Code of Civil Procedure and held that it would be wrong
improper to reverse an appeal without having to the extent of the appeal
the result.

24. In *R.K.N. Srinivas v. Bhatia Bhabha* this Court found that the
appellate court is required to address all the issues and determine the appeal
upon a statement of legal reasons.

25. In this view of the matter it is not necessary for us to consider the
submission of Mr. Srinivas in regard to the effect of the severance of the joint
status as admitted by this Court in *A.R. Choudhary v.*

26. The facts are set out in the judgment. There is no need in this appeal
which is accordingly dismissed. However, in the facts and circumstances
of the case there do not arise any questions.



- 1. *ANAND SINGH BARNALIA V. SINGHARU*, *Delhi*, *1987*, 1 SCL 477
- 2. *ANAND SINGH BARNALIA V. SINGHARU*, *Delhi*, 1987, 1 SCL 477
- 3. *ANAND SINGH BARNALIA V. SINGHARU*, *Delhi*, 1987, 1 SCL 477
- 4. *ANAND SINGH BARNALIA V. SINGHARU*, *Delhi*, 1987, 1 SCL 477
- 5. *ANAND SINGH BARNALIA V. SINGHARU*, *Delhi*, 1987, 1 SCL 477
- 6. *ANAND SINGH BARNALIA V. SINGHARU*, *Delhi*, 1987, 1 SCL 477

The judgment of the Court was delivered by

P.K. BALASUBRAMANIAM, J. Restored to the original file No. 59 of 1990 in the file of the Master's Court at Bawal against the appellant and others. Granted relief in favour of the plaintiff as a matter of course of equity and in the absence of any other consequential reliefs. The appellant, however, Defendant in the suit, entered appearance and contested the suit and the application for interim injunction filed by the plaintiff. The application for interim injunction was heard and the same was dismissed by the trial court. The plaintiff filed an appeal against the order under Order 43 Rule 1 of the Code of Civil Procedure, 1908 in which the trial court's judgment was also dismissed by the District Judge on 16.3.1990.

2. The suit itself stands posted in 8.11.1990. The appellant, the last defendant, did not appear. The evidence of the plaintiff was accepted. On 9.11.1990 the plaintiff filed two applications – one for an amendment of the plaint and the other for certain directions in the plaint. Those applications were allowed the same day in the absence of any opposition. In view of his absence, the first defendant, the appellant, was set ex parte and on 11.11.1990, the suit was decreed ex parte.

3. On 16.11.1990, the last defendant, the appellant, filed a motion under Order 9 Rule 3 of the Code of Civil Procedure by an advocate under Section 13 of the Limitation Act for leave to file the appeal, a set aside the ex parte decree. Both the applications were opposed by the plaintiff. On 21.11.1990, the first defendant, the appellant, also filed an appeal under Appeal No. 157 of 1990 against the ex parte decree along with an application for condoning the delay in filing the appeal as provided by Order 9 Rule 3 of the Code and invoking Section 5 of the Limitation Act. On 29.11.1990, the trial court allowed the application filed by the first defendant under Section 5 of the Limitation Act and condoned the delay in filing the appeal under Order 9 Rule 3 of the Code. The plaintiff challenged the order of the District Court in revision. But the revision was dismissed on 1.8.1991. There was a further revision to the High Court which was dismissed on 14.9.1991.

4. On 1.12.1991, since the last defendant, the appellant, did not appear to prosecute his application under Section 5 of the Limitation Act in Appeal No. 157 of 1990, his appeal against the ex parte decree of the District



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Court dismissed that application for non-compliance of steps required in regard
Order 37(3), in view of the non-appearance of the first defendant. The
application (File Appeal No. 157 of 1996) against the ex parte decree itself was
dismissed for default. In other words, both the application under Section 5 of
the Act for condoning the delay in filing that appeal and the appeal against
the ex parte decree filed by the first defendant, were dismissed for default.

8. In the final order, the petition for setting aside the ex parte decree filed
under Order 9 Rule 13 of the Code came up for hearing. On account of the
petitioner's objection was raised that in view of the filing of File Appeal
No. 157 of 1996 by the first defendant against the ex parte decree and in view
of the Explanation to Order 9 Rule 13 of the Code, the application under
Order 9 Rule 13 of the Code could not be entertained by the court which had
passed the ex parte decree. On behalf of the first defendant, the applicant, it
was contended that since the appeal filed by the applicant against the ex parte
decree was dismissed for default as a consequence of the dismissal of the
application for condoning the delay in filing that appeal, being dismissed for
default, the Explanation created no bar to the entertaining of the petition
under Order 9 Rule 13 of the Code, especially in the context of the fact that
the delay in filing that petition had already been condoned by the trial court
and admitted up to the High Court. But, the trial court took the view that
since the appeal against the ex parte decree filed by the first defendant was
not withdrawn, the petition under Order 9 Rule 13 of the Code could not be
entertained in case, granted to the first defendant in view of the Explanation
to Order 9 Rule 13 of the Code. Thus, the petition for setting aside the ex
parte decree was dismissed. The first defendant challenged and succeeded in an
appeal under Order 41 Rule 1 of the Code. The lower appellate court agreed
with the conclusion of the trial court that the Explanation to Order 9 Rule 13
of the Code precluded the court from exercising its power to set aside the ex
parte decree. Thus, the appeal was dismissed. The first defendant challenged
the status of a proceeding before the High Court under Article 227 of the
Constitution. The High Court held that the question posed for decision was
covered by decisions of this Court rendered by it in its order and in the light
of those decisions the issue of the trial court as assumed by the District
Court, could not be interfered with. The High Court thus dismissed the
petition filed by the first defendant under Article 227 of the Constitution. The
first defendant has challenged this order of the High Court in an appeal.

9. On the facts, it is thus clear that the first defendant filed a petition for
setting aside the ex parte decree under Order 9 Rule 13 of the Code
accompanied by an application for condoning the delay in filing that petition,
and subsequently he also filed an appeal against that ex parte decree, and
accompanied by an application for condoning the delay in filing that appeal.
That application for condoning the delay in filing that appeal against the ex
parte decree and the appeal against ex parte decree were both dismissed for
default. The petition for setting aside the ex parte decree under Order 9
Rule 13 of the Code was filed first, and the appeal was filed while that
petition was pending. But, before the petition under Order 9 Rule 13 of the



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Code could be dismissed if the appeal had been dismissed on default. Thus, on the day the petition under Order 9 Rule 13 of the Code was taken up for disposal, no appeal against the decree was pending.

7. The Explanation to Order 9 Rule 13 of the Code added by the Code of Civil Procedure Amendment Act (Act 103 of 1976) which came into force with effect from 1.7.1977, reads as under:

“Explanation.—Where an appeal against a decree has been passed as per the provisions of this Code and the appeal has been disposed of on any ground other than the ground that the appeal was withdrawn, the appeal on application shall be deemed to be set aside, to be re-examined.”

7.1. It is argued on behalf of the appellant that on the day the petition under Order 9 Rule 13 of the Code was laid, no appeal against the decree had been filed or was in existence and consequently, the Explanation did not apply since it only provided that an appeal under Order 9 Rule 13 of the Code could not be entertained only in a case where the decree against which it was filed was an appeal. It is also submitted that on the day the petition was filed under Order 9 Rule 13 of the Code for considering the appeal against the decree, it had not been dismissed for default and hence no appeal was in existence. There was no objection in the appeal so as to bring down a copy of the decree of the trial court in that of the appeal court. It was further submitted that since the appeal itself could not be entertained in view of the dismissal of the application for considering the delay in filing the appeal, it is in terms of Order 1, Rule 3A of the Code read with Section 2 of the Limitation Act, 1963 has to be taken that there came in a provision to appeal in the event of the law and consequently, the decree given by the trial court could not apply. He ultimately submitted that the dismissal of an appeal for non-prosecution amounts to a withdrawal of the appeal by the appellant and consequently, it cannot stand in the way of the petition laid under Order 9 Rule 13 of the Code being heard and disposed of on merits. On behalf of the defendant respondent, it is submitted that the arguments raised could not be accepted in the light of the decisions of this Court referred to and followed by the High Court and there was also no occasion for reconsidering the correctness of these decisions since the law has been uniformly laid down in these decisions. It is submitted that the dismissal of an appeal on default on the ground that it was barred by limitation cannot be considered as a withdrawal of the appeal, excluding the operation of the Explanation to Order 9 Rule 13 of the Code. Nor can it be contended that an appeal filed with a petition for considering the delay in filing the appeal since an appeal and the dismissal of the application for considering the delay and the consequent dismissal of the appeal is not a dismissal of the appeal as contemplated by the Code.

8. The first question to be considered is whether an appeal, as contemplated by an application for considering the delay in filing the appeal, is an appeal in the eye of the law when the application for considering the delay in filing the appeal is dismissed and consequently the appeal is dismissed as being



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here barred by limitation in view of Section 2 of the Limitation Act. There
was conflicting views on this aspect between the High Courts. But the Privy
Council in *Vegetable and Oil Dea. Society Chartered Dea. Indhar* AIR 1917 1017

"There is no action of appeal in the Civil Procedure Code. The
fact that a party has no direct application by a party to an
appellate court to set aside or reverse a decision of a subordinate
court is an appeal within the ordinary acceptation of the term and that it
is not an appeal because it is irregular or incomplete."

82. These observations were followed in *Wadhwa* by this Court in
*Harji Kishoreji v. State of Bombay*¹⁰

9. The specific question involved came to be considered by this Court in
*Harji Kishoreji v. State of Bombay*¹¹. This Court held that an appeal proper in all
time is an appeal and not merely a proceeding which has the appearance of an
appeal. This Court referred to and followed the view taken by the Privy
Council in *Vegetable and Oil Dea. Society Chartered Dea. Indhar* referred to
this Court in *Wadhwa* in approval of the observations of Lord C. G. D. S.
Patel in *Wadhwa* by AIR 1960 SC 1060 in the following manner: SCR 1010

"Although the Appellate Assistant Commissioner did not hear the
appeal on merits and hence the appeal was barred by limitation the
bar was under Section 21 and the extent of that bar was to maintain
the assessment which had been made by the Income Tax Officer."

93. In *Shivani Singh v. Queen's College*¹² rendered by three-judge
Bench of this Court one of the questions that arose was whether the
dismissal of an appeal from a court on the ground that the appeal was
barred by limitation was a decision in the appeal. This Court held: SCR
pp. 338 D - 338 E

"We are inclined to agree that where a decision is given on the
merits by the trial court and a matter is taken in appeal and the appeal
is dismissed on some procedural ground, like limitation or defect in
particulars, the appellate court is not to be taken to have decided on
the merits of the case. Its jurisdiction in the appeal being heard
and finally disposed of, the dismissal being on the ground of
limitation or the appeal."

94. In *Harji Kishoreji v. State of Bombay*¹³ this Court approved the
decision of the Madras High Court which had applied the principle stated in
*Harji Kishoreji v. State of Bombay*¹⁴

10. The question was considered extensively in *Harji Kishoreji v. State of
Bombay* in *Harji Kishoreji v. State of Bombay*. The difference relating to the extent

¹⁰ AIR 1960 SC 1060, AIR 1960 SC 1055

¹¹ AIR 1960 SC 1060, AIR 1960 SC 1055

¹² AIR 1960 SC 1060, AIR 1960 SC 1055

¹³ AIR 1960 SC 1060, AIR 1960 SC 1055

¹⁴ AIR 1960 SC 1060, AIR 1960 SC 1055

¹⁵ AIR 1960 SC 1060, AIR 1960 SC 1055, AIR 1960 SC 1055

¹⁶ AIR 1960 SC 1060



3433558, 2019BOM1155, 2019SC10197A, *Shri Gopal Das v. State of Bihar*, 11/11/2019

11. The learned counsel for the appellant relied on the Full Bench decision of the Calcutta High Court in *Mishra v. Kishore*, 1978 Calcutta 1000 to contend that an order made in a writ petition mandating the deposit of a sum of money as a condition for the grant of a writ is not a decree for the purpose of a writ appeal. It was also held that Rule 3 of Order II introduced by Amendment Act 1 of 1976 in the Code of Civil Procedure was not to change the principle that a writ appeal is governed by Rule 3 of Order II of the Code and not by a special provision according to law. It was held that an appeal for the purpose of law is its ostensible nature and dismissal of an application for entertaining the appeal is a substance and effect a confirmation of the decree appealed against. Thus, the position that arises in a survey of the authorities is that an appeal filed along with an application for condoning the delay in filing an appeal when dismissed on the refusal to condone the delay is nevertheless a decree for the appeal.

12. Learned counsel for the appellant relied on the Full Bench decision of the Calcutta High Court in *Mishra v. Kishore*, 1978 Calcutta 1000 to contend that an order made in a writ petition mandating the deposit of a sum of money as a condition for the grant of a writ is not a decree for the purpose of a writ appeal. It was also held that Rule 3 of Order II introduced by Amendment Act 1 of 1976 in the Code of Civil Procedure was not to change the principle that a writ appeal is governed by Rule 3 of Order II of the Code and not by a special provision according to law. It was held that an appeal for the purpose of law is its ostensible nature and dismissal of an application for entertaining the appeal is a substance and effect a confirmation of the decree appealed against. Thus, the position that arises in a survey of the authorities is that an appeal filed along with an application for condoning the delay in filing an appeal when dismissed on the refusal to condone the delay is nevertheless a decree for the appeal.

13. Learned counsel placed reliance on the decision in *Ramesh Chandra v. Upadhyay* rendered by two learned judges of this Court and pointed out that it was held therein that dismissal of an application for the grant of a writ would not amount to a decree and, therefore, dismissal of an application for the grant of a writ is not a decree. That decision was rendered in the context of Article 226 of the Constitution of India and in the light of the provisions contained therein. But we must not forget that the decisions of this Court in *Mishra v. Kishore* and *Shri Gopal Das v. State of Bihar* were not rendered on the merits of these writ petitions. They were decided by a three-judge Bench of this Court in *Mishra v. Kishore* and the same in *Shri Gopal Das v. State of Bihar* was, thus, not relied and the view expressed by the two-judge Bench cannot be accepted as laying down the correct law on the question of writs. These Bench decisions have stated that they were aware the same decisions of the High Courts have taken the view that even rejection of an application for grant of a writ is present and that it is a decree with the definition of a decree.

6
1. *Mishra v. Kishore*, 1978 Calcutta 1000.
2. *Shri Gopal Das v. State of Bihar*, 1978 Calcutta 1000.



affirmed in the Civil Proceedings bench and decision of the Calcutta High Court have been followed. These judgments in conclusion implicitly agree with the decision of the Orissa High Court. Through the decision of the Privy Council in *Verghese Mathew v. State of Kerala*, the law was clarified and it was not applied on the ground that it was based on Article 142 of the Constitution Act, 1950, and there was a departure in the legal position in view of Article 136 of the Constitution Act, 1950. But with respect, we must point out that the decision really conforms with the ratio of the decision in *Mathew Mathew v. State of Kerala* and *Shri Gopal Singh* and another decision of this Court rendered by two learned Judges in *Manoj Choudhary v. P. C. Agarwal* (2009) 10 SCC 609. In *Manoj Choudhary v. P. C. Agarwal*, two learned Judges of this Court, and open the question, have referred to that decision as being available for appeal.

3. In the context of the Explanation to Order 9 Rule 13 of the Code, the question was squarely considered by this Court in *Manoj Choudhary v. P. C. Agarwal*. In that case, the High Court in its view, has rightly held that the decision of this case is directly covered by that decision. The court explained, "The wife, plaintiff, and her husband, the defendant, were married. The husband, the defendant, had preferred an appeal in the High Court against the decree and a separate application under Section 5 of the Limitation Act for condoning the delay in filing the appeal. The High Court, dismissing the appeal as being time barred, the husband, the defendant, then filed a petition under Order 9 Rule 13 of the Code for setting aside the ex parte decree along with an application under Section 5 of the Limitation Act. The trial court, dismissing the application for setting aside the ex parte decree, was made out by condoning the delay in filing the petition under Order 9 Rule 13 of the Code. The husband, the defendant, then filed an appeal in the High Court that attempt is said to be a fresh appeal. The High Court, in its view, that the Explanation to Order 9 Rule 13 of the Code are not creating any new material rule by which a petition under that rule as the appeal against the ex parte decree that has been dismissed in its merits can be made on the ground of condoning the delay in filing the application for condoning the delay in filing the appeal, was rendered in violation of the law. In its view, the High Court was not correct in appeal. The High Court. It was argued that the High Court has misinterpreted the scope and ambit of the Explanation to Order 9 Rule 13 of the Code and that in the circumstances, the High Court should have held that the petition under Order 9 Rule 13 of the Code would not lie. This Court accepted that contention. This Court held that where there has been an appeal against an ex parte decree and the appeal has not been withdrawn by the appellant and has been dismissed in its merits, the application under Order 9 Rule 13 of the Code which may be made should not be entertained. Hence, even though the appeal against the ex parte decree was dismissed on the ground of limitation, and not on the basis of application to Order 9 Rule 13 of the Code



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was entered into the order under Order 9 Rule 13 of the Code would
be. On the score of the Explanation, it was stated that the dismissal of the
a appeal is quite different from the Ex parte decree which is not intended to create any
a legal disability resulting from the expiry of the period of the appeal. It is
with a difference that of the appellate court on the dismissal of the appeal. The
dismissal of the appeal may be on any ground and though the withdrawal of an
appeal by an appellant is also to be considered as dismissal of the appeal, the
same has been expressly excluded by the Explanation. It was also stated
b that the legislature when incorporated in the Explanation to Order 9 Rule 13
of the Code was intending to confer the appellate jurisdiction of appeal and to
discharge the obligation of the appellant in the ex parte decree, namely, by
providing an alternative to the appellant under Order 9 Rule 13 of the Code
or setting aside the decree and as if the appellant considered a suit against
c him. It would be wrong to draw the appeal filed as a matter allowed the appellant to be
dismissal of an appeal on any ground, he was directed to apply under
Order 9 Rule 13 of the Code. The Court also clarified that by the amendment
of the Explanation, the mere operation of the date of expiry of the
period of any appeal, whether a suit or a suit withdrawal, does not
d constitute sufficient reason for holding that the appellant in the appeal. It was
held that though in the case the appeal filed by the husband against the ex
parte decree was dismissed on the ground of not being filed within time, it
was a dismissal of the appeal and the provision under Order 9 Rule 13 of the
Code was not applicable. In *J. Sivaraj Kumar v. S.D. Kumar*, this
Court followed the decision in *Rao Ch. Subbarao v. Ch. Subbarao*. The dismissal
e of the appeal and not an ex parte decree is based by continuing operation of the
Code. Order 9 Rule 13 of the Code in view of the Explanation.

14. It was sought to be argued on behalf of the appellant that the above
decisions were distinguishable in view of the fact that in these cases, the
a appeals against the decrees were filed first, followed by the petitions under
Order 9 Rule 13 of the Code, whereas in the present case the petition under
Order 9 Rule 13 of the Code was filed first and only during its pendency an
b appeal against the decree was filed with an application for rendering the
order of appeal inoperative. It would not make any difference to the
principle enunciated by the Court in *Rao Ch. Subbarao v. Ch. Subbarao* at
the date the appeal was called upon to consider and dispose of the petition
c under Order 9 Rule 13 of the Code, an appeal which is not filed, but has been filed
against the decree by the appellant and the same had been dismissed as
being barred by limitation and had not been withdrawn. It is not possible to accept
d the contention that the application to the Explanation should be confined to
cases where an appeal had already been filed against the ex parte decree, and
it should be held not to apply in cases where an appeal is subsequently filed.
The application of such an application in such cases would lead to disturb the



14. SUPREME COURT CASES 2019-2021

15. In the present case, as indicated in *Bhat Chhabho* case¹, the appellant's appeal stands to be allowed by the intervention of the High Court in Order 9 Rule 13 since no appeal was previously filed.

16. We are not impressed by the argument of learned counsel for the appellant that the decision in *Bhat Chhabho* case² requires notice to be given. Despite the general notice to be given to the parties and reasons for the intervention of the High Court in Order 9 Rule 13 and the intervention to appeal as indicated by the High Court, and also in view of the decisions already cited, the argument that an appeal which is dismissed for default, in a matter, by limitation because of the dismissal of the application for extension of time in filing the same, should be treated on a par with the rule 13 of an appeal or the withdrawal of an appeal cannot be accepted. The argument that since there is no merger of the decree of the trial court in case of the appeal, even in a case of the nature and consequently the extension should not be applied, cannot also be accepted in the context of what this Court has consistently held and what we have already done.

17. Thus, in the case at hand, we hold that the trial court, the appellate court and the High Court have rightly found that petition under Order 9 Rule 13 of the Code were not in view of excluding an appeal against the decree by the appellant and the dismissal of the appeal, though, of default, since a dismissal for default on the ground of it being barred by limitation cannot be equated with a withdrawal of the appeal. Consequently, the basis of the trial court is affirmed and this appeal is dismissed. In the circumstances of the case, we make no other orders.

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SHRI RUPAK, S/O. C. L. SINGH, MANAGER
AND P. K. JAIN, ASST. MANAGER, I/O.

VS.
STATE OF BIHAR

Appellant

Vs.

STATE OF BIHAR

Respondents

Civ. App. No. 631 of 2017 with Nos. 631 to 637 of 2017 (53078, 53079, 53080, 53081, 53082, 53083 and 53084 of 2017) (53078 of 2017 and 53081 of 2017) decided on November 05, 2019.

A. Minor Amends Act, 1988 - S. 100(4) - Applicability - Draft scheme dated 23.2.1985 covering Saharanpur Subdivision District and 36 other districts, has, had not lapsed under S. 100(4) in view of the earlier decision by the Supreme Court in this regard. - Hence, it was not open to

¹ AIR 2019 SC 1007. ² AIR 2019 SC 1007. ³ AIR 2019 SC 1007. ⁴ AIR 2019 SC 1007.

⁵ AIR 2019 SC 1007. ⁶ AIR 2019 SC 1007.

⁷ AIR 2019 SC 1007. ⁸ AIR 2019 SC 1007.

Banarsi & Ors. v Ram Phal

(2003) 9 SCC 606

Bench: R.C. Lahoti, Brijesh Kumar, JJ.

The Judgment was delivered by: R. C. Lahoti, J.

1. A suit for specific performance of an agreement to sell entered into between the parties on 03.11.1988 and later on novated by an agreement dated 15.7.1991, was filed by the respondent herein. According to the latter agreement, the consideration for sale was appointed at Rs. 2, 90,000 out of which an amount of Rs. 2,40,000 was acknowledged by the vendor to have been received, leaving a balance of Rs. 50,000 to be received at the time of execution and registration of the sale deed. The appellants had also filed their own suit seeking cancellation of the agreement dated 03.11.1988 on the ground that the nature of transaction between the parties was one of loan; that the amount of loan taken by the appellants was only Rs. 60,000 but the respondent had added advance interest and capitalized the same; and that the amount of loan with interest was returned and yet the respondent had failed to deliver back as fully discharged the agreements dated 03.11.1988 and 15.7.1991. The two suits were consolidated and tried together by the learned Civil Judge. Vide the judgment and decree dated 20.5.1994, disposing of both the suits, the Trial Court held that looking at the real nature of the transaction entered into between the parties and the evidence adduced to show the actual amount which passed from the respondent to the appellants it was just and proper that the appellants returned the amount of Rs. 2, 40,000 with interest calculated at the rate of 1% month with effect from 3.11.1988 on Rs. 1,80,000 and with effect from 15.7.1991 on Rs. 60,000. During the course of its judgment the Trial Court recorded a specific finding that the appellants were cultivating the land; that land in dispute was very necessary for the maintenance of their family; and that if execution of sale deed was directed they would suffer too much hardship.

2. The appellants herein filed two appeals in the High Court. By an interim order dated 13.7.94 passed in one of the appeals, the High Court directed execution of decree under appeal to remain stayed subject to the appellants depositing an amount of Rs. 80,000 on or before 31st March, 1995. On 24.3.95, the appellants deposited the amount of Rs. 80,000 in the High Court. During the pendency of the first appeals, the pecuniary jurisdiction of the District Courts was enhanced consequent whereupon the first appeals came to be transferred from the High Court to the District Court. Both the appeals came to be heard and decided by the learned Additional District Judge vide his judgment dated 21.9.99. Both the appeals were dismissed. The respondent did not prefer any appeal of his own nor filed any cross-objection. While holding the appeals preferred by the appellants liable to be dismissed, the first appellate Court framed the operative part of the judgment as under-

"both the appeals are liable to be rejected with this modification that the suit of the plaintiff Ramphal is liable to be decreed for specific relief and the original suit no.63 of 1993 Banarsi Versus Ramphal is liable to be rejected.

The Order of the Court was as follows:

Both the appeals, while rejecting this order passed by the Court below in the impugned judgment and decree dated 20.5.1984 that deposit the amount Rs. 2, 40,000 with interest @ 1% within two months and after that make the endorsement of the receipt of the entire money on the back of the Agreement dated 15.7.1991 by the Defendant Ramphal and after confirming the remaining order, modifying the impugned order and decree to that extent, are hereby dismissed. In this manner the suit of the Plaintiff Ramphal for the specific relief is decreed with costs against the original Suit No. 38 of 1993 in the matter of the defendant Banarsi etc. and the Defendant Banarsi etc. are hereby directed that they after receiving the balance amount of Rs. 50,000 as the agreement dated

15.7.1991 within a period of one month execute the sale deed and hand over the possession otherwise the plaintiff shall be at liberty to get the above work done through Court. Original Suit no.63 of 1993 Banarsi etc. Versus Ram Phal is dismissed with costs. Copy of this order be kept in the concerned file. Both the parties would bear their respective costs of both the appeals."

3. The appellants preferred two second appeals before the High Court. By an interim order dated 20.12.99, the High Court directed the execution of the decrees appealed against to remain stayed subject to the appellants depositing an amount of Rs. 2, 40,000, after adjusting the amount already deposited by them pursuant to the earlier

order of the High Court, within a period of eight weeks, which amount along with the amount already deposited should be kept in fixed deposit. On 10.2.2000, the appellants deposited an amount of Rs. 1, 60,000 in the Court of Civil Judge Senior Division, Kairana (M. Nagar). Both the amounts deposited by the appellants, i.e. Rs. 80,000 and Rs. 1, 60,000, are now lying in fixed deposit. Vide the impugned common judgment (in the two appeals) dated 10.8.2001, the High Court has directed both the second appeals filed by the appellants to be dismissed as raising no substantial question of law. One of the pleas advanced on behalf of the appellants before the High Court was that the first Appellate Court could not have, in the purported exercise of power under Order 41 Rule 33 of the CPC, reversed the decree in respect of the refund of money and directed the suit for specific performance to be decreed in favour of the respondent without there being any appeal or cross-objection preferred by the respondent.

The High Court opined that it was open for the respondent not to file any appeal against the Trial Court's decree on the belief that he would either get his money back within the short time provided under the decree or would have the contract specifically formed. However, on account of the stay order obtained by the appellants, the payment of decretal amount was not made by the appellants to the respondent as the terms of the decree and in such circumstances, the first Appellate Court committed no error of law in exercising power under Order 41 Rule 33 of the CPC and passing a decree for specific performance in favour of the respondent.

4. Feeling aggrieved by the judgment and decree of the High Court the appellants have filed these two appeals by special leave.

5. **The appeals raise a short but interesting question of frequent recurrence as to the power of the appellate court to interfere with and reverse or modify the decree appealed against by the appellants in the absence of any cross-appeal or cross-objection by respondent under Order 41 Rule 22 of the CPC and the scope of power conferred on appellate court under Rule 33 of Order 41 of the CPC.**

6. **The first question is whether without cross objection by the respondent, could the Appellate Court have set aside the decree passed by the Trial Court and instead granted straightaway a decree for specific performance of contract?**

This would require reference to the principles underlying right to file an appeal and right to prefer cross objection or when does it become necessary to prefer cross objection without which decree under appeal cannot be altered or varied to the advantage of the respondent and/or to the disadvantage of the appellant. Rule 22 of Order 41, as amended by CPC Amendment Act 104 of 1976, with effect from 1.2.1977 is reproduced hereunder in juxtaposition with the text of the provision as it stood prior to the amendment.

Order 41 Rule 22

Text as amended by Act 104 of 1976 (w.e.f. 1-2-1977)

7. Text pre-amendment R.22. Upon hearing, respondent may object to decree as if he had preferred a separate appeal.-(1)

8. Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal:

9. Provided he has filed such' objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

[Explanation.-A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or in part, in favour of that respondent.]

10. R.22. Upon hearing, respondent may object to decree as if he had preferred a separate appeal.-(1)

11. Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

(2) xxxx xxxx xxxx	(2) xxxx xxxx xxxx
(3) xxxx xxxx xxxx	(3) xxxx xxxx xxxx
(4) Where, in any case in which any respondent has under this rule a filed a memorandum of objection, original appeal is withdrawn or dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as to the Court thinks fit.	(4) Where, in any case in which any respondent has under this rule filed memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to other parties as the Court thinks fit.

12. Sections 96 and 100 of the CPC make provision for an appeal being preferred from every original decree or from every decree passed in appeal respectively; none of the provisions enumerates the person who can file an appeal. However, it is settled by a long catena of decisions that to be entitled to file an appeal the person must be one aggrieved by the decree. Unless a person is prejudicially or adversely affected by the decree he is not entitled to file an appeal. No appeal lies against a mere finding. It is significant to note that both Sections 96 and 100 of the CPC provide for an appeal against decree and not against judgment.

14. Any respondent though he may not have filed an appeal from any part of the decree may still support the decree to the extent to which it is already in his favour by laying challenge to a finding recorded in the impugned judgment against him. Where a plaintiff seeks a decree against the defendant on grounds (A) and (B), any one of the two grounds being enough to entitle the plaintiff to a decree and the Court has passed a decree on ground (A) deciding it for the plaintiff while ground (B) has been decided against the plaintiff, in an appeal preferred by the defendant, in spite of the finding on ground (A) being reversed the plaintiff as a respondent can still seek to support the decree by challenging finding on ground (B) and persuade the appellate court to form an opinion that in spite of the finding on ground (A) being reversed to the benefit of defendant-appellant the decree could still be sustained by reversing the finding on ground (B) though the plaintiff-respondent has neither preferred an appeal of his own nor taken any cross objection. A right to file cross objection is the exercise of right to appeal though in a different form.

CPC Amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross objection. However, the insertion made in the text of sub-rule (1) makes it permissible to file a cross objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross objection to the extent to which decree is in his favour; however, if he proposes to attack any part of the decree he must take cross objection. The amendment inserted by 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:-

- (i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent;
- (ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent;
- (iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

15. In the type of case (i) it was necessary for the respondent to file an appeal or take cross objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross objection. The law remains so post amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross objection as he was not the son aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross objection to & finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross objection is spelled out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent.

16. The fact remains that to the extent to which the decree is against the respondent and he wishes to get rid of it he should have either filed an appeal of his own or taken cross objection failing which the decree to that extent cannot be insisted on by the respondent for being interfered, set aside or modified to his advantage. The law continues to remain so post-1976 amendment.

17. In a suit seeking specific performance of an agreement to sell governed by the provisions of the Specific Relief Act, 1963 the Court has a discretion to decree specific performance of the agreement. The plaintiff may also claim compensation under Section 21 or any other relief to which he may be entitled including the refund of money or deposit paid or made by him in case his claim for specific performance is refused. No compensation or any other relief including the relief of refund shall be granted by the Court unless it has been specifically claimed in the plaint by the plaintiff. Certainly the relief of specific performance is a larger relief for the plaintiff and more onerous to the defendant compared with the relief for compensation or refund of money. The relief of compensation or refund of money is a relief smaller than the relief of specific performance. A plaintiff who files a suit for specific performance claiming compensation in lieu of or in addition to the relief of specific performance or any other relief including the refund of any money has a right to file an appeal against the original decree if the relief of specific performance is refused and other relief is granted. The plaintiff would be a person aggrieved by the decree in spite of one of the alternative reliefs having been allowed to him because what has been allowed to him is the smaller relief and the larger relief has been denied to him. A defendant against whom a suit for specific performance has been decreed may file an appeal seeking relief of specific performance being denied to the plaintiff and instead a decree of smaller relief such as that of compensation or refund of money or any other relief being granted to the plaintiff for the former is larger relief and the latter is smaller relief. The defendant would be the son aggrieved to that extent. It follows as a necessary corollary from the above said statement of law that in an appeal filed by the defendant laying challenge to the relief of compensation or refund of money or any other relief while decree for specific performance was denied to the plaintiff, the plaintiff as a respondent cannot seek the relief of specific performance of contract or modification of the impugned decree except by filing an appeal of his own or by taking cross objection.

18. **We are, therefore, of the opinion that in the absence of cross appeal preferred or cross objection taken by the plaintiff-respondent the First Appellate Court did not have jurisdiction to modify the decree in the manner in which it has done. Within the scope of appeals preferred by the appellants the First Appellate Court could have either allowed the appeals and dismissed the suit filed by the respondent in its entirety or could have deleted the latter part of the decree which granted the decree for specific performance conditional upon failure of the defendant to deposit the money in terms of the decree or could have maintained the decree as it was passed by dismissing the appeals. What the First Appellate Court has done is not only to set aside the decree to the extent to which it was in favour of the appellants but also granted an absolute and out and out decree for specific performance of agreement to sell which is to the prejudice of the appellants and to the advantage of the respondent who has neither filed an appeal nor taken any cross objection.**

19. The learned counsel for the respondent forcefully argued that even in the absence of appeal preferred by the plaintiff or cross objection taken by the plaintiff-respondent the Appellate Court was not powerless to grant the decree which it has done in exercise of the power conferred by Rule 33 of Order 41 of the CPC.

20. Rule 4 seeks to achieve one of the several objects sought to be achieved by Rule 33, that is, avoiding a situation of conflicting decrees coming into existence in the same suit. The above said provisions confer power of widest amplitude on the appellate court so as to do complete justice between the parties and such power is unfettered by consideration of facts like what is the subject matter of appeal, who has filed the appeal and whether the appeal is being dismissed, allowed or disposed of by modifying the judgment appealed against.

21. While dismissing an appeal and though confirming the impugned decree, the appellate court may still direct passing of such decree or making of such order which ought to have been passed or made by the court below in accordance with the findings of fact and law arrived at by the court below and which it would have done had it been conscious of the error committed by it and noticed by the Appellate Court. While allowing the appeal or otherwise interfering with the decree or order appealed against, the appellate court may pass or make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the appellate court. The object sought to be achieved by conferment of such power on the appellate court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care while exercising the power. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a son not a party before the Court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has mitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate court exercising power under Rule 33 of Order 41.

28. In the case before us, the Trial Court found the plaintiff (in his suit) not entitled to decree for specific performance and found him entitled only for money decree. In addition, a conditional decree was also passed directing execution of sale deed if only the defendant defaulted any paying or depositing the money within two months. Thus to the extent of specific performance, it was not a decree outright; it was a conditional decree. Rather, the latter part of the decree was a direction in terrorem so as to secure compliance by the appellant of the money part of the decree in the scheduled time frame. In the event of the appellant having made the payment within a period of two months, the respondent would not be, and would never have been, entitled to the relief of specific performance. The latter decree is not inseparably connected with the former decree. The two reliefs are surely separable from each other and one can exist without the other. Nothing prevented the respondent from filing his own appeal or taking cross-objection against that part of the decree which refused straightaway a decree for specific performance in his favour based on the finding of comparative hardship recorded earlier in the judgment. The dismissal of appeals filed by the appellant was not resulting in any inconsistent, iniquitous, contradictory or unworkable decree coming into existence so as to warrant exercise of power under Rule 33 of Order 41. It was not a case of interference with decree having been so interfered with as to call for adjustment of equities between respondents inter se. By his failure to prefer an appeal or to take cross-objection the respondent has allowed the part of the Trial Court's decree to achieve a finality which was adverse to him.

29. **For the foregoing reasons we are of the opinion that the first Appellate Court ought not to have, while dismissing the appeals filed by the defendant-appellants before it, modified the decree in favour of the respondent before it in the absence of cross-appeal or cross-objection. The interference by the first Appellate Court has reduced the appellants to a situation worse than in what they would have been if they had not appealed. The High Court ought to have noticed this position of law and should have interfered to correct the error of law committed by the first Appellate Court.**

30. During the course of hearing, the learned counsel for the appellants made a statement under instructions, that the appellants have a large family to support which is entirely dependent on the suit land for maintaining itself and they have no other means of livelihood. (This statement finds support from the finding arrived at by the Trial Court). He further stated that, in any case, to get rid of the onerous part of the decree, the appellants volunteer to pay a further amount of Rs. 1, 20,000 by way of compensation to the respondent over and above the amount of Rs. 2, 40,000 already deposited by them in the Court pursuant to interim orders along with the bank interest accrued thereon. That statement is taken on record and being a very fair voluntary offer deserves to be accepted and incorporated in the decree.

31. The appeals are allowed. The judgment and decree of the first Appellate Court are set aside and instead those of the Trial Court restored. In view of the appellants having deposited the money due and payable under the money part of the decree, it is held that they are relieved from specifically forming the agreement and executing sale deed in pursuance thereof. The delay in deposit, if any, deserves to be condoned in view of the interim orders passed by the High Court and is hereby condoned. The time for deposit, as appointed by the Trial Court, shall be deemed to have been extended upto the dates of actual deposits made by the appellants. The amount of Rs. 2,40,000 lying deposited in the Court and invested in fixed deposits shall, along with the interest earned, be released to the respondents. In addition the appellants shall, as offered by them, deposit with the executing court for payment to the respondent another amount of Rs. 1, 20,000 within a period of eight weeks from today. On that being done, the decree passed by the Trial Court shall be deemed to have been fully satisfied. The respondent shall deliver the agreements dated 03.11.1988 and 15.7.1991 to the appellants endorsing upon the agreements the amount of money received and that the agreements stand discharged and need not be formed. The costs shall be borne by the parties as incurred throughout. Appeals allowed



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this was a case where the High Court should not have exercised those powers.

32. It was submitted that the presentation of the case before the court may be of the appellate jurisdiction before the High Court. It was submitted that the presentation of these arguments before the High Court and therefore they should not be permitted to raise these contentions before this Court. It does appear that the exception of such matters was not argued before the High Court. However, we are reminded that Section 109A was brought into force in the High Court. The High Court was also aware that by the time it heard the matter the evidence had already been received and the trial had reached the final stage. On the convenience of all concerned, the High Court should have exercised its power to transfer the matter and should have allowed the parties to register their contentions in the appeal to be filed under Section 117(1)(A).

33. It must be mentioned that before us also arguments on merits were made. At one stage the Court had considered taking a decision on merits. However, on a proper consideration of the matter, it appears to us that to give a decision on merits would be to perpetuate the mistake made earlier by the High Court. It would result in depriving one or the other party of a final judgment and in the result it is a unjust result which is not consistent with the Doctrine of Finality of the High Court. We therefore refrain from expressing any opinion on merits. We clarify that all parties were free to argue all questions in the pending appeals before the Division Bench of the High Court.

34. In the above view, we allow the appeals and set aside the impugned order. There will be no order as to costs.

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सुप्रीम कोर्ट के सिंगल जज के आदेश में सुनवाई के क्रम में 560

SWARAJI V. CHITERS AN THE OTHERS Respondents
Civil Appeal No. 4388 of 2015 with Nos. 4389 of 2015, 4390 of 2015, 4391 of 2015 and 4392 of 2015, decided on April 17, 2019.

3. Civil Procedure Code, 1908 – S. 115 provide (after amendment by Act 46 of 1999 w.e.f. 17.10.2017) – Maintainability of revision application after the amendment – Held, question to be asked is whether the order in favour of the party applying for revision in the courts below would have given finality to the suit or other proceedings – If answer in the affirmative, then application maintainable, otherwise not – Hence, if impugned order is

[1] See, e.g., (2018) 10 SCC 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.



interim in nature in that it does not finally decide the lis, the revising application will not be maintainable. Civil Procedure Code (Amendment) Act, 1999 (46 of 1999), S. 12

4. Civil Procedure Code, 1908 — Or. 39 R. 1 & S. 115 proviso after amendment by Act 46 of 1999 w.e.f. 1-7-2002 — Interim orders — Judicial review of — Held, interim orders no longer reviewable under S. 115 due to the amendment of the proviso which has inter alia deleted the erstwhile cl. (b) of the proviso. Civil Procedure Code (Amendment) Act, 1999 (46 of 1999), S. 12

5. Civil Procedure Code, 1908 — S. 115 proviso (after amendment by Act 46 of 1999 w.e.f. 1-7-2002) — Civil Procedure Code (Amendment) Act, 1999 (46 of 1999), S. 32(2) — Civil Procedure Code (Amendment) Act, 1976 (104 of 1976), S. 97(3) — General Clauses Act, 1897 — S. 6 — Effect of Amendment Act 46 of 1999 — Effect on pending proceedings filed previous to amendment — Absence of specific saving provision for pending proceedings — If a case of *casus omissus* — Held, the legislative intent crystal clear — Marked distinction is to be seen in the language of S. 32(2) of Act 46 of 1999 as compared to S. 97(3) of Act 104 of 1976

S. 6 of General Clauses Act further held, not applicable since no substantive vested right was available to party seeking revision under S. 115 — Since amendment relates to procedure parties to proceed according to altered mode in the absence of a different stipulation — So proceedings admitted or pending before amendment, in view of the amendment, were rightly held by High Court as not maintainable

6. By Section 211, of the Code of Civil Procedure (Amendment) Act, 1999 (46 of 1999) the Amendment Act (1999) was amended. The amendments were made in Section 211 of the Code of Civil Procedure (1908) which applied, but because of the amended Section 211, the revisions can be filed only if not maintainable as had already been passed in favour of the party applying for revision, the same would not have been disposed of the trial or other proceedings. Hence, the present appeals

The contentions put forth in behalf of the appellants were

(i) The amended provisions did not apply to the appellants as they were notified by the notification.

(ii) Appeals and revisions stand on a par and both parties are vested rights in the appeals and revisions and the amended provisions would therefore not have any retrospective implication.

(iii) The appellants are aggrieved and the law would favour the subject matter of the revisions related to the expression "if the proceedings" and even if the amended provisions applied retrospectively the revision would have been filed and disposed of before the amendment.

(iv) Even if there was no specific provision saving the pending proceedings before the amendment, the effect of the amendment was clearly a case of *casus omissus*.

Discussing the appeals, the Supreme Court

Held

1. The original and substituted provisions clearly do not finally decide the lis, the revision under Section 115 will not be maintainable. The legislative intent is crystal clear. There is no saving provision in the language of Section 32(2) of the Amendment Act and Section 97(3) of the General Clauses Act. While in the



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1. In this case, there was a question whether the appellants were entitled to a writ of mandamus to enforce the implementation of the order. Section 109 of the Code of Civil Procedure is applicable in this case. Section 109 of the Code of Civil Procedure provides that no person is bound to obey a decree or order of a court unless it is made in accordance with the provisions of the Code. The appellants were not bound to obey the order of the court unless it was made in accordance with the provisions of the Code. (Para 31)

2. Section 109 of the Code of Civil Procedure is applicable in this case. Section 109 of the Code of Civil Procedure provides that no person is bound to obey a decree or order of a court unless it is made in accordance with the provisions of the Code. (Para 32)

3. *Prabhu Lal Choudhary v. State of Punjab*, AIR 1958 SC 534 (1958) 2 SCR 534

4. *U.P. State v. Muzaffar Hussain*, AIR 1958 SC 534 (1958) 2 SCR 534

5. The provision of Section 109 of the Code of Civil Procedure is applicable in this case. Section 109 of the Code of Civil Procedure provides that no person is bound to obey a decree or order of a court unless it is made in accordance with the provisions of the Code. (Para 33)

6. Therefore, the appellants are entitled to a writ of mandamus to enforce the implementation of the order. (Para 34)

7. The appellants are entitled to a writ of mandamus to enforce the implementation of the order. (Para 35 and 36)

8. *J. K. Somaiya v. State of Gujarat*, AIR 1958 SC 534 (1958) 2 SCR 534

9. Civil Procedure Code, 1908 – Ss. 2(2), (14) and 96 & 104
“Decree” – Meaning in Appellate Jurisdiction – Matter of substance and form – Held, that it matters little that a judgment is styled as an “order”, if in fact it fulfils the conditions of the definition of “decree” under S. 2(2) – Moreover, since the “order” fulfils the conditions under S. 2(2) it becomes appealable and does not fall within S. 104 – Law only applicable section is S. 96 (Para 31)

10. Civil Procedure Code, 1908 – Ss. 9 and 96 & 100 – Rights of filing suit and of appeal – Nature of – Right of suit is an inherent right while right of appeal has to be conferred by statute (Para 11)

11. Civil Procedure Code, 1908 – Ss. 96, 100 and 115 – Appeal and Revision – Nature and relative scope of compared – (i) Right of appeal is a substantive right – No such substantive right in applying for revision – Only right associated with revision is the right of proceeding in the manner prescribed, as is true of all procedure (ii) Appeal is continuation of proceedings – In effect entire proceedings are before appellate authority – Right of appeal carries with it a right of rehearing on law and fact including the power to review evidence, subject to any statutory limitations – No such



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powers accrue in pending, unless the statute expressly confers such powers.

Power of hearing revision generally given to superior court to satisfy itself that a particular case has been decided according to law. The right under S. 115 is confined to jurisdiction and jurisdiction alone.

(Para 13 to 17 and 29)

(1) Civil Procedure Code, 1908 — Ss. 96 and 100 — Appeal — Various connotations of — Nature and features of appeal, discussed — (ii) Right of appeal is a substantive right — (iii) Right of appeal a matter of substance not of procedure — (iv) Right of appeal not inherent but has to be conferred by statute — (v) Right of appeal becomes a vested right when conferred by statute — (vi) Appeal is continuation of proceedings — In effect entire proceedings are before appellate authority — Right of appeal carries with it a right of rehearing on law and fact including the power to review evidence, subject to any statutory limitations — Words and phrases — “Appeal”

(Para 13 to 17 and 29)

State of Madhya Pradesh v. Kalyan Das, AIR 1963 SC 1011, 1014, 1015, 1016, 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 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It is a well settled principle governing the interpretation of any provision of a contract or provision which is plain and unambiguous. A statute is an act of the legislature. The primary concern of a statute is the determination of the intention of the legislature. Words and phrases and symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the legislature. (Para 10)

The intention of the legislature is primarily to be ascertained from the words used, where necessary, attention may be paid to what the legislature has done and what is not done. As a rule, the primary intention of the legislature is to be ascertained from the words used, where necessary, attention may be paid to what the legislature has done and what is not done. (Para 10)

The principles of construction governing the interpretation of a statute are the other important factors. The rule is that words are to be interpreted in their ordinary and natural meaning unless the context requires a different meaning. The context of the statute is the statute as a whole and the words used in the statute should be read in their ordinary and natural meaning. The context of the statute is the statute as a whole and the words used in the statute should be read in their ordinary and natural meaning. The context of the statute is the statute as a whole and the words used in the statute should be read in their ordinary and natural meaning. (Para 11)

Views expressed by the legislature are to be ascertained from the words used in the statute. (Para 11)

The words used in a statute are to be interpreted in their ordinary and natural meaning. (Para 11)

The words used in a statute are to be interpreted in their ordinary and natural meaning. (Para 11)

1. Legal Remedies. Awaiting alternative remedies. Recourse taken to one remedy. Bar barred by law. Whether leave of Court necessary to avail of alternative remedy — Held, no such leave need be obtained since Plaintiffs are at liberty to avail of remedies that were open to them. (Para 15)



SRINIVASA MOHANTHAN, J. (With whom Justice Chandrachud and Justice Dhananjaya Ganpatrao Phule concur) 1

The judgment of the Court was delivered by

ARJUN PASWALK, J. (With whom Justice Chandrachud and Justice Dhananjaya Ganpatrao Phule concur) 2

3. A short but important question of law involving effect of amendment to section 115 of the Code of Civil Procedure, 1908 (in short "the Code") is involved in these appeals since the answer to the question does not only determine the admissibility of a plea of estoppel thereto would suffice. 3

4. By section 115 of the Code of Civil Procedure (Amendment Act, 1996) (in short "the Amendment Act") and section 117 of the Code, amendments were made to section 115 of the Code. In all these appeals, the High Courts concluded that, because of amended Section 115, the plea of estoppel thereto was not maintainable, as had an order been passed in favour of the party opposing the revision, the same would not have finally disposed of the suit or other proceeding. 4

5. It has been contended by learned counsel for the appellants that the High Courts were wrong in disposing of the revision applications as the appellants' suits were pending. They are to be amended provisions do not apply to suits which were started before the amendment, for amendments and revisions start on a parallel footing and proceed along in the same independence, as the case may be, the as such, the amended provisions would not have any application and, hence, the application for amendment and revision which form the subject-matter of the revisions, remain in the existence "as they proceeded" and even if the amended provisions apply, disposal of the revision would not have meant final disposal of such "other proceeding". 5

6. With reference to Section 117 of the Amendment Act, it is submitted that the same does not convey any meaning. The legislature always saved pending proceedings in terms of section 6 of the General Clauses Act, 1897 (in short "the General Clauses Act") and, hence, proceedings which were pending before the High Courts on the date of amendment, are clearly outside the effect of amendment. Even if it is conceded for the sake of arguments that there is no specific provision in that regard, it is only a case of *ejusdem generis*. 6

7. In response, learned counsel for the respondents submitted that plain meaning of provisions of a statute has to be given full effect and even a bare reading of the provisions makes it clear that the High Courts' orders are *interim*. Whatsoever the legislature intended to keep the pending proceedings out of the purview of amended provisions, it was specifically so provided. Reference is made to the amendment in 1996 to the Code which in section 5(1)(b) of the Code of Civil Procedure (Amendment Act, 1996) (in short "the Old Amendment Act") saved the pending proceedings, taking into account of Section 6 of the General Clauses Act. 7

8. In order to appreciate the rival submissions it will be necessary to take into consideration provisions of Section 115 as they stood before amendment, and after amendment. 8



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SECTION 115, CLAUSE 3

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Section 115 (before amendment).

115 (1) The High Court may call for the records and case which has been allocated by any court subordinate to said High Court and may do so for any of the following purposes:

- (a) to correct an error in a judgment or order;
- (b) to correct an error in a judgment or order which has been made in the exercise of its jurisdiction although such error was not a legal error;

(2) The High Court may make such order in the exercise of this power:

(a) provided that the High Court shall not order this section to vary an order or any order made in any other proceedings or award in the exercise of its jurisdiction in any other proceedings;

(b) if the order is a judgment or order in favour of the party appealing the order, it will not have any effect in the execution of the order or the proceedings in which the order was made;

(c) if the order is a judgment or order which is not in favour of the party appealing the order, it will not have any effect in the execution of the order or the proceedings in which the order was made;

(3) The High Court shall not exercise this section to vary an order or any order or award which in a final decision of the High Court is to any person's final advantage;

(4) Subject to sub-section (3), the expression "any case which has been allocated" includes any order made in any proceedings in which the order is a judgment or order in favour of the party appealing the order.

Section 115 (after amendment).

115 (1) The High Court may call for the records and case which has been allocated by any court subordinate to said High Court and may do so for any of the following purposes:

- (a) to correct an error in a judgment or order;
- (b) to correct an error in a judgment or order which has been made in the exercise of its jurisdiction although such error was not a legal error;

(2) The High Court may make such order in the exercise of this power:

(a) provided that the High Court shall not order this section to vary an order or any order made in any other proceedings or award in the exercise of its jurisdiction in any other proceedings, except where the order is a judgment or order in favour of the party appealing the order, in which case it will not have any effect in the execution of the order or the proceedings in which the order was made;

(b) if the order is a judgment or order which is not in favour of the party appealing the order, it will not have any effect in the execution of the order or the proceedings in which the order was made;

(3) The High Court shall not exercise this section to vary an order or any order or award which in a final decision of the High Court is to any person's final advantage;

(4) Subject to sub-section (3), the expression "any case which has been allocated" includes any order made in any proceedings in which the order is a judgment or order in favour of the party appealing the order.

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8. A comparison of the two provisions shows that while provision of the amended provision has been retained in its entirety in the amended provisions clause (b) of the proviso has been omitted.

9. It is a well settled principle of interpretation that if by the Old Amendment No. 1 the power provision was wider. By the amendment certain positive restrictions were put on the High Court's power to deal with revision under Section 118. Due to the said amendment, it was not strictly necessary that the High Court would have the residue of its jurisdiction under clause (a) of the proviso in the lower courts. In fact, the power could be exercised in any case where a substantial error was committed by the original court or where substantial injustice had resulted by the Old Amendment No. 1, provided of course certain conditions were met. In the said amendments was introduced. The proviso which was introduced contains modifications which are primarily for the exercise of power under Section 118. They were introduced notwithstanding the fact that the High Court has suo motu power to exercise an order where there is failure of justice, which has not been exercised in principle, as and when it may be exercised by parties when it was made. These powers were retained by clause (a). Till after 1976, the exercise of power was somewhat circumscribed, it was not widely exercised. In other words, the High Court could exercise its jurisdiction in the absence of cases where there was failure of justice or irreparable loss or as a result of the proceedings was substantially impaired and the suo motu power of the High Court was retained. It was not a general power of superintendence over the subordinate courts. Changes were required to indicate limitations in exercise of power.

10. Even after the amendments in 1975 and 1976, in spite of the amendment in 1976, the revision power was exercised in a case where the order had been, as the case may be, was not appealable.

11. Self section 118, which was introduced by the old Amendment No. 1, contained a proviso that the High Court shall not interfere where the order of the lower is appealable, in courts which make to the High Court.

12. It is interesting to note that the Law Commission in its initial recommendation deletion of Section 118. In the Law Commission's opinion, provisions of Section 118 are in derogation of provisions of Article 227 of the Constitution of India to submit to clause (a) and the proviso would be a qualified immunity was not an absolute bar. The Joint Committee of Parliament discussed these recommendations and duly accepted proposals to retain the provisions in the section. In the course of the amendment of Section 118 by the Old Amendment No. 1, the discussions in the Committee are reflected in the following words.

"The Committee, however, felt that in addition to the restrictions contained in Section 118, in overall view, further relaxation of the provisions of revision in subordinate courts should be possible. It was agreed that any modifications made by the Law Commission in its 10th and 11th Reports, the Committee recommended that Section 118



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of the Code should be retained subject to the modification that the new definition of "appeal" in Section 13 should state that ordinarily it means the right of appeal which is subject to the provisions of the Code with certain exceptions.

The first of the changes were made in favour of the appellants and would not be in the disposal of the suits or of proceedings in an

appeal. The second, that would extend the scope of revision to a certain class of cases, is not in the disposal of the suits or of proceedings in an

13. This aspect of the Bill has to be considered in the respective scope of appeal and revision. It is clearly a well settled principle of law that the right of appeal is a substantive right. But there is no such substantive right in making an application under Section 13. It is a procedural provision and of certain instances in *Shreeji Ramchandra Maheshwari v. Kalyanji Dattaram Bhandari* it was held that appeal and revision stand on the same pedestal. It is sufficient to say that the provisions in the said case are being read in the context. What was held in that case is that in the exercise of power of a higher court and in the exercise of the right of consideration in appeal and revision was referred to. It was held that in that case the appeal is a substantive right.

14. Section 13 is essentially a source of power for the High Court to supervise the subordinate courts. It does not in any way confer a right on a High Court to interfere with the jurisdiction of a subordinate court to proceed to a High Court for relief. The scope for making a revision under Section 13 is not linked with a substantive right.

15. Language of Sections 96 and 101 of the Code which deal with appeals can be compared with section 13 of the Code. While the former two provisions specifically provide for a right of appeal, the same is not the position as regards Section 13. It is not a substantive right of appeal but a mere power conferred by a court of a subordinate court. As the Code itself is a source of power of the High Court to supervise and control the subordinate courts by exercise of supervisory power.

16. An appeal is essentially a continuation of the proceedings commenced by the provisions contained in the final order of the subordinate court and is over in the case of the appeal. This is because there is a vested right in the litigant to the remedy of an appeal. As was observed in *S. Kaper Chaudhary v. Prakash Chandra Choudhary* only in cases where the subordinate court has involved a question has to be referred to a court of a higher court. The right of appeal is a substantive right and is a necessary part of the procedure in an appeal. But the right of creating a subordinate court and the jurisdiction and the powers to be redress the grievances of the people seems an end in itself and it is not a right of appeal. In *State of Gujarat v. Shreeji Ramchandra Maheshwari*, (1974) 1 SCR 1000. The appeal itself is a substantive right in which the jurisdiction, whether it is vested in the court from which it

[1] AIR 1977 SC 1000.

[2] AIR 1974 SC 1000, para 13-14.

[3] AIR 1974 SC 1000, para 13-14.

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construed in the light of the plain meaning of the Act we are not bound to read and by construction there are to be excluded unless the words "See *Manoj Gopal v. Gopalan Anandhan Pillai*." It is generally the duty of a constructor to read words in an Act unless it is absolutely necessary to do so. See *Nandani, United India Insurance Co. v. Ruler of Insurance* and other judgments in this regard. The provisions of a statute by the application of a technical meaning. Courts are not intended to read words in an Act of Parliament in a sense that is not intended by the legislature at the time of the Act, unless the Court is satisfied that the words used in the Act are ambiguous. See *Union of India v. V.K. Rajgopal*, *Union of India v. K. S. Narayana Murthy*, *Krishna Prasad v. Devaraj* etc.

20. The government is not to be suggested that it has been interpreted by words has been said. Statutes should be construed not as the terms of technical Judge. Learned Judge said that words must be construed with a view to their operation in the purposes which lie behind them. See *State of Madhya Pradesh v. State of Uttar Pradesh*. The case was referred in *State of Madhya Pradesh v. State of Uttar Pradesh* (1962) 1 SCR 1000.

21. In *P. R. Venkatasubramanian v. The Tamil Nadu Government* it was observed that courts should avoid the danger of a purely technical interpretation of the meaning of a word or phrase in a statute. The words should be interpreted in their natural and ordinary sense and which are to be interpreted in a somewhat broad. They are not to be interpreted in a technical sense or in a narrow sense or in a restrictive sense.

22. Where the plain meaning of a provision is clearly interpreted, the law and general principle of construction of law is not to be used in a restrictive sense in the process of law. It is for the legislature to amend, modify or repeal the law as may be necessary. See *State of Madhya Pradesh v. State of Uttar Pradesh*. The law is not to be interpreted in a restrictive sense.

23. Two principles of construction of a statute are to be kept in mind. One is to read the statute as a whole and to read it in the light of the other provisions. The other is to read it in the light of the words used in it. Under the first principle a clause analysis cannot be supplied by the court. Under the second principle a clause analysis cannot be supplied by the court. The words used in the statute should be read in their natural and ordinary sense and should not be given a restrictive and technical purpose. All the provisions of a statute or section must be read in their natural and ordinary sense. Every clause of a section should be construed with a view to the context and other clauses thereof so that the construction may be put on the statute which does not involve a restrictive construction of it. This would be true to the words used in the statute and to the general purpose of the statute. It is not to be interpreted in a restrictive sense. It is to be interpreted in its natural and ordinary sense. See *State of Madhya Pradesh v. State of Uttar Pradesh* (1962) 1 SCR 1000.

1. (1962) 1 SCR 1000. See also *State of Madhya Pradesh v. State of Uttar Pradesh* (1962) 1 SCR 1000.
2. (1962) 1 SCR 1000. See also *State of Madhya Pradesh v. State of Uttar Pradesh* (1962) 1 SCR 1000.
3. (1962) 1 SCR 1000. See also *State of Madhya Pradesh v. State of Uttar Pradesh* (1962) 1 SCR 1000.
4. (1962) 1 SCR 1000. See also *State of Madhya Pradesh v. State of Uttar Pradesh* (1962) 1 SCR 1000.
5. (1962) 1 SCR 1000. See also *State of Madhya Pradesh v. State of Uttar Pradesh* (1962) 1 SCR 1000.
6. (1962) 1 SCR 1000. See also *State of Madhya Pradesh v. State of Uttar Pradesh* (1962) 1 SCR 1000.
7. (1962) 1 SCR 1000. See also *State of Madhya Pradesh v. State of Uttar Pradesh* (1962) 1 SCR 1000.
8. (1962) 1 SCR 1000. See also *State of Madhya Pradesh v. State of Uttar Pradesh* (1962) 1 SCR 1000.



32. A proper reading of Section 135 as it now stands leads to the conclusion that the stress is on the question whether the order in favour of the party applying for revision would have given finality to the proceedings. If the answer is "yes" then the revision is maintainable. But in the contrary, if the answer is "no" then the revision is not maintainable. If the order of the original order is affirmed in nature or does not finally decide the issue, the revision will not be maintainable. The only situation in which the order of the original order is affirmed in nature is when the subject matter of revision under Section 135 is the order of the High Court in the language of Section 135 and in the Old Amendment Act and Section 135 of the Amendment Act. While in the former there was an explicit provision for revision in cases of pending orders, the amendment came into force when an amendment is specifically absent in Section 135. The amendment relates to procedures. No person has a vested right in a course of procedure. He has only the right of participation in the course prescribed. If by a statutory change the mode of procedure is altered, the parties are to proceed accordingly in the new mode, without exception, unless there is a different stipulation.

33. Section 6 of the General Clauses Act has no application because there is no substantial question of law involved. If a party seeks to rely on clause Section 135 of the Code in *Shri Jagannath Chatterjee v. Bank of India*, it was observed that "if a provision of statute is unambiguously applied without any change in legal effect, no party can object to its application, not even when it is retrospective in its operation and if that relief has not been granted before the commencement of the statute is no ground for granting it afterwards. There is no doubt that it is possible by operation of Section 6 of the General Clauses Act, or by making special provisions, Operation of new law can be made to be retrospective, but that is not the scope of the provisions applicable in a case where a particular provision in the statute is omitted and in its place another provision dealing with the same subject-matter is introduced without a saving clause in favour of pending proceedings, then it can be reasonably inferred that the intention of the Legislature is that the pending proceedings shall continue as if the proceedings for the same purpose may be initiated under the new provision."

34. In view of what has been stated above, the inevitable conclusion is that the High Courts were right in the conclusions about non-maintainability of revision applications.

35. It was submitted by learned counsel for the appellants that even if the revision applications are held to be not maintainable, they should not be a bar to challenge the order made under Article 226 of the Constitution. It was submitted that an opportunity may be granted to the appellants to raise the merits.

36. If any remedy is available to a party under any statute or the Constitution, it is not to be denied for raising the same. If the appellants could challenge the order made under Article 226 of the Constitution, it would be a bar to challenge the same without attending to the law.

37. The appeals are dismissed. No costs.

P. Kiran Kumar vs. A.S. Khadar and others

(2002) 5 SCC 161

Bench: Ashok Bhan, V.N. Khare, JJ.

The Judgment was delivered by: Ashok Bhan, J.

3. The short point involved in these appeals is as to **whether the dismissal of an appeal against an ex-parte decree on the ground that the same is barred by limitation attracts the provisions of explanation to Order IX Rule 13 of the Code of Civil Procedure and creates a bar to the maintainability of an application under Order IX Rule 13, CPC for setting aside an ex-parte decree.**

4. Appellant, while going from School to his house at Bangalore met with an accident on 30th November, 1988 with a motorcycle bearing Registration No. MEB 910. Respondent No.1, As Khadar was driving the motorcycle which is owned by respondent No.2. Appellant, through his father, filed a claim petition u/s. 110 A of the Motor Vehicles Act on 28th March, 1989 for a total sum of Rs. 150, 000/- as compensation. Respondent Nos.1 and 2 appeared through a common advocate who filed his vakalatnama on their behalf before the Motor Accident Claims Tribunal, Kolar ('the Tribunal'). On 3rd December, 1991 the counsel appearing for the respondents filed a memo before the Tribunal seeking to withdraw from the case for want of instructions. Thereafter respondents neither put an appearance in person nor through a counsel. Tribunal set the respondent ex-parte. After taking evidence of the appellant, Tribunal allowed the claim in part and awarded a sum of Rs. 1, 00, 000/- as compensation, out of which Rs.75, 000/- was directed to be kept in an fixed deposit till the appellant attained majority and the balance amount of Rs. 25, 000/- was directed to be paid to the appellant's father for meeting the treatment and other incidental expenses.

5. Since the order was not complied with, execution petition No.6/1996 was filed before the Principal District Judge, Kolar. Respondent No.1 was served and he put in his appearance before the executing court on 1st January, 1996 through a counsel. On 22nd November, 1996 at the request of the appellant, the execution petition was transferred to Bangalore. Respondent No.2 was thereafter served and he also put in his appearance.

6. On 15th September, 1998, respondent No.2 filed an appeal being M.F.A. No. 4166 of 1998 in the High Court of Karnataka against the order of the Tribunal dated 28th September, 1995. The appeal was filed along with an application u/s. 5 of the Limitation Act to condone the delay of 994 days in filing the appeal. An application for stay of the execution proceedings was also filed. Both the applications were dismissed by the High Court by its order dated 14th October, 1998. A clear finding was recorded by the High Court that the respondents were duly served and even had engaged a counsel in the Tribunal, and as such, the explanation given for condoning the delay was not only unsatisfactory but completely false as well. As a consequence thereof the appeal was dismissed as barred by limitation.

7. Thereafter respondents filed Mis. No. 54 of 1998 on 14th December, 1998 before the Tribunal under Order IX Rule 13 read with S. 151 of the Code of Civil Procedure for setting aside the ex-parte Award dated 28th September, 1995 and permit them to file their written statement and lead evidence. The Tribunal vide its order dated 15th December, 1999 set aside the ex-parte proceedings and the award dated 28th September, 1995, with the result the M.V.C. No. 152 of 1989 was restored back to the file for fresh disposal in accordance with law.

8. One of the points raised before the Tribunal by the appellant was that the appeal filed by the respondent No.2 having been dismissed by the High Court and the order of the Tribunal having merged with the order of the High Court made in the appeal, an application under Order IX Rule 13 for setting aside the ex-parte award was not maintainable. The Tribunal correctly noted the principle of law to the effect that the appeal filed against the ex-parte order having been dismissed, an application under Order IX Rule 13 to set aside the award would not be maintainable but rejected the plea for want of particulars of the appeal.

9. Aggrieved by the order of the Tribunal the appellant filed Civil Revision Petition No. 1345 of 2000 which was dismissed, even without noticing the plea raised by the appellant that the application under Order IX Rule 13 was not maintainable in view of the dismissal of the appeal by the High Court against the order of the Tribunal in

MFA No. 4166 of 1998. Thereafter the appellant filed a review petition No. 104 of 2001 which was also dismissed on 3rd April, 2001 without noticing the point that the application under Order IX Rule 13, CPC was not maintainable in view of the dismissal of the earlier appeal filed by the respondent No.2.

10. Aggrieved by the order passed by the High Court in Civil Revision No. 1345 of 2000 and Review Petition No. 104 of 2001 the present appeals by special leave have been filed.

11. The only contention raised on behalf of the appellant is that on a true interpretation of the explanation to Order IX Rule 13, CPC the application for setting aside the ex-parte decree must be held to be incompetent in view of the dismissal of the appeal filed by respondent No.2. It was urged that even if the appeal was dismissed on the ground of limitation, the application under Order IX Rule 13 for setting aside the ex parte award would not be maintainable. Order IX Rule 13, CPC reads as under:

Setting Aside decree ex parte against defendant: In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

1. Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:(Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient to appear and answer the plaintiff's claim).

(Explanation - Where there has been an appeal against a decree passed ex-parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree) " .

12. Explanation was added to Order IX Rule 13 with effect from February 1, 1997 by the Code of Civil Procedure. Prior to its enactment a defendant burdened by an ex parte decree could apply under Order IX Rule 13 for setting aside the ex parte decree. He could also file an appeal u/s. 96 against the ex parte decree. The mere fact of filing the appeal did not take away the jurisdiction to entertain and dispose of an application for setting aside an ex parte decree. Only in the cases in which the trial court decree merged with the order of the appellate court by reversal, confirmation or varying it, the trial court was precluded from setting aside the ex parte decree. Where the trial court decree did not merge with the appellate court order the trial court was at liberty to proceed with the application for setting aside the ex-parte decree.

Such instances arose when the appeal was dismissed in default or where it was dismissed as having abated by reasons of omission by the appellant to implead the legal representatives of a deceased respondent or where it was dismissed as barred by limitation. Explanation was added to discourage the two pronged attacks on the decree i.e. by preferring an application to the trial court under Order IX Rule 13 for setting aside the decree and by filing an appeal to the superior court against it. The legislative attempt incorporating the Explanation to Order IX Rule 13 is to confine the defendant, to either one of the remedies made available to him and not both. Dismissal of the appeal on any ground, apart from its withdrawal constituted a bar on the jurisdiction of the trial court to set aside the ex-parte decree. With the introduction of the explanation, no application to set aside the ex-parte decree would be maintainable where the defendant filed an appeal and the appeal was disposed of on any ground, other than the ground that the appeal have been withdrawn by the appellant.

15. In the present case, as well we find that respondent No. 2, the father of respondent No. 1 preferred an appeal which had been dismissed as barred by limitation. Reading of the explanation to Order IX Rule 13 clearly indicates that if any appeal against an ex-parte decree had been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application for setting aside the ex-parte decree under Order IX Rule 13, CPC would be entertained. The words of the explanation are clear and unambiguous. It clearly indicate and suggest that if an appeal has been preferred and the same had been dismissed on any ground other than the

withdrawal of the appeal, the same would cause a bar to the filing of the application under Order IX Rule 13, CPC for setting aside the ex parte decree. The position of law on this point is discussed in paragraph 15 of the Judgment in Rani Choudhury's case 1982 Indlaw SC 194. It has been observed that on a proper interpretation of the explanation, if an appeal against an ex parte decree has been filed and the appeal has been dismissed on any ground other than the dismissed as withdrawn, then the application under Order IX Rule 13, CPC would not be maintainable and cannot be entertained.

16. In the present case, admittedly an appeal MFA No. 4166 of 1998 had been preferred by respondent No. 2 and the same was dismissed as barred by limitation. In view of the dismissal of the earlier appeal, the application under Order IX Rule 13, CPC for setting aside an ex parte decree/award was not maintainable and the Tribunal erred in setting aside the ex-parte decree/award made against the respondents. The High Court failed to notice this point in spite of the fact that the same had been specifically raised.

18. For the reasons stated above we find substance in the contention raised by the counsel for the appellant and accept the same. The impugned order of the High court and that of the Tribunal setting aside the ex parte award are set aside. It is held that in view of the dismissal of the appeal MFA No. 4166 of 1998 by the High Court, the application under Order IX Rule 13 filed by the respondents was not maintainable. Consequently these appeals are allowed. The executing court shall now give effect to the ex parte award in accordance with law. There shall be no order as to costs. Appeals allowed

Madhukar vs. Sangram

(2001) 4 SCC 756

Bench: A.S. Anand, R.C. Lahoti, Brijesh Kumar, JJ.

Summary: Land & Property - Suit for declaration - Dismissal of suit by trial court on ground of limitation and principal of res judicata - Held, High Court's order singularly silent of any discussion either of documentary evidence or oral evidence - Sitting as a court of first appeal, it was duty of HC to deal with all issues and evidence led by parties before recording its findings - Appeal disposed of.

The Order of the Court was as follows:

1. Respondents-plaintiffs filed a suit for declaration that they along with defendant No. 1 were the joint owners in possession of the suit property and also for a declaration that gift deed bearing No. 3042/65 and the two sale deeds dated 28.02.1989 were ineffective insofar as the rights of the plaintiffs are concerned. Suit was dismissed by the Trial Court. A perusal of the order of the Trial Court shows that suit was dismissed inter-alia on the ground (1) of limitation and (2) on the ground that decision in an earlier suit, being OS No. 93/71 operated as res judicata against defendant No. 1 only. Before the Trial Court, documentary evidence was led, including placing on record copies of entries of public records and decision of the earlier suit (O.S: No: 93/71).

2. Against the dismissal of the suit a first appeal was filed by the plaintiffs-respondents in the High Court. The High Court, after noticing some details from the judgment of the Trial Court as also pleadings of the parties, opined that the questions to be decided in the appeal were:

"(1) Whether the relationship claimed by the parties are true.' (2) Whether the plaintiff is entitled to declaration as prayed for?"

3. After deciding these questions in favour of the plaintiffs-respondents, the High Court set aside the judgment and decree of the trial court and allowed the first appeal. Aggrieved, this appeal has been filed by special leave by the appellants-contesting defendants

4. We have carefully perused the judgment and decree of the High Court in the first appeal. We find that substantial documentary evidence had been placed before the trial court including certified copies of certain public records besides copy of the judgment and decree of the earlier suit (O.S. No. 93/71). Oral evidence had also been led by the parties before the trial court, which was noticed and appreciated by the trial court. However, the

impugned judgment in the first appeal, is singularly silent of any discussion either of documentary evidence or oral evidence. Not only that, we find that though trial court had dismissed the suit on ground of limitation as also on the ground that the decision in the earlier suit (O.S. No. 93/71) operated as res judicata against defendant No. 1 only the High Court has not even considered, much less discussed, correctness of either of the two grounds on which the trial court had dismissed the suit. Sitting as a Court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. It has failed to discharge the obligation placed on a first appellate court.

5. The judgment under appeal is so cryptic that none of the relevant aspects have even been noticed. The appeal has been decided in a very unsatisfactory manner. First appeal is a valuable right and the parties have a right to be heard both on questions of law and oh facts and the judgment in the first appeal must address itself to all the issues of law and fact arid decide it by giving reasons in support of the findings:

6. In Santosh Hazari v, Purshottam Tiwari' (Dead) by L. Rs JT (2001) 2 SC 407 2001 Indlaw SC 266 this court opined:

"The Appellate Court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law. The whole case is therein open for rehearing both on questions of fact and law. The judgment of the Appellate Court must, therefore, reflect its conscious application of mind, and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the Appellate Court."

"While reversing a finding of fact the Appellate Court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the First Appellate Court had discharged the duty expected of it."

7. The salutary principle referred to above in Santosh Hazari's case 2001 Indlaw SC 266 (supra) have been respected in their breach. Our careful perusal of the judgment in the first appeal shows that it hopelessly falls short of considerations which are expected from the court of first appeal. We, accordingly, set aside the impugned judgment and decree of the High Court and remand the first appeal to the High Court for its fresh disposal in accordance with law.

8. We wish to clarify that nothing said hereinabove shall be construed as any expression of opinion on the merits of the case; we request the High Court to dispose of the appeal expeditiously after notice to the parties.

9. The appeal is disposed of in the above terms. Parties shall bear their own costs. Appeal disposed of



CHAPTER 1

General Principles of a Fair Trial Applicable in all Stages

Introduction

All principles discussed in this chapter are relevant to ensure a fair trial and are required to be upheld by all parties at every stage of the judicial proceedings – the pre-trial, trial and post-trial stages. Illustratively, fair trial norms include the right to be presumed innocent, the right to be defended by a lawyer, the right to be informed of charges. The rules that ensure protection of all parties – defence, prosecution, accused, victim and witnesses – are laid down in the Code of Criminal Procedure and the Evidence Act. The system is not perfect but is designed with the specific idea of creating a level playing field, arriving at the truth and delivering justice, as nearly as it is humanly possible to do.

As the judge has complete control of a case as soon as it comes to court, it is his paramount duty to ensure that fair trial norms that have been assured by the Indian Constitution as well as internationally agreed to are adhered to. Non-compliance with any single norm at any stage can subvert all further proceedings, taint the entire process and gravely impinge on the rights of all parties before the court.

A trial primarily aimed at ascertaining truth has to be fair to all concerned which includes the accused, the victims and society at large. Each person has a right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as it is to the victim and society.

1.1 Right to Be Presumed Innocent

“It is better that ten guilty escape than one innocent suffers.”¹ This quote reflects the principle, known in criminal law as Blackstone’s Formulation named after English jurist William Blackstone, “that there is hardly anything more undesirable in a legal system than the wrongful conviction of an innocent person”. This is because the consequences of convicting an innocent person are so significantly serious that its reverberations are felt throughout a civilised society.² For example, the sentence served by an innocent person cannot be erased by any subsequent act of annulment.³ Thus, to ensure as far as possible that no court will wrongfully convict an innocent person, an accused person is presumed innocent until proven guilty, with the prosecution bearing the burden of establishing the facts necessary to prove guilt.

¹ Letter from Benjamin Franklin to Benjamin Vaughan, 14 March 1785.

² *Kali Ram v State of Himachal Pradesh* 1973 AIR SC 2773.

³ *Ibid.*, para. 28.

1.1.1 Domestic Law

All criminal trials are based on the principle that the accused is innocent till proved guilty. The presumption of innocence is a cardinal principle of our legal system and a basic right of the accused person. The presumption must stand and be the guiding principle right from the moment of suspicion, through investigation, throughout the trial process and till the delivery of the verdict.

Criminal procedure is built around the principle of “innocent until proven guilty” and is designed to protect this right. When it is said that a defendant to a criminal charge is presumed to be innocent, what is really meant is that the burden of proving his guilt lies on the prosecution.”⁴ This means that it is the duty of the accuser to show not merely the general probability of guilt in the circumstances, but requires him to prove every element of the offence beyond reasonable doubt.

It is frequently argued that the rights afforded to the accused are somehow bought at the cost of the victim, the state and society at large, but that is not so. The scheme of the Evidence Act and the codes of procedure are designed not to favour one party over the other, but to create a balance between all parties, that will eventually help lead as closely as possible to discovering the truth and delivering justice.

Arguments that there is nothing wrong per se in shifting the burden of proof on to the accused, especially where grave offences are involved, have not found favour in our legal system, where the notion of being innocent until proven guilty is considered as important as the liberty of the individual. Shifting the burden would create a presumption of guilt which the individual accused would have to displace. If not the judge would be bound to convict, creating a greater risk of innocent persons being convicted simply because they are without resources to fight their cases well. This is particularly necessary to factor in, in countries such as India, where most of the population is not in a position to mount a serious challenge to the state’s accusations. In addition, the state sets the rules by which the game is to be played, and is better equipped to play the game. Finally, the state has at its disposal various resources for evidence collection and gathering which the individual cannot possibly have.

The state, in the form of its law enforcement agencies and prosecution machinery wields the sword of justice when it acts on behalf of the victim and must investigate, prepare and present its case to the fullest, to satisfy that trust. On the other hand, fair trial norms, including the presumption of innocence, are the individual’s shields of justice provided by law to protect the accused against any unfair, biased or illegal acts of a powerful state. The judge’s role is to hold the scales balanced by his assessment of what is brought before him, and active interventions when he suspects or knows of danger to any of these rights by the flouting of these rules.

Over time, the pronouncements of the Supreme Court have consistently reaffirmed that the presumption of innocence is a human right.⁵ That the accused, however unpleasant and unattractive he or she may be and however deplorable the alleged crime is, must be afforded *all* the protections required for the realisation of this right.



⁴ William Glanville, *The Proof of Guilt*; edn. 3, Stevens, 1963, pp. 184 -85.

⁵ *Narendra Singh and Anr. v State of Madhya Pradesh*, (2004) CrLJ (2842), para. 31.

This presumption of innocence must condition his/her treatment and the procedure of the trial throughout.

The Apex Court in *P.N. Krishna Lal v Government of Kerala*⁶ clarified that the principle of presumption of innocence is entrenched in the Indian Constitution, the Universal Declaration of Human Rights and the Civil and Political Rights Convention, to which India is a member, guarantee fundamental freedom and liberty to an accused person. The *procedure prescribed for trial must also stand the test of the rights guaranteed by those fundamental human rights.*⁷ In criminal jurisprudence, the settled law is that the prosecution must prove all the ingredients of the offences for which the accused has been charged. The proof of guilt of the accused is on the prosecution and must be beyond reasonable doubt. At no stage of trial is the accused under an obligation to disprove his innocence. “Unlike in a trial of civil action, the burden of proof of a case always rests on the prosecution and it never gets shifted....To place the entire burden on the accused to prove his innocence, therefore, is arbitrary, unjust and unfair infringing, violating the guarantee under Article 21.”

Section 101 of the Indian Evidence Act further reinforces this right, by providing that whoever desires a court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts.⁸ Thus, if the state wishes to convict an individual of an alleged crime, the state carries the burden of firmly establishing and proving the defendant’s guilt.

To protect this right to be presumed innocent, Section 161(2) of the Code of Criminal Procedure permits persons questioned by the police to refrain from answering questions which might expose them to criminal penalty.⁹ Imprisonment without regard to procedures intended to protect the right to remain silent is unconstitutional under Article 21.

It is often wrongly believed that the burden of proof has been implacably reversed in those cases where state policy has required in introduction of stringent legislation to deal with well-recognised evils, illustratively, dowry killings. Here the statute clearly states: “When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry; the court shall presume that such person had caused the dowry death.” Even here, the Law Commission and several Supreme Court cases have clarified that it is the prosecution that must show to a high level of proof that each element that makes up what amounts to a dowry death is in fact made out. It is only after this that the presumption arises that the accused has “caused the dowry death”, but even this is just a rebuttable presumption and the accused has every right to show that there were other circumstances that displace the prosecution’s case. In the words of the Law Commission: “Under the Section, it is first necessary to prove that such woman has

⁶ 1995 Supp(2) SCC 187, para. 23.

⁷ Author’s emphasis.

⁸ The Indian Evidence Act, 1872, Section 101.

⁹ Regarding police questioning: “Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.” Code of Criminal Procedure, 1973, Section 161(2).



been subjected by such person to cruelty or harassment and secondly, such cruelty should have been or in connection with any demand for dowry and thirdly that this must have been soon before her death. If these are proved, the court 'shall presume' the person caused the dowry death. Of course, the words 'shall presume' mean that the court is, in such circumstances, bound to presume that such person had caused the dowry death but still the presumption is rebuttable."

Ram Gopal v State of Maharashtra (1972) 4 SCC 625

Facts: The appellant Ram Gopal was charged with the murder of Zingrooji Sita Ram. It was established that Sita Ram was poisoned and died on his way to the hospital. The prosecution argued that Ram Gopal had administered the victim some insecticide in kerosene oil either with tea or in water and it was a result of the poisonous insecticide that Sita Ram died. The post-mortem report suspected death by poisoning and a chemical analyst's report confirmed the presence of an organo-chloro compound in the viscera of the deceased. The prosecution argued that the defendant's motive to murder Sita Ram was established by the fact that prior to his death Sita Ram had sold a piece of land to Ram Gopal. However Ram Gopal had not paid him anything but had promised to pay the amount within six weeks of the execution of the sale deed. Despite constant pestering, Ram Gopal kept putting off Sita Ram on some pretext or the other. **Case History:** The prosecution's case relied on the post-mortem chemical analysis of the viscera which showed the presence of an organo-chloro compound. It argued that the deceased had sickened and died after a visit to the accused. Opportunity and the means of death had been established. Ram Gopal was sentenced to death by the Sessions Judge Nagpur and this was confirmed by the High Court of Bombay (Nagpur Bench). In appeal to the Supreme Court against the death sentence the Apex Court stated that the prosecution's case had too many gaps. There was no evidence to show that the accused was ever in possession of any organo-chloro compound. It was improbable that such a large dose of a kerosene-based poison that was fatal could have been consumed by the victim without noticing it and other possibilities like suicide had not been ruled out. This was sufficient to give the accused the benefit of doubt and the Apex Court reversed the verdict of the lower courts. The case is illustrative of the need to keep in mind that not only must every fact be established along with the *mens rea* required, but that the prosecution must be able to link the sequence of events and rule out other probable causes for the occurrence. Here the Supreme Court felt that there may have been other causes for the death of the victim and therefore the beyond reasonable doubt degree of proof had not been met.

Kali Ram v State of Himachal Pradesh AIR 1973 SC 2773

Kali Ram was convicted of two murders. He appealed his conviction in the Supreme Court. The prosecution's case rested on three pieces of evidence. First, a witness testified that Kali Ram had spent the night near the victims' residence, and on the evening of the crime was seen heading toward the victims' house. Second, the prosecution asserted that they had a written confession from Kali Ram which he had mailed to the police station. Third, the prosecution asserted



that Kali Ram made an oral confession to a witness. Noting that the accused was entitled to the presumption of innocence requiring the prosecution to establish guilt beyond a reasonable doubt, the Supreme Court reviewed the prosecution's evidence. First, the Court concluded that the evidence that Kali Ram was headed toward the victims' house on the night of the crime was unreliable because the testifying witness had waited for over two months to come forward, despite knowing of the incident, since the crime's occurrence. The Court found that the prosecution did not offer a cogent explanation as to why the witness was silent for so long. Second, the Court held that the prosecution had not verified the authenticity of the letter of confession nor displaced the possibility that it could have been fabricated. It was necessary for the prosecution to do that before the letter of confession had evidentiary value. Third, the Court found the testimony of the witness regarding the oral confession highly questionable, as the police had hired this witness to testify. Having found all the prosecution's primary evidence questionable, the Court reversed the conviction, explaining that the prosecution did not rebut the accused's presumption of innocence.

1.1.2 International Law

India is part of the international community of nations. It has contributed significantly to the building of international norms and has long accepted their validity. In fact, its Constitution mirrors many of the fundamental rights and norms agreed to at international law.

In the last five decades, a considerable amount of international law has developed, which has resulted in the creation of internationally accepted standards and guarantees for human rights. The Universal Declaration of Human Rights (UDHR) adopted by the United Nations in 1948 was intended to set *a common standard* that ought to be met by all nations. The rights and dignities contained in the UDHR should be a standard for every nation to follow and achieve.

Although the UDHR is not a legally binding document, it represents the will of the international community that human rights and dignity must be protected. Many of its principles have been turned into binding norms, reflected in specific multilateral covenants and treaties that obligate states to bring their own policy, practice and legal standards into conformity with them.

The main instrument dealing with the pre-eminent international legal standards on the subject of fair trial rights is the International Covenant on Civil and Political Rights (ICCPR). The ICCPR is a United Nations treaty created in 1966 and entered into force on 23 March 1976. Nations that ratified this treaty are bound by it. The ICCPR is monitored by the Human Rights Committee, a group of 18 experts who meet thrice a year to consider periodic reports submitted by member states on their compliance with the treaty.¹⁰

¹⁰ The Human Rights Committee is a body of independent experts that monitors the implementation of the International Covenant on Civil and Political Rights by its state parties. All states parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially one year after acceding to the Covenant and then whenever the Committee requests (usually every four years). The Committee examines each report and addresses its concerns and recommendations to the state party in the form of "concluding observations".



India ratified the ICCPR in 1979, meaning that India is committed to upholding all the rights it guarantees. Many of the rights contained in the ICCPR relate to the criminal justice system – whether in relation to the pre-trial, trial or post-trial stage. Many of the safeguards provided in Indian law are also mandated by international law.

Treaties, agreements and covenants signed and ratified by the Government of India do not automatically become a part of our domestic law unless incorporated into our laws by our legislatures. Nevertheless, judges have often discussed the effect of the international covenants or agreements signed and ratified by India and whether these are enforceable in Indian courts. In relation to human rights norms, our courts have adopted a progressive line and have declared that insofar as the rights declared in such international instruments are consistent with the fundamental rights guaranteed by Part Three of the Constitution, they can be read as facets of, and to elucidate, the content of the fundamental rights guaranteed by our Constitution.¹¹ Any international convention consistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantees.

The Universal Declaration of Human Rights (UDHR) lays down the common standard to be met by all nations. Article 11(1) states: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.” Indian law is precisely in line with Article 14(2) of ICCPR which states: “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”

In its General Comment No 13 the Human Rights Committee reiterates in unambiguous terms that the presumption of innocence is fundamental to the protection of human rights. “By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused gets the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt.” Further, all accused persons must be treated in accordance with this principle and it is the duty of all public authorities to refrain from prejudging the outcome of a trial.¹² This is particularly important for adjudicating authorities to keep at the forefront of their minds, and indicates once again the need to ensure that procedure is meticulously followed so that there is little room for the play of private prejudice, personal bias, socialisation, or public pressure to invade or colour a trial’s outcome.

1.1.3 Guide for Judicial Enforcement

Judges need to bear in mind that *suspicion, however grave, cannot take the place of proof, and strong pieces of circumstantial evidence cannot establish guilt unless each piece links to another and every link in the chain is proved.*

Judgements require that in coming to a verdict the Court evidences in its rationale that it: has recognised that the burden of proof lies with the prosecution; has satisfied itself of the degree to which the burden of proof has been shown to be beyond reasonable



¹¹ *People’s Union for Civil Liberties v. Union of India* (1997) SC 1203 and *Vishakha v State of Rajasthan* (1997) 6 SCC 241.

¹² General Comment No. 13 (Article 14), in *UN Compilation of General Comments*, p. 124.

doubt or been left wanting; indicates the point in the trial when the onus of proof shifted, if at all it did, and the extent to which the other side could displace it; and the effect of the whole on the outcome of the trial.

The cardinal rules are:

- The burden of proof rests on the prosecution.
- The prosecution must establish guilt beyond reasonable doubt.
- The benefit of doubt belongs to the accused.
- High probability is not enough to convict – where there are several possible accounts, the account supporting the accused should be upheld.

The Supreme Court in *Sharad Birdhichand Sarda v State of Maharashtra* stressed the following “five golden principles”¹³ that must be fulfilled before the case against an accused can be said to be fully established and called it the Panchsheel of the proof of a case based on circumstantial evidence:

“The circumstances from which the conclusion of guilt is to be drawn should be fully established.” The Court stressed that the circumstances concerned “must or should” and not “may be” established. “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.”

“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.”

The circumstances should be of a conclusive nature and tendency.

They should exclude every possible hypothesis except the one to be proved.

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.

Judges must always honour this right of the accused person. Their own predilections, the force of prosecutions arguments or the weakness of the defence is not adequate to ground a conviction. These elements may factor in but it is not sufficient proof of guilt. The objective evidence that is put forward, the unbroken chain of events that lead to an irresistible conclusion are factors for grounding a conviction. Extraneous factors such as public pressure, media reports, the judge’s own biases or popular opinion cannot influence the judicial verdict.¹⁴ Sometimes cases may appear to present a clash between the public’s outcry for conviction and the rights of the accused individual. However, the benefit of reasonable doubt cannot be withheld from the accused.¹⁵ The decision of the court can only be based on the facts and evidence proved before it.



¹³ (1984) 4 SCC 116, para. 153.

¹⁴ *Kali Ram v State of Himachal Pradesh* AIR 1973 SC 2773, para. 27.

¹⁵ *Ibid.*

Trial by Media

“Trial by media” refers to the impact of television and newspaper coverage on a person’s reputation by creating a widespread perception of guilt or innocence regardless of an objective evaluation of the case before the court. The media have a right to report topical events, but in recent times the sensational nature and intensity pose a danger of creating exceptional pressures on judges, which they must resist.

A week after the 20 December 2001 attack on Parliament the police went so far as to call a press conference in the course of which the prime accused “incriminated himself” in front of the national media even before the matter went to trial.

Similarly, a co-defendant was initially sentenced to death for his alleged involvement, despite an overwhelming lack of evidence. Large sections of the Indian media portrayed him as a dangerous and trained terrorist. On appeal, the Delhi High Court overturned the conviction and described the prosecution’s case as “at best, absurd and tragic”.

Jayendra Saraswati, head of Kanchi Kamakoti, was accused of killing two mill workers as sacrifice, based solely on newspaper reports. The Andhra Pradesh High Court in *Labour Liberation Front v State of Andhra Pradesh* held that the writ petition filed to force the authorities to investigate relied on incorrect facts that should have been verified. The Court observed that “once an incident involving a prominent person or institution takes place, the media is swinging into action and virtually leaving very little for the prosecution or the Courts...”

1.2 Right to Equality before the Law and Equal Treatment by the Law

The principle of equality encompasses all areas of India’s governance and society. The Constitution is unequivocal that equality is a fundamental mandate by which both state and individual are bound. In one stroke of the pen it removes immoral and iniquitous practices such as untouchability and begar. Through positive discrimination, it makes clear that there is no place for discriminatory societal divisions or practices such as caste, the historic disadvantages of sections such as women, and the vulnerability of minorities and children. It decrees that “we the people” shall be equal in our freedoms, have equality of opportunity and shall, first and foremost, be equal before the law. Furthering this principle and making equality a reality, is part of the judge’s mandate. Equality before the law requires that there must be equal access to the law and equal treatment before the law.

The right to equality before the law and equal treatment by the law means that discrimination is prohibited throughout the judicial proceedings. Judges and officials may not act in a discriminatory manner when enforcing laws and they must ensure that the rights of all are equally protected.



1.2.1 Domestic Law

Article 14 of the Constitution states: “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”¹⁶ Article 15 lays down the principle of non-discrimination according to which: “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”¹⁷

In terms of justice delivery, the principle of equality basically has two aspects: equal access to the courts and equal treatment at law. In its application, this means that irrespective of religious identity, gender, caste, class, or regional identity, every citizen appearing before a court has a right not to be discriminated against in the course of the proceedings or the manner in which the law is applied.

Equality however, does not always mean the same treatment to everyone, but recognises that there are pertinent differences which require that persons be treated differently to the extent that there is a relevant difference between them. It is also settled law that discrimination can arise through the application of different rules to comparable situations or the application of the same rule to different situations. To treat persons the same when they are in fact already unequal is to perpetuate rather than to eliminate inequality. “Sometimes the greatest discrimination can lie in treating things that are different as though they were exactly alike.”¹⁸

Equality, therefore, prohibits both direct and indirect discrimination. The European Court of Justice (ECJ) has explained these concepts of direct and indirect discrimination in the following terms:¹⁹

Direct discrimination thus involves treating people differently when they are in a comparable situation and should be treated the same. It occurs when someone is disadvantaged or favoured in comparison to someone else by reference to some characteristic such as colour or religion when there is no good reason for distinguishing between them on this basis or the distinguishing characteristic does not justify the extent of the disadvantage or favour. Indirect discrimination involves treating people the same when they are in different situations and should be treated differently. It is determined by the differential impact of the same treatment on the members of one group of persons in comparison to the members of another. If such differential impact operates to the advantage or disadvantage of the members of one group rather than the other, then, unless such differential is capable of objective justification, the apparent equal treatment amounts to indirect discrimination. Both these dimensions of discrimination have been acknowledged by courts and other bodies in their interpretation of constitutional and international guarantees of equality before the law.

Equality is, however, more than the absence of discrimination, whether direct or indirect. The statement of equality is not solely a matter of individual effort. It involves



¹⁶ Constitution of India, Article 14.

¹⁷ Constitution of India, Article 15(1).

¹⁸ *Jenness Fortsom* 403 (1971) US 431.

¹⁹ *C-279/93 Finanzamt Köln-Altstadt v Schumacker* (1995) ECR I-225.

the development of strategies which would actively promote a civil society based on principles of social, economic and political inclusion. This embraces taking positive measures to enable a person to overcome disadvantage and to afford them real equality of opportunity; and it is important to recognise that such measures do not constitute discrimination, but rather, promote equality.

The Supreme Court explained in *Mrs Maneka Gandhi v. Union of India (UOI) and Anr.* that the right to equality articulated in Article 14 not only prohibits the state from discriminatorily applying the law, but also mandates that the law is not applied unreasonably, arbitrarily, fancifully or oppressively.²⁰ The Court explained that Article 14 interacts with Article 21, thereby making any unreasonable or arbitrary proceeding a violation of Article 21.²¹ The Court also characterised the right to equality before the law as a fundamental right, thus attaching to every human being, everywhere, at all times.²²

Mrs Maneka Gandhi v Union of India (UOI) and Anr. (1978) 1 SCC 248

Mrs. Gandhi had her passport impounded by the Indian Passport Authority pursuant to the Passports Act, 1967. However, in contravention of the Act, the Authority did not provide Mrs. Gandhi with any reason why her passport was impounded, nor did the state permit her a hearing to challenge the decision.

Although the Court disposed the matter without passing any formal judgement due to the Attorney General's subsequent independent efforts to remedy the matter, the Court's opinion noted that the Passport Authority's conduct violated Articles 14 and 21 of the Constitution.

1.2.2 International Law

Although domestic law is consistent with international law on this standard, international law is more descriptive, articulating specific types of discrimination that are prohibited. Article 26 of the ICCPR states: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."²³

The specific right to equality before the courts is expressly provided in Article 14(1) of the ICCPR which states: "All persons shall be equal before the courts and tribunals.

²⁰ *Mrs. Maneka Gandhi v. Union of India (UOI) and Anr.* (1978) 1 SCC 248, para. 56.

²¹ *Ibid.*

²² *Ibid.*, para. 20.

²³ ICCPR, *supra* note 47, Article 26.



1.2.3 Guide for Judicial Enforcement

A major challenge before any judge is the existence, risk or even appearance of bias in the courtroom. This segment is restricted to indicating some of the common concerns at court from the point of view of the court user. It does not study all aspects of equality; just a few which district judges and magistrates might benefit from whilst on the bench.

It is not out of place to say that the adage “justice must not only be done, it must be seen to be done” has stood the test of time. Nothing done by the judge or in his court must damage the integrity of the proceedings. Firstly, no justifiable doubts must arise on the impartiality of the judge himself. Occasionally, bias is open; it manifests on the face of the record and is clear for all to see.

Bhanwari Devi was a grass roots government worker whose job included reporting on child marriages. She duly reported the marriage of the one-year-old daughter of a Women’s Development Programme official to the authorities. Though the police tried to stop the marriage the family proceeded secretly with the ceremony. A few months later, in retaliation for her intervention, Bhanwari was gang raped in the presence of her husband. The trial judge acquitted the accused on the reasoning that “...rape is usually committed by teenagers, and since the accused are middle aged and therefore respectable, they could not have committed the crime. An upper caste man could not have defiled himself by raping a lower caste woman”.

At other times, it is important for the judge to be aware that religious, class, caste, gender, language and other group identities in India are deep-seated and considerably more difficult to recognise in the self and in officers of the court, as it is unconscious and not reflected on. Personal prejudice often goes unnoticed by the ones holding them and remains unchallenged because it reflects commonly held stereotypes, or is assertive of one’s own group identity, social orientation or personal proclivity. If allowed – however unwittingly – to come into play or go unchecked, it can taint the proceedings and skew outcomes to the disadvantage of one or the other protagonist in the case.

Being free from personal prejudice or bias must necessarily include detachment from one’s own inner prejudices. If in reality this is difficult to apply, the judge or magistrate should recuse himself or herself.

Being aware of one’s own socialisation and those of others towards lay people who come to court, accepting how the court appears to others, and understanding the circumstances of those who come to court can go a long way to create a sense of confidence and fairness. For instance, simple considerations, such as recognising that some witnesses and victims will lose vital daily wages each time they are required to be in court, and designing dates and times to minimise ineffective hearings, indicates fairness and an understanding of economic differentials that if unattended can affect the outcome of a case.



In guarding against bias, judges are not expected to treat every person in the same manner. In fact, ensuring fairness and equality of access and a level playing field at court may mean providing special or different treatment where these are merited. Judicial decision-making must be informed by objectivity. However, this objectivity should be tempered by the constitutional premise that every person has the right to be treated equally and that individuals and groups that are historically and socially disadvantaged should be provided equal opportunities and their rights secured.

Bias – if ever it is to exist – must be for constitutionalism, protection of human rights and the interests of the poor and underprivileged.

Women, minority communities, Dalits, Scheduled Castes and Scheduled Tribes, and the poor in general, as well as those such as children, require the court’s special consideration as a protector of rights. Many who come to court may suffer multiple disadvantages. People who are socially and economically disadvantaged have a more difficult time coming to court as witness, victim or accused. It is far more difficult for them to comprehend the proceedings and find legal counsel of quality, or at all. It is important for the judge to notice these things and remedy them, so that traditional disadvantage does not turn into serious obstacles to achieve fair outcomes. Judges have a duty to ensure that a disadvantage is not permitted to become an obstacle to the attainment of justice.

Violence against women remains rife across all communities. Despite significant law reform in this area and other interventions, justice cannot be ensured without a change in mindset of those who make up the criminal justice system. Women are often wrongly accused of misusing penal provisions that address cruelty towards them – both mental and physical – and for making unwarranted demands for maintenance and matrimonial rights. In cases of rape and sexual molestation, women often find themselves being objectified and treated with disdain. Instead of being treated with consideration and sensitivity, they are sometimes blamed – even by the court – for having contributed to the commission of the offence. This, coupled with the low rate of conviction in crimes against women, leaves a large majority of women unable to secure effective protection from the criminal justice system.

One way to maximise the integrity of the proceedings is to ensure that procedures are strictly adhered to, as procedures are designed to assure an even playing field between contesting parties. The responsibility for adhering to due process rests on everyone involved in the administration of justice. Nevertheless, the judge, because he has absolute control of his court, has a paramount responsibility to ensure that the process inspires confidence, ensures impartial treatment and is seen as transparently fair by all who approach it.

Awareness of “where people are coming from” – their background, culture, special needs and concerns, and the potential impact of these on each person, whether a party in a suit, a victim, witness, or accused will nuance the judge’s response.



While civil suits carry an element of voluntarism this is not present in criminal cases where the state makes the choice of prosecuting on behalf of the victim and society. The victim may be traumatised, witnesses afraid and uncertain, and the accused in the captivity of the state. While the rights of the victim are protected by the state, the accused is often completely dependent on the judge to ensure his rights. Witnesses too, may be looking for assurances of safety from the court. But ultimately, they all rely on the judge on his bench to assure the protection of their rights.

The majority of those who appear before the courts, whether in civil suits or criminal proceedings, know little law and less about proceedings. The hierarchies of the court, its officers and their duties, the local language and the language of law are alien, the very structures and physical set-up engender fear and anxiety and are deeply intimidating. An accused, for instance, will often not know the duty of care his lawyer owes him, or that the prosecution must aid the court in arriving at the truth, or that the judge is not a punishing authority, but an active umpire bound to make sure that the playing field is level, and that fairness and impartiality rule. Indeed, given the profile of most undertrials lodged in jails across the country, it is safe to assume that few know how to differentiate the court clerks from the bar and the bench as all appear alien and fearsome. The fine points of procedure, the right to silence, challenging charges, mounting the best defence, insisting on disclosure, the concepts of shifting evidentiary burdens, balance of probabilities, reasonable doubt, interim applications, right to bail, parole and probation, are all foreign to most people hauled up before the courts. Initially, even knowing why he is before a court may be totally outside the ken of the accused, and later, awareness of the importance of being brought to court within certain strict time limits, or at all, may not be in his knowledge. In these common situations, it is the judge's duty to ensure that the underprivileged, in particular, are provided with information and assistance to access their fair trial rights.

Where procedures are strictly followed and challenged when breached at the correct stages and when they are expected to be taken account of, they work to ensure fairness. Sloppy procedures lower general standards and create bad practice. Allowing habitual slippage and breaches of safeguards written into law incentivises illegality in policing and poor standards in prosecution and defence. It wastes court time, ensures that the victim is kept away from remedies or the accused is severely prejudiced by overlong incarceration and deprived of just treatment. Lax procedures also affect the functioning of the state by creating cascading obstacles to the administration of justice that in turn generate huge backlogs and unnecessary appeals, wasting taxpayers' money in trials that are bound to fail in the end owing to early infirmities.

This is why the court is expected to inquire and challenge the police in relation to the necessity of an arrest, the fullness of investigations, the rationale for remand and the custodial treatment of the accused. Given the well-known poverty of lawfulness in policing, the judge is required to go beyond merely noting the presence of the accused, to carefully inquire about the presence of ill-treatment, making sure his questions rule it out or take steps to prevent and punish ill-treatment. Given the asymmetry of power between police and prisoner, mere silence in the face of a judge's quick questions or even seeming acquiescence cannot be taken to mean there has been no ill-treatment in custody when the norm of ill-treatment is well known and widely documented. Nor



are routine questions asked in the presence of the police by a busy judge sufficient fulfilment of his duty to inquire into the custodial situation of the accused.

Similarly, explaining carefully to the accused that he has the right to a competent lawyer of his choice and assisting him in getting one through legal aid if necessary is a vital early part of fulfilling the fairness doctrine. Absence of this knowledge and right in the accused immediately deprives him of the ability to mount an effective defence and contaminates the proceedings at the very outset.

If liberty is to be treated as a prime constitutional value it is also important for trials to come to quick outcomes. The willing practice of granting maximum remands of 15 days without questioning its necessity reinforces police laxity in investigation. Similarly, the arbitrary setting of next dates for appearance once the trial has begun and habitually agreeing to adjournments, favours court authorities and legal professionals over litigants, witnesses, victims and accused and under-values their freedom and the cardinal, constitutional principle of liberty.

Trials that continue for long periods of time severely prejudice at least one party. Constant adjournments favour and therefore privilege lawyers over litigants or one party over the other. Routinely agreeing to pass over dates and accepting excuses for non-production of the accused because of lack of adequate police escort, favours the police over undertrials and creates an uneven playing field, so that malfunctioning systems are perpetuated. The judge is the king of his court. Any lack of action in the face of procedural breach and misbehaviour is an indication of bias. Recognising this and remedying it is the judge's duty.

1.3 Right to Remain Silent

It is a generally accepted principle that the suspect/accused cannot be forced to incriminate him/herself. Therefore any coercion exerted by the authorities with the aim of compelling the suspect/accused to make a statement or confess guilt is prohibited during all stages of the proceeding. The right to be presumed innocent is impaired if authorities draw adverse inferences from the silence of the suspect/accused. Under no circumstances may the silence of the accused be considered as proof of guilt. The burden of proof rests solely on the prosecution. The right to remain silent is supported by three related underlying policies. First, it ensures that the government is according respect and dignity to its citizens.²⁴ "To adequately respect the inviolability of the human personality, an accusatory system of criminal law requires that the government attempting to punish an individual must do so by producing its own evidence through its own independent efforts, rather than by the cruel, shortcut, practice of compelling inculpatory statements from the accused's mouth."²⁵ Second, the right to remain silent safeguards the accused by deterring police coercion and forced statements.²⁶ Third, by deterring coerced statements, the right to remain silent helps ensure that the statements made by the accused are reliable.²⁷

²⁴ *Miranda v Arizona*, 384 US 436 (1966).

²⁵ *Ibid.* See also 8 Wigmore, *Evidence* (1961).

²⁶ *Miranda*, 384 US 436.

²⁷ *Ibid.*



1.3.1 Domestic Law

1.3.1.1 Protection in Respect of Conviction of Offences/Privilege Against Self-Incrimination

Article 20(3) of the Constitution protects the right of the accused to remain silent by providing that: “No person accused of any offence shall be compelled to be a witness against himself.”

1.3.1.2 Examination of Witnesses by Police

Section 161(2) of the Code of Criminal Procedure leaves no room for doubt when it states that an accused is bound to answer all questions of a state official truthfully except “questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture”.

1.3.1.3 Further Statements of the Accused to the Court

The Code of Criminal Procedure, Section 313 further protects the right to silence. It protects the accused from liability for refusing to answer or falsely answering questions by a judge during a court proceeding. It says: “the accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.”

1.3.1.4 The Accused is a Competent Witness for the Defence

During a trial, the accused can be arraigned as a witness for the defence but cannot be called on to give evidence except at their own request.²⁸ If the accused chooses not to give evidence, the court cannot draw any adverse presumption against him.²⁹ Additionally, the accused can choose not to answer questions put to them by the court.³⁰ Except as a condition requisite to a tender of pardon, no influence by means of any promise or threat or otherwise can be used on the accused to induce them to disclose or withhold any matter within their knowledge.³¹

Thus Sections 161, 313, 315 and 316 of the Code raise a presumption against guilt and in favour of innocence, grant a right to silence both at the stage of investigation and trial and also preclude any party or the court from commenting on the silence.

The Supreme Court views Section 161(2) as a type of “parliamentary commentary”³² on Article 20(3). Along with many other jurisdictions, Indian courts recognise the right of persons not to answer questions that would tend to lead to a criminal charge against them. This protection is closely linked to ensuring that there is no incentive to the police to coerce or torture confessions and will “prevent police interrogations

²⁸ Code of Criminal Procedure, 1973, Section 315.

²⁹ Ibid.

³⁰ Code of Criminal Procedure, 1973, Section 313.

³¹ Code of Criminal Procedure, 1973, Section 316.

³² *Nandini Satpathy v P.L. Dani* AIR 1978 SC 1025, para. 46.



from devolving into an antagonistic inquisition”.³³ The Court has also said that no adverse inference against the accused can be drawn because he refuses to answer.

***Nandini Satpathy v P.L. Dani* AIR 1978 SC 1025**

Ms Nandini Satpathy was accused of embezzling funds while serving as Chief Minister of Orissa. She was made to present herself before the Deputy Superintendent of Police (Vigilance) and provide answers to written questions. She refused to answer the questionnaire on the grounds that it was a violation of her fundamental right against self-incrimination. Upon refusing to answer, Ms Satpathy was charged under Section 179 of the Indian Penal Code, 1860, which prescribes a punishment for refusing to answer any questions asked by a public servant authorised to ask that question.

The issue before the Supreme Court was whether Ms Satpathy had a “right to silence” and whether people can refuse to answer questions during investigation that would point towards guilt.

The Supreme Court held that Ms Satpathy had to answer all questions that did not materially incriminate her. For questions she refused to answer, she was required to provide, without disclosing details, her reasons for fearing that answering such questions would result in self-incrimination. Her reasons for invoking her right to remain silent would then be examined and she would be liable for prosecution under Section 179 if it was determined that she refused to answer a question under the false pretence of self-incrimination.

The Supreme Court accepted that there is a rivalry between social interest in crime detection and the constitutional rights of an accused person. However, the protection of fundamental rights enshrined in the Constitution is of utmost importance and in the interest of protecting these rights “we cannot write off fear of police torture leading to forced self-incrimination”.

Simply put, the protection against self-incrimination is undoubtedly quite extensive in criminal law, extending as it does to almost all people, at nearly all stages of a criminal trial. It is this wide armour that must be kept in mind.

1.3.2 International Law

Similar to domestic law, ICCPR Article 14(3)(g) guarantees the right of the accused “not to be compelled to testify against himself or to confess guilt”.³⁴ This protection is also to be found in the UN Body of Principles for the Protection of All Persons and under the Rome Statute of the International Criminal Court.

1.3.3 Guide for Judicial Enforcement

The right to silence has various facets. One is that the burden is on the state, or rather the prosecution, to prove that the accused is guilty. Another is that an accused



³³ Ibid., para. 45.

³⁴ ICCPR, *supra* note 47, Article 14 (3)(g).

is presumed to be innocent till he is proved guilty. The third is the right of the accused against self-incrimination, namely, the right to be silent and that he cannot be compelled to incriminate himself. There are also exceptions to the rule. An accused can be compelled to submit to investigation by allowing his photographs to be taken, voice recorded, blood sample tested, hair or other bodily material used for DNA testing, etc.

The Supreme Court has laid down the following directives with regard to the right to silence:

- An accused person cannot be coerced into giving a statement pointing to his/her guilt.
- The accused person must be informed of his/her right to remain silent and also of the right against self incrimination.
- No adverse inference may be drawn from anyone availing this right to silence.
- An accused person must be informed of his/her right to consult a lawyer at the time of questioning, irrespective of whether he/she is under arrest or in detention.
- The person being interrogated has the right to have a lawyer by his/her side during the interrogation but not throughout.

This right is violated if the following four elements are satisfied:

- (i) The individual must be accused of a crime.
- (ii) The individual must be asked a question the answer to which would incriminate the accused.
- (iii) Such a question can be asked at any stage of the process including during the investigation.
- (iv) The individual must be *compelled* to answer such a question.

Given these elements, many issues arise regarding the breadth of the right to remain silent.

(1) To What Individuals Does the “Accused of a Crime” Standard Apply?³⁵

- Individuals formally charged of an offence.
- Suspects who have been accused of an offence.
 - The scope and nature of the inspector’s inquiry must indicate that an accusation has been made.
 - The right thus does not apply merely during the beginning of the general investigatory stage.
- The person must have been accused before he is asked to make a statement. It is not sufficient that he became an accused after the statement was made. The statement of a person who is brought in for questioning but is not yet an accused, is not affected by Article 20(3). A general enquiry has no specific accusation before it and therefore, Article 20(3) stands excluded. A person stands in the character of an accused when a First Information Report is lodged against him in respect of an offence before an officer competent to investigate it, or when a complaint is made relating to the commission of an offence



³⁵ Satpathy, para. 50.

before a Magistrate competent to try or send the accused to another Magistrate for trial of the offence.

(2) To What Statements/Questions Does the Right Apply?³⁶

- An accused has the right of silence only for confessions or statements, the answer to which would incriminate the accused. Remanding the accused to custody for securing recovery under Section 27 of the Evidence Act is violative of the right to silence.
- The right would extend to any compulsory process for production of evidentiary documents which are reasonably likely to support a prosecution against the accused.
- To be witness against oneself is not confined to the particular offence regarding which the questioning is made. It extends to other offences about which the accused has reasonable apprehension of implication from his answer. This conclusion also flows from the “tendency to be exposed to a criminal charge”. “A criminal charge” covers any criminal charge other than those under investigation or trial or imminently threatens the accused.
- Incriminatory statements:
 - o Statements which have a reasonable tendency to point to the guilt of the accused.
 - o Statements which will furnish a real and clear link in the chain of evidence to bind the accused with the crime, become incriminatory and offend Article 20(3) if drawn by pressure from the accused.
 - o Answers that would, in themselves, support a conviction are confessions. But answers which have a reasonable tendency to strongly point to the guilt of the accused are incriminatory. An answer acquires confessional status only if all the facts which constitute the offence are admitted by the offender. If a statement also contains self-exculpatory matter it ceases to be a confession. Article 20(3) strikes at confessions and self-incriminations but leaves other relevant facts untouched.

For example, A dies and B is suspected of the murder. In such a case, B is asked several questions. B may describe the scene giving relevant evidence of the landscape. This may be relevant but has no incriminatory force. However, an answer stating that B was at or near the scene, at or about the time of the occurrence or had blood on his clothes would be incriminatory.

(3) At What Stage Does the Right to Silence Apply?³⁷

- The right to remain silent is not merely restricted to the trial stage and courtroom proceedings where the accused is a witness.
- The right also applies to pre-court, police and custodial interrogations and other elements of the investigation process that might compel incriminating information.



³⁶ Ibid., paras. 57-61.

³⁷ Ibid., para. 55.

(4) What is Compulsion?³⁸

- Duress:
 - Statements obtained through physical threats or violence. It also includes threatening, beating or imprisonment of any family member of the accused.
 - Statements obtained through psychological torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidating methods.
- Compulsion does not include the prospect of prosecution.
- A police officer investigating a crime against a certain individual merely telling the person to do a certain thing is not compulsion.
- Merely being in police custody is not compulsion. However it is open to an accused person to show that while he was in police custody he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was, in fact, exercised. It will be a question of fact in each case to be determined by the court on weighing the facts and circumstances disclosed in the evidence before it.

A lawyer's presence is a constitutional guarantee and in the context of the right to silence, it is an assurance of awareness and observance of this right. Given the various elements surrounding the right to remain silent, the Supreme Court had stated that it would be "prudent", but not required, for the police to permit the accused's legal counsel to be present during police examinations.³⁹ However, moving on from Satpathy, the Supreme Court in *D.K. Basu v State of West Bengal* went on to say that the arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

Courts must be especially aware that many accused, including indigents and illiterates, can often be confused or tense by the police process, and thus unable to protect themselves against overbearing questioning.⁴⁰ Thus, courts should carefully protect a citizen's right to remain silent in the face of compulsive police questioning tactics. In determining whether a statement was given out of compulsion, all the circumstances surrounding the questioning should be considered, including the manner in which the question was asked.⁴¹

The setting of the case will be critical in determining whether an accused's response to questions should be viewed as incriminatory. The court should not focus on whether the accused subjectively perceived that his answer would be incriminatory, but whether the setting and circumstances surrounding the questioning objectively indicate that the accused's response would serve to incriminate him.⁴²

³⁸ Ibid., paras. 68-69.

³⁹ Ibid., para. 74.

⁴⁰ *Satpathy*, para. 5.

⁴¹ Ibid., para. 69.

⁴² Ibid., para. 62.



Narco Analysis

Narco Analysis, polygraph and brain mapping tests have been hotly contested legal issues in India. Various High Courts have given conflicting rulings on these issues. It is no longer so. The Supreme Court has now held that these tests cannot be administered on any accused without their consent. Further, the courts should not take the process of obtaining the consent of the accused lightly. The courts must ensure that the “consent” of the accused for such tests is in fact voluntary. For this purpose, the Supreme Court has not only endorsed the guidelines issued by the National Human Rights Commission in this regard but has held them as binding.

The Supreme Court in *Selvi and others v State of Karnataka*⁴³ held that: “The compulsory administration of the impugned techniques violates the ‘right against self-incrimination’. This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence.”

The Court also stated that: “Forcing an individual to undergo any of the impugned techniques violates the standard of ‘substantive due process’ which is required for restraining personal liberty. Such a violation will occur irrespective of whether these techniques are forcibly administered during the course of an investigation or for any other purpose, since the test results could also expose a person to adverse consequences of a non-penal nature.”

The Court further said: “The protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion.”

Upholding the right to remain silent, guaranteed by Article 20(3) of the Constitution, the Supreme Court held that the forcible “conveyance of personal knowledge that is relevant to the facts in issue” violates Article 20(3) of the Constitution.

In the concluding paragraph of the *Selvi* case, the Supreme Court held the “Guidelines for the Administration of Polygraph Test (Lie Detector Test) on an Accused” issued by the National Human Rights Commission in 2000, as binding. The Court said that these guidelines should be strictly adhered to and similar safeguards should be adopted for conducting the “narco analysis technique” and the “brain electrical activation profile” test. These guidelines were reproduced in the *Selvi* judgement. They are:

1. No lie detector tests should be administered except on the basis of the consent of the accused. An option should be given to the accused whether he wishes to avail such a test or not.



⁴³ AIR 2010 SC 1974.

2. If the accused volunteers for a lie detector test, he should be given access to a lawyer and the physical, emotional and legal implication of such a test should be explained to him by the police and his lawyer.
3. The consent should be recorded before a Judicial Magistrate.
4. During the hearing before the Magistrate, the person alleged to have agreed should be duly represented by a lawyer.
5. At the hearing, the person in question should also be told in clear terms that the statement that is made shall not be a “confessional” statement to the Magistrate but will have the status of a statement made to the police.
6. The Magistrate shall consider all factors relating to the detention including the length of detention and the nature of the interrogation.
7. The actual recording of the lie detector test shall be done by an independent agency (such as a hospital) and conducted in the presence of a lawyer.
8. A full medical and factual narration of the manner of the information received must be taken on record.

1.4 *Nullum Crimen Sine Lege*: Principle of Non-Retroactivity

“No crime, no punishment, without a previous penal law.” The simple proposition is that no one can be investigated tried or punished for something which was not a crime when the event or actions took place. The paramount importance of this principle has been universally recognised. The principle also extends to law making. It is considered oppressive and unfair to make laws which operate retrospectively, i.e. make some action performed in the past into a crime in the present. The principle also accords with another universally recognised rule that it is the duty of any law maker to declare the law and make it known so that it can be obeyed. These principles are universally accepted as absolutely necessary to underpin the rule of law and because it is recognised that the state is much more powerful than the individual and its power must be conditioned in order to protect individual liberties against arbitrary and unwarranted intrusions by the state.

1.4.1 Domestic Law

1.4.1.1 Protection Against *Ex-Post Facto* Law

Article 20(1) of the Constitution states: “No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.”⁴⁴ This Article not only prohibits laws purporting to create an *ex post facto* application, but also prohibits convictions or sentences based on laws not yet enacted when the charged offence occurred.⁴⁵ So for example, when a newly enacted sentencing guideline calls



⁴⁴ Constitution of India, Article 21.

⁴⁵ *Rao Shiv Bahadur Singh v State of Vindhya Pradesh* AIR 1953 SC 394, para. 11.

for harsher penalties for the same crime, the court cannot apply these newer penalties to crimes committed before they entered into force.⁴⁶ However, courts can still apply repealed criminal statutes if the accused committed the crimes prior to such statute's repeal.⁴⁷ Illustratively, persons charged under the Terrorism and Disruptive Activities Act (TADA) and Prevention of Terrorism Act (POTA) continue to languish in jail even though the laws have been repealed, and they will be tried and sentenced under those laws. Courts can as well, apply a repealed statute to crimes committed after to the repeal if by trial time a new statute is in force that revives the earlier statute's rule.⁴⁸

G.P. Nayyar v State (Delhi Administration) AIR 1979 SC 602

Two public officials were tried in 1973 for criminal conspiracy and illegal gratification under the Prevention of Corruption Act, 1947, for allegedly accepting bribes from 1955 to 1961. The accused appealed to the Supreme Court claiming that the burden of proof applied to their trial mandating that the court presume the accused guilty unless proved otherwise was in violation of Article 20(1), as in 1964 the legislature had repealed the relevant statute which applied this standard. The Supreme Court denied the appeal, explaining that repealed statutes remain applicable to crimes committed before the statute's repeal. Also, here, the repealed statute was revived by a subsequent statute in 1967, thus further allowing for application of the rule even during the repeal period for acts committed before the repeal.

Kedar Nath Bajoria v West Bengal AIR 1953 SC 404

Defendant Chatterjee committed an offence in 1947 under the Prevention of Corruption Act which then prescribed a punishment of imprisonment or fine or both. In 1949, by an amendment of the law, the punishment was enhanced.

Chatterjee was fined Rs. 50,000, for accepting Rs. 47,550 from the government as compensation for damages that he falsely claimed the government inflicted on his property. He claimed that the Rs. 50,000 fine violated Article 20(1) of the Constitution because, in 1947, the relevant criminal law only allowed for a fine equal to the amount of money the accused obtained from the commission of the crime. However, at the time of his trial in 1950, the relevant statute, enacted in 1949, allowed for increased fines.

Agreeing with Chatterjee's claim and setting aside the excess fine, the Supreme Court held that the enhanced punishment would not be applicable to the offence committed in 1947 because of the prohibition contained in Article 20(1).



⁴⁶ *Kedar Nath Bajoria v West Bengal* AIR 1953 SC 404.

⁴⁷ *G.P. Nayyar v State (Delhi Administration)* AIR 1979 SC 602.

⁴⁸ *Ibid.*, para. 13.

1.4.2 International Law

Article 15(1) of the ICCPR states: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.” In addition to the ICCPR espousing this principle, several international criminal statutes have adopted non-retroactivity, including the Rome Statute of the International Criminal Court.⁴⁹

1.4.3 Guide for Judicial Enforcement

When presented with the claim that the application of a law violates Article 20(1), judges should note that retroactivity cannot be cured by the statute at issue merely containing a clause stating that such a law shall be in force as of some back-dated time. The phrase “law in force” in Article 20(1) demands that the law *actually* is in operation at the time of the commission of the offence, not *deemed* to be in operation at that time by a statute *enacted at a later date*.⁵⁰



⁴⁹ Rome Statute of the International Criminal Court, Art. 22, UN Doc. A/CONF. 183/9 (17 July 1998).

⁵⁰ *Bahatur*, para. 13.

WHAT IS A FAIR TRIAL?

A Basic Guide to Legal Standards and Practice

March 2000

Lawyers Committee for Human Rights

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Lawyers Committee for Human Rights

Since 1978 the Lawyers Committee for Human Rights has worked to promote international human rights and refugee law and legal procedures in the United States and abroad. The Chairman of the Lawyers Committee is William Zabel. Michael H. Posner is its Executive Director. George Black is Research and Editorial Director.

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PREFACE

PREFACE

This guide deals with two separate but linked issues that the Lawyers Committee for Human Rights and other NGOs face in their trial monitoring activities. The first is the question of what are the basic legal standards that should be used in evaluating the fairness of a trial. The second is how a trial observation mission should be prepared and carried out in practice. Since trial observers may be—but often are not—litigation lawyers, this guide has been written and structured so as to provide brief yet clear guidelines on how to conduct a trial observation mission, in both substantive and practical terms. It does not deal with the additional issues that may arise when a trial takes place in a military tribunal.

The main purpose of this guide is to assist Lawyers Committee trial observers. We hope, however, that it will be of use to other NGOs engaged in trial monitoring, some of which have sought the assistance of the Lawyers Committee in this area. We would very much welcome any suggestions for improvements that NGOs and individuals with trial monitoring experience may wish to make.

New York, New York
March 2000

I. INTRODUCTION

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights (ICCPR),¹ which provides that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

The fundamental importance of this right is illustrated not only by the extensive body of interpretation it has generated but, most recently, by a proposal to include it in the non-derogable rights provided for in Article 4(2) of the ICCPR.² The right to a fair trial is applicable to both the determination of an individual's rights and duties in a suit at law and with respect to the determination of any criminal charge against him or her. The term “suit at law” refers to various types of court proceedings—including administrative proceedings, for example—because the concept of a suit at law has been interpreted as hinging on the nature of the right involved rather than the status of one of the parties.³ For the purposes of this guide only proceedings involving criminal charges will be considered since non-governmental organizations (NGOs) typically monitor criminal trials or, more precisely, criminal trials involving “political” offenses.⁴

Due to the specifics of each individual case and the interests of monitoring organizations, a detailed rendition of trial observation aims is not feasible. The key general goals may be summarized as follows:

- to make known to the court, the authorities of the country and to the general public the interest in and concern for the trial in question;
- to encourage a court to give the accused a fair trial. The impact of an observer's presence in a courtroom cannot be evaluated with mathematical precision. However, both observers and defense attorneys have pointed out that a monitor's

¹ International Covenant on Civil and Political Rights, UN General Assembly resolution 2200A (XXI), December 16, 1966, entered into force March 23, 1976 [hereinafter ICCPR].

² See Draft Third Optional Protocol to the ICCPR, Aiming at Guaranteeing Under All Circumstances the Right to a Fair Trial and a Remedy, Annex I, in: “The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial: Current Recognition and Measures Necessary for Its Strengthening,” Final Report, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Session, E/CN.4/Sub.2/1994/24, June 3, 1994 [hereinafter The Final Report], at 59-62. (<http://www.unhcr.ch/Huridocda/Huridoca.nsf/TestFrame/d8925328e178f8748025673d00599b81?Opendocument>).

³ See Dominic McGoldrick, *The Human Rights Committee, Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press, Oxford: 1994), at 415.

⁴ There is, at present, no positive definition of what constitutes a “political offense” and therefore little guidance on which proceedings may be deemed “political” in nature. In this context it should be noted that trial observation is a very useful mechanism for the prevention of human rights abuses but one that, necessarily, depends on the willingness of a government to conduct a trial in the first place. As is well known, in many areas of the world individuals are still being arrested, imprisoned and executed without any trial at all.

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presence often changes the atmosphere in the courtroom and facilitates defense by, *inter alia*, making the court more cognizant of the defense's arguments, encouraging defense counsel and the defendant to be more forceful in contesting the prosecution's claims, in attracting media attention to the trial, etc;

- to obtain more information about the conduct of the trial, the nature of the case against the accused and the legislation under which s/he is being tried; and
- to collect general background information about the political and legal circumstances leading to the trial and possibly affecting its outcome.⁵

In the broader sense, trial monitoring consists not only of an observer's physical presence in the courtroom during at least part of the proceedings but, just as importantly, of the duty promptly to prepare a report for the organization he or she represents, with conclusions on the fairness of the trial observed. The publicity which this report receives may serve in the short term to enhance a defendant's chances of having his/her case fairly reviewed on appeal. The lasting aim is to inform the government and the general public of possible irregularities in criminal procedure and to prompt action to bring practice into line with international human rights standards. The basic criteria according to which the fairness of a trial may be assessed is the first issue that will be dealt with in this review. The second is how a trial observation mission is typically carried out.

II. BASIC FAIR TRIAL CRITERIA

The standards against which a trial is to be assessed in terms of fairness are numerous, complex, and constantly evolving. They may constitute binding obligations that are included in human rights treaties to which the state is a party. But, they may also be found in documents which, though not formally binding, can be taken to express the direction in which the law is evolving.⁶ In order to avoid possible challenges to the legal nature of the standards employed

⁵ See International Commission of Jurists (ICJ), "Guidelines for ICJ Observers to Trials" (ICJ, Geneva: 1978).

⁶ Non-binding documents of relevance to the conduct of criminal proceedings and to ascertaining fair trial standards include: the Basic Principles for the Treatment of Prisoners, UN General Assembly resolution 45/111, December 14, 1990 [hereinafter Basic Principles on Prisoners]; Standard Minimum Rules for the Treatment of Prisoners, UN Economic and Social Council resolution 663 C (XXIV), July 31, 1957 and resolution 2076 (LXII), May 13, 1977 [hereinafter Standard Minimum Rules]; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly resolution 43/173, December 9, 1988 [hereinafter Body of Principles]; Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990 [hereinafter Basic Principles on Lawyers]; Basic Principles on the Independence of the Judiciary, UN General Assembly resolution 40/32, November 29, 1985 and resolution 40/146, December 13, 1985 [hereinafter Basic Principles on the Judiciary]; UN Standard Minimum Rules for the Administration of Juvenile Justice, UN General Assembly resolution 40/33, November 29, 1985; Code of Conduct for Law Enforcement Officials, UN General Assembly resolution 34/169, December 17, 1979; Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990; Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, UN Economic and Social Council recommended resolution 1989/65, May 24, 1989; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, August 27-September 7, 1990; UN Rules for the Protection of Juveniles Deprived of Their Liberty, UN General Assembly

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in evaluating the fairness of a trial, monitors should refer to norms of undisputedly legal origin. These are:

- (i) the laws of the country in which the trial is being held;
- (ii) the human rights treaties to which that country is a party, and
- (iii) norms of customary international law.⁷

Before observing a trial, a monitor should read relevant materials pertaining to domestic legislation. Due to the various legal systems and legal orders involved, as well as the differing stages of their development, it is not possible to devise a comprehensive list of essential texts. A minimum list would comprise: i) a state's Constitution, especially its provisions on human rights and the judicial system; ii) its Criminal Code and Code of Criminal Procedure; statutes on the establishment and jurisdiction of the courts and on the public prosecutor's office, and iii) landmark court decisions pertaining to human rights, particularly in common law countries. The aim of an observer at this level of examination is to assess whether the applicable provisions of domestic law guaranteeing a fair trial have been implemented and, if so, to what extent. It is well known that while constitutions and statutes generally provide for some measure of fairness in criminal proceedings, implementation by the courts is often not adequate.

Before undertaking a trial observation mission, a monitor should find out to which human rights treaties the respective state is a party. The most important of these is the ICCPR, which contains several relevant articles in assessing the fairness of a trial.⁸

resolution 45/113, December 14, 1990; etc. Also relevant is the Draft Body of Principles on the Right to a Fair Trial and a Remedy, Annex II, in The Final Report, *supra* note 1. For trial observation in OSCE countries the human rights provisions of the final documents from review conferences would also be important as a source of standards (see www.osce.org). See the Appendix to this report: "Note on Sources" for hints on how to find these documents.

⁷ The provisions of the Universal Declaration of Human Rights, (UN General Assembly resolution 217A (III), December 10, 1948 [hereinafter UDHR]), are for the most part considered declarative of customary international law and may be of paramount importance if a state has not ratified or acceded to the ICCPR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (UN General Assembly resolution 39/46, December 10, 1984, entered into force June 26, 1987 [hereinafter Torture Convention]), or any regional human rights instrument. The most directly relevant articles of the UDHR are 5, 9, 10 and 11. As customary international law will most probably be used as a supplementary source of a state's obligations in ensuring the right to a fair trial, it will not be further considered.

⁸ The web site of the UN High Commissioner for Human Rights has a list of those nations that have ratified the ICCPR at http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/iv_boo/iv_4.html. Depending on the regional human rights instrument(s) that a state is bound by, the corresponding provisions of such treaties should be taken into account as well. For European states the most important instrument would be the European Convention for the Protection of Human Rights and Fundamental Freedoms, November 5, 1950 [hereinafter European Convention] (<http://www.coe.fr/eng/legaltxt/5e.htm>). For Latin and North American states it would be the American Convention on Human Rights, November 22, 1969 [hereinafter American Convention] (<http://www.cidh.oas.org/Básicos/Basic%20Documents/enbas3.htm>), while for the African states it would be the African Charter on Human and People's Rights, adopted June 27, 1981, entered into force October 21, 1986 [hereinafter African Charter] (http://www.oau-oua.org/oau_info/rights.htm).

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The right to a fair trial on a criminal charge is considered to start running not “only upon the formal lodging of a charge but rather on the date on which State activities substantially affect the situation of the person concerned.”⁹ This could obviously coincide with the moment of arrest, depending on the circumstances of the case. Fair trial guarantees must be observed from the moment the investigation against the accused commences until the criminal proceedings, including any appeal, have been completed. The distinction between pre-trial procedures, the actual trial and post trial procedures is sometimes blurred in fact, and the violation of rights during one stage may well have an effect on another stage. However the most relevant articles of the ICCPR can be loosely divided into those three categories and the separation is sometimes helpful for the purposes of identifying which issues will be of particular interest during different time periods of the trial process.

A. PRE-TRIAL RIGHTS

1. *The prohibition on arbitrary arrest and detention*

Article 9(1) of the ICCPR¹⁰ provides that “everyone has the right to liberty and security of person.” The liberty of a person has been interpreted narrowly, to mean freedom of bodily movement, which is interfered with when an individual is confined to a specific space such as a prison or a detention facility.¹¹ Security has been taken to mean the right to be free from interference with personal integrity by private persons. Under Article 9(1) “No one shall be subjected to arbitrary arrest or detention” and “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” The principle of legality embodied in the latter sentence both substantively (“on such grounds”) and procedurally (“in accordance with such procedure”) mandates that the term “law” should be understood as referring to an abstract norm, applicable and accessible to all, whether laid down in a statute or forming part of the unwritten, common law. The prohibition of arbitrariness mentioned in the previous sentence serves to ensure that the law itself is not arbitrary, i.e. that the deprivation of liberty permitted by law is not “manifestly unproportional, unjust or unpredictable, and [that] the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in view of the circumstances of the case.”¹²

⁹ Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (N.P. Engel, Arlington: 1993) [hereinafter Nowak Commentary], at 244.

¹⁰ See also European Convention, *supra* note 8, Article 5(1); African Charter, *supra* note 8, Article 6; American Convention, *supra* note 8, Article 7(1)-(3); and Statute of the International Criminal Court [hereinafter ICC Statute], Article 55(1)(d). The ICC Statute establishes a permanent institution for the purposes of trying persons for the most serious international crimes (including genocide, crimes against humanity and war crimes) where a national legal system has failed to do so. The Statute was approved on July 17, 1998 but will not come into force until 60 nations have ratified. As of February 16, 2000, 94 countries had signed the Statute but only seven countries had ratified it.

¹¹ The ensuing interpretation of the ICCPR is primarily based on the Nowak Commentary, *supra* note 9.

¹² Nowak Commentary, *supra* note 9, at 173.

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2. *The right to know the reasons for arrest*

Article 9(2) of the ICCPR¹³ provides that “Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.” These provisions have been interpreted to mean that anyone who is arrested must be informed of the general reasons for the arrest “at the time of arrest,” while subsequent information, to be furnished “promptly,” must contain accusations in the legal sense.¹⁴ However there must be sufficient information to permit the accused to challenge the legality of his or her detention.¹⁵ A written arrest warrant is not unconditionally required, but the lack of a warrant may, in some cases, give rise to a claim of arbitrary arrest.

The reasons for arrest, and the explanation of any other rights (for example, the right to legal counsel), must be given in a language that the person arrested understands.¹⁶ Accordingly, the accused has a right to a competent interpreter in the event that he or she does not understand the local language.¹⁷ This right extends to all pre-trial proceedings.¹⁸

3. *The right to legal counsel*

The right to be provided and communicate with counsel is the most scrutinized specific fair trial guarantee in trial observation practice, because it has been demonstrated to be the one that is most often violated. Principle 1 of the Basic Principles on Lawyers states that “[a]ll persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.” This right is particularly relevant in case of pre-trial detention¹⁹ and is discussed in that context in this section. However the right to counsel is also an important element of the right to adequate

¹³ See also European Convention, *supra* note 8, Article 5(2); American Convention, *supra* note 8, Article 7(4); Body of Principles, *supra* note 6, Principle 10; 1992 Resolution on the Right to Recourse Procedure and Fair Trial of the African Commission on Human and Peoples’ Rights [hereinafter African Commission Resolution], Paragraph 2(B) (<http://www1.umn.edu/humanrts/africa/achpr11resrecourse.html>).

¹⁴ See *infra* notes 73-76 and accompanying text.

¹⁵ For example, the European Court of Human Rights has held that Article 5(2) of the European Convention means an arrested person should “be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness....” However, the Court also held that it was not necessary to give a full description of the charges at the moment of arrest (*Fox, Campbell and Hartley* (18/1989/178/234-236), August 30, 1990, para 40).

¹⁶ European Convention, *supra* note 8, Article 5(2); Human Rights Committee General Comment No. 13/21 of April 12, 1984 [hereinafter General Comment 13], para 8; African Commission Resolution, *supra* note 13, Paragraph 2(B); Body of Principles, *supra* note 6, Principle 14; and ICC Statute, *supra* note 10, Article 67(1)(a).

¹⁷ Principle 14 of the Body of Principles sets out the right to an interpreter in all legal proceedings subsequent to arrest. Article 67(1)(f) of the ICC Statute guarantees the right to a “competent” interpreter.

¹⁸ Body of Principles, *supra* note 6, Principle 14.

¹⁹ The Human Rights Committee has stated that “all persons who are arrested must immediately have access to counsel.” (Concluding Observations of the Human Rights Committee, Georgia, UN Doc. CCPR/C/79 Add.75, April 1, 1997 para 27) [hereinafter Concluding Observations of the HRC]. See also the Report of the Special Rapporteur on the Independence of Judges and Lawyers regarding the Mission of the Special Rapporteur to the United Kingdom, UN Doc E/CN.4/1998/39/Add.4, March 5, 1998, para 47.

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facilities for the preparation of a defense²⁰ and the right to a defense which will be discussed later in this paper.²¹

Principle 5 of the Basic Principles on Lawyers and Principle 17 of the Body of Principles specifically provide that when a person is arrested, charged or detained he or she must be promptly informed of the right to legal assistance of his or her choice. Article 7 of the Basic Principles on Lawyers requires governments to ensure that all persons arrested or detained should have access to a lawyer within 48 hours from arrest or detention.²² An individual's right to choose counsel thus begins to run when a suspect or accused is first taken into custody, regardless of whether s/he is formally charged at that moment. Furthermore, if the accused cannot afford his or her own counsel, the relevant authorities must provide a lawyer free of charge if the interests of justice so require.²³ Whether or not the interests of justice require such an appointment depends primarily on the seriousness of the offence and the severity of the potential penalty.²⁴

Principle 8 of the Basic Principles on Lawyers requires the authorities to ensure that all arrested, detained or imprisoned persons have adequate opportunities to be visited by and to communicate with their lawyer without delay, interception or censorship, in full confidentiality. When the lawyer and his or her client meet they may be in sight of a law enforcement official, but cannot be within hearing range.²⁵

4. The right to a prompt appearance before a judge to challenge the lawfulness of arrest and detention

Article 9(3)²⁶ refers specifically to the rights of a person arrested or detained on a criminal charge, who “shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.” Promptness has been interpreted by the Human Rights Committee (HRC) to mean

²⁰ General Comment 13, *supra* note 16, para 9.

²¹ See *infra* notes 77-80, 83-89 and accompanying text.

²² Compare Principle 15 of the Body of Principles, which states that a detainee must be able to communicate with counsel within “a matter of days,” with the Human Rights Committee’s statement that “all persons who are arrested must immediately have access to counsel.” Concluding Observations of the HRC, *supra* note 19.

²³ Principles on the Role of Lawyers, *supra* note 6, Principle 6; Body of Principles, *supra* note 6, Principle 17(2); ICC Statute, *supra* note 10, Article 55(2)(c).

²⁴ For further the discussion on the right to counsel during the hearing see *infra* notes 83-89 and accompanying text.

²⁵ See Principles on the Role of Lawyers, *supra* note 6, Principle 22 (“Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationships are confidential;” and Body of Principles, *supra* note 6, Principles 15 and 18.

²⁶ See also European Convention, *supra* note 8, Article 5(3); American Convention, *supra* note 8, Article 7(5); African Commission Resolution, *supra* note 13, Paragraph 2(C); and ICC Statute, *supra* note 10, Article 59(2)-(3). See further Body of Principles, *supra* note 6, Principles 11, 38 and 39; and Declaration on the Protection of all Persons from Enforced Disappearance, UN General Assembly resolution 47/133, December 18, 1992, Article 10(1).

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that the period of custody, before an individual is brought before a judge or other officer, may not exceed “a few days.”²⁷

Article 9(3) makes it clear that pre-trial detention “shall not be the general rule” and implicitly provides a detainee with a legitimate claim to release in exchange for bail or some other guarantee of appearance at the trial.²⁸ Furthermore, Article 9(3) states that if a trial does not occur within a reasonable period of time then the accused must be released from pre-trial detention pending trial.²⁹ The period of time that is considered to be “reasonable” depends on the circumstances of the case. The relevant factors include the risk of flight, the complexity of the case, the nature of the offence and the diligence of the investigating and prosecutorial authorities in pursuing the case.³⁰

Without expressly mentioning it, Article 9(4)³¹ provides for the right to habeas corpus, or *amparo*, that is, the right of anyone deprived of liberty by arrest or detention to “take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.” In this context it should be noted:

- i) that the term “court” signifies not only a regular court, but a special court, including an administrative, constitutional or military court as well;³²

²⁷ Human Rights Committee, General Comment No. 8, July 27, 1982, [hereinafter General Comment 8], para 2. The European Court has held that to hold a person for four days and six hours violates article 5(3) of the European Convention (*Brogan et al v United Kingdom*, 10/1987/133/184-187, November 29, 1988, para 62). The Inter-American Commission has held that a week is too long (Inter-American Commission Seventh Report on the Situation on Human Rights in Cuba, 1983 OEA Ser L/V/11 61.doc 29 rev 1, at 41).

²⁸ In General Comment 8, *supra* note 27, para 3, the UN Human Rights Committee stated that “[p]re trial detention should be an exception and as short as possible.” Furthermore, in the case of *Van Alphen v The Netherlands*, the Human Rights Committee stated that “remand in custody must not only be lawful but necessary in all the circumstances...for example, to prevent flight, interference with evidence or the recurrence of crime.” Detention for the sole purpose of further interrogation is not justifiable. (Communication 305/1988, 23 July 1990, 1990 Report of the Human Rights Committee Vol. II, UN Doc. A/45/40, at 115).

²⁹ See also European Convention, *supra* note 8, Article 5(3); American Convention, *supra* note 8, Article 7(5); African Commission Resolution, *supra* note 13, Paragraph 2(C); ICC Statute, *supra* note 10, Article 60(4); and Body of Principles, *supra* note 6, Principle 38.

³⁰ The European Court has held that the authorities must exercise “special diligence” in the conduct of proceedings when the accused is in pre-trial detention (see *Tomasi v France*, 27/1991/279/350, 25 June 1992, para 84; *Abdoella v the Netherlands*, 1/1992/346/419, 28 October 1992, para 24).

³¹ See also European Convention, *supra* note 8, Article 5(4); African Charter, *supra* note 8, Article 7(1)(a); American Convention, *supra* note 8, Article 7(6); and Body of Principles, *supra* note 6, Principle 32.

³² Note that review by a superior military officer, government official or advisory panel would be insufficient. Regarding superior military officers, see *Vuolanne v Finland* (Communication 265/1987, 7 April 1989, 1989 Report of the Human Rights Committee, UN Doc.A/44/40, at 265-257) stating that review of detention of a soldier by a superior military officer does not satisfy Article 9(4). As to government officials, see the Human Rights Committee in *Torres v Finland* (Communication 291/1988, 2 April 1990, 1990 Report of the Human Rights Committee, Vol II, UN Doc.A/45/40, at 99-100), which states that the opportunity of an asylum-seeker to appeal to the Ministry of the Interior does not satisfy Article 9(4) of the ICCPR. Regarding advisory panels, see the European Court in *Chahal v United Kingdom* (70/1995/576/662, 15 November 1996, paras 130-133) which decided that an advisory panel which did not disclose its reasons for decision, had no binding decision-making power and which did not permit legal representation did not satisfy Article 5(4) of the European Convention.

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- ii) that the court's decision pertains only to the lawfulness of detention, and
- iii) that what constitutes “delay” must be assessed with regard to the circumstances of the case.

The habeas corpus procedures must be simple, speedy and free of charge if the detainee cannot afford to pay.³³ The detainee also has the right to continuing review of the lawfulness of detention at reasonable intervals.³⁴

Lastly, Article 9(5)³⁵ provides that “[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.” Such a claim arises when the arrest or detention has contravened the provisions of Article 9(1) to (4) and/or a provision of domestic law. The way in which a claim for compensation is to be implemented is not, however, explicitly spelled out, but is generally considered to refer to an individual's right to bring a civil law suit either against the state or the particular body or person responsible for the wrongful conduct.

5. The prohibition of torture and the right to humane conditions during pre-trial detention

Article 7 of the ICCPR prohibits torture—or cruel, inhuman or degrading treatment or punishment—and is a norm of customary international law that also belongs to the category of *jus cogens*. The definition of and protection against torture was elaborated in the 1984 Convention against Torture:

Art 1(1): ... the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The definition of torture, which is prohibited by the ICC Statute as a crime against humanity when committed on a widespread or systematic basis, is slightly broader in that Statute than in the Torture Convention. Unlike the Torture Convention, the ICC Statute definition includes acts committed independently of any public official (i.e. by private individuals with private motives).³⁶

³³ Body of Principles, *supra* note 6, Principle 32(2).

³⁴ *Id.*, Principles 11(3), 32 and 39.

³⁵ See also European Convention, *supra* note 8, Article 5(5); American Convention, *supra* note 8, Article 25; and African Charter, *supra* note 8, Article 7(1)(a).

³⁶ Article 7(2)(e) of the ICC Statute defines torture as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture

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Under Article 2(2) of the Torture Convention no exceptional circumstances whatsoever, “whether a state of war or a threat of war, internal political instability or any other public emergency” may be invoked as a justification of torture.³⁷ States parties are obliged to take effective legislative, administrative, judicial and other measures to prevent acts of torture in any territory under their jurisdiction [Article 2(1)]. Furthermore, according to Article 2(3), superior orders may not be invoked as a justification of torture.

Article 10 of the ICCPR provides in paragraph 1 that “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”³⁸ It should be stressed that, unlike the prohibition against torture in Article 7 of the ICCPR, which demands non-interference on the part of state authorities, the right to humane treatment imposes a positive obligation on states. This obligation is intended to ensure the observance of minimum standards with regard to conditions of detention and the exercise of a detainee's rights while deprived of liberty. The line between Articles 7 and 10 is, admittedly, sometimes hard to draw, as evidenced by the case law of the HRC.

In general, it may be said that inhuman treatment as referred to in Article 10 pertains to a “lower intensity of disregard for human dignity than that within the meaning of Article 7.”³⁹ While the prohibition of torture and other cruel, inhuman or degrading treatment or punishment covers specific attacks on personal integrity⁴⁰ and applies to all persons, whether in any form of detention or not, Article 10 relates more to the general state of a detention facility and/or the conditions of detention and is meant to encompass only the treatment of persons actually deprived of liberty. According to the HRC, States cannot invoke a lack of adequate material resources or financial difficulties as justification for inhuman treatment and are obliged to provide detainees and prisoners with services that will satisfy their essential needs.⁴¹ For instance, detainees have a right to food,⁴² to clothing,⁴³ to adequate medical attention⁴⁴ and to communicate with their families.⁴⁵

shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.”

³⁷ See also Body of Principles, *supra* note 6, Principle 6: “No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.” See further Code of Conduct for Law Enforcement Officials, *supra* note 6, Article 5: “No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.”

³⁸ See also American Convention, *supra* note 8, Article 5; African Charter, *supra* note 8, Articles 4-5; Basic Principles for the Treatment of Prisoners, *supra* note 6, Principle 1; and Body of Principles, *supra* note 6, Principle 1.

³⁹ Nowak Commentary, *supra* note 9, at 186.

⁴⁰ This would include, for example, acts that cause mental suffering. It would also include prolonged solitary confinement. See Human Rights Committee General Comment 20, (Forty-fourth session, 1992), [hereinafter General Comment 20], paras 5 and 6 respectively.

⁴¹ See Human Rights Committee, General Comment No. 9/16, July 27, 1982.

⁴² Standard Minimum Rules for the Treatment of Prisoners, *supra* note 6, Rules 20 and 87.

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Generally, the Standard Minimum Rules,⁴⁶ Basic Principles on Prisoners and Body of Principles are important reference tools regarding the rights of prisoners.⁴⁷

6. *The prohibition on incommunicado detention*

The HRC has found that incommunicado detention may violate Article 7 of the ICCPR which prohibits torture, inhuman, cruel and degrading treatment.⁴⁸ Principle 19 of the Body of Principles states that a “detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.” At a minimum, the right to communicate with the “the outside world” includes the right to communicate with a detainee’s family, a lawyer and a doctor.

Principle 16 of the Body of Principles requires that the family of any arrested or detained person must be notified promptly of the arrest and the location of their family member. If the detainee is moved to another facility the family must be notified of that change.⁴⁹ A detainee cannot be denied the right to communicate with his family and counsel “for more than a matter of days.”⁵⁰ Furthermore, where the detainee is in pre-trial detention he or she is entitled to visits by family and friends, subject only to restrictions “*necessary* in the interests of the administration of justice and of the security and good order of the institution.”⁵¹

Regarding access to lawyers, see section II.A.3. of this report, which discusses access to legal counsel. With respect to doctors, HRC General Comment 20, the Body of Principles

⁴³ *Id.*, Rules 17, 18, and 88; Body of Principles, *supra* note 6, Principles 15-16.

⁴⁴ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, *supra* note 6, Principle 24; Standard Minimum Rules for the Treatment of Prisoners, *supra* note 6, Rules 22-25, 91; and Code of Conduct for Law Enforcement Officials, *supra* note 6, Article 6 (imposing a duty on officials to ensure the health of prisoners).

⁴⁵ See further *infra* notes 73-76 and accompanying text.

⁴⁶ See especially Rules 84-93 and 95 regarding persons under arrest, awaiting trial and detained without charge. Standard Minimum Rules, *supra* note 6.

⁴⁷ All of these documents can be found on the web site of the UN High Commissioner for Human Rights at <http://www.unhchr.ch/html/intlinst.htm>. See further the Appendix to this report, “Note on Sources.”

⁴⁸ See e.g., Human Rights Commission Resolution 1997/38 para 20 holding that “prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment.” See further, the Report of the Special Rapporteur on Torture, UN Doc E/CN.4/1995/34, para 926(d) and findings of the Inter-American Commission (Report on the Situation of Human Rights in Bolivia, OEA/Ser.L/V/II.53, doc rev.2, 1 July 1981 at 41-42) and Inter American Court (*Suavez Rosero Case*, Ecuador, 12 November 1997).

⁴⁹ See also Standard Minimum Rules, *supra* note 6, Rule 92.

⁵⁰ Body of Principles, *supra* note 6, Principle 15.

⁵¹ Standard Minimum Rules, *supra* note 6, Rule 92 (emphasis added).

and the Standard Minimum Rules all state that detainees must be provided prompt and regular access to medical care.⁵²

Finally, if the detainee is a foreign national, he or she must be permitted to communicate with, and receive visits from, representatives of their government.⁵³

B. THE HEARING

Article 14 of the ICCPR is undoubtedly the most pertinent to this review. It specifically provides for equality before the courts and for the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, regardless of whether a criminal trial or a suit at law is involved (paragraph 1). The remainder of its provisions—paragraphs 2 to 7—contain a catalogue of “minimum [procedural] guarantees” belonging to an individual in the determination of any criminal charge against him/her. The following section elaborates the meaning of the rights set out in Article 14 in the order in which they arise.

1. *Equal access to, and equality before, the courts*

The first sentence of Article 14(1) provides that “All persons shall be equal before the courts and tribunals” and has been interpreted to signify that all persons must be granted, without discrimination, the right of equal access to a court. This, on the one hand, means that establishing separate courts for different groups of people based on their race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status would be a contravention of Article 14(1). On the other hand, the establishment of certain types of special courts with jurisdiction over all persons belonging to the same category, such as military personnel, remains a thorny issue. According to the HRC, this practice is not prohibited under Article 14(1) as long as the procedural guarantees set forth in it are observed; in addition, the HRC has not ruled across the board that military courts may never try civilians. At the same time however, there is an increasingly widespread view that the trials of civilians by military courts lack legitimacy. This interpretation, endorsed by many human rights NGOs, is also supported by the provisions of the Basic Principles on the Independence of the Judiciary. Paragraph 5 of the Basic Principles provides that “Everyone shall have the right to be tried by *ordinary courts or tribunals* using established legal procedures.”[emphasis added]⁵⁴

The second sentence of Article 14(1) relates to the right to a fair and public hearing by a competent, independent and impartial tribunal established by law. It includes the basic

⁵² See General Comment 20, *supra* note 1, para 11; Body of Principles, *supra* note 6, Principle 24; Standard Minimum Rules, *supra* note 6, Rule 24.

⁵³ Vienna Convention on Consular Relations, April 24, 1963, Article 36; Body of Principles, *supra* note 6, Rule 16(2); Standard Minimum Rules, *supra* note 6, Rule 38.

⁵⁴ This provision raises the question of the validity of a hearing by a military tribunal. The Human Rights Committee has raised serious questions about the validity of such tribunals. See General Comment 13, *supra* note 16, para 4. A detailed analysis of this issue is outside the scope of this paper.

components of due process of law which is, in criminal cases, further supplemented by the other provisions of Articles 14 and 15.⁵⁵

2. *The right to a fair hearing*

The right to a fair hearing as provided for in Article 14(1) of the ICCPR encompasses the procedural and other guarantees laid down in paragraphs 2 to 7 of Article 14 and Article 15.⁵⁶ However, it is wider in scope, as can be deduced from the wording of Article 14(3) which refers to the concrete rights enumerated as “minimum guarantees.” Therefore, it is important to note that despite having fulfilled all the main procedural guarantees laid out in paragraphs 2-7 of Article 14 and the provisions of Article 15, a trial may still not meet the fairness standard envisaged in Article 14(1).

The single most important criterion in evaluating the fairness of a trial is the observance of the principle of equality of arms between the defense and the prosecution. (The specific procedural rights constituting “minimum guarantees” of a fair trial will be mentioned later.) Equality of arms, which must be observed throughout the trial, means that both parties are treated in a manner ensuring their procedurally equal position during the course of a trial. It would be difficult to identify in advance all of the situations that could constitute violations of this principle. They might range from denying the accused and/or counsel time to prepare a defense to excluding the accused and/or counsel from an appellate hearing when the prosecutor is present.

3. *The right to a public hearing*

Article 14(1) of the ICCPR⁵⁷ also guarantees the right to a public hearing, as one of the essential elements of the concept of a fair trial. However, it also permits several exceptions to this general rule under specified circumstances. The publicity of a trial includes both the public nature of the hearings—not, it should be stressed, of other stages in the proceedings—and the publicity of the judgement eventually rendered in a case. It is a right belonging to the parties, but also to the general public in a democratic society.

The right to a public hearing means that the hearing should as a rule be conducted orally and publicly, without a specific request by the parties to that effect. The court or tribunal is, *inter alia*, obliged to make information about the time and venue of the public hearing available and to provide adequate facilities for attendance by interested members of the public, within reasonable limits. The public, including the press, may be excluded from all or

⁵⁵ For an explanation of Article 15, see *infra* notes 102-104 and accompanying text.

⁵⁶ See also European Convention, *supra* note 8, Article 6(1); American Convention, *supra* note 8, Article 8; and ICC Statute, *supra* note 10, Article 67(1).

⁵⁷ See also European Convention, *supra* note 8, Article 6(1); and American Convention, *supra* note 8, Article 8(5).

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part of a trial for the reasons specified in Article 14(1), but such an exclusion must be based on a decision of the court rendered in keeping with the respective rules of procedure.

The public may be excluded for reasons of “morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires.” The public may also be excluded “to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.” Moral grounds for the exclusion of the public are usually asserted in cases involving sexual offences. The term “public order” in this specific context has been interpreted to relate primarily to order within the courtroom, while reasons of national security may be advanced so as to preserve military secrets. In both the latter cases, however, the restriction applied must correspond to the principles observed *in a democratic society*, [emphasis added], a qualification that seeks to prevent arbitrariness in decisions to close trials. The private lives of the parties has been interpreted to denote family, parental and other relations, such as guardianship, which could be prejudiced in public proceedings. Lastly, the public may be barred from a trial in the interests of justice, but only in special circumstances and to the extent strictly necessary in the opinion of the court. Emotional outburst(s) by the spectators of a trial has been cited as an example of when this provision could come into play.

While the number of instances that could merit the closing of a trial are fairly broad, this is not the case when the pronouncement of a judgement is involved.⁵⁸ Under Article 14(1) judgements “shall be made public” except where the interest of juvenile persons otherwise requires or where the proceedings concern matrimonial disputes of the guardianship of children. The possible exceptions from publicity are thus defined more narrowly and precisely. A judgement is considered to have been made public either when it was orally pronounced in court or when it was published, or when it was made public by a combination of those methods. In any event, its accessibility to all is the determining factor. The judgment must provide reasons sufficient to permit the accused to lodge an appeal,⁵⁹ and must be delivered within a reasonable time of the hearing.⁶⁰

4. The right to a competent, independent and impartial tribunal established by law

The basic institutional framework enabling the enjoyment of the right to a fair trial is that proceedings in any criminal case (or in a suit at law) are to be conducted by a competent, independent and impartial tribunal established by law [Article 14(1)].⁶¹ The rationale of this provision is to avoid the arbitrariness and/or bias that would potentially arise if criminal

⁵⁸ This includes the delivery of judgments of military courts and courts of appeal. See General Comment 13, *supra* note 16, para 4.

⁵⁹ The Human Rights Committee held that a Jamaican court violated Article 14(1) by failing to issue a reasoned written judgment (*Hamilton v Jamaica* (377/1989), 29 March 1996, Report of the HRC, vol. II (A/49/40), 1994 at 73.

⁶⁰ See *Curne v Jamaica* (377/1989), 29 March 1994, Report of the HRC, vol. II (A/49/40), 1994 at 73.

⁶¹ See also European Convention, *supra* note 8, Article 6(1); American Convention, *supra* note 8, Articles 8(1) and 27(2); and African Charter, *supra* note 8, Articles 7(1) and 26.

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charges were to be decided on by a political body or an administrative agency. A tribunal should be competent and established by law. Both of these attributes are in fact aspects of the same requirement: while competence refers to the appropriate personal, subject-matter, territorial or temporal jurisdiction of a court in a given case, the court as such, including the delineation of its competence, must have been established by law. The term “law” denotes legislation passed by the habitual law-making body empowered to enact statutes or an unwritten norm of common law, depending on the legal system. In either case the important feature is that the law must be accessible to all who are subject to it. The general aim of this provision is to assure that criminal charges are heard by a court set up in advance and independently of a particular case—and not prior to and specifically for the offense involved. In order to be independent, a tribunal must have been established by law to perform adjudicative functions, i.e. to determine matters within its competence on the basis of rules of law (substantive) and in accordance with proceedings conducted in a prescribed manner (procedural).⁶²

Independence presupposes a separation of powers in which the judiciary is institutionally protected from undue influence by, or interference from, the executive branch and, to a lesser degree, from the legislative branch. The Basic Principles on the Judiciary set out in some detail the need for and mechanisms necessary to achieve that independence. Some of the practical safeguards of independence include the specification of qualifications necessary for judicial appointment, the terms of appointment,⁶³ the need for guaranteed tenure,⁶⁴ the requirement of efficient, fair and independent disciplinary proceedings regarding judges,⁶⁵ and the duty of every State to provide adequate resources to enable the judiciary to properly perform its functions⁶⁶ (for example adequate salaries⁶⁷ and training⁶⁸). Depending on the circumstances of a case, a court's independence may also be assessed on the basis of its relationship with prominent social groups such as political parties, the media and various lobbies.

While independence primarily rests on mechanisms aimed at ensuring a court's position externally, impartiality refers to its conduct of, and bearing on, the final outcome of a specific case. Bias (or a lack thereof) is the overriding criterion for ascertaining a court's impartiality. It can, thus, be *prima facie* called into question when a judge has taken part in the proceedings in some prior capacity, or when s/he is related to the parties, or when s/he has a personal stake in the proceedings. It is also open to suspicion when the judge has an evidently preformed opinion that could weigh in on the decision-making or when there are other reasons giving rise to concern about his/her impartiality.

⁶² The Final Report, *supra* note 2, at 67.

⁶³ Basic Principles on the Independence of the Judiciary, *supra* note 6, Principle 10.

⁶⁴ *Id.*, Principle 12.

⁶⁵ *Id.*, Principles 17-20.

⁶⁶ *Id.*, Principle 7.

⁶⁷ *Id.*, Principle 11.

⁶⁸ *Id.*, Principle 10.

5. *The right to a presumption of innocence*

According to Article 14(2) of the ICCPR “Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.”⁶⁹ As a basic component of the right to a fair trial, the presumption of innocence, *inter alia*, means that the burden of proof in a criminal trial lies on the prosecution and that the accused has the benefit of the doubt.⁷⁰ Despite the fact that Article 14(2) does not specify the standard of proof required, it is generally accepted that guilt must be proved “to the intimate conviction of the trier of fact or beyond a reasonable doubt, whichever standard of proof provides the greatest protection for the presumption of innocence under national law.”⁷¹ The presumption of innocence must, in addition, be maintained not only during a criminal trial *vis á vis* the defendant, but also in relation to a suspect or accused throughout the pre-trial phase. It is the duty of both the officials involved in a case as well as all public authorities to maintain the presumption of innocence by “refrain[ing] from prejudging the outcome of a trial.”⁷² It may also be necessary to pay attention to the appearance of an accused during a trial in order to maintain the presumption of innocence, for instance, it may be prejudicial to require the accused to wear handcuffs, shackles or a prison uniform in the courtroom.

6. *The right to prompt notice of the nature and cause of criminal charges*

In the determination of any criminal charge against him/her everyone shall be entitled, in full equality “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.”⁷³ This duty to inform relates to an exact legal description of the offense (“nature”) and of the facts underlying it (“cause”) and is thus broader than the corresponding rights granted under Article 9(2) of the ICCPR applicable to arrest.⁷⁴ The rationale is that the information provided must be sufficient to allow the preparation of a defense.

When information may be deemed to have been “promptly” supplied, has not been uniformly interpreted, but has generally been taken to coincide with the “lodging of the charge or directly thereafter, with the opening of the preliminary judicial investigation or with the setting of some other hearing that gives rise to clear official suspicion against a specific person.”⁷⁵ The information must also be provided to the accused in a language which s/he understands, meaning that translation is mandated and that its form, oral or written, will depend on the manner in which the “charge” is initially conveyed. An indictment must, obviously, be translated in writing.⁷⁶

⁶⁹ See also European Convention, *supra* note 8, Article 6(2); American Convention, *supra* note 8, Article 8(2); African Charter, *supra* note 8, Article 7(1)(b); and ICC Statute, *supra* note 10, Article 66(1).

⁷⁰ See e.g., ICC Statute, *supra* note 10, Article 66.

⁷¹ The Final Report, *supra* note 2, at 76. See also General Comment 13, *supra* note 16, para 7; ICC Statute, *supra* note 10, Article 66.

⁷² General Comment 13, *supra* note 16, para 7.

⁷³ ICCPR, *supra* note 1, Article 14(3)(a).

⁷⁴ See *supra* notes 13-15 and accompanying text.

⁷⁵ Nowak Commentary, *supra* note 9, at 255.

⁷⁶ See *supra* notes 16-18 and accompanying text on the right to an interpreter.

7. *The right to adequate time and facilities for the preparation of a defense*

Article 14(3)(b) of the ICCPR provides that in the determination of any criminal charge against him or her everyone is entitled “To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing.”⁷⁷ The right to adequate time and facilities for the preparation of a defense applies not only to the defendant but to his or her defense counsel as well⁷⁸ and is to be observed in all stages of the proceedings.

What constitutes “adequate” time will depend on the nature of the proceedings and the factual circumstances of a case. Factors to be taken into account include the complexity of a case, the defendant's access to evidence, the time limits provided for in domestic law for certain actions in the proceedings, etc.

The term “facilities” has, among other things, been interpreted to mean that the accused and defense counsel must be granted access to appropriate information, files and documents necessary for the preparation of a defense and that the defendant must be provided with facilities enabling communication, in confidentiality, with defense counsel.⁷⁹ An individual's right to communicate with counsel of his or her own choosing, is the most important element of the right to adequate facilities for the preparation of a defense.⁸⁰

8. *The right to a trial without undue delay*

In the determination of any criminal charge against him/her, everyone shall be entitled “To be tried without undue delay” [Article 14(3)(c)]. This provision has been interpreted to signify the right to a trial that produces a final judgement and, if appropriate, a sentence without undue delay. The time limit “begins to run when the suspect (accused, defendant) is informed that the authorities are taking specific steps to prosecute him.”⁸¹ The assessment of what may be considered undue delay will depend on the circumstances of a case, i.e. its complexity, the conduct of the parties, whether the accused is in detention, etc. The right is, however, not contingent on a request by the accused to be tried without undue delay.

Note that a person who is in pre-trial detention may be entitled to release prior to the commencement of the trial even if there has not been undue delay.⁸²

⁷⁷ See also European Convention, *supra* note 8, Article 6(3)(b); American Convention, *supra* note 8, Article 8(2)(c); African Commission Resolution, *supra* note 13, Article 2(E)(1); and ICC Statute, *supra* note 10, Articles 67(1)(b) and 67(2).

⁷⁸ See Basic Principles on the Role of Lawyers, *supra* note 6, Principle 21.

⁷⁹ General Comment 13, *supra* note 16, para 9. Basic Principles on Lawyers, *supra* note 6, Principle 21. The European Commission has stated that this right permits the defense to have reasonable access to the prosecutions files (*X v Austria* (7138/75), 5 July 1977, 9 DR 50) but this may be subject to reasonable security restrictions (*Haase v Federal Republic of Germany* (7412/76, 12 July 1977, 11 DR 78).

⁸⁰ See *supra* notes 16-18 and *infra* notes 83-89 and accompanying text.

⁸¹ Nowak Commentary, *supra* note 9, at 257.

⁸² See *supra* notes 10-12, 26-35 and accompanying text.

9. *The right to defend oneself in person or through legal counsel*

The right to counsel in the pre-trial stages of a criminal trial, as discussed earlier in this paper,⁸³ is clearly linked to the right to a defense during trial as set out in Article 14(3)(d) of the ICCPR. The provision states that everyone shall be entitled, in the determination of any criminal charge against him/her “To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.” This provision includes the following specific rights:

- (i) the right to be tried in one's presence. This is one of the more controversial rights in terms of its interpretation. A literal reading would not permit trials in absentia, which is a view consistently held by most international human rights NGOs and, more recently, supported by the Statute of the International Criminal Court.⁸⁴ However, according to the HRC, trials in absentia are permissible in certain circumstances if the state makes “sufficient efforts with a view to informing the [accused] about the impending court proceedings, thus enabling him to prepare his defense.”⁸⁵
- (ii) to defend oneself in person;
- (iii) to choose one's own counsel;
- (iv) to be informed of the right to counsel; and
- (v) to receive free legal assistance.

Their operation may be summed up as follows: “Everyone charged with a criminal offense has a primary, unrestricted right . . . to defend himself. However, he can forego this right and instead make use of defense counsel, with the court being required to inform him of the right to counsel. In principle, he may select an attorney of his own choosing so long as he can afford to do so. Should he lack the financial means, he has a right to appointment of defense counsel by the court at no cost, insofar as this is necessary in the administration of justice. Whether the interests of justice require the state to provide for effective representation by counsel depends primarily on the seriousness of the offense and the potential maximum punishment.”⁸⁶

⁸³ See *supra* notes 19-25 and accompanying text.

⁸⁴ ICC Statute, *supra* note 10, Article 67(1)(d).

⁸⁵ See *Daniel Monguya Mbenge et al. v. Zaire* (16/1977) (March 25, 1983), Selected Decisions of the Human Rights Committee under the Optional Protocol, International Covenant on Civil and Political Rights, Volume 2, Seventeenth to Thirty-second Sessions (October 1982-April 1988), United Nations publication, Sales No. E.89.XIV.1, at 78.

⁸⁶ Nowak Commentary, *supra* note 9, at 259-260. For instance, the Human Rights Committee has held that any person charged with a crime punishable by death must have counsel assigned (*Henry and Douglas v Jamaica* (571/1994), 26 July 1996, UN Doc CCPR/C/57/D/571/1994, para 9.2.). However, a person accused of speeding would not necessarily be entitled to have counsel appointed at the expense of the state (*OF v Norway* (158/1983), 26 October 1984, 2 Sel. Dec.44). In the Inter-American system, counsel must be provided if it is necessary to ensure a fair hearing (Inter-American Court, Advisory Opinion of August 1990, OC 11/90, Exceptions to the

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According to the prevailing reading of the ICCPR, the right to counsel applies to all stages of criminal proceedings, including the preliminary investigation and pre-trial detention.⁸⁷ Assignment of counsel by the court contravenes the principle of fair trial if a qualified lawyer of the accused's own choice is available and willing to represent him or her.⁸⁸ Court-appointed counsel must be able effectively to defend the accused, that is, to freely exercise his/her professional judgement and to actually advocate in favor of the accused.⁸⁹

10. The right to examine witnesses

In the determination of any criminal charge against him/her, everyone is entitled “to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him” [Article 14(3)(e)].⁹⁰ This right is an essential element of the principle of equality of arms. The terms “to examine, or have examined” should be read as a recognition of the two main systems of criminal justice, the inquisitorial and accusatorial one. It should be noted that, according to the text itself, the defense does not have an unlimited right to obtain the compulsory attendance of witnesses on the defendant's behalf, but only “under the same conditions” as witnesses against him/her. No such restriction applies to the prosecution. While a court is thereby given a fairly free hand in summoning witnesses, it must do so in keeping with the principle of fairness and equality of arms. This, in turn, mandates that the parties be equally treated with respect to the introduction of evidence by means of interrogation of witnesses.⁹¹

In addition, Article 14(3)(e) has been concretely interpreted to mean that the prosecution must inform the defense of the witnesses it intends to call at trial within a reasonable time prior to the trial so that the defendant may have sufficient time to prepare his/her defense. The defendant also has the right to be present during the testimony of a witness and may be restricted in doing so only in exceptional circumstances, such as when the witness reasonably fears reprisal by the defendant.

In order to avoid violations of a defendant's right to examine and have examined witnesses against him or her, courts should particularly scrutinize claims of possible reprisals and allow the removal of defendants from the courtroom only in truly valid instances.

Exhaustion of Domestic Remedies, OAS/Ser.L/V/III23 Doc 12 rev 1991, paras 25-28).

⁸⁷ See Nowak Commentary, *supra* note 9, at 256 and The Final Report, *supra* note 2, at 71. See also *Henry and Douglas v Jamaica* (571/1994), 26 July 1996, UN Doc CCPR/C/57/D/571/1994, para 9.2. See further *supra* notes 19-25 and accompanying text.

⁸⁸ See e.g., the case of *Estrella v Uruguay* (74/180) 29 March 1983, at 95 where the Human Rights Committee held that a military court had violated the defendant's right to choose counsel by limiting him to a choice between two appointed attorneys. See also Basic Principles on the Role of Lawyers, *supra* note 6, Principle 5.

⁸⁹ General Comment 13, *supra* note 16, para 9. See also Principle 6 of the Basic Principles on the Role of Lawyers, *supra* note 6, which refers to the right to “effective legal assistance.”

⁹⁰ See also European Convention, *supra* note 8, Article 6(3)(d); American Convention, *supra* note 8, Article 8(2)(f); African Commission Resolution, *supra* note 13, Paragraph 2(e)(3); and ICC Statute, *supra* note 10, Article 67(1)(e).

⁹¹ Nowak Commentary, *supra* note 9, at 262.

However, in no case may a witness be examined in the absence of both the defendant and counsel. Similarly, the use of the testimony of anonymous witnesses at trial is considered impermissible, as it would represent a violation of the defendant's right to examine or have examined witnesses against him/her.⁹²

11. The right to an interpreter

In the determination of any criminal charge against him/her everyone is entitled “To have the free assistance of an interpreter if he cannot understand or speak the language used in court” [Article 14(3)(f)].⁹³ The main issue raised by this provision is what interpretation should be given to the words “used in court.” While the phrase could obviously be said to refer to oral proceedings, the right to translation of written documents is not expressly provided for. Both in scholarly writings and in the practice of human rights bodies, however, the view has consistently been held that the right to an interpreter includes the translation of all the relevant documents.⁹⁴ As already mentioned, the right to an interpreter may also be claimed by a suspect or an accused being interrogated by the police or by an investigating judge in the pre-trial phase.⁹⁵

The right to an interpreter applies equally to nationals and aliens,⁹⁶ but cannot be demanded by a person who is sufficiently proficient in the language of the court.⁹⁷ When granted, the right to the assistance of an interpreter is free and can in no way be restricted by seeking payment from the defendant upon conviction.

12. The prohibition on self-incrimination

In the determination of any criminal charge against him/her, everyone is entitled “Not to be compelled to testify against himself or to confess guilt” [Article 14(3)(g)].⁹⁸ This

⁹² The Final Report, *supra* note 2, para 60(j), at 77. *See e.g.*, Human Rights Committee’s Concluding Observations on Colombia, UN Doc. CCPR/c/79/Add. 76 1 April 1997, paras. 21, 40 (criticism of the Colombian practice of suppressing the names of judges, prosecutors and witnesses in regional courts dealing with certain drug, terrorism, rebellion and weapons crimes). Note however that the European Court permits anonymous witnesses in some limited cases such as during the investigative stage of a case. *See Doorson v. The Netherlands*, 26 March 1996, 2 Ser A 470, para 69. Compare the decision of the ICTY in *Prosecutor v. Tadic, Prosecutor’s motion Requesting Protective Measures for Victims and Witnesses* 10 Aug. 1995.

⁹³ *See also* European Convention, *supra* note 8, Article 6(3)(e); American Convention, *supra* note 8, Article 8(2)(a); African Commission Resolution, *supra* note 13, Paragraph 2(E)(4); and ICC Statute, *supra* note 10, Article 67(1)(f).

⁹⁴ For example, the Inter-American Commission considers the right to translation of documents as fundamental to due process (Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA Ser.L/V/11.62, doc.10, rev. 3, 1983).

⁹⁵ *See supra* notes 16-18 and accompanying text.

⁹⁶ General Comment 13, *supra* note 16, para 13.

⁹⁷ *See, e.g.*, *Cadoret and Bihan v France* (221/1987 and 323/1988), April 11, 1991, Report to the HRC (A/46/40), 1991 at 219.

⁹⁸ *See also* American Convention, *supra* note 8, Articles 8(2)(g) and 8(3); ICC Statute, *supra* note 10, Articles 55(1)(a) (pre-trial) and 67(1)(g).

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provision aims to prohibit any form of coercion, whether direct or indirect, physical or mental, and whether before or during the trial, that could be used to force the accused to testify against him/herself or to confess guilt. Although the exclusion of evidence obtained by such means is not expressly covered by this provision, it is a well-established interpretation that such evidence is not admissible at trial.⁹⁹ The judge must have the authority to consider an allegation of coercion or torture at any stage of the proceedings.¹⁰⁰ In addition, silence by the accused may not be used as evidence to prove guilt and no adverse consequences may be drawn from an accused's exercise of the right to remain silent.¹⁰¹

13. The prohibition on retroactive application of criminal laws

Although set forth as last in the sequence of the ICCPR's provisions relating to criminal justice, Article 15(1) of the ICCPR which embodies the principle *nullum crimen sine lege* (a crime must be provided for by law)¹⁰², can in fact be taken as a point of departure in any consideration of the fairness of a trial. In the broad sense, it expresses the principle of legality, according to which “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed” [Article 15(1)]. In the narrow sense, it is aimed at prohibiting the retroactive application of substantive criminal law and thus chronologically precedes a determination of the procedural fairness of a trial pursuant to Article 14. It is one of the few non-derogable rights provided for in Article 4(2) of the ICCPR.

The principle of legality obliges states to define criminal offences by law, that is, in the form of abstract norms laid down in statutes or belonging to the body of unwritten common law accessible to all. It is important to note that the prohibition of retroactivity applies to all criminal offenses, which may be provided for either in domestic legislation or international law, both treaty-based and customary.¹⁰³ The reference to international law was included to prevent individuals from escaping international justice by claiming that an act or omission did not constitute an offense under national law. On the other hand, it is also meant to protect individuals against the retroactive application of international law. Just as no one can be found

⁹⁹ See the prohibition on the use of evidence in Article 15 of the Convention against Torture and Article 10 of the Inter-American Convention on Torture. See also General Comment 13, *supra* note 16, para 14. See also the European Court in *Murray v United Kingdom* 41/1994/488/570, 8 February 1996, para 45.

¹⁰⁰ General Comment 13, *supra* note 16, para 15.

¹⁰¹ The Final Report, *supra* note 2, Article 58(b), at 76. Article 14(4) of the ICCPR pertaining to the rights of juvenile persons has been omitted from this review.

¹⁰² See also European Convention, *supra* note 8, Article 7; American Convention, *supra* note 8, Article 9; African Charter, *supra* note 8, Article 7(2); and ICC Statute, *supra* note 10, Article 22.

¹⁰³ The one exception to the prohibition of retroactive domestic criminal legislation is contained in Article 15(2) of the ICCPR: “Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.” This provision has been interpreted to mean that certain violations of customary international law, such as war crimes, torture, slavery, etc. may be punished by states applying retroactive domestic criminal laws. However, in effect, this provision simply restates the position that persons may held accountable for violations of international customary law: it merely facilitates the ability of States to legislate to this effect. ICCPR, *supra* note 1, Article 15(2).

guilty of a criminal offense which was not laid down as such at the time an act or omission took place, so also, under Article 15(1) a penalty cannot be imposed if it was not provided for under national or international law at the time the offense was committed (*nulla poena sine lege*). Moreover, under Article 15(1), a penalty heavier than the one that was prescribed at the time of commission for a specific offense may not be imposed. In keeping with a contemporary understanding of the role of criminal sanctions, Article 15(1) also provides that states are obliged to retroactively apply a lighter penalty if it is subsequently provided for by law.¹⁰⁴

14. *The prohibition on double jeopardy*

“No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country” [Article 14(7)].¹⁰⁵ The prohibition of *ne bis in idem* or of double jeopardy is aimed at preventing a person from being tried—and punished—for the same crime twice. The issue here is what is the relevant jurisdiction. According to some interpretations, including that of the HRC, double jeopardy applies only to prohibit a subsequent trial for the same offense within the jurisdiction of one state, but is not valid with regard to the national jurisdiction of two or more states.¹⁰⁶ On the other hand, some hold the view that this is “too general and too absolute.”¹⁰⁷ An interesting question raised by the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and by the Statute of the future International Criminal Court is whether retrials of persons by those tribunals after the completion of proceedings in a national jurisdiction, permitted under certain circumstances, violate the principle of double jeopardy.¹⁰⁸ The prevailing view is that they do not.

C. POST-TRIAL RIGHTS

1. *The right to appeal*

“Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law” [Article 14(5)].¹⁰⁹ The right to appeal is aimed at ensuring at least two levels of judicial scrutiny of a case, the second of which must take place before a higher tribunal. The review undertaken by such a tribunal must be genuine.

¹⁰⁴ The right to retroactive application of a lighter penalty generally applies only in cases where a penalty is irreversible, however some exceptions include cases where the sentence is for life, the death penalty or corporal punishment. See Nowak Commentary, *supra* note 9, at 279-280.

¹⁰⁵ See also Article 4 of Protocol 7 to the European Convention and Article 20 of the ICC Statute. Note that Article 8(4) of the American Convention is different in that the prohibition applies only if the accused has been previously *acquitted*, but then the prohibition is not limited to retrial on the same charge—no charge arising out of the same facts (“the same cause”) may be pursued.

¹⁰⁶ See Nowak Commentary, *supra* note 9, at 273.

¹⁰⁷ *Id.*

¹⁰⁸ See ICC Statute, *supra* note 10, Article 20; Statute of the International Criminal Tribunal for Yugoslavia, Article 10; and Statute of the International Criminal Tribunal for Rwanda, Article 9.

¹⁰⁹ See also European Convention, *supra* note 8, Article 2 of Protocol 7; American Convention, *supra* note 8, Article 8(2)(h); and African Commission Resolution, *supra* note 13, para 3.

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This, among other things, means that appeal proceedings confined only to a scrutiny of issues of law raised by a first instance judgement might not always meet that criterion.¹¹⁰ Appeal proceedings must also be timely. The immediate effect of the exercise of the right to appeal is that a court has to stay the execution of any sentence passed in the first instance until appellate review has been concluded. This principle applies unless the convicted person voluntarily accepts that the sentence be implemented earlier. The right to appeal belongs to all persons convicted of a crime regardless of the severity of the offense and of the sentence pronounced in the first instance.¹¹¹ The guarantees of a fair trial must be observed in all appellate proceedings.

2. *The right to compensation for miscarriage of justice*

“When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him” [Article 14(6)].¹¹² It should be noted that compensation for miscarriage of justice may be granted only after a conviction has become final and that the claim may be brought regardless of the severity of the offense involved. There are three additional conditions that must be cumulatively met: i) a miscarriage of justice must have been subsequently officially acknowledged by a reversal of the conviction or by pardon; ii) the delayed disclosure of the pertinent fact(s) must not be attributable to the convicted person, and iii) the convicted person must have suffered punishment as a result of the miscarriage of justice. The phrase “according to law” does not mean that states can ignore the right to compensation by simply not providing for it, but rather that they are obliged to grant compensation pursuant to a mechanism provided for by law.¹¹³

III. TRIAL OBSERVATION

Regardless of the considerable experience in trial observation accumulated by international and local NGOs over the past few decades, there are no ironclad rules as to how monitoring should be carried out. It is unlikely that such norms can ever be developed because monitoring is an activity that needs to be tailored to each particular case. Monitors need a certain flexibility and must use their own judgement in responding to the different situations they may encounter. This is not to say that a set of basic directions for trial observation

¹¹⁰ See for example the concerns of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions in his 1993 Report (7 December 1993, UN Doc E/CN.4/1994/7 at paras 113 and 404).

¹¹¹ General Comment 13, *supra* note 16, para 17.

¹¹² See also European Convention, *supra* note 8, Article 3 of Protocol 7; and American Convention, *supra* note 8, Article 10.

¹¹³ See General Comment 13, *supra* note 16, para 18.

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completely lacking: the ensuing section is based on guidelines pertaining to the practice of trial monitoring developed and applied by organizations with extensive expertise in this area.¹¹⁴

1. Choice of Trials

The choice of a trial to be observed will primarily depend on the sending organization's general field of activity and the interest it might have in a particular case. Factors which may influence a decision to send trial observers are: the stature of the person on trial, the political or human rights significance of the proceedings, the historical relevance of the trial, the media attention generated by the case, anticipated irregularities in the proceedings, etc., or any combination of these and other concerns. There simply can be no exhaustive enumeration.

2. Selection of Trial Observer

Regardless of the underlying reasons for observing a trial, crucial to the success of every mission will be the monitor's independence, impartiality and qualifications. The different factors most often taken into account when selecting an observer are: the individual's prestige, reputation for impartiality, knowledge of domestic law and international human rights standards, familiarity with a case, language skills, trustworthiness, availability at short notice, etc. If an observer is being sent to monitor a trial abroad, his or her nationality, ethnicity or gender may be relevant criteria. His or her ability to enter a particular country with or without a visa will also be significant. In the selection of observers, NGOs are faced with the option of either sending a staff member or engaging an independent expert outside the organization. The advantage of the former is that a staff member will most likely be familiar with the case and can be trusted to present a reliable and timely report. However, the presence of a prestigious independent expert outside the organization will often have more impact on the proceedings. Similarly, an issue that needs to be considered is the utility of engaging local lawyers—whether staff members or outside experts—to observe domestic trials. While such lawyers may know the legal system and background of a case very well, this may in fact be perceived as potentially tainting their assessment of the fairness of the proceedings and give rise to claims of bias. Because of their prestige and lack of national affiliation, foreign lawyers are initially less open to such charges. It should be noted that several international human rights NGOs, among them Amnesty International, have explicit rules against the practice of engaging local lawyers as trial observers.

3. Informing the Government

The sponsoring organization should supply an observer with several copies of an Order of Mission (Letter of Credentials) stating the purpose of the mission, the identity and qualifications of the observer and requesting the cooperation of the authorities. It is standard practice to also inform the appropriate bodies, such as the Ministry of Justice, by letter or other

¹¹⁴ Among others, The International Commission of Jurists (ICJ), Amnesty International (AI), The International Federation of Human Rights (FIDH), and The American Bar Association (ABA). This sections also draws heavily on Professor David Weissbrodt's seminal article "International Trial Observers," *Stanford Journal of International Law*, Volume 18, Issue 1, Spring 1982.

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means, of the nomination of an observer and to request that s/he be extended the usual facilities.

4. Briefing

Before undertaking an observer mission, a monitor should be briefed by the sending organization on i) the approach, policies and methods of the sending organization; ii) the background of the case, including the relevant domestic and international legal framework applicable in the proceedings; iii) the names, addresses and background of lawyers, translators and other contacts during the proceedings, as the situation may necessitate; and iv) the means of a monitor's communication with the organization while on the mission.

5. Translators

An observer should, among other things, be chosen for his/her command of the language in which the proceedings will be conducted. When such a person cannot be found the observer should, ideally, be provided with an interpreter who will sit next to him/her in the courtroom and give a simultaneous translation sotto voce. The selection of an interpreter is important because an observer's impartiality could be discredited if the interpreter is perceived as being affiliated with the parties or participants in the proceedings. An interpreter should, ideally, have the requisite legal knowledge, be trustworthy and independent.

6. Travel and Housing Arrangements; Visa and Entry Formalities

If the trial to be observed is taking place outside the seat of the sending organization or abroad, arrangements should be made for the monitor to be assisted upon arrival by a person not involved in the proceedings who could provide him/her with an initial briefing. The observer should preferably stay in a hotel, or other mode of accommodation, close to the court. S/he should not take up offers to be hosted by persons involved in the proceedings or their supporters, as that could discredit his/her impartiality.

If a trial is being observed abroad, it would be logical to select as an observer a person who does not need a visa to enter the country of destination or who already has one. If a visa is required, an Order of Mission (Letter of Credentials) should be furnished along with the visa application, stating that the purpose of the visit is to attend the trial in question on behalf of the sponsoring organization.

7. Public Statements Before, During and After a Mission

There is little uniformity of practice among NGOs as regards statements made by an observer prior to, during and after a mission. While some organizations will announce a mission precisely in order to attract attention to a case, others will decline to do so for fear of making it harder for the observer to attend the trial. In each instance of advance announcement the expected benefits must be weighed against the possible drawbacks. There is also no common stand among NGOs with respect to an observer's statements during a mission. On the one hand, statements might jeopardize the mission, the appearance of neutrality or even the

safety of the observer but, on the other hand, the impact of public comments is usually the greatest while the trial is still taking place or immediately upon its conclusion. On a cautionary note, it can be said that an observer should generally refrain from commenting on a trial that is still unfolding unless there are exceptional events—such as a breakdown of the judicial process—which merit immediate response. Similarly, if an observer is not specifically authorized to issue a statement after the end of his/her mission he or she should generally refrain from doing so unless there is an issue requiring momentary reaction. Practice has shown that it is often better both for the observer and for the appearance of his/her impartiality if a statement is issued after the observer has returned home and has had time for reflection, rather than if s/he comments on the trial while at the trial site. A case by case approach is necessary in this phase as well. Throughout the proceedings, however, a monitor should be free to inform the press about his/her presence, the purpose of the mission and about the report to be drawn up following the end of trial observation. S/he should also be prepared to explain his/her authority to make statements during and after the trial or to decline from comments.

8. Contacts and Interviews during the Mission

An observer should, if possible, try to make contact with the parties to the trial and with the presiding judge before the proceedings begin. If helpful, s/he should also arrange to be introduced in open court by a neutral party so as to enable the participants and the public to take note of his/her presence. Depending on the scope of the observer's mission, the circumstances of the case and the observer's stature, he or she may also try to establish contact with other government officials in order to collect more background information and to enhance his or her impact on the proceedings. An observer should also leave him/herself time for collecting documents related to the trial and other information of relevance to an assessment of fairness. Last, but not least, if possible, a monitor should try to interview the defendant, in full confidentiality, in order to observe his/her physical and mental condition and the circumstances of detention.

9. Seating in the Courtroom; Notes

With the primary aim of preserving an appearance of neutrality, an observer should ideally follow the proceedings from a prominent but neutral position in the courtroom. The seating arrangement should not lead to an observer's being identified with persons participating in the proceedings or attending it in some other capacity, such as defense attorneys or the press. Nor should it detract from his/her prestige, which would be the case if s/he were to sit in the section of the courtroom reserved for the general public. While following the trial the observer should be seen taking extensive notes. This action not only signifies the close attention being paid to the trial but, also, the creation of a record that will be used in compiling the final report.

10. Observer's Report

Preparing a report upon the completion of a trial observation mission is the second half of an observer's task. If the mission is to be successful, the report should be drawn up as quickly as possible so that the sponsoring organization may issue it while the government and the general public are still responsive to the findings. Promptness is vital.

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NGOs with extensive practice in trial observation recommend that a trial observation report be composed to include the following headings (the list is not exhaustive and will obviously depend on the circumstances of the case):¹¹⁵

- (i) the observer's instructions;
- (ii) the background of the case;
- (iii) the facts of the case as revealed at trial and by independent fact-finding, with particular emphasis on the prosecution and defense evidence;
- (iv) the charges, applicable laws, pre-trial procedures, trial process, judgment (if any) and subsequent proceedings;
- (v) the mental and physical condition of the defendant and the conditions of confinement;
- (vi) an evaluation of the fairness of the proceedings, applicable laws and treatment of the defendant under national and international standards; and
- (vii) a conclusion.

In addition a report should, if possible, include the following information:

- (i) a copy of the Order of Mission;
- (ii) copies of relevant procedural rules, court decisions and laws;
- (iii) copies of charges, transcripts and the court's judgment;
- (iv) a description of the observer's methodology, including material studied and persons interviewed;
- (v) sensitive material which should be omitted from the published report;
- (vi) copies of newspaper articles referring to the trial or the observer's presence, with the names of the newspapers and the dates of publication;
- (vii) additional information not strictly within the observer's mission (such as information about other prisoners, other trials and recent laws); and
- (viii) practical observations for the guidance of future observers.

When there is a protracted trial the observer will usually attend only part of the proceedings. In such a case s/he should send an immediate report to the sponsoring organization and add to it later, in the form of a supplement commenting on the decision rendered at the end of the trial. S/he should therefore make arrangements for the official text of the judgment and the sentence of the court to be sent to the sponsoring organization either directly or through the observer him/herself.

Observers may include recommendations to the government concerned or to the sending organization on how to overcome the irregularities noted in the trial procedure and/or on the action the sponsoring organization should take in pursuing this goal, depending, of course on the sender's mandate.

¹¹⁵ This list is reproduced from Weissbrodt, *supra* note 114, at 93-94.

Finally, an issue that also needs to be resolved by the sponsoring organization is whether the report will be conveyed to the government in question for comment and response before it is made public. This is a matter of policy that will hinge on the circumstances of a case, the purpose and focus of the report and the government's anticipated reaction to it. If the report is first sent to the government it should contain precise time limits for a response before publication.

IV. CONCLUSION

An examination of the customary international law status of trial observation is outside the scope of this review. However, the practice of sending and receiving trial observers is today so widespread and accepted that it may already constitute a norm of customary international law. The rapid development of the institution of trial observation over the past several decades can be attributed largely to the knowledge and integrity of the individuals who have served as observers. In order for this method of human rights monitoring to expand further, the high standards achieved so far must be maintained and continuously refined. This, among other things, means that the monitors themselves should increasingly be individuals familiar with the intricacies of domestic and international fair trial standards. In practice, they should bring to the performance of their task the very qualities they monitor: fairness and humanity.

Asha Ranjan and another v State of Bihar and others AIR
2017 SC 1079, 2017(2) SCALE 709

Bench: Dipak Misra, Amitava Roy, JJ.

The Judgment was delivered by: Dipak Misra, J.

1. Regard being had to the similitude of prayers and considering the commonality of issues expounded in these Writ Petitions, they were finally heard together. The principal issue raised is disposed of by this singular order. It is necessary to note that in Writ Petition (Criminal) No. 132 of 2016 preferred by Asha Ranjan, it has been prayed for issue of appropriate directions to the Central Bureau of Investigation (CBI) to take over the investigation in connection with FIR No. 362/16 dated 13.05.2016 under Police Station Nagar Thana, Siwan, District Siwan under Sections 302/120B read with Section 34 of the Indian Penal Code (IPC); to transfer the entire proceedings and trial in FIR No. 362/16 dated 13.05.2016 registered under the same Police Station for the same offences from Siwan, Bihar to Delhi; to call for the status report in the investigation relating to FIR No. 362/16 dated 13.05.2016; to grant appropriate compensation to the petitioner and her family members and to ensure their security. That apart, there is also a prayer to register FIR against respondent Nos. 3 and 4 for conspiracy and harboring and sheltering the proclaimed offenders in FIR No. 362/16 dated 13.05.2016. In this Writ Petition, at a subsequent stage, Criminal Miscellaneous Petition No. 17101 of 2016 has been filed for transfer of respondent No. 3, M. Shahabuddin, from Siwan Jail, Bihar to a jail in Delhi. During the pendency of this case, Writ Petition (Criminal) No. 147 of 2016 came to be filed. In the said Writ Petition, the prayer is to issue a direction to transfer respondent No. 3, M. Shahabuddin, to a jail outside the State of Bihar and to issue further directions for conducting of the trial in pending cases against him through video conferencing. Thus, the prayers in Writ Petition (Criminal) No. 147 of 2016 are two fold and in Writ Petition (Criminal) No. 132 of 2016 are manifold.

2. It is apposite to state here that both the cases, as stated earlier, were heard together and learned counsel for the parties addressed the Court with regard to sustainability of prayer for transfer of the cases pending against respondent No. 3, Shahabuddin, from Siwan Jail to a jail in Delhi and conducting of the trial through video conferencing.

3. Thus, we are presently required to deal with the transfer of the third respondent, M. Shahabuddin from the Siwan Jail, Bihar to a Jail in Delhi keeping in view the averments made in Writ Petition (Criminal) No. 147 of 2016 and the assertions made in the application filed in Writ Petition (Criminal) No. 132 of 2016

4. The factual matrix in Writ Petition (Criminal) No. 132 of 2016, as unfolded, is that on 13.5.2016 petitioner's husband, namely, Sh. Rajdev Ranjan, Senior Reporter (Journalist Incharge, Dainik Hindustan, Siwan Bureau, Bihar) was shot dead as he received five bullet injuries in his head and other parts of his body and FIR No. 362/16 dated 13.5.16 was registered under PS Nagar Thana, Dist. Siwan for the offences punishable under Sections 302/120(B) and 34 of IPC.

5. On 13.5.2016, the petitioner informed the police that one notorious criminal, Shahabuddin, and his henchmen were involved in the murder of her husband but the police deliberately did not include the name of Shahabuddin in the list of accused persons. Thereafter, as the matter stands today, the investigation of the said case has been transferred to the CBI. It is asseverated that in the meantime certain persons have been arrested and some have surrendered to custody.

6. The factual expose of the murder of the husband of the petitioner has a narrative that goes back to the year 2005. The husband of the petitioner, a journalist, it is averred, had written various news reports pertaining to serious and substantive criminal activities of said Shahabuddin who had threatened to eliminate him and his family members. Undeterred he kept on writing various investigative news articles and reports in respect of murder of the three sons of one Siwan resident, namely, Chanda Babu, which eventually led to the arrest of Shahabuddin and after conclusion of the trial he stood convicted for the offence under Section 302 IPC and sentenced to undergo life imprisonment. It is apt to note that during the trial of the said case, Shahabuddin and his shooters had constantly threatened the petitioner's husband with death threats to him and the family members. As the narration has been undraped, petitioner's husband highlighted about the murder of one Shrikant Bharti by publishing news articles and at that stage on 13.5.2016 petitioner's husband got a phone call from an unknown person on his mobile about 7.15 p.m. and soon thereafter he left the office and started moving towards the Station Road. About 7.30 p.m. he was shot dead.

7. Thereafter, during the course of investigation, two accused persons, namely, Mohammed Kaif and Mohammad Javed were declared as proclaimed offenders. On 10.9.2016, Shahabuddin was released on bail and the aforesaid proclaimed offenders were seen in his company but apathy reigned and the fear ruled so that no police official dared to arrest them. On 14.9.2016 petitioner saw the pictures of the proclaimed offenders

Mohammed Kaif and Mohammad Javed with Shri Tej Pratap Yadav, Health Minister of Bihar on all media channels.

8. Feeling in secured, terrorized and helpless as regards her safety and security and of her two minor children, the petitioner has moved this Court. As set forth, the death of the husband, makes her apprehensive that Shahabuddin may eliminate her entire family. Her petrification has been agonizingly articulated in the petition and by the learned counsel, sometimes with vehemence and on occasions with desperation.

9. At this juncture, we may advert to the facts in Writ Petition (Crl.) No. 147 of 2016. It is averred that respondent No. 3 is a dreaded criminal-cum-politician who has already been declared history-sheeter Type A (who is beyond reform) and till date he has been booked in 75 cases.

10. It is set forth that in August 2004, three sons of the petitioner were picked up by the henchmen of respondent No. 3 and taken to his native village Pratappur where two of his sons, namely, Girish and Satish were drenched in acid and his third son, who witnessed the murder managed to escape and a criminal case was registered against him under Sections 341, 323, 380, 364, 435/34 IPC for abduction, etc. of the petitioner's two sons in which charges were framed on 04.06.2010 against respondent No. 3 and others. The prosecution moved an application for addition of charges under Sections 302 and 201 read with Section 120B IPC, which prayer was initially rejected on the ground of delay but after the direction of the High Court of Patna, the charges under the aforesaid Sections were added vide order dated 18.04.2014. During the litigation, the petitioner's third son, Rajeev Roshan, a material eye witness in the said case was murdered and an FIR No. 220/14 was lodged against respondent No. 3, his son Osama and other unknown persons. Thus, the three sons of the petitioner were murdered.

11. On 18.05.2016, a raid was conducted by the district administration at Siwan jail and District Magistrate, Siwan in his report stated about the conduct of respondent No. 3 inside the jail and the facilities he was enjoying in jail in violation of the jail rules/manual and recommended his transfer from Siwan to Bhagalpur jail whereafter he was transferred to Bhagalpur jail for six months.

12. As the narration would further unfurl, in the said case, the High Court granted bail to the respondent No. 3 on 02.03.2016 in FIR No. 131/04 and further granted bail in the murder's case of third son of petitioner on 07.09.2016 in the FIR No. 220/14. The petitioner as well as the State of Bihar challenged the orders granting bail. The bail orders have been set aside by this Court in Chandrakeshwar Prasad v. State of Bihar and Anr. (2016) 9 SCC 443. While setting aside the order granting him bail, this Court has held:-

"12. In the instant case, having regard to the recorded allegations against the respondent-accused and the overall factual scenario, we are of the view, having regard in particular to the present stage of the case in which the impugned order has been passed, that the High Court was not justified in granting bail on the considerations recorded. Qua the assertion that the respondent-accused was in judicial custody on the date on which the incident of murder in the earlier case had occurred, the judgment and order of the trial court convicting him has recorded the version of the brother of the deceased therein, that he had seen the respondent-accused participating in the offence. We refrain from elaborating further on this aspect as the said judgment and order of the trial court is presently sub judice in an appeal before the High Court.

13. *On a careful perusal of the records of the case and considering all the aspects of the matter in question and having regard to the proved charges in the cases concerned, and the charges pending adjudication against the respondent-accused and further balancing the considerations of individual liberty and societal interest as well as the prescriptions and the perception of law regarding bail, it appears to us that the High Court has erred in granting bail to the respondent-accused without taking into consideration the overall facts otherwise having a bearing on the exercise of its discretion on the issue."*

On the aforementioned factual plinth, the petitioner has sought transfer of the third respondent from the Siwan jail to a jail outside the State of Bihar and conducting of the trials in pending cases by video conferencing.

14. As per our order dated 17.01.2017, the grievance against the 4th respondent in Writ Petition (Criminal) No. 132 of 2016 shall be heard and dealt with after pronouncement of this judgment and hence, we shall not delve into the contentions put forth in the said writ petition and the stand taken in the counter affidavit in that regard for the present.

15. The seminal issue that we are required to address is **whether this Court, in exercise of power under Article 32 and Article 142 of the Constitution can direct transfer of an accused from one State to another and direct conducting of pending trials by way of video conferencing.** Needless to emphasise the said advertence in law will also depend upon the factual scenario and satisfaction of the judicial conscience of this Court to take recourse to such a mode. The petitioners have asserted with regard to the criminal activities of the third respondent, the cases in which he has been roped in, the convictions he has faced, the sentences imposed

upon him, the snails speed at which the trials are in progress because of the terror that reigns in Siwan, the declaration of the third respondent as a history-sheeter Type-A (who is beyond reform), the non-chalant attitude unabashedly and brazenly demonstrated by him that has unnerved and shaken the victims and the society at large, the impunity with which the collusion with the jail administration has taken place, the blatant intimidation of witnesses that weakens their sense of truth and justice; and mortal terror unleashed when they come to court, the audacious violation of the rules and regulations that are supposed to govern the convicts or under-trial prisoners inside the jail as if they have been made elegantly unperceivable and the confinement inside jail remains a word on paper, for the third respondent, still is able to issue his command and writs from the jail, run a parallel administration and get involved with the crimes, at his own whim and fancy.

20. First, we shall have a survey of the statutory law in the field. The Prisoners Act, 1900 was brought into existence to consolidate the law relating to prisoners confined by the order of a court. As Section 29 of the Prisoners Act, 1900 covered a different field, the Parliament thought it appropriate to bring in the Transfer of Prisoners Act, 1950 (for short, "the 1950 Act").

22. We are required to examine, when the said provision permits transfer outside the State only in certain circumstances and the case of respondent No. 3 does not come within any of the circumstances, could the accused respondent be transferred from the prison in Bihar to any other prison situate in another State. It is also necessary to be addressed, whether the transfer would vitiate the basic tenet of Article 21 of the Constitution and should such a right be allowed to founder. In this regard, we have been commended to *Sunil Batra (II) v. Delhi Administration*, 1980) 3 SCC 488 1979 Indlaw SC 329, and *State of Maharashtra & ors v. Saeed Sohail Sheikh and Ors.* (2012) 13 SCC 192 2012 Indlaw SC 392.

23. In *Sunil Batra (II) 1979 Indlaw SC 329* (supra), a writ petition was registered on receipt of a letter from the prisoner complaining of a brutal assault by Head Warder on another prisoner. The letter was metamorphosed into a proceeding under Article 32 of the Constitution. The Court referred to the decision in *Sunil Batra v. Delhi Administration & Ors.*, (1978) 4 SCC 494 1978 Indlaw SC 289, to opine that the said decision imparts to the habeas corpus writ a versatile vitality and operational utility that makes a healing presence of the law to live up to its reputation as bastion of liberty even within the secrecy of the hidden cell.

27. Considerable emphasis was laid on the aspect that transfer to a distant prison where visits or society of friends or relations is snapped, is an affliction or abridgment and the same is an infraction of liberty or life in its wider sense and cannot be sustained unless Article 21 is satisfied.

31. The question that is required to be posed is if the accused is transferred to another jail in another State, would the same become an apology for trial or promote and safeguard free and fair trial. The argument that all relevant witnesses are in Siwan and the witnesses the defence intends to cite are in Siwan and in such a situation the trial after shifting cannot be characterized as fair trial refers to only one aspect. The concept of fair trial recognized under the Code of Criminal Procedure is conferred an elevated status under the Constitution, is a much broader and wider concept. If the transfer will create a dent in the said concept, there is no justification to accept such a prayer at the behest of the petitioners. In oppugnation, the conception of fair trial in criminal jurisprudence is not one way traffic, but includes the accused and the victim and it is the duty of the court to weigh the balance. When there is threat to life, liberty and fear pervades, it sends shivers in the spine and corrodes the basic marrows of holding of the trial at Siwan. This is quite farther from the idea of fair trial. The grievance of the victims, who have enormously and apparently suffered deserves to be dealt with as per the law of the land and should not remain a mirage and a distant dream. As we find, both sides have propounded the propositions in extreme terms. And we have a duty to balance.

32. To appreciate the contention on this score, we may, at present, refer to certain authorities that have dealt with fair trial in the Constitutional and statutory backdrop.

33. In *J. Jayalithaa & Ors v. State of Karnataka & Ors.* (2014) 2 SCC 401, the Court held that fair trial is the main object of criminal procedure and such fairness should not be hampered or threatened in any manner. Fair trial must be accorded to every accused in the spirit of the right to life and personal liberty and the accused must get a free and fair, just and reasonable trial on the charge imputed in a criminal case. It has been further observed that any breach or violation of public rights and duties adversely affects the community as a whole and it becomes harmful to the society in general and, therefore, in all circumstances, the courts have a duty to maintain public confidence in the administration of justice and such duty is to vindicate and uphold the "majesty of the law" and the courts cannot turn a blind eye to vexatious or oppressive conduct that occurs in relation to criminal proceedings. The Court further laid down that denial of a fair trial is as much injustice to the accused as is to the victim and the society. It necessarily requires a trial before an impartial Judge, a fair prosecutor and an atmosphere of judicial calm. Since the object of the trial is to mete out justice and to convict the guilty and protect the innocent,

the trial should be a search for the truth and not about over technicalities and must be conducted under such rules as will protect the innocent and punish the guilty. Justice should not only be done but should be seen to have been done. Therefore, free and fair trial is a sine qua non of Article 21 of the Constitution. Right to get a fair trial is not only a basic fundamental right, but a human right also. Therefore, any hindrance in a fair trial could be violative of Article 14 of the Constitution.

34. In this regard, we may sit in the time machine and refer to a three-Judge Bench judgment in *Maneka Sanjay Gandhi & another v. Rani Jethmalani*, (1979) 4 SCC 167 1978 Indlaw SC 109, wherein it has been observed that assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperiling, from the point of view of public justice and its attendant environment is necessitous, if the court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. The Court observed that accused cannot dictate where the case against him should be tried and, in a case, it the duty of the Court to weigh the circumstances.

36. Be it noted, the Court in the said case had noted that there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused but, a pregnant one, every procedural lapse or every interdict that has been acceded to and not objected at the appropriate stage would not get the trial dented or make it unfair. Treating it to be unfair would amount to an undesirable state of pink of perfection in procedure. An absolute apple-pie order in carrying out the adjective law, would only be sound and fury signifying nothing."

40. In *Mohd. Hussain @ Julfikar Ali* 2012 Indlaw SC 332 the three-Judge Bench has drawn a distinction between the speedy trial and fair trial by opining that there is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-a-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of the accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end.

41. We have referred to the said authority as the three-Judge Bench has categorically stated that interests of the society at large cannot be disregarded or totally ostracized while applying the test of fair trial.

42. In *Bablu Kumar and Ors. v.State of Bihar and Anr.* (2015) 8 SCC 787 2015 Indlaw SC 488, the Court observed that it is the duty of the court to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding. They cannot expropriate or hijack the community interest by conducting themselves in such a manner as a consequence of which the trial becomes a mock trial. The Court further ruled that a criminal trial is a serious concern of society and every member of the collective has an inherent interest in such a trial and, therefore, the court is duty-bound to see that neither the prosecution nor the defence takes unnecessary adjournments and take the trial under their control. The said observations were made keeping in view the concept of fair trial, the obligation of the prosecution, the interest of the community and the duty of the court.

44. On a studied analysis of the concept of fair trial as a facet of Article 21, it is noticeable that in its ambit and sweep it covers interest of the accused, prosecution and the victim. The victim, may be a singular person, who has suffered, but the injury suffered by singular is likely to affect the community interest. Therefore, the collective under certain circumstances and in certain cases, assume the position of the victim. They may not be entitled to compensation as conceived under section 357A of the Cr.PC. but their anxiety and concern of the crime and desire to prevent such occurrences and that the perpetrator, if guilty, should be punished, is a facet of Rule of Law. And that has to be accepted and ultimately protected.

45. It is settled in law that the right under Article 21 is not absolute. It can be curtailed in accordance with law. The curtailment of the right is permissible by following due procedure which can withstand the test of reasonableness. Submission that if the accused is transferred from jail in Siwan to any other jail outside the State of Bihar, his right to fair trial would be smothered and there will be an inscription of an obituary of fair trial and refutation of the said proponent, that the accused neither has monopoly over the process nor does he has any

exclusively absolute right, requires a balanced resolution. The opposite arguments are both predicated on the precept of fair trial and the said scale would decide this controversy. The interest of the victim is relevant and has to be taken into consideration. The contention that if the accused is not shifted out of Siwan Jail, the pending trials would result in complete farce, for no witness would be in a position to depose against him and they, in total haplessness, shall be bound to succumb to the feeling of accentuated fear that is created by his unseen tentacles, is not an artifice and cannot be ignored. In such a situation, this Court should balance the rights between the accused and the victims and thereafter weigh on the scale of fair trial whether shifting is necessary or not. It would be travesty if we ignore the assertion that if the respondent No. 3 is not shifted from Siwan Jail and the trial is held at Siwan, justice, which is necessitous to be done in accordance with law, will suffer an unprecedented set back and the petitioners would remain in a constant state of fear that shall melt their bones. This would imply balancing of rights.

48. In this context, it is also appropriate to refer to certain other decisions where the Court has dealt with the concept of competing rights. We are disposed to think that dictum laid therein has to be appositely appreciated. In *Mr. 'X' v. Hospital 'Z'*, (1998) 8 SCC 296 1998 Indlaw SC 1218, the issue arose with regard to right to privacy as implicit in the right to life and liberty as guaranteed to the citizens under Article 21 of the Constitution and the right of another to lead a healthy life. Dealing with the said controversy, the Court held as a human being, Ms Y must also enjoy, as she obviously is entitled to, all the human rights available to any other human being. This is apart from, and in addition to, the fundamental right available to her under Article 21, which guarantees "right to life" to every citizen of this country. The Court further held that where there is a clash of two fundamental rights, namely, the appellant's right to privacy as part of right to life and Ms 'Y's right to lead a healthy life which is her fundamental right under Article 21, the right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as the courtroom, but have to be sensitive.

49. The aforesaid decision is an authority for the proposition that there can be a conflict between two individuals qua their right under Article 21 of the Constitution and in such a situation, to weigh the balance the test that is required to be applied is the test of larger public interest and further that would, in certain circumstances, advance public morality of the day. To put it differently, the "greater community interest" or "interest of the collective or social order" would be the principle to recognize and accept the right of one which has to be protected.

50. In this context, reference to the pronouncement in *Rev. Stainislaus v. State of M.P. and Ors.* (1977) 1 SCC 677 1977 Indlaw SC 284, would be instructive. In the said case, the Constitution Bench was dealing with two sets of appeals, one arising from Madhya Pradesh that related to Madhya Pradesh Dharma Swatantraya Adhiniyam, 1968 and the other pertained to Orissa Freedom of Religion Act, 1967. The two Acts insofar as they were concerned with prohibition of forcible conversion and punishment therefor, were similar. The larger Bench stated the facts from Madhya Pradesh case which eventually travelled to the High Court. The High Court ruled that there was no justification for the argument that Sections 3, 4 and 5 were violative of Article 25(1) of the Constitution. The High Court went on to hold that those Sections "establish the equality of religious freedom for all citizens by prohibiting conversion by objectionable activities such as conversion by force, fraud and by allurement". The Orissa Act was declared to be ultra vires the Constitution by the High Court. To understand the controversy, the Court posed the following questions:-

"(1) whether the two Acts were violative of the fundamental right guaranteed under Article 25(1) of the Constitution, and

(2) whether the State Legislatures were competent to enact them?"

51. It was contended before this Court that the right to propagate one's religion means the right to convert a person to one's own religion and such a right is guaranteed by Article 25(1) of the Constitution. The larger Bench dealing with the said contention held:-

"We have no doubt that it is in this sense that the word 'propagate' has been used in Article 25(1), for what the article grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. It has to be remembered that Article 25(1) guarantees 'freedom of conscience' to every citizen, and not merely to the followers of one particular religion, and that, in turn postulates that there is no fundamental right to convert another person to one's own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the 'freedom of conscience' guaranteed to all the citizens of the country alike." And again:-

"It has to be appreciated that the freedom of religion enshrined in the article is not guaranteed in respect of one religion only, but covers all religions alike, and it can be properly enjoyed by a person if he exercises his right in a manner commensurate with the like freedom of persons following the other religions. What is freedom for one, is freedom for the other, in equal measure, and there can therefore be no such thing as a fundamental right to convert any person to one's own religion."

52. The aforesaid judgment clearly lays down, though in a different context, that what is freedom for one is also the freedom for the other in equal measure. The perception is explicated when the Court has said that it has to be remembered that Article 25(1) guarantees freedom of conscience to other citizens and not merely to followers of particular religion and there is no fundamental right to convert another person. The right is guaranteed to all citizens. The right to propagate or spread one's religion by an exposition of its tenets does not mean one's religion to convert another person as it affects the fundamental right of the other. We have referred to this authority as it has, in a way, dwelt upon the "intra-conflict of a fundamental right".

53. Be it stated, circumstances may emerge that may necessitate for balancing between intra-fundamental rights. It has been distinctly understood that the test that has to be applied while balancing the two fundamental rights or inter fundamental rights, the principles applied may be different than the principle to be applied in intra-conflict between the same fundamental right. To elaborate, as in this case, the accused has a fundamental right to have a fair trial under Article 21 of the Constitution. Similarly, the victims who are directly affected and also form a part of the constituent of the collective, have a fundamental right for a fair trial. Thus, there can be two individuals both having legitimacy to claim or assert the right. The factum of legitimacy is a primary consideration. It has to be remembered that no fundamental right is absolute and it can have limitations in certain circumstances. Thus, permissible limitations are imposed by the State. The said limitations are to be within the bounds of law. However, when there is intra-conflict of the right conferred under the same Article, like fair trial in this case, the test that is required to be applied, we are disposed to think, it would be "paramount collective interest" or "sustenance of public confidence in the justice dispensation system". An example can be cited. A group of persons in the name of "class honour", as has been stated in *Vikas Yadav v. State of U.P. & Ors.* (2016) 9 SCC 541 2016 Indlaw SC 702, cannot curtail or throttle the choice of a woman. It is because choice of woman in choosing her partner in life is a legitimate constitutional right. It is founded on individual choice that is recognized in the Constitution under Article 19, and such a right is not expected to succumb to the concept of "class honour" or "group thinking". It is because the sense of class honour has no legitimacy even if it is practised by the collective under some kind of a notion. Therefore, if the collective interest or the public interest that serves the public cause and further has the legitimacy to claim or assert a fundamental right, then only it can put forth that their right should be protected. There can be no denial of the fact that the rights of the victims for a fair trial is an inseparable aspect of Article 21 of the Constitution and when they assert that right by themselves as well as the part of the collective, the conception of public interest gets galvanised. The accentuated public interest in such circumstances has to be given primacy, for it furthers and promotes "Rule of Law". It may be clarified at once that the test of primacy which is based on legitimacy and the public interest has to be adjudged on the facts of each case and cannot be stated in abstract terms. It will require studied scanning of facts, the competing interests and the ultimate perception of the balancing that would subserve the larger public interest and serve the majesty of rule of law. In this regard, we are reminded of an ancient saying:- "yadapi siddham, loka viruddham Na adaraniyam, na acharaniyam"

The aforesaid saying lays stress on public interest and its significance and primacy over certain individual interest. It may not thus have general application, but the purpose of referring to the same is that on certain occasions it can be treated to be appropriate.

54. There may be a perception that if principle of primacy is to be followed, then the right of one gets totally extinguished. It has to be borne in mind that total extinction is not balancing. When balancing act is done, the right to fair trial is not totally crippled, but it is curtailed to some extent by which the accused gets the right of fair trial and simultaneously, the victims feel that the fair trial is conducted and the court feels assured that there is a fair trial in respect of such cases. That apart, the faith of the collective is reposed in the criminal justice dispensation system and remains anchored.

55. While appreciating the concept of public interest in such a situation, the Court is required to engage itself in construing the process of fair trial which ultimately subserves the cause of justice and remains closer to constitutional sensibility. An accused, in the name of fair trial, cannot go on seeking adjournments defeating the basic purpose behind the conducting of a trial as enshrined under Section 309 CrPC. He cannot go on filing applications under various provisions of CrPC, whether tenable or not, and put forth a plea on each and every occasion on the bedrock that principle of fair trial sanctions it. In such a situation, as has been held by this Court, the prosecution which represents the cause of collective and the victim, who fights for remedy of his individual grievance, is allowed to have a say and the court is not expected to be a silent spectator. Thus, the discord that

arises when there is intra-conflict in the same fundamental right especially, in the context of fair trial, it has to be resolved regard being had to the obtaining fact situation. An accused who has been able to, by his sheer presence, erode the idea of safety of a witness in court or for that matter impairs and rusts the faith of a victim in the ultimate justice and such erosion is due to fear psychosis prevalent in the atmosphere of trial, is not to be countenanced as it is an unconscionable situation. Such a hazard is not to be silently suffered because the "Majesty of Justice" does not allow such kinds of complaints to survive. Thus analysed, the submission of Mr. Naphade that shifting of the accused outside the Siwan Jail would affect his right under Article 21 of the Constitution does not commend acceptance.

56. The next limb of controversy relates to exercise of power and jurisdiction.

67. In the context of the aforesaid authorities, the submission of Mr. Naphade is to be appreciated. It is canvassed by him that Section 3 of the 1950 Act permits transfer of a prisoner outside the State under certain circumstances and, therefore, no other circumstance can be visualized while exercising power under Article 142 of the Constitution as that will be running counter to the substantive provisions of the statute. He further submits that this Court cannot legislate under Article 142 and equity must yield to the provisions of law.

68. There can be no doubt that equity cannot override law. As far as the first aspect is concerned, we need not advert to the broad platform on which Mr. Naphade has based his contention. Suffice it to note that Section 3 of the 1950 Act bestows power on the State Government to transfer an accused to another State after consulting the other State. Such an action by the State has to be totally controlled by the circumstances which find mention under Section 3. When the State passes an order with the concurrence of another State, it is obliged to be bound by the circumstances which are postulated under Section 3(1) of the 1950 Act, but when the issue of fair trial emerges before the Constitutional court, Section 3 of the 1950 Act cannot be regarded so as to restrain the court from what is mandated and required for a free and fair trial. The statutory power is not such which is negative and curtails power of the court to act in the interest of justice, and ensure free and fair trial, which is of paramount importance for the Rule of Law. It only controls the power of the executive. Therefore, we are unable to accept the submission of Mr. Naphade in this regard.

69. Presently, we shall advert to the facts which we have stated in the beginning. The third respondent has already been declared as a history-sheeter type 'A', that is, who is beyond reform. Till today, he has been booked in 75 cases, out of which he had been convicted in 10 cases and presently facing trial in 45 cases. There is no dispute that he has been acquitted in 20 cases. Out of 45 cases, 21 cases are those where maximum sentence is 7 years or more. He has been booked in 15 cases where he has been in custody and one such case relates to the murder of the third son of the petitioner and other two cases are of attempt to murder. He is an influential person of the locality, for he has been a representative to the Legislative Assembly on two occasions and elected as a Member of Parliament four times. This is not a normal and usual case.

It has to be dealt with in the aforesaid factual matrix. A history-sheeter has criminal antecedents and sometimes becomes a terror in society.

We have referred to the aforesaid authority to highlight how the Court has taken into consideration the paramountcy of peaceful social order while cancelling the order of bail, for the order granting bail was passed without proper consideration of criminal antecedents of the accused whose acts created a concavity in the social stream.

70. Mr. Bhushan, learned senior counsel heavily relied on the authority in Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Ya.dav and another, (2005) 3 SCC 284 2005 Indlaw SC 93. It is urged by him that factual matrix in the said case and the present case is identical. In the said case, the Court noticed that the respondent therein, Rajesh Ranjan alias Pappu Yadav while he was in judicial custody, was found addressing an election meeting. The Court called for a report from the authorities concerned requiring them to explain on what authority the said respondent was allowed to address a public meeting. The report filed by the CBI revealed that the respondent, in collusion with the police authorities accompanying him to Madhepura, had addressed a public meeting and the escort accompanying him took him to various places which the respondent wanted to visit beyond the scope of the production warrant. It had come to the knowledge of the Court that though his bail had been cancelled, the accused was never taken into jail and, in fact, when he was arrested after the cancellation of bail, he was taken to Patna and an urgent Medical Board was constituted to examine him which opined that the accused required medical treatment at Patna Medical College and permitted him to stay in the said Medical College. Taking various other facts into consideration, the Court opined that the respondent had absolutely no respect for the Rule of Law nor was he, in any manner, afraid of the consequences of his unlawful acts. It was also observed that, it was evident from the fact that some of the illegal acts of the respondent were committed even when his application for grant of bail was pending. When the issue of transfer from Beur Jail, Patna to a jail outside the State arose, a contention was advanced that it would affect his fundamental right as has been enunciated in Sunil

Batra (II) 1979 Indlaw SC 329 (supra). The Court referred to Section 3 of the 1950 Act and in that context, opined that in an appropriate case, such request can also be made by an undertrial prisoner or a detenu and there being no statutory provisions contrary thereto, this Court in exercise of its jurisdiction under Article 142 of the Constitution may issue necessary direction.

The aforesaid authority stands in close proximity to the case at hand. The present case, in fact, frescoes a different picture and projects a sad scenario compelling us to take immediate steps, while safeguarding the principle of fair trial for both the sides.

73. It is fruitful to note that in Dr. Praful B. Desai 2003 Indlaw SC 320 (supra) it has been clearly held that recording of evidence by way of video conferencing is valid in law.

74. In view of the aforesaid analysis, we record our conclusions and directions in seriatim:-

(i) The right to fair trial is not singularly absolute, as is perceived, from the perspective of the accused. It takes in its ambit and sweep the right of the victim(s) and the society at large. These factors would collectively allude and constitute the Rule of Law, i.e., free and fair trial.

(ii) The fair trial which is constitutionally protected as a substantial right under Article 21 and also the statutory protection, does invite for consideration a sense of conflict with the interest of the victim(s) or the collective/interest of the society. When there is an intra-conflict in respect of the same fundamental right from the true perceptions, it is the obligation of the Constitutional courts to weigh the balance in certain circumstances, the interest of the society as a whole, when it would promote and instill Rule of Law. A fair trial is not what the accused wants in the name of fair trial. Fair trial must soothe the ultimate justice which is sought individually, but is subservient and would not prevail when fair trial requires transfer of the criminal proceedings.

(iii) A wrongful act of an individual cannot derogate the right of fair trial as that interest is closer, especially in criminal trials, to the Rule of Law. An accused cannot be permitted to jettison the basic fundamentals of trial in the name of fair trial.

(iv) The weighing of balance between the two perspectives in case of fair trial would depend upon the facts and circumstances weighed on the scale of constitutional norms and sensibility and larger public interest.

(v) Section 3 of the 1950 Act does not create an impediment on the part the court to pass an order of transfer of an accused or a convict from one jail in a State to another prison in another State because it creates a bar on the exercise of power on the executive only.

(vi) The Court in exercise of power under Article 142 of the Constitution cannot curtail the fundamental rights of the citizens conferred under the Constitution and pass orders in violation of substantive provisions which are based on fundamental policy principles, yet when a case of the present nature arises, it may issue appropriate directions so that criminal trial is conducted in accordance with law. It is the obligation and duty of this Court to ensure free and fair trial.

(vii) The submission that this Court in exercise of equity jurisdiction under Article 142 of the Constitution cannot transfer the accused from Siwan Jail to any other jail in another State is unacceptable as the basic premise of the said argument is erroneous, for while addressing the issue of fair trial, the Court is not exercising any kind of jurisdiction in equity.

75. In view of the aforesaid conclusions, we direct the State of Bihar to transfer the third respondent, M. Shahabuddin, from Siwan Jail, District Siwan to Tihar Jail, Delhi and hand over the prisoner to the competent officer of Tihar Jail after giving prior intimation for his transfer in Delhi. Needless to say, that the authorities escorting the third respondent from Siwan Jail to Tihar Jail would strictly follow the rules applicable to the transit prisoners and no special privilege shall be extended. The transfer shall take place within a week hence. Thereafter, the trial in respect of pending trials shall be conducted by video conferencing by the concerned trial court. The competent authority in Tihar Jail and the competent authority of the State of Bihar shall make all essential arrangements so that the accused and the witnesses would be available for the purpose of trial through video conferencing. A copy of this order shall forthwith be communicated to the Home Secretary, Government of Bihar, Superintendent of Siwan Jail and the Inspector General, Prisons, Tihar Jail, Delhi. All concerned are directed to act in aid of the aforesaid order as contemplated under Article 144 of the Constitution.

76. We have noted that the High Court of Patna has granted stay in certain proceedings. The High Court is requested to dispose of the said matters on their merits within four months hence. A copy of this order be sent to the Registrar General, High Court of Patna for placing the same before the learned Acting Chief Justice.

77. In view of the aforesaid analysis, Writ Petition (Criminal) No. 147 of 2016 stands disposed of. Similarly, Writ Petition (Criminal) No. 132 of 2016 also stands disposed of except for the prayer seeking direction to register FIR against Shri Tej Pratap Yadav, Health Minister of Bihar and S.P., Police of Siwan District, for which the matter be listed for further hearing at 2.00 p.m. on 21st of April 2017.

Balakram vs. State of Uttarakhand and others

2017(5) SCALE 220

Bench: Mohan M. Shantanagoudar, Dipak Misra, A.M. Khanwilkar, JJ.

The Judgment was delivered by: Mohan M. Shantanagoudar, J.

2. The judgment in Miscellaneous application No. 1123 of 2016, passed by the High Court of Uttarakhand at Nainital setting aside the order dated 31.8.2016 in I.A. No. 174 Kha in S.T. No. 1 of 2015 is called on question in this appeal.

3. Respondent No.3 herein, along with another accused, is facing trial in ST No. 01 of 2015 before the Sessions Court, Champawat for the offences punishable under Section 302 and 201 of IPC. During the course of the trial, after the completion of examination in chief of PW-15, an application was filed by the respondent No.3 herein (one of the accused), the contents of which read thus:-

"In the above mentioned case applicant wants to submit some key and relevant documents which are necessary for the fair and just trial of instant case.

It is therefore, humbly prayed that your Honour may kindly grant permission for the same in the interest of justice."

4. Along with the application, list of documents to be produced was also filed. The documents are stated to be copies of certain pages of Police diary maintained under Section 172 of the Code of Criminal Procedure, 1973 (for brevity, Cr.P.C), by the Investigation Officer (PW-15), which were obtained by respondent No.3 by making an application under the provisions of Right to Information Act, 2005. The respondent No. 3 proposes to confront PW 15 with those documents.

5. Such application was opposed by the appellant herein/complainant on the ground that the fresh documents cannot be allowed to be produced by the accused at the premature stage of trial and it is always open for the accused to produce such documents during the stage of recording of statements of the accused under Section 313, Cr.P.C It was further contended by the appellant that it is open for the accused to lead evidence on their behalf after recording of the statements of the accused under Section 313, Cr.P.C

6. The application came to be rejected by the Sessions Court on 31.8.2016. Being aggrieved by the same, respondent No.3 herein filed Misc. Application No. 1123 of 2016 before the High Court of Uttarakhand at Nainital under Section 482 Cr.P.C By the impugned order the High Court allowed the said miscellaneous application.

7. Learned counsel for the appellant taking us through the order of the Courts below, argued that entries made in the police diary referred to in Section 172 of the Cr.P.C cannot be used for the purpose of Section 145 of the Indian Evidence Act, 1872 unless the conditions laid down under Section 172(2) and (3) of Cr.P.C are satisfied; that the High Court is not justified in allowing the accused/respondent herein to produce certain pages of police diary obtained by the respondent under the provisions of Right to Information Act. He argued in support of the order of the Trial Court.

8. Per contra, advocate for the respondent argued in support of the order of the High Court contending that the documents sought to be produced were for confronting PW 15-Investigation Officer who is the author of those documents; the defence will lose an opportunity to confront the investigation officer, in case the respondent is not allowed to produce the documents in question. According to him, it is always open to the accused to produce the documents to be relied upon by him at the time of recording his statement under Section 313 of the Cr.P.C but the accused would not get chance to confront the Investigation Officer with such documents.

Section 145 of the Indian Evidence Act, 1872

145. Cross-examination as to previous statements in writing.-A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

10. The afore-mentioned provisions are to be read conjointly and homogenously. It is evident from sub-section (2) of Section 172 Cr.P.C, that the Trial Court has unfettered power to call for and examine the entries in the police diaries maintained by the Investigating Officer. This is a very important safeguard. The legislature has reposed complete trust in the Court which is conducting the inquiry or the trial. If there is any inconsistency or contradiction arising in the evidence, the Court can use the entries made in the diaries for the purposes of contradicting the police officer as provided in sub-section (3) of Section 172 of Cr.P.C

It cannot be denied that Court trying the case is the best guardian of interest of justice. Under sub-section (2) the criminal court may send for diaries and may use them not as evidence, but to aid it in an inquiry or trial. The information which the Court may get from the entries in such diaries usually will be utilized as foundation for questions to be put to the police witness and the court may, if necessary in its discretion use the entries to contradict the police officer, who made them. But the entries in the police diary are neither substantive nor corroborative evidence, and that they cannot be used against any other witness than against the police officer that too for the limited extent indicated above.

11. Coming to the use of police diary by the accused, sub-section (3) of Section 172 clearly lays down that neither the accused nor his agents shall be entitled to call for such diaries nor he or they may be entitled to see them merely because they are referred to by the Court. But, in case the police officer uses the entries in the diaries to refresh his memory or if the Court uses them for the purpose of contradicting such police officer, then the provisions of Sections 145 and 161, as the case may be, of the Evidence Act would apply. Section 145 of the Evidence Act provides for cross examination of a witness as to the previous statements made by him in writing or reduced into writing and if it was intended to contradict him in writing, his attention must be called to those portions which are to be used for the purpose of contradiction. Section 161 deals with the adverse party's right as to the writing used to refresh memory. It can, therefore, be seen that, the right of the accused to cross-examine the police officer with reference to the entries in the police diary is very much limited in extent and even that limited scope arises only when the Court uses the entries to contradict the police officer or when the police officer uses it for refreshing his memory.

12. In other words, in case if the Court does not use such entries for the purpose of contradicting the police officer or if the police officer does not use the same for refreshing his memory, then the question of accused getting any right to use entries even to that limited extent does not arise. The accused persons cannot force the police officer to refresh his memory during his examination in the Court by referring to the entries in the police diary.

13. ***Section 145 of the Indian Evidence Act consists of two limbs. It is provided in the first limb of Section 145 that a witness may be cross-examined as to the previous statements made by him without such writing being shown to him. But the Second limb provides that, if it is intended to contradict him by the writing, his attention must before writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. Sections 155 (3) and 145 of Indian Evidence Act deal with the different aspects of the same matter and should, therefore, be read together.***

14. Be that as it may, as mentioned supra, right of the accused to cross examine the police officer with reference to the entries in the police diary is very much limited in extent and even that limited scope arises only when the Court uses such entries to contradict the police officer or when the police officer uses it for refreshing his memory and that again is subject to provisions of Sections 145 and 161 of the Indian Evidence Act.

Thus, a witness may be cross-examined as to his previous statements made by him as contemplated under Section 145 of the Evidence Act if such previous statements are brought on record, in accordance with law, before the Court and if the contingencies as contemplated under Section 172(3) of Cr.P.C are fulfilled. Section 145 of the Indian Evidence Act does not either extend or control the provisions of Section 172 of Cr.P.C We may hasten to add here itself that there is no scope in Section 172 of the Cr.P.C to enable the Court, the prosecution or the accused to use the police diary for the purpose of contradicting any witness other than the police officer, who made it.

15. In case of Malkiat Singh and others vs. State of Punjab 1991(4) SCC 341 1991 Indlaw SC 1040, this Court while considering the scope of Section 172(3) Cr.P.C with reference to Section 145 of the Indian Evidence Act observed thus:-

"It is manifest from its bare reading without subjecting to detailed and critical analysis that the case diary is only a record of day to day investigation of the investigating officer to ascertain the statement of circumstances ascertained through the investigation. Under sub-section (2) the court is entitled at the trial or enquiry to use the diary not as evidence in the case, but as aid to it in the inquiry or trial. Neither the accused, nor his agent, by operation of sub-section (3), shall be entitled to call for the diary, nor shall he be entitled to use it as evidence

merely because the court referred to it. Only right given thereunder is that if the police officer who made the entries in the diary uses it to refresh his memory or if the court uses it for the purpose of contradicting such witness, by operation of Section 161 of the Code and Section 145 of the Evidence Act, it shall be used for the purpose of contradicting the witness, i.e. Investigating Officer or to explain it in re-examination by the prosecution, with permission of the court. It is, therefore, clear that unless the investigating officer or the court uses it either to refresh the memory or contradicting the investigating officer as previous statement under Section 161 that too after drawing his attention thereto as is enjoined under Section 145 of the Evidence Act, the entries cannot be used by the accused as evidence."

16. The police diary is only a record of day to day investigation made by the investigating officer. Neither the accused nor his agent is entitled to call for such case diary and also are not entitled to see them during the course of inquiry or trial. The unfettered power conferred by the Statute under Section 172 (2) of Cr.P.C on the court to examine the entries of the police diary would not allow the accused to claim similar unfettered right to inspect the case diary.

18. From the afore-mentioned, it is clear that the denial of right to the accused to inspect the case diary cannot be characterized as unreasonable or arbitrary. The confidentiality is always kept in the matter of investigation and it is not desirable to make available the police diary to the accused on his demand.

19. Since we are not called upon to decide the question as to whether the copy of the case diary or a portion thereof can be provided to the accused under the provisions of the Right to Information Act, we are not deciding the said question in the matter on hand.

20. Since in the matter on hand, neither the police officer has refreshed his memory with reference to entries in the police diary nor has the trial court used the entries in the diary for the purposes of contradicting the police officer (PW-15), it is not open for the accused to produce certain pages of police diary obtained by him under the provisions of Right to Information Act for the purpose of contradicting the police officer.

21. In view of the above, the High Court is not justified in permitting the accused to produce certain pages of police diary at the time of cross examination of PW-15/Investigating Officer. Accordingly, the impugned Order is liable to be set aside and the same stands set aside. The appeal is allowed.

Naresh Kumar alias Nitu vs. State of Himachal Pradesh

2017 Indlaw SC 508

Bench: Navin Sinha, L. Nageswara Rao, JJ.

The Judgment was delivered by: Navin Sinha, J.

1. The acquittal of the appellant by the Special Judge, Shimla in Sessions Trial No.7-S/7/2012, from the charge under Sections 20 and 61 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('the Act') has been reversed by the High Court. The appellant has been sentenced to fifteen years imprisonment and fine of Rs.2, 00,000/-. Thus the present appeal.

2. The appellant is stated to have been apprehended at Majhotli, by the police party, on suspicion. Two kilograms of Charas is stated to have been recovered from a bag in his possession in presence of PW-2, Sita Ram an independent witness. DW-1 Shayam Singh, the depot in-charge at Nerwa, and DW-2 Khem Raj, the conductor of the bus in question were examined as defence witnesses.

3. After consideration of the entirety of the evidence, particularly that of PW-2 and DW-2, and also noticing that PW-1, Constable Rakesh Kumar, an eye-witness to the incident, had not been mentioned as a witness in the seizure memo Exhibit PW-1/B, the Special Judge opined that two theories had emerged with regard to the accusations against the appellant. The appellant was acquitted, giving him the benefit of doubt.

4. The High Court reversed the acquittal, holding that PW-2 had admitted his signatures on Exhibit PW-1/B, the bag along with the narcotic, Ex.PW-2/A seal impression, Ex.PW-2/D the arrest memo and the Ex.PW-2/E personal search memo. No complaint had been lodged by the witness that he had been compelled by the police to sign the documents under pressure. The statements of the official witnesses, PW-1 Rakesh Kumar and PW-6 Head Constable Parmanand, were trustworthy, inspiring confidence, and could not be rejected only on the ground that they were police personnel. Any discrepancy with regard to distance and travelling time between Nerwa and Majhotli could be attributed to memory loss with passage of time, and was not required to be with mathematical precision. The time with regard to purchase of bus ticket had not been established.

7. The public bus, on which the appellant was traveling, was going from Nerwa to Chamunda. The ticket issued to the appellant Exhibit DX, proved by the bus Conductor DW-2, bears the time of issuance 6.51 A.M., visible to the naked eye. The distance from Nerwa to Majhotli, is 26 kms. as deposed by DW-1. We find substance in the submission on behalf of the appellant, that the travelling time for the bus, in the hills, for this distance would be one hour or more. Prima facie, the prosecution story that the appellant was apprehended at Majhotli at 6.15 A.M. becomes seriously doubtful if not impossible. The bus would have reached Majhotli at about 8.00 A.M. or thereafter only. The conclusion of the High Court that passage of time, and memory loss, were sufficient explanation for the time difference, is held to be perverse, and without proper consideration of Exhibit DX. PW-2, the independent witness has stated that he was stopped at Majhotli by the police at 10.30 A.M. and was allowed to leave after verification of his motor cycle papers.

The witness has specifically denied that the appellant was apprehended in his presence and that any search, seizure and recovery was conducted in his presence. He had deposed that he was called to the police station at 1:00 P.M. and asked to sign the papers. The witness was declared hostile. This aspect has not been considered by the High Court, which proceeded on the only assumption that the signatures were admitted.

8. In a case of sudden recovery, independent witness may not be available. But if an independent witness is available, and the prosecution initially seeks to rely upon him, it cannot suddenly discard the witness because it finds him inconvenient, and place reliance upon police witnesses only. In the stringent nature of the provisions of the Act, the reverse burden of proof, the presumption of culpability under Section 35, and the presumption against the accused under Section 54, any reliance upon Section 114 of the Evidence Act in the facts of the present case, can only be at the risk of a fair trial to the accused. *Karamjit Singh vs. State (Delhi Administration)*, AIR 2003 SC 1311 2003 Indlaw SC 285, is distinguishable on its facts as independent witness had refused to sign because of the fear of terrorists. Likewise *S. Jeevananthan vs. State*, 2004(5) SCC 230 2004 Indlaw SC 1115, also does not appear to be a case where independent witnesses were available.

9. The presumption against the accused of culpability under Section 35, and under Section 54 of the Act to explain possession satisfactorily, are rebuttable. It does not dispense with the obligation of the prosecution to prove the charge beyond all reasonable doubt. The presumptive provision with reverse burden of proof, does not sanction conviction on basis of preponderance of probability. Section 35 (2) provides that a fact can be said to have been proved if it is established beyond reasonable doubt and not on preponderance of probability.

10. In the facts of the present case, and the nature of evidence as discussed, the prosecution had failed to establish the foundational facts beyond all reasonable doubt. The special judge committed no error in acquitting the appellant. The High Court ought not to have interfered with the same. The submissions regarding non-compliance with Section 50 of the Act, or that the complainant could not be the investigating officer are not considered necessary to deal with in the facts of the case.

11. In *Basappa* 2014 Indlaw SC 130 (supra), it was observed that the High Court before setting aside an order of acquittal was required to record a finding that the conclusions of the Trial Court were so perverse and wholly unreasonable, so as not to be a plausible view by misreading and incorrect appreciation of evidence. The conclusions of the High Court in the facts of the present case are more speculative, based on conjectures and surmises, contrary to the weight of the evidence on record.

12. The order of the High Court is set aside. The acquittal of the appellant ordered by the Special Judge is restored. The appellant is set at liberty forthwith, unless wanted in any other case. The appeal is allowed.

Amrutbhai Shambhubhai Patel vs. Sumanbhai Kantibhai Patel and others

AIR 2017 SC 774, 2017(2) SCALE 198

Bench: Amitava Roy, Dipak Misra

The Judgment was delivered by: Amitava Roy, J.

1. The assail is of the verdict dated 10.04.2015 rendered by the High Court, setting at naught the order dated 27.5.2014 passed by the Chief Judicial Magistrate, Gandhinagar, whereby the Trial Court had allowed the application filed by the appellant, the original informant, under Section 173(8) of the Code of Criminal Procedure, 1973 ("the Code/1973 Code") for further investigation by the police.

3. The appellant had lodged a First Information Report ("FIR") against the respondents under Sections 406, 420, 426, 467, 468, 471, 477B and 120B of the Indian Penal Code ("IPC"). There was a dispute between the parties relating to agricultural land and that the appellant/informant had alleged forgery of the signatures and thumb impression of his as well as of his family members in the register maintained by the Notary (Public). After the charge-sheet was submitted, charge was framed against the respondents and they stood the trial accordingly, as they denied the imputations. As would be gleanable from the records, the oral evidence of the appellant/first informant was concluded on 03.07.2012 followed by that of the investigating officer of the case on 10.09.2013. Subsequent thereto, the statements of the respondents were recorded under Section 313 Cr.PC on 03.12.2013, whereafter an application was filed at the culminating stages of the trial by the appellant/informant seeking a direction under Section 173(8) from the Trial Court for further investigation by the police and in particular to call for a report from the Forensic Science Laboratory as regards one particular page of the register of the Notary (Public), which according to the appellant/informant was of debatable authenticity, as it appeared to have been affixed/pasted with another page thereof. To be precise, this application was filed at a stage when the case was fixed for final arguments.

4. The Trial Court, however, by the order impeached before the High Court granted the prayer made and issued a direction to the police for further investigation. Significantly, prior thereto in Special Leave Petition being SLP (Crl.) No.9106 of 2010, this Court had directed expeditious disposal of the trial. It is also worthwhile to record that the application filed by the appellant/informant under Section 173(8) of Cr.PC had been opposed by the respondents herein, who being dissatisfied with the order of the Trial Court, thus impugned the same before the High Court.

5. The High Court, as the impugned decision would disclose exhaustively examined the purport of Section 173(8) in the particular context of the scope of further investigation by the police after it had submitted a charge sheet and the Trial Court had taken cognizance on the basis thereof and had proceeded with the trial, following the appearance of the accused persons. It, amongst others took note of the 41st Report of the Law Commission of India which after reflecting on the view of the Courts that once a final report under Section 173 had been submitted by the police, the latter could not touch the case again and reopen the investigation, recommended that it ought to be made clear that under the said provision of the Code, it was still permissible for the police to examine any evidence even after the submission of the charge-sheet and to submit a report to the Magistrate. Thus, the Law Commission's emphasis was to obviate any hindrance in the way of the investigating agency, which in certain fact situations could be unfair to the prosecution as well as to the accused.

6. The High Court having regard to this recommendation and the incorporation of Section 173(8) as a sequitur thereof held that it was permissible for the investigating officer or the officer-in-charge of the police station to undertake a further investigation even after the filing of the charge sheet, but neither the informant nor the accused could claim as a matter of right, any direction from the Court directing such further investigation under the said provision after a charge-sheet was filed. The High Court deduced on the basis of an in-depth survey of the state of law, on the import and ambit of Section 173(8) Cr.P.C that in absence of any application or prayer made by the investigating authority for further investigation in the case, the Trial Court had erred in allowing the application filed by the appellant/informant for the same.

11. Without prejudice to this finding, the High Court was further of the view that having regard to the sequence of events and the delay on the part of the informant to make such a prayer at the closing stages of the trial, it was not entertainable. In arriving at this determination, the High Court, amongst others marked that the evidence of the appellant/informant had been recorded in the year 2012 when he did have sufficient opportunity to scrutinise the document in question but for inexplicable reasons did wait for more than two years to register the prayer for further investigation. It was of the view that the attendant factual setting did not demonstrate any defective investigation which demanded curation through a further drill and that in any view of the matter, additional report from the Forensic Science Laboratory had not been called for. This is more so, as in the view of the High Court, the entire register of the Notary (Public) had been seized by the investigating officer and that any unusual or suspicious feature therein would have been certainly examined by the FSL and findings in connection therewith recorded. The High Court thus interfered with the order of the Magistrate permitting further investigation by the police in the case and ordered for expeditious disposal of the trial.

13. Having regard to the contentious assertions, expedient it would be to retrace the law propounded by this Court on the import and impact of Section 173 Cr.PC, with particular reference to sub-Section (8) thereof.

14. It would be appropriate at this juncture to set out as well the Section 173 of the Code of Criminal Procedure 1898.

"Section 173. Report of police-officer.-

(1) Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer in charge of the police-station shall-

(a) forward to a Magistrate empowered to take cognizance of the offence on a police-report a report, in the form prescribed by the State Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody, or has been released on his bond, and, if so, whether with or without sureties, and,

(b) communicate, in such manner as may be prescribed by the State Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.

(2) Where a superior officer of police has been appointed under section 158, the report shall, in any cases in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police-station to make further investigation.

(3) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(4) After forwarding a report under this section, the officer in charge of the police-station shall, before the commencement of the inquiry or trial, furnish or cause to be furnished to the accused, free of cost, a copy of the report forwarded under sub-section (1) and of the first information report recorded under section 154 and of all other documents or relevant extracts thereof, on which the prosecution proposes to rely, including the statements and confessions, if any recorded under section 164 and the statements recorded under sub-section (3) of section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(5) Notwithstanding anything contained in sub-section (4), if the police-officer is of opinion that any part of any statement recorded under sub-section (3) of section 161 is not relevant to the subject-matter of the inquiry or trial of that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, he shall exclude such part from the copy of the statement furnished to the accused and in such a cause, he shall make a report to the Magistrate stating his reasons for excluding such part.

Provided that at the commencement of the inquiry or trial, the Magistrate, shall after perusing the part so excluded and considering the report of the police-officer, pass such orders as he thinks fit and if he so directs, a copy of the part so excluded or such portion thereof, as he thinks proper, shall be furnished to the accused."

15. A plain comparison of these two provisions would amply demonstrate that though these relate to the report of a police officer on completion of investigation and the steps to ensue pursuant thereto, outlining as well the duties of the officer in-charge of the concerned police station, amongst others to communicate, the action taken by him to the person, if any, by whom the information relating to the commission of offence was first given, it is explicit that the recast provision of the 1973 Code did incorporate sub-clause 8 as a significant addition to the earlier provision.

16. The Forty-first Report of the Law Commission of India ("the Commission") on the Code of Criminal Procedure, 1898 dealt with the aspect of reopening of investigation in the context of the existing Section 173 of the Code 1898 and recommended in the following terms:

"14.23: A report under section 173 is normally the end of the investigation. Sometimes, however, the police officer after submitting the report under section 173 comes upon evidence bearing on the guilt or innocence of the accused. We should have thought that the police officer can collect that evidence and send it to the magistrate concerned. It appears, however, that courts have sometimes taken the narrow view that once a final report under section 173 has been sent, the police cannot touch the case again and cannot re-open the investigation. This view places a hindrance in the way of the investigating agency, which can be very unfair to the prosecution and, for that matter, even to the accused. It should be made clear in section 173 that the competent police officer can examine such evidence and send a report to the magistrate. Copies concerning the fresh material must of course be furnished to the accused."

17. The Commission in the above perspective proposed a revision of Section 173 of Code 1898 in the following terms:

"14.24: We propose that section 173 should be revised as follows:-

173. (1) Every investigation under this Chapter shall be completed without unnecessary delay.

(2) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police-report a report, in the form prescribed by the State Government, stating- (a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed, and if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond under section 169, and, if so, whether with or without sureties,-

(g) whether he has been forwarded in custody under section 170.

The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under section 158, the report shall, in any cases in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct that officer in charge of the police-station to make further investigation.

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which section 170 applies, the police-officer shall forward to the Magistrate along with the report-

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation; and,

(b) the statements recorded under.....section 161 of all persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate. Where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (5) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report under sub-section (2)."

18. The Bill to consolidate and amend the law relating to criminal procedure followed and was circulated in the Gazette of India, Extraordinary, Part II, published on December 10, 1970 proposing, the Code of Criminal Procedure. The Statement of Objects and Reasons clearly disclosed that the recommendations of the Commission to overhaul the Code 1898 as made were accepted and vis-a-vis Section 173, which corresponded to Section 176 in the aforementioned report, the amendment proposed was to facilitate collection of evidence by the police after filing the charge-sheet and production thereof before the Court, subject to the accused being given usual facilities for copies. The remodelled Section 173 was identical in form and substance to the one, as proposed by the Commission in chime with its recommendation as contained in the Report. Sub-clause (7) of the new Section 173, as proposed by the Commission and integrated in the Bill, however eventually appeared as sub-clause (8) to the Section under Code 1973.

19. The newly added sub-section (8), as its text evinces, permits further investigation by the concerned officer in-charge of the police station in respect of an offence after a report under sub-section 2 had been forwarded to the Magistrate and also to lay before the Magistrate a further report, in the form prescribed, whereafter such investigation, he obtains further evidence, oral or documentary. It is further ordained that on submission of such

further report, the essentialities engrafted in sub-sections 2 to 6 would apply also in relation to all such report or reports.

20. The integration of sub-section 8 is axiomatically subsequent to the 41st Report of the Law Commission Report of India conveying its recommendation that after the submission of a final report under Section 173, a competent police officer, in the event of availability of evidence bearing on the guilt or innocence of the accused ought to be permitted to examine the same and submit a further report to the Magistrate concerned. This assumes significance, having regard to the language consciously applied to design Section 173(8) in the 1973 Code. Noticeably, though the officer in-charge of a police station, in categorical terms, has been empowered thereby to conduct further investigation and to lay a supplementary report assimilating the evidence, oral or documentary, obtained in course of the said pursuit, no such authorization has been extended to the Magistrate as the Court is seisin of the proceedings. **It is, however no longer res integra that a Magistrate, if exigent to do so, to espouse the cause of justice, can trigger further investigation even after a final report is submitted under Section 173(8). Whether such a power is available suo motu or on the prayer made by the informant, in absence of request by the investigating agency after cognizance has been taken and the trial is in progress after the accused has appeared in response to the process issued is the issue seeking scrutiny herein.**

22. In *Bhagwant Singh v. Commissioner of Police & Anr.*, (1985) 2 SCC 537, a three Judge Bench of this Court was seized with the poser as to whether in a case where the First Information Report is lodged and after completion of the investigation initiated on the basis thereof, the police submits a report that no offence has been committed, the Magistrate if is inclined to accept the same, can drop the proceeding without issuing notice to the first informant or to the injured or in case where the incident has resulted in death, to the relatives of the deceased. This Court in its adjudicative pursuit, embarked upon a scrutiny of the provisions of Chapter XII of the Cr.P.C, dealt with Sections 154, 156, 157 thereof before eluding to Section 173 of the Code. It noticed that under sub-Section (1) of Section 154, every information relating to the commission of a cognizable offence, if given orally to an officer in-charge of a police station has to be reduced into writing by him or under his direction and is to be read over to the informant and every such information whether given in writing or reduced to writing, shall be signed by the person giving it and that a copy thereof shall be given forthwith to the informant, free of cost.

It noticed that under Section 156(1), the officer in-charge of a police station is vested with the power to investigate any cognizable case without the order of the Magistrate and that sub-Section (3) authorized the Magistrate empowered under Section 190 Cr.P.C to order an investigation, as mentioned in sub-Section (1). The prescription under Section 157(1) requiring the officer in-charge of a police station to forthwith send a report of the information to a Magistrate empowered to take cognizance of such offence upon a police report, in case he has reason to suspect the commission of an offence which he is empowered under Section 156 to investigate, was taken note of. The mandate of Section 157(2) for the police officer to notify the informant, in case he was of the view that no sufficient ground for entering on an investigation had been made out, was also referred to.

23. It noted as well that under Section 173(2)(i), the officer in-charge, as soon as the investigation is completed, is required to forward to the Magistrate empowered, a report in the prescribed form so as to enable the Court to take cognizance of the offence based thereon. This Court also adverted to Section 190 enumerating the modes of taking cognizance of an offence by a Magistrate, as specified therein, either upon receiving a complaint of facts which constituted such offence or upon a police report of such facts or upon information received from any person other than a police officer or upon his own knowledge that such offence had been committed.

24. In the conspectus of the provisions of Cr.P.C traversed, this Court held the view that an informant who lodges the first information report does not fade away therewith and is very much concerned with the action initiated by the officer in-charge of the police station pursuant thereto, so much so, that not only a copy of the said report is to be supplied to him free of cost and in case, no investigation is intended, he has to be notified of such decision. The reason, in the contemplation of this Court, for the officer in-charge of a police station to communicate the action taken by him to the informant and a report to the Magistrate under Section 173(2) Cr.P.C was that the informant, who sets the machinery of investigation into motion, was required to know what was the result of the exercise initiated on the basis thereof, as he would be vitally interested therein and hence, the obligations cast by law on the officer in-charge.

25. This Court assayed the courses open to the Magistrate on receipt of a report by the police on the completion of the investigation. It was enunciated that if the report submitted by the police divulged that no offence had been committed, there again, the Magistrate would be left at liberty to adopt one of the three courses, namely; he could accept the report and drop the proceeding, or he could disagree with the report and taking the view that there was sufficient ground for proceeding further, take cognizance of the offence and issue process or he could direct further investigation to be made by the police under sub-Section (3) of Section 156. Noticeably,

these three courses referred to hereinabove are at the pre-cognizance stage and can be opted for by the Magistrate depending on his satisfaction on an assessment of the materials then on record.

26. Be that as it may, this Court held that whereas neither the informant nor the injured nor the relative of the deceased in case of death, would be prejudicially affected in case the Magistrate decides to take cognizance of the offence and to issue a process, they would certainly be prejudiced in case, the Court holds the view that there is no sufficient ground for proceeding further and is inclined to drop the proceeding. Having regard to the scheme of Sections 154, 157 and 173 in particular of the Cr.P.C and the pattern of consequences to follow in the two contingencies referred to herein above, this Court propounded that in case the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process. Qua the requirement of issuance of such notice to the injured person or to a relative of the deceased, in case of death, who is/are not the informant(s) who had lodged the first information report, it was elucidated that it would be open for the Magistrate in the exercise of his discretion, if he thinks fit, to give such notice. However, the locus standi of the injured person or any relative of the deceased, though not entitled to notice on the Magistrate to apply for the Court at the time of consideration of the report, if he/they otherwise come to know of such stage of the proceeding, was recognized, so much so that in case he/they would want to advance any submission with regard to the report, the Magistrate would be bound to hear him/them as the case may be.

27. This verdict in re the issue presently involved is significant, so far as it outlines the different modes of taking cognizance of an offence by a Magistrate and also the procedures and powers available to him on the submission of a police report following the completion of investigation. This decision is pellucid in its statement that the Magistrate, on receipt of the report, at that stage before taking cognizance of the offence alleged, may direct further investigation under sub-Section (3) of Section 156 Cr.P.C and require the police to make further report and that such power can be exercised suo motu, contingent on its satisfaction of the necessity thereof to espouse the cause of justice.

28. The question that fell for appraisal in *Randhir Singh Rana* 1996 Indlaw SC 1566 (supra) was as to whether a judicial Magistrate, after taking cognizance of an offence, on the basis of a police report and after appearance of the accused in pursuance of the process issued, can order of its own, further investigation in the case. The significantly additional feature of this query is the stage of the proceedings for directing further investigation in the case i.e. after the appearance of the accused in pursuance of the process already issued. This Court reiterated that such power was available to the police, after submission of the charge-sheet as was evident from Section 173(8) in Chapter XII of the Code, 1973. That it was not in dispute as well that before taking cognizance of the offence under Section 190 of Chapter XIV, the Magistrate could himself order investigation as contemplated by Section 156(3) of the Code was noted as well. This Court also noticed the power under Section 311 under Chapter XXIV to summon any person as a witness at any stage of an inquiry/trial or other proceedings, if the same appeared to be essential to the just decision of the case.

29. It recalled its earlier rendering in *Tula Ram and others v. Kishore Singh*, (1977) 4 SCC 459 1977 Indlaw SC 397 to the effect that the Magistrate could order investigation under Section 156(3) only at the pre-cognizance stage under Sections 190, 200 and 204 Cr.P.C and that after he decides to take cognizance under the provisions of Chapter XIV, he would not be entitled in law to order any investigation under Section 156(3), and further though in cases not falling within the proviso to Section 202, he could order such investigation by the police, the same would be in the nature of an inquiry only as contemplated by Section 202.

30. This Court also recounted its observations in *Ram Lal Narang* 1979 Indlaw SC 298 (supra) to the effect that on the Magistrate taking cognizance upon a police report, the right of the police to further investigate even under the 1898 Code was not exhausted and it could exercise such right often as necessary, when fresh information would come to light. That this proposition was integrated in explicit terms in sub-Section (8) of Section 173 of the new Code, was noticed. The desirability of the police to ordinarily inform the Court and seek its formal permission to make further investigation, when fresh facts come to light, was stressed upon to maintain the independence of the judiciary, the interest of the purity of administration of criminal justice and the interest of the comity of the various agencies and institutions entrusted with different stages of such dispensation.

31. The pronouncement of this Court in *Devarapalli Lakshminarayana Reddy and others v. V. Narayana Reddy and others*, (1976) 3 SCC 252 emphasizing on the distinction in the power to order police investigation under Section 156(3) and under Section 202(1) of the Cr.P.C, was referred to. It was ruled that the two powers operate in separate distinct spheres at different stages, the former being exercisable at the pre-cognizance stage and the latter at the post-cognizance stage when the Magistrate is in seisin of the case. It was underlined that in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) could be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a), but once such

cognizance is taken and he embarks upon the procedure embodied in Chapter XV, he would not be competent to revert to the pre-cognizance stage and avail Section 156(3). On the other hand, it was observed that Section 202 would be invocable at a stage when some evidence has been collected by the Magistrate in the proceedings under Chapter XV, but is deemed to be insufficient to take a decision as to the next step and in such an event, the Magistrate would be empowered under Section 202 to direct, within the limits circumscribed by that provision, an investigation for the purpose of deciding whether or not, there is sufficient ground for proceeding. It was thus expounded that the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing the proceedings already instituted upon a complaint before him. It was thus concluded on an appraisal of the curial postulations above referred to, that the Magistrate of his own, cannot order further investigation after the accused had entered appearance pursuant to a process issued to him subsequent to the taking of the cognizance by him.

32. The scope of the judicial audit in *Reeta Nag* (supra), to reiterate, was whether, after the charge-sheet had been filed by the investigating agency under Section 173(2) Cr.P.C, and charge had been framed against some of the accused persons on the basis thereof, and other co-accused had been discharged, the Magistrate could direct the investigating agency to conduct a re-investigation or further investigation under sub-Section (8) of Section 173. The recorded facts revealed that the Magistrate had in the contextual facts directed for re-investigation and to submit a report, though prior thereto, he had taken cognizance of the offences involved against six of the original sixteen accused persons, discharging the rest. The informant had thereafter filed an application for re-investigation of the case and the prayer was acceded to. This Court referred to its earlier decisions in *Sankatha Singh and others v. State of Uttar Pradesh*, AIR 1962 SC 1208 1962 Indlaw SC 132 and *Master Construction Company (P) Ltd. v. State of Orissa and another*, AIR 1966 SC 1047 1965 Indlaw SC 81 to the effect that after the Magistrate had passed a final order framing charge against some of the accused persons, it was no longer within his competence or jurisdiction to direct a re-investigation into the case. The decision in *Randhir Singh Rana* 1996 Indlaw SC 1566 (supra), which propounded as well that after taking cognizance of an offence on the basis of a police report and after the appearance of the accused, a Magistrate cannot of its own order further investigation, though such an order could be passed on the application of the investigating authority, was recorded. It was reiterated with reference to the earlier determination of this Court in *Dinesh Dalmia v. CBI*, (2007) 8 SCC 770 2007 Indlaw SC 935 that the power of the investigating officer to make a prayer for conducting further investigation in terms of Section 173(8) of the Code was not taken away only because a charge-sheet had been filed under Section 173(2) and a further investigation was permissible even if cognizance had been taken by the Magistrate. This Court, therefore summed up by enouncing that once a charge-sheet was filed under Section 173(2) Cr.P.C and either charges have been framed or the accused have been discharged, the Magistrate may on the basis of a protest petition, take cognizance of the offence complained of or on the application made by the investigating authority, permit further investigation under Section 173(8), but he cannot suo motu direct a further investigation or order a re-investigation into a case on account of the bar of Section 167(2) of the Code. It was thus held that as the investigating authority did not apply for further investigation and an application to that effect had been filed by the defacto complainant under Section 173(8), the order acceding to the said prayer was beyond the jurisdictional competence of the Magistrate. It was, however observed, that a Magistrate could, if deemed necessary, take recourse to the provisions of Section 319 Cr.P.C at the stage of trial.

33. This decision reinforces the view that after cognizance is taken by the Magistrate on the basis of a report submitted by the police on the completion of the investigation, no direction for further investigation can be made by the Magistrate suo motu and it would be permissible only if such a request is made by the investigating authority on the detection of fresh facts having bearing on the case and necessitating further exploration thereof in the interest of complete and fair trial.

34. The query in *Vinay Tyagi v. Irshad Ali @ Deepak & Ors.*, (2013) 5 SCC 762 was whether in exercise of powers under Section 173 Cr.P.C, the Trial Court has the jurisdiction to ignore any of the police reports, where there was more than one, whether by the same or different investigating agencies submitted in furtherance of the orders of a Court. The respondents therein were sought to be prosecuted by filing a First Information Report under Sections 120B, 121 and 122 of the IPC read with Section 25 of the Arms Act and Sections 4 and 5 of Explosives Substance Act, 1908. The FIR was filed by the Special Cell of Delhi Police, which the respondents alleged had been lodged to falsely implicate them. Being aggrieved, the respondents challenged this action before the High Court and inter alia prayed that the investigation in the case be transferred to the CBI. As the High Court did not, though it had issued notice in the writ petition, stay the investigation, eventually the Special Cell of Delhi Police did file a charge-sheet before the Trial Court. The High Court finally, while disposing of the writ petition and being satisfied, directed the CBI to undertake an inquiry into the matter and submit a report. Subsequent thereto the CBI filed its report indicating in substance that the recoveries, amongst others made from the respondents in course of the inquisition made by the Special Cell of Delhi Police did not inspire confidence and that further investigation was needed.

35. The CBI, after detailed investigation, submitted a closure report, whereafter one of the respondents filed an application before the Trial Court seeking discharge. This prayer was declined by the Trial Court as premature, observing that no definite conclusion could be drawn at that stage to ascertain the truthfulness of the version of the two different agencies. The High Court, being approached under Section 482 of the Cr.P.C by one of the respondents, seeking to quash the First Information Report, it disposed of the same by holding that once the report had been filed by the CBI, it ought to be construed as an investigating agency, and thus its closure report should be considered by the Trial Court and thus remanded the case by observing that in undertaking the exercise, as directed, the Trial Court should not be influenced by the report of the Special Cell of Delhi Police. This order formed the subject matter of challenge before this Court.

36. After referring to Section 156(3) in particular and Section 190 Cr.P.C, this Court reverted to Section 173 and ruled that a very wide power was vested in the investigating agency to conduct further investigation after it had filed its report in terms of sub-Section (2) thereof. It held on an elucidation of the contents of Section 173(8) that the investigating agency was thus competent to file a report supplementary to its primary report and that the former was to be treated by the Court in continuation of the latter, and that on an examination thereof and following the application of mind, it ought to proceed to hear the case in the manner prescribed. It was elaborated that after taking cognizance of the offence, the next step was to frame charge in terms of Section 228 of the Code unless the Court found, upon consideration of the record of the case and the documents submitted therewith, that there did exist no sufficient ground to proceed against the accused, in which case it would discharge him on reasons to be recorded in terms of Section 227 of the Code. Alluding to the text of Section 228 of the Code which is to the effect that if a Judge is of the opinion that there is ground for presuming that the accused had committed an offence, he could frame a charge and try him, this Court propounded that the word "presuming" did imply that the opinion was to be formed on the basis of the records of the case and the documents submitted therewith along with the plea of the defence to a limited extent, if offered at that stage. The view of this Court in *Amit Kapoor v. Ramesh Chander and another*, (2012) 9 SCC 460 2012 Indlaw SC 309 underlining the obligation of the Court to consider the record of the case and the documents submitted therewith to form an opinion as to whether there did exist or not any sufficient ground to proceed against an accused was underlined. This aspect was dilated upon logically to respond to the query in the contextual facts as to whether both the reports submitted by the Special Cell of the Delhi Police and the CBI were required to be taken note of by the Trial Court.

37. Additionally, this Court also dwelt upon the three facets of investigation in succession i.e. (i) initial investigation (ii) further investigation and (iii) fresh or de novo or reinvestigation. Whereas initial investigation was alluded to be one conducted in furtherance of registration of an FIR leading to a final report under Section 173(2) of the Code, further investigation was a phenomenon where the investigating officer would obtain further oral or documentary evidence after the final report had already been submitted, so much so that the report on the basis of the subsequent disclosures/discoveries by way of such evidence would be in consolidation and in continuation of the previous investigation and the report yielded thereby. "Fresh investigation" "reinvestigation" "de novo investigation", however is an exercise, which it was held, could neither be undertaken by the investigating agency suo motu nor could be ordered by the Magistrate and that it was essentially within the domain of the higher judiciary to direct the same and that too under limited compelling circumstances warranting such probe to ensure a just and fair investigation and trial. Adverting to Section 173 of the Code again, this Court recalled its observations in *State of Punjab v. CBI and others*, (2011) 9 SCC 182 2011 Indlaw SC 619 that not only the police had the power to conduct further investigation in terms of Section 173(8) of the Code, even the Trial Court could direct further investigation in contradistinction to fresh investigation even where the report had been filed.

38. The decisions in *Minu Kumari and another v. State of Bihar and others*, (2006) 4 SCC 359 and *Hemant Dhasmana v. CBI and another*, (2001) 7 SCC 536 to the effect that a Court could order further investigation under Section 173(8) of the Code even after a report had been submitted under Section 173 (2) thereof, was adverted to.

39. Noticeably, none of these decisions, however pertain to a situation where after the final report had been submitted, cognizance had been taken, accused had appeared and trial is underway, the Court either suo motu or on the prayer of the informant had directed further investigation under Section 173(8) in absence of a request to that effect made by the concerned investigating officer.

40. The rendition in *Bhagwant Singh* 1985 Indlaw SC 48 (supra) was also relied upon. It was eventually held, by drawing sustenance from the pronouncement in *Bhagwant Singh* 1985 Indlaw SC 48 (supra) that a Magistrate before whom a report under Section 173(2) of the Code had been filed, was empowered in law to direct further investigation and require the police to submit a further or a supplementary report. To reiterate, in *Bhagwant Singh* 1985 Indlaw SC 48 (supra), this Court had in particular dealt with the courses open to a Magistrate, once a

charge-sheet or a closure report is submitted on the completion of investigation under Section 173(2) of the Code and thus did essentially concentrate at the pre-cognizance stage of the proceedings.

41. From the issues sought to be answered in this decision and having regard to the overall text thereof, it is not possible to discern that the power of the Magistrate, even at the post cognizance stage or after the accused had appeared in response to the process issued, the suo motu power of the Magistrate to direct further investigation was intended to be expounded thereby. Significantly, the adjudication was essentially related to the pre-cognizance stage.

42. In *Chandra Babu alias Moses v. State through Inspector of Police and others*, (2015) 8 SCC 774, the appellant had filed a FIR with the Kulaskaram Police Station against the respondents-accused alleging unlawful assembly and assault resulting in multiple injuries. After the initial investigation, the same was transferred to the District Crime Branch Police, Kanyakumari which eventually filed a final report in favour of the respondents-accused, which was accepted by the learned Magistrate. Meanwhile, however the appellant/informant filed a protest petition before the Magistrate praying for a direction to the CBCID to reopen the case and file a fresh report. As before any decision on this protest petition, the final report filed by the police had already been accepted, the appellant approached the High Court, which called for the report from the learned Magistrate and finally interfered with the order accepting the final report and directed the Magistrate to consider the same along with the protest petition. The Magistrate next held that there was no justification for ordering reinvestigation of the case and directed that the protest petition be treated as a separate private complaint.

43. This order being challenged again before the High Court, the matter was remanded to the learned Magistrate with a direction to consider the final report and the other materials on record and pass appropriate orders after hearing both the public prosecutor and the de facto complainant. This time, the learned Magistrate returned a finding that the investigation by the District Crime Branch was a biased one and that the final report was not acceptable and consequently forwarded the complaint for further investigation by the CBCID, which was a different investigating agency. The matter was taken to the High Court by one of the respondents/accused, whereupon it annulled the direction of the learned Magistrate for reinvestigation, holding that not only there were material discrepancies in the evidence brought on record, but also there was no exceptional circumstance for such a course to be adopted by the Magistrate. It was also of the view, having regard to the scheme of the Section 173(8) of the Code that the investigating officer only could request for further investigation.

44. While disapproving the approach of the High Court in reappreciating the facts in the exercise of its revisional jurisdiction, this Court advertent, amongst others to the three Judge Bench exposition in *Bhagwant Singh 1985 Indlaw SC 48* (supra) reiterated that a Magistrate could disagree with the police report and take cognizance and issue process and summon the accused, if satisfied as deemed fit in the attendant facts and circumstances. The rendition in *Vinay Tyagi 2012 Indlaw SC 547* (supra) was also alluded to. It was ultimately expounded that the learned Magistrate had really intended to direct further investigation, but as a different investigating agency had been chosen, the word re-investigation had been used. This Court thus construed the direction for investigation by the CBI to be one for further investigation and upheld the same, but nullified the selection of a new investigating agency therefor. As a corollary, the investigating agency that had investigated the case earlier and had submitted the final report, was directed by this Court to undertake further investigation to be supervised by the Superintendent of Police and to submit a report before the learned Chief Judicial Magistrate to be dealt with in accordance with law.

45. This decision too was concerned with a fact situation, pertaining to the pre-cognizance stage of the proceedings before the learned Magistrate and therefore, does not, in our comprehension, further the case of the appellant.

46. As adumbrated hereinabove, Chapter XIV of the Code delineates the conditions requisite for initiation of proceedings before a Magistrate. Section 190, which deals with cognizance of offences by Magistrate, sets out that any Magistrate of the first Class and any Magistrate of the second class specially empowered, as contemplated, may take cognizance of any offence either upon receiving a complaint of facts which constitute such offence or upon a police report of such facts or upon information received from any person other than the police officer, or upon his own knowledge that such offence had been committed. Section 156, which equips a police officer with the power to investigate a cognizable case mandates vide sub-section 3 thereof that any Magistrate empowered under Section 190 may order such an investigation. The procedure for dealing with complaints to Magistrate is lodged under Chapter XV of the Code. Section 202 appearing therein predicates that any Magistrate on receipt of a complaint of an offence of which he is authorized to take cognizance or which had been made over to him under Section 192, may, if he thinks fit and shall in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction, postpone the issue of process against the accused and either enquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit for

the purpose of deciding whether or not there is sufficient ground for proceeding. The contents of this text of Section 202(1) of the Code unmistakeably attest that the investigation that can be directed by the Magistrate, to be undertaken by a police officer would essentially be in the form of an enquiry for the singular purpose of enabling him to decide whether or another there is sufficient ground for proceeding with the complaint of an offence, of which he is authorised to take cognizance. This irrefutably is at the pre-cognizance stage and thus logically before the issuance of process to the accused and his attendance in response thereto. As adverted to hereinabove, whereas Section 311 of the Code empowers a Court at any stage of any inquiry, trial or other proceeding, to summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined, if construed to be essential to be just decision of the case, Section 319 authorizes a Court to proceed against any person, who though not made an accused appears, in course of the inquiry or trial, to have committed the same and can be tried together. These two provisions of the Code explicitly accoutre a Court to summon a material witness or examine a person present at any stage of any inquiry, trial or other proceeding, if it considers it to be essential to the just decision of the case and even proceed against any person, though not an accused in such enquiry or trial, if it appears from the evidence available that he had committed an offence and that he can be tried together with the other accused persons.

47. On an overall survey of the pronouncements of this Court on the scope and purport of Section 173(8) of the Code and the consistent trend of explication thereof, **we are thus disposed to hold that though the investigating agency concerned has been invested with the power to undertake further investigation desirably after informing the Court thereof, before which it had submitted its report and obtaining its approval, no such power is available therefor to the learned Magistrate after cognizance has been taken on the basis of the earlier report, process has been issued and accused has entered appearance in response thereto. At that stage, neither the learned Magistrate suo motu nor on an application filed by the complainant/informant direct further investigation. Such a course would be open only on the request of the investigating agency and that too, in circumstances warranting further investigation on the detection of material evidence only to secure fair investigation and trial, the life purpose of the adjudication in hand.**

48. The un-amended and the amended sub-Section (8) of Section 173 of the Code if read in juxtaposition, would overwhelmingly attest that by the latter, the investigating agency/officer alone has been authorized to conduct further investigation without limiting the stage of the proceedings relatable thereto. This power qua the investigating agency/officer is thus legislatively intended to be available at any stage of the proceedings. The recommendation of the Law Commission in its 41st Report which manifesting heralded the amendment, significantly had limited its proposal to the empowerment of the investigating agency alone.

49. In contradistinction, Sections 156, 190, 200, 202 and 204 of the Cr.P.C clearly outline the powers of the Magistrate and the courses open for him to chart in the matter of directing investigation, taking of cognizance, framing of charge, etc. **Though the Magistrate has the power to direct investigation under Section 156(3) at the pre-cognizance stage even after a charge-sheet or a closure report is submitted, once cognizance is taken and the accused person appears pursuant thereto, he would be bereft of any competence to direct further investigation either suo motu or acting on the request or prayer of the complainant/informant. The direction for investigation by the Magistrate under Section 202, while dealing with a complaint, though is at a post-cognizance stage, it is in the nature of an inquiry to derive satisfaction as to whether the proceedings initiated ought to be furthered or not. Such a direction for investigation is not in the nature of further investigation, as contemplated under Section 173(8) of the Code.**

If the power of the Magistrate, in such a scheme envisaged by the Cr.P.C to order further investigation even after the cognizance is taken, accused persons appear and charge is framed, is acknowledged or approved, the same would be discordant with the state of law, as enunciated by this Court and also the relevant layout of the Cr.P.C adumbrated hereinabove. Additionally had it been the intention of the legislature to invest such a power, in our estimate, Section 173(8) of the Cr.P.C would have been worded accordingly to accommodate and ordain the same having regard to the backdrop of the incorporation thereof. In a way, in view of the three options open to the Magistrate, after a report is submitted by the police on completion of the investigation, as has been amongst authoritatively enumerated in Bhagwant Singh 1985 Indlaw SC 48 (supra), the Magistrate, in both the contingencies, namely; when he takes cognizance of the offence or discharges the accused, would be committed to a course, whereafter though the investigating agency may for good reasons inform him and seek his permission to conduct further investigation, he suo motu cannot embark upon such a step or take that initiative on the request or prayer made by the complainant/informant.

Not only such power to the Magistrate to direct further investigation suo motu or on the request or prayer of the complainant/informant after cognizance is taken and the accused person appears, pursuant to the process, issued or is discharged is incompatible with the statutory design and dispensation, it would even otherwise render the provisions of Sections 311 and 319 Cr.P.C, whereunder any witness can be summoned

by a Court and a person can be issued notice to stand trial at any stage, in a way redundant. Axiomatically, thus the impugned decision annulling the direction of the learned Magistrate for further investigation is unexceptional and does not merit any interference. Even otherwise on facts, having regard to the progression of the developments in the trial, and more particularly, the delay on the part of the informant in making the request for further investigation, it was otherwise not entertainable as has been rightly held by the High Court.

50. In the result, the appeal, being devoid of any merit, fails and is dismissed.

Ajay Singh vs. State of Chhattisgarh

(2017) 3 SCC 330

Bench: Dipak Misra, Amitava Roy, JJ.

The Judgment was delivered by: Dipak Misra, J.

1. Performance of judicial duty in the manner prescribed by law is fundamental to the concept of rule of law in a democratic State. It has been quite often said and, rightly so, that the judiciary is the protector and preserver of rule of law. Effective functioning of the said sacrosanct duty has been entrusted to the judiciary and that entrustment expects the courts to conduct the judicial proceeding with dignity, objectivity and rationality and finally determine the same in accordance with law. Errors are bound to occur but there cannot be deliberate impeccability which can never be countenanced. The plinth of justice dispensation system is founded on the faith, trust and confidence of the people and nothing can be allowed to contaminate and corrode the same. A litigant who comes to a court of law expects that inherent and essential principles of adjudication like adherence to doctrine of audi alteram partem, rules pertaining to fundamental adjective and seminal substantive law shall be followed and ultimately there shall be a reasoned verdict. When the accused faces a charge in a court of law, he expects a fair trial. The victim whose grievance and agony have given rise to the trial also expects that justice should be done in accordance with law. Thus, a fair trial leading to a judgment is necessitous in law and that is the assurance that is thought of on both sides. The exponent on behalf of the accused cannot be permitted to command the trial as desired by his philosophy of trial on the plea of fair trial and similarly, the proponent on behalf of the victim should not always be allowed to ventilate the grievance that his cause has not been fairly dealt with in the name of fair trial. Therefore, the concept of expediency and fair trial is quite applicable to the accused as well as to the victim. The result of such trial is to end in a judgment as required to be pronounced in accordance with law. And, that is how the stability of the creditability in the institution is maintained.

2. The above prefatory note has relevance, a significant one, to the case at hand. To appreciate the controversy, certain facts are requisite to be noted. The marriage between the appellant No. 1 and Ruby Singh, the deceased, was solemnized according to Hindu rites on 22.06.1997. She committed suicide at her matrimonial home on 01.12.1998. Kameshwar Pratap lodged FIR No. 194/98 at Police Station Lakhanpur, Distt. Surguja against Ajay Singh (husband), Sureshwar Singh (father-in-law), Dhanwanti Devi (mother-in-law) and Kiran Singh (sister-in-law) for offences punishable under Section 304B, 34 of the Indian Penal Code (IPC) and other offences. After the criminal law was set in motion, investigating agency after commencement of investigation and after completion thereof laid charge sheet under Sections 304B, 498A/34, 328 IPC read with Section 3/4 of Dowry Prohibition Act, 1961 against the accused persons before the Court of Chief Judicial Magistrate, Ambikapur, who, in turn, committed the matter to the Court of Session and eventually the matter was tried by Second Additional Sessions Judge, Ambikapur. The learned trial Judge passed an order in the order sheet that recorded that the accused persons had been acquitted as per the judgment separately typed, signed and dated.

3. A member of the State Bar Council sent a complaint to the Registry of the High Court of Chhattisgarh, Bilaspur alleging that learned trial judge had acquitted the accused persons but no judgment had been rendered. The Registrar (Vigilance) of the High Court issued a memorandum to the District and Sessions Judge, Surguja at Ambikapur on 18.02.2008 to inquire into the matter and submit a report. The concerned District and Sessions Judge submitted the report to the High Court on the same date stating that no judgments were found in the records of such cases. It has also been brought to the notice of the High Court that in sessions trials being Sessions Trial No. 148 of 1999 and Sessions Trial No. 71 of 1995 though the same trial judge had purportedly delivered the judgments but they were not available on record as the judgments had not actually been dictated, dated or signed. Thereafter the matter was placed before the Full Court of the High Court on 04.03.2008 on which date a resolution was passed placing the concerned trial judge under suspension in contemplation of a departmental inquiry. At the same time, the Full Court took the decision to transfer the cases in question from the concerned trial judge to the file of District and Sessions Judge, Surguja at Ambikapur for rehearing and disposal. It is worthy to note here that the concerned officer was put under suspension and after completion of

inquiry was imposed with the punishment of compulsory retirement on 22.03.2011. We make it clear that we are not concerned with the said punishment in the case.

4. After the decision was taken for transferring the cases by the Full Court for rehearing, three writ petitions forming the subject matter of Writ Petition (Criminal) Nos. 2796 of 2008, 2238 of 2008 and 276 of 2010 were filed. The accused in Sessions Trial No. 148 of 1999 filed Writ Petition (Criminal) Nos. 2796 of 2008 and 2238 of 2008 and accused in Sessions Trial No. 71 of 1995 filed the other writ petition, that is, Writ Petition (Criminal) No. 276 of 2010.

5. The controversy really centers around two issues, namely, **whether the learned trial judge had really pronounced the judgment of acquittal on 31.10.2007 and whether the High Court could have in exercise of its administrative power treated the trial as pending and transferred the same from the Court of Second Additional Sessions Judge, Ambikapur to the Court of District and Sessions Judge, Surguja at Ambikapur for rehearing and disposal.**

8. To appreciate the controversy, it is necessary to refer to the order sheet in Sessions Trial No. 71 of 1995. The trial judge on 28.1.2008 had passed the following order:-

"28.1.2008:

State represented by Shri Rajesh Tiwari, A.G.P.

Accused along with their Counsel Shri Arvind

Mehta, Advocate

The judgment has been typed separately. The same has been dated, signed and announced.

Resultantly, Accused T.P. Ratre is acquitted of the charge under Section 306 IPC. A copy of this judgment be sent to the District Magistrate, Surguja (Ambikapur) through A.G.P.

Proceedings completed.

The result be noted in the register and the record be sent to the Record Room."

Be it noted, in the other Sessions Trial, i.e., Sessions Trial No. 148 of 1999 almost similar order has been passed. Be it stated, apart from the aforesaid order, as per the enquiry conducted by the learned District Judge, there was nothing on record. The trial judge had not dictated the order in open court. In such a situation, it is to be determined whether the judgment had been delivered by the trial judge or not.

15. Section 363 provides copy of judgment to be given to the accused and other persons. Section 364 provides for the situation where the judgment requires to be translated. It is apposite to note that though CrPC does not define the term "judgment", yet it has clearly laid down how the judgment is to be pronounced. The provisions clearly spell out that it is imperative on the part of the learned trial judge to pronounce the judgment in open court by delivering the whole of the judgment or by reading out the whole of the judgment or by reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader.

17. We have already noted that the judgment was not dictated in open court. Code of Criminal Procedure provides reading of the operative part of the judgment. It means that the trial judge may not read the whole of the judgment and may read operative part of the judgment but it does not in any way suggest that the result of the case will be announced and the judgment would not be available on record. Non-availability of judgment, needless to say, can never be a judgment because there is no declaration by way of pronouncement in the open court that the accused has been convicted or acquitted. A judgment, as has been always understood, is the expression of an opinion after due consideration of the facts which deserve to be determined. Without pronouncement of a judgment in the open court, signed and dated, it is difficult to treat it as a judgment of conviction as has been held in *Re. Athipalayan and Ors AIR 1960 Mad 507*. As a matter of fact, on inquiry, the High Court in the administrative side had found there was no judgment available on record. Learned counsel for the appellants would submit that in the counter affidavit filed by the High Court it has been mentioned that an incomplete typed judgment of 14 pages till paragraph No. 19 was available. The affidavit also states that it was incomplete and no page had the signature of the presiding officer. If the judgment is not complete and signed, it cannot be a judgment in terms of Section 353 CrPC. It is unimaginable that a judgment is pronounced without there being a judgment. It is gross illegality.

19. Having stated that, as is evincible in the instant case, the judgment is not available on record and hence, there can be no shadow of doubt that the declaration of the result cannot tantamount to a judgment as prescribed in the CrPC. That leads to the inevitable conclusion that the trial in both the cases has to be treated to be pending.

20. The next issue that emerges for consideration is whether the High Court on its administrative side could have transferred the case from the Second Additional Sessions Judge, Ambikapur to the Court of

District and Sessions Judge, Surguja at Ambikapur. In this regard, it is suffice to understand the jurisdiction and authority conferred under the Constitution on the High Court in the prescription of power of superintendence under Article 227. The aforesaid Article confers power of superintendence on the High Court over the courts and tribunals within the territory of the State. The High Court has the jurisdiction and the authority to exercise suo motu power.

22. We have already stated that the Division Bench while concurring with the opinion of the learned single Judge has also quashed the order by the learned trial judge on the ground that there was no judgment on record. There is no dispute about the fact that the Full Court of the High Court after coming to a definite conclusion that the learned trial judge had really not passed any judgment, resolved that the matter should be heard by the learned Sessions Judge and accordingly the Registrar General of the High Court communicated the decision to the concerned learned Sessions Judge. The submission of the learned counsel for the appellant is that such a power could not have been exercised by the Full Court on the administrative side, for in exercise of administrative authority, the High Court cannot transfer the case. The contention is that High Court can only transfer the case in exercise of power under Section 407 and that too on the judicial side. Our attention has also been drawn to Section 194 of CrPC. Section 194 empowers the Additional and Assistant Sessions Judges to try cases made over to them. The said provision reads as follows:-

"194. Additional and Assistant Sessions Judges to try cases made over to them. - An Additional Sessions Judge or Assistant Sessions Judge shall try such cases as the Sessions Judge of the division may, by general or special order, make over to him for trial or as the High Court may, by special order, direct him to try."

23. It is argued that Section 194 can be exercised on the administrative side before the commencement of the trial and not thereafter, whereas Section 407 can be taken recourse to on the judicial side and a case can be transferred on the basis of parameters laid down for transfer of a criminal trial. In this regard, we may usefully refer to the authority in *Ranbir Yadav v. State of Bihar*, (1995) 4 SCC 392 wherein under certain circumstances the High Court had transferred the sessions trial from the court of one Additional Sessions Judge to another by an administrative order at a stage when the trial had commenced. It was contended before this Court that the trial that took place before the transferee court was wholly without jurisdiction and consequently the conviction and sentence recorded by that court were null and void and were not curable under Section 465 CrPC.

25. In the case at hand, the High Court on the administrative side had transferred the case to the learned Sessions Judge by which it has conferred jurisdiction on the trial court which has the jurisdiction to try the sessions case under CrPC. Thus, it has done so as it has, as a matter of fact, found that there was no judgment on record. There is no illegality. Be it noted, the Division Bench in the appeal preferred at the instance of the present appellants thought it appropriate to quash the order as there is no judgment on record but a mere order-sheet. In a piquant situation like the present one, we are disposed to think that the High Court was under legal obligation to set aside the order as it had no effect in law. The High Court has correctly done so as it has the duty to see that sanctity of justice is not undermined. The High Court has done so as it has felt that an order which is a mere declaration of result without the judgment should be nullified and become extinct.

26. The case at hand constrains us to say that a trial Judge should remember that he has immense responsibility as he has a lawful duty to record the evidence in the prescribed manner keeping in mind the command postulated in Section 309 of the CrPC and pronounce the judgment as provided under the Code. A Judge in charge of the trial has to be extremely diligent so that no dent is created in the trial and in its eventual conclusion. Mistakes made or errors committed are to be rectified by the appellate court in exercise of "error jurisdiction". That is a different matter. But, when a situation like the present one crops up, it causes agony, an unbearable one, to the cause of justice and hits like a lightning in a cloudless sky. It hurts the justice dispensation system and no one, and we mean no one, has any right to do so. The High Court by rectifying the grave error has acted in furtherance of the cause of justice. The accused persons might have felt delighted in acquittal and affected by the order of rehearing, but they should bear in mind that they are not the lone receivers of justice. There are victims of the crime. Law serves both and justice looks at them equally. It does not tolerate that the grievance of the victim should be comatosed in this manner.

27. Consequently, appeals are dismissed. The trial court to whom the cases have been transferred is directed to proceed in accordance with law.

State of Bihar vs. Rajballav Prasad @ Rajballav Pd. Yadav @ Rajballabh Yadav

(2017) 2 SCC 178

Bench: A.K. Sikri, A.M. Sapre, JJ.

The Judgment was delivered by: A.K. Sikri, J.

1. Respondent herein is facing trial in Mahila Police Station, wherein he is charged for committing offences under Sections 376, 420/34, 366-A, 370, 370-A, 212, 120-B of the Indian Penal Code, Sections 4, 6 and 8 of the Protection of Children from Sexual Offences Act, 2012 ("POCSO Act" for short) as well as Sections 4, 5 and 6 of the Immoral Traffic Act, 1956. He is one of the co-accused in the said trial. FIR in this behalf was registered on the basis of written complaint of the prosecutrix Preeti Kumari (minor) on 09.02.2016. During investigation, the respondent was identified as the main accused having committed the rape on the said minor. However, since at that time, he was allegedly absconding, the trial court issued process under Section 82 of the Code of Criminal Procedure, 1973 ("Cr.P.C.") and thereafter on 27.07.2006 issued process under Section 83 against the respondent. At that stage, apprehending his imminent arrest, the respondent surrendered before the trial court on 10.03.2016 and was taken into custody. After conclusion of the investigation, chargesheet in the case was filed on 20.04.2016 and the charges were framed on 06.08.2016.

2. Pending trial, the respondent filed bail application before the learned Additional Sessions Judge which was heard and dismissed by the trial court vide order dated 30.05.2016. The respondent approached the High Court for grant of bail which came up for hearing before the High Court on 27.07.2016. However, permission was sought to withdraw the said bail application and accepting this request, the bail petition was dismissed as withdrawn on 27.07.2016. Within three weeks thereafter i.e. on 19.08.2016, the respondent preferred another bail petition before the High Court. This time he has succeeded in his attempt as the High Court has, vide judgment dated 30.09.2016, directed release of the respondent on bail. Certain conditions are also imposed while granting this bail. **It is the State which feels aggrieved by the impugned order granting bail to the respondent and has challenged this order in the present proceedings.** Notice was issued in the SLP on 07.10.2016 for actual returnable date i.e. 17.10.2016. Thereafter, the material date of hearing is 08.11.2016 when the following order was passed:

"We have heard learned counsel for the parties for some time.

In the instant case, the High Court has granted bail to the respondent herein during the pendency of the trial against the respondent who is facing the charges under Sections 376, 420/34, 366-A, 370, 370-A, 212, 120-B of the Indian Penal Code as well as the charges under Section 4, 6 and 8 of the POCSO Act, 2012. He is also facing trial for offences under Sections 4, 5 and 6 of the Immoral Traffic Act, 1956. The case is pending in the Court of Additional Sessions Judge-Ist-cum-Special Judge, Nalanda at Biharsharif. The deposition of the Prosecutrix is yet to be recorded. Without making any observation at this stage, we are of the opinion that in order to enable the Prosecutrix to give her statement fearlessly and without any pressure, it would be necessary that she deposes when the respondent is in custody. For this reason, we suspend the judgment and order dated 30th September, 2016 passed by the High Court granting bail to the respondent herein for a period of two weeks from the date the respondent is taken into custody to enable the Prosecutrix to give her evidence. We direct that the respondent shall surrender to the Trial Court tomorrow i.e. 09.11.2016 and would be taken into custody in the same manner he was facing incarceration before he was granted bail by the High Court, for a period of two weeks.

The Trial Court is impressed upon to start recording the evidence of the Prosecutrix immediately and endeavour to complete the same within the said period of two weeks.

We also hope and expect that the respondent shall not try to exert any pressure, directly or indirectly, upon the Prosecutrix or other prosecution witnesses.

List the matter for further directions on 23.11.2016. Dasti, in addition, is permitted."

3. Pursuant to the aforesaid order, the respondent surrendered and period of two weeks expired yesterday i.e. on 23.11.2016 when this appeal was also finally heard. During this period, statement of prosecutrix has been recorded and she has been cross-examined as well.

6. It may also be pointed out at this stage that in the special leave petition, another ground taken to challenge the impugned order is that when earlier application was dismissed by a particular Judge of the High Court on 27.07.2016, as per the directives of this Court, second application should also have to be listed before the same Judge. However, the second application was taken by the Chief Justice himself wherein the impugned order has been passed rather than assigning it to the Judge who had passed the order on 27.07.2016. However, Mr. Subramaniam did not press this ground too hard, except submitting that propriety demanded that matter is posted

before the same Judge who had passed the order on 27.07.2016 before whom the first bail application had come up for hearing.

12. We may observe at the outset that we are conscious of the limitations which bind us while entertaining a plea against grant of bail by the lower court, that too, which is a superior court like High Court. It is expected that once the discretion is exercised by the High Court on relevant considerations and bail is granted, this Court would normally not interfere with such a discretion, unless it is found that the discretion itself is exercised on extraneous considerations and/or the relevant factors which need to be taken into account while exercising such a discretion are ignored or bypassed. In the judgments relied upon by the learned counsel for the respondent, which have already been noticed above, this Court mentioned the considerations which are to be kept in mind while examining as to whether order of bail granted by the court below was justified. There have to be very cogent and overwhelming circumstances that are necessary to interfere with the discretion in granting the bail. These material considerations are also spelled out in the aforesaid judgments, viz. whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted in his favour by tampering with the evidence. We have kept these very considerations in mind while examining the correctness of the impugned order.

16. It is a matter of record that when FIR was registered against the respondent and on the basis of investigation he was sought to be arrested, the respondent had avoided the said arrest. So much so, the prosecution was compelled to file an application under Section 82 of Cr.P.C. before the trial court and the trial court even initiated the process under Section 83 of Cr.P.C. At that stage only that the respondent surrendered before the trial court and was arrested.

17. The respondent's application was dismissed by the Additional Sessions Judge vide orders dated 30.05.2016. While passing this order of rejection, the trial court was persuaded by the submission of the Prosecutor that direct and specific allegations had been levelled against the respondent of committing rape upon the victim minor girl and he was identified by the victim during the course of investigation while he was walking in the P.O. House. It was also noted that prayer for bail of co-accused Sandeep Suman @ Pushpanjay had already been rejected and the case of the respondent was on graver footing and also that the respondent had a long criminal diary, as would be evident from the Case Diary produced before the Court.

18. It has also come on record that the prosecutrix had her family members made representations claiming that the respondent is threatening the family members of the prosecutrix. So much so, having regard to several complaints of intimidation of witnesses made on behalf of the prosecutrix and her family members, the State administration has deputed a force of 1+4 for the safety and security of the prosecutrix and her family.

19. In spite of the aforesaid material on record, the High Court has made casual and cryptic remarks that there is no material showing that the accused had interfered with the trial by tampering evidence. On the other hand, it has discussed the merits of the case/evidence which was not called for at this stage. No doubt, in a particular case if it appears to the court that the case foisted against the accused is totally false, that may become a relevant factor while considering the bail application. However, it can be said at this stage that the present case falls in this category. That would be a matter of trial. Therefore, the paramount consideration should have been as is pointed out above, whether there are any chances of the accused person fleeing from justice or reasonable apprehension that the accused person would tamper with the evidence/trial if released on bail. These aspects are not dealt with by the High Court appropriately and with the seriousness they deserved. This constitutes a sufficient reason for interfering with the exercise of discretion by the High Court.

20. The High Court also ignored another vital aspect, namely, while rejecting the bail application of co-accused, the High Court had ordered expeditious, nay, day-to-day trial to ensure that the trial comes to an end most expeditiously. When order had already been passed to fast-track the trial, and the application for bail by co-accused Sandeep Suman @ Pushpanjay was also rejected, the High Court, while considering the bail application of the respondent, was supposed to take into consideration this material fact as well. Further, while making a general statement of law that the accused is innocent, till proved guilty, the provisions of Section 29 of POCSO Act have not been taken into consideration.

21. Keeping in view all the aforesaid considerations in mind, we are of the opinion that it was not a fit case for grant of bail to the respondent at this stage and grave error is committed by the High Court in this behalf.

22. As indicated by us in the beginning, prime consideration before us is to protect the fair trial and ensure that justice is done. This may happen only if the witnesses are able to depose without fear, freely and truthfully and this Court is convinced that in the present case, that can be ensured only if the respondent is not enlarged on bail.

24. We are conscious of the fact that the respondent is only an under-trial and his liberty is also a relevant consideration. However, equally important consideration is the interest of the society and fair trial of the case. Thus, undoubtedly the courts have to adopt a liberal approach while considering bail applications of accused persons. However, in a given case, if it is found that there is a possibility of interdicting fair trial by the accused if released on bail, this public interest of fair trial would outweigh the personal interest of the accused while undertaking the task of balancing the liberty of the accused on the one hand and interest of the society to have a fair trial on the other hand. When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice delivery system. It is this need for larger public interest to ensure that criminal justice delivery system works efficiently, smoothly and in a fair manner that has to be given prime importance in such situations. After all, if there is a threat to fair trial because of intimidation of witnesses etc. that would happen because of wrongdoing of the accused himself and the consequences thereof, he has to suffer.

43. Almost to similar effect are the observations of Law Commission of India in its 198th Report (Report on 'witness identity protection and witness protection programmes'), as can be seen from the following discussion therein:

"The reason is not far to seek. In the case of victims of terrorism and sexual offences against women and juveniles, we are dealing with a section of society consisting of very vulnerable people, be they victims or witnesses. The victims and witnesses are under fear of or danger to their lives or lives of their relations or to their property. It is obvious that in the case of serious offences under the Indian Penal Code, 1860 and other special enactments, some of which we have referred to above, there are bound to be absolutely similar situations for victims and witnesses. While in the case of certain offences under special statutes such fear or danger to victims and witnesses may be more common and pronounced, in the case of victims and witnesses involved or concerned with some serious offences, fear may be no less important. Obviously, if the trial in the case of special offences is to be fair both to the accused as well as to the victims/witnesses, then there is no reason as to why it should not be equally fair in the case of other general offences of serious nature falling under the Indian Penal Code, 1860. It is the fear or danger or rather the likelihood thereof that is common to both cases. That is why several general statutes in other countries provide for victim and witness protection."

27. No doubt, the prosecutrix has already been examined. However, few other material witnesses, including father and sister of the prosecutrix, have yet to be examined. As per the records, threats were extended to the prosecutrix as well as her family members. Therefore, we feel that the High Court should not have granted bail to the respondent ignoring all the material and substantial aspects pointed out by us, which were the relevant considerations.

28. For the foregoing reasons, we allow this appeal thereby setting aside the order of the High Court. In case the respondent is already released, he shall surrender and/or taken into custody forthwith. In case he is still in jail, he will continue to remain in jail as a consequence of this judgment.

29. Before we part with, we make it clear that this Court has not expressed any observations on the merits of the case. Whether the respondent is guilty or not, of the charges framed against him, will be decided by the trial court on its own merits after analysing the evidence that surfaces on record during the trial. Appeal allowed

Mohammed Kasab @ Abu Mujahid v. State of Maharashtra
(2012) 9 SCC 1

Hon'ble Judges: Aftab Alam and Chandramauli Kumar Prasad, JJ.

The Judgment of the Court was delivered by Justice Aftab Alam:

Summary Highlighting Issues of Right against Self Incrimination and Right to Legal Aid

In this case the issue was raised that the constitutional rights of the appellant under Article 22 (1) and Article 20 (3) was not protected because the accused was not made aware of these rights by the magistrate at the stage of recording a confession under Section 164 Code of Criminal Procedure.

The Supreme Court rejected the issue and hold that the right of an accused against self incrimination is protected through the 161 (2) and 164 (2) (3) (4) CrPC and compliance of these provisions inevitably give effect to the constitutional principle of right against self incrimination under Article 20(3) of the Constitution. A voluntary

confession taken in accordance to the framework of investigation under Section 161, 162, 163 and 164 of CrPC is admissible in law. The court ruled thus:

467. The object of the criminal law process is to find out the truth and not to shield the accused from the consequences of his wrongdoing. A defense lawyer has to conduct the trial on the basis of the materials lawfully collected in the course of investigation. The test to judge the Constitutional and legal acceptability of a confession recorded Under Section 164 Code of Criminal Procedure is not whether the accused would have made the statement had he been sufficiently scared by the lawyer regarding the consequences of the confession. **The true test is whether or not the confession is voluntary. If a doubt is created regarding the voluntariness of the confession, notwithstanding the safeguards stipulated in Section 164 it has to be trashed; but if a confession is established as voluntary it must be taken into account, not only constitutionally and legally but also morally.**

Regarding the right to legal aid during the pretrial stage the court observed thus:

484. We, therefore, have no hesitation in holding that the right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a magistrate. We, accordingly, hold that it is the duty and obligation of the magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceedings.

488. But the failure to provide a lawyer to the accused at the pre-trial stage may not have the same consequence of vitiating the trial. It may have other consequences like making the delinquent magistrate liable to disciplinary proceedings, or giving the accused a right to claim compensation against the State for failing to provide him legal aid. But it would not vitiate the trial unless it is shown that failure to provide legal assistance at the pre-trial stage had resulted in some material prejudice to the accused in the course of the trial. That would have to be judged on the facts of each case.

497. In the aforesaid facts we are firmly of the view that there is no question of any violation of any of the rights of the Appellant under the Indian Constitution. He was offered the services of a lawyer at the time of his arrest and at all relevant stages in the proceedings. We are also clear in our view that the absence of a lawyer at the pre-trial stage was not only as per the wishes of the Appellant himself, but that this absence also did not cause him any prejudice in the trial.

Pooja Pal vs. Union of India and others
(2016) 3 SCC 135

48. The casual decision of the public prosecutor to drop a material witness, a measure approved by the trial court also came to be criticized. The lapse of non-examination of the injured eye-witnesses, who were kept away from the trial, was also highlighted. It was alleged that the partisan witnesses had been examined to favour the accused persons resulting in a denial of fair trial.

49. This Court in the above disquieting backdrop, did underline that discovery, vindication and establishment of truth were the avowed purposes underlying the existence of the courts of justice. Apart from indicating that the principles of a fair trial permeate the common law in both civil and criminal contexts, this Court underscored the necessity of a delicate judicial balancing of the competing interests in a criminal trial - the interests of the accused and the public and to a great extent that too of the victim, at the same time not losing the sight of public interest involved in the prosecution of persons who commit offences.

50. It was propounded that in a criminal case, the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community and are harmful to the society in general. That the concept of fair trial entails the triangulation of the interest of the accused, the victim, society and that the community acts

through the state and the prosecuting agency was authoritatively stated. This Court observed that the interests of the society are not to be treated completely with disdain and as persona non grata. It was remarked as well that due administration of justice is always viewed as a continuous process, not confined to the determination of a particular case so much so that a court must cease to be a mute spectator and a mere recording machine but become a participant in the trial evincing intelligence and active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth and administer justice with fairness and impartiality both to the parties and to the community.

51. While highlighting the courts' overriding duty to maintain public confidence in the administration of justice, it was enunciated as well, that they cannot turn a blind eye to vexatious and oppressive conduct, discernable in relation to the proceedings. That the principles of rule of law and due process are closely linked with human rights protection, guaranteeing a fair trial, primarily aimed at ascertaining the truth, was stated. It was held as well, that the society at large and the victims or their family members and relatives have an inbuilt right to be dealt fairly in a criminal trial and the denial thereof is as much injustice to the accused as to the victim and the society. Dwelling upon the uncompromising significance and the worth of witnesses in the perspective of a fair trial, the following revealing comments of Bentham were extracted in paragraph 41:

"41. "Witnesses", as Bentham said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political count and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate causalities. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slot process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert the trial getting tainted and derailed and truth becoming a causality. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose the truth without any fear of being haunted by those against whom he has deposed."

58. *Vis-a-vis the notions of 'speedy trial' and 'fair trial' as the integral constituents of Article 21 of the Constitution of India, it was observed that there was a qualitative difference between the right to speedy trial and the right of the accused to fair trial. While pointing out that unlike the accused's right of fair trial, the deprivation of the right to speedy trial does not per se prejudice the accused in defending himself, it was proclaimed that mere lapse of several years since the commencement of prosecution by itself, would not justify the discontinuance of prosecution or dismissal of the indictment. It was stated in no uncertain terms, that the factors concerning the accused's right to speedy trial have to be counterpoised with the impact of the crime on the society and the confidence of the people in the judicial system. It was noted that speedy trial secures rights to an accused but it does not preclude the rights of public justice. It was explicated that the nature and gravity of the crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former, the long delay in conclusion of trial should not operate against the continuation of the prosecution but if the right of the accused in the facts and circumstances of the case and the exigencies or situation leans the balance in his favour, the prosecution may be brought to end. It was held that the guiding factor for a retrial essentially has to be the demand of justice. It was emphasized that while protecting the right of an accused to fair trial and due process of law, the interest of the public at large who seek protection of law ought not to be altogether overlooked so much so, that it results in loss of hope in the legal system. Retrial in the facts of the case was ordered.*

67. While recalling its observation in *State of Bihar and another vs. JAC Saldanha and others* (1980) 1 SCC 554 1979 Indlaw SC 344, that on a cognizance of the offence being taken by the court, the police function of investigation comes to an end subject to the provision contained in Section 173(8) of the Code and that the adjudicatory function of the judiciary commences, thus delineating the well demarcated functions of crime detection and adjudication, this Court did recognize a residuary jurisdiction to give directions to the investigating agency, if satisfied that the requirements of law were not being complied with and that the investigation was not being conducted properly or with due haste and promptitude. It was reiterated in *Babubhai* 2010 Indlaw SC 694 (supra) that in exceptional circumstances, the court in order to prevent the miscarriage of criminal justice, may direct investigation de novo, if it is satisfied that non-interference would ultimately result in failure of justice. In such an eventuality endorsement of the investigation to an independent agency to make a fresh probe may be well merited. That not only fair trial but fair investigation is also a part of the Constitutional rights guaranteed under Articles 20 & 21 of the Constitution of India and therefore investigation ought to be fair, transparent and judicious, was reemphasized. The expression "ordinarily" as used in Section 173(8) of the Code was noted again to rule that in exceptional circumstances however, in order to prevent miscarriage of criminal justice, a court may still direct investigation de novo. The above postulations being strikingly common in all these decisions, do pervade the fabric and the content thereof and thus dilation of individual facts has been avoided.

76. A "speedy trial", albeit the essence of the fundamental right to life entrenched in the Article 21 of the Constitution of India has a companion in concept in "fair trial", both being in alienable constituents of an adjudicative process, to culminate in a judicial decision by a court of law as the final arbiter. There is indeed a qualitative difference between right to speedy trial and fair trial so much so that denial of the former by itself would not be prejudicial to the accused, when pitted against the imperative of fair trial. As fundamentally, justice not only has to be done but also must appear to have been done, the residuary jurisdiction of a court to direct further investigation or reinvestigation by any impartial agency, probe by the state police notwithstanding, has to be essentially invoked if the statutory agency already in-charge of the investigation appears to have been ineffective or is presumed or inferred to be not being able to discharge its functions fairly, meaningfully and fruituously. As the cause of justice has to reign supreme, a court of law cannot reduce itself to be a resigned and a helpless spectator and with the foreseen consequences apparently unjust, in the face of a faulty investigation, meekly complete the formalities to record a foregone conclusion. Justice then would become a casualty. Though a court's satisfaction of want of proper, fair, impartial and effective investigation eroding its credence and reliability is the precondition for a direction for further investigation or reinvestigation, submission of the charge-sheet ipso facto or the pendency of the trial can by no means be a prohibitive impediment. The contextual facts and the attendant circumstances have to be singularly evaluated and analyzed to decide the needfulness of further investigation or reinvestigation to unravel the truth and mete out justice to the parties. The prime concern and the endeavour of the court of law is to secure justice on the basis of true facts which ought to be unearthed through a committed, resolved and a competent investigating agency.

78. As succinctly summarised by this Court in *Committee for Protection of Democratic Right* 2010 Indlaw SC 133 (supra), the extra ordinary power of the Constitutional Courts in directing the CBI to conduct investigation in a case must be exercised sparingly, cautiously and in exceptional situations, when it is necessary to provide credibility and instill confidence in investigation or where the incident may have national or international ramifications or where such an order may be necessary for doing complete justice and for enforcing the fundamental rights. In our comprehension, each of the determinants is consummate and independent by itself to justify the exercise of such power and is not inter-dependent on each other.

79. A trial encompasses investigation, inquiry, trial, appeal and retrial i.e. the entire range of scrutiny including crime detection and adjudication on the basis thereof. Jurisprudentially, the guarantee under Article 21 embraces both the life and liberty of the accused as well as interest of the victim, his near and dear ones as well as of the community at large and therefore cannot be alienated from each other with levity. It is judicially acknowledged that fair trial includes fair investigation as envisaged by Articles 20 and 21 of the Constitution of India. Though, well demarcated contours of crime detection and adjudication do exist, if the investigation is neither effective nor purposeful nor objective nor fair, it would be the solemn obligation of the courts, if considered necessary, to order further investigation or reinvestigation as the case may be, to discover the truth so as to prevent miscarriage of the justice. No inflexible guidelines or hard and fast rules as such can be prescribed by way of uniform and universal invocation and the decision is to be conditioned to the attendant facts and circumstances, motivated dominantly by the predication of advancement of the cause of justice.

86. A strain of piognance and disquiet over the insensitive approach of the court concerned in the textual facts in the context of fair trial in the following observations of this Court in *Vinod Kumar vs. State of Punjab* (2015) 3 SCC 220 2015 Indlaw SC 125 sounds an awakening caveat:

"The narration of the sad chronology shocks the judicial conscience and gravitates the mind to pose a question: Is it justified for any conscientious trial Judge to ignore the statutory command, not recognize "the felt necessities of time" and remain impervious to the cry of the collective asking for justice or give an indecent and uncalled for burial to the conception of trial, totally ostracizing the concept that a civilized and orderly society thrives on the rule of law which includes "fair trial" for the accused as well as the prosecution."

87. The observations though made in the backdrop of repeated adjournments granted by the trial court, chiefly for cross-examination of a witness resulting in the delay of the proceedings, the concern expressed is of overarching relevance demanding sentient attention and remedial response. The poser indeed stems from the indispensable interface of the orderly existence of the society founded on the rule of law and "fair trial" for the accused as well as the prosecution. That the duty of the Court while conducting a trial is to be guarded by the mandate of law, conceptual fairness and above all its sacrosanct role to arrive at the truth on the basis of material brought on record, was reiterated.

Dinubhai Boghabhai Solanki vs. State of Gujarat and Ors.

(2018)11SCC129

Facts:

An activist, who made a complaint against illegal mining, was murdered. An FIR was registered. The Appellant was an accused in offence of murder. Investigation was lackadaisical. The complainant was forced to approach High Court to seek necessary directions for proper investigation. The High Court directed de novo trial of case with specific directions. Aggrieved by present appeal was filed.

13. After taking note of the aforesaid facts and submissions, the High Court pointed out that moot question was as to whether it could order retrial in exercise of writ jurisdiction Under Article 226 of the Constitution of India. With this poser, the High Court has analyzed the said issue under the following heads:

- Concept of fair trial.
- Hostile witnesses - a menace to the criminal justice system.
- Exercise of writ jurisdiction for the purpose of retrial.
- Sections 311 and 391 of Code of Criminal Procedure and Section 165 of the Indian Evidence Act, 1872.

The High Court has given a detailed discourse on the necessity to have a fair trial, as a backdrop of the Rule of law as well as for dispensation of criminal justice. Taking cognizance of so many judgments¹ of this Court wherein the concept of fair trial with the sole idea of finding the truth and to ensure that justice is done, and extensively quoting from the said judgments, the High Court has emphasized that free and fair trial is *sine qua non* of Article 21 of the Constitution of India. It has also remarked that criminal justice system is meant not only safeguarding the interest of the Accused persons, but is equally devoted to the rights of the victims as well. If the criminal trial is not free and fair, then the confidence of the public in the judicial fairness of a judge and the justice delivery system would be shaken. Denial to fair trial is as much injustice to the Accused as to the victim and the society. No trial can be treated as a fair trial unless there is an impartial judge conducting the trial, an honest and fair defence counsel and equally honest and fair public prosecutor. A fair trial necessarily includes fair and proper opportunity to the prosecutor to prove the guilt of the Accused and opportunity to the Accused to prove his innocence.

15. It is not necessary to reproduce those copious quotes from various judgments which have been incorporated by the High Court. However, following passage from the judgment in *Ajay Singh* needs reiteration as it sums up the entire fulcrum astutely:

Performance of judicial duty in the manner prescribed by law is fundamental to the concept of Rule of law in a democratic State. It has been quite often said and, rightly so, that the judiciary is the protector and preserver of Rule of law. Effective functioning of the said sacrosanct duty has been entrusted to the judiciary and that

entrustment expects the courts to conduct the judicial proceeding with dignity, objectivity and rationality and finally determine the same in accordance with law. Errors are bound to occur but there cannot be deliberate peccability which can never be countenanced. The plinth of justice dispensation system is founded on the faith, trust and confidence of the people and nothing can be allowed to contaminate and corrode the same. A litigant who comes to a court of law expects that inherent and essential principles of adjudication like adherence to doctrine of audi alteram partem, Rules pertaining to fundamental adjective and seminal substantive law shall be followed and ultimately there shall be a reasoned verdict. When the Accused faces a charge in a court of law, he expects a fair trial. The victim whose grievance and agony have given rise to the trial also expects that justice should be done in accordance with law. Thus, a fair trial leading to a judgment is necessitous in law and that is the assurance that is thought of on both sides. The exponent on behalf of the Accused cannot be permitted to command the trial as desired by his philosophy of trial on the plea of fair trial and similarly, the proponent on behalf of the victim should not always be allowed to ventilate the grievance that his cause has not been fairly dealt with in the name of fair trial. Therefore, the concept of expediency and fair trial is quite applicable to the Accused as well as to the victim. The result of such trial is to end in a judgment as required to be pronounced in accordance with law. And, that is how the stability of the credibility in the institution is maintained.

16. The High Court, thereafter, described the phenomena of hostile witnesses which have assumed alarming proportion to the criminal justice system in India and adversely affecting the fair trial and justice dispensation system. In the process, the High Court has again referred to various judgments².

32. There is a discernible paradigm shift in the criminal justice system in India which keeps in mind the interests of victims as well. Victim oriented policies are introduced giving better role to the victims of crime in criminal trials. It has led to adopting two pronged strategy. On the one hand, law now recognises, with the insertion of necessary statutory provisions, expanding role of victim in the procedural justice. On the other hand, substantive justice is also done to these victims by putting an obligation on the State (and even the culprit of crime) by providing adequate compensation to the victims⁵. The result is that private parties are now able to assert "their claim for fair trial and, thus, an effective 'say' in criminal prosecution, not merely as a 'witness' but also as one impacted"⁶.

34. The position which emerges is that in a criminal trial, on the one hand there are certain fundamental presumptions in favour of the accused, which are aimed at ensuring that innocent persons are not convicted. And, on the other hand, it has also been realised that if the criminal justice system has to be effective, crime should not go unpunished and victims of crimes are also well looked after. After all, the basic aim of any good legal system is to do justice, which is to ensure that injustice is also not meted out to any citizen. This calls for balancing the interests of Accused as well as victims, which in turn depends on fair trial. For achieving this fair trial which is the solemn function of the Court, role of witnesses assumes great significance. This fair trial is possible only when the witnesses are truthful as 'they are the eyes and ears' of the Court.

38. Trial is expedited on the directions of the Court and witnesses start turning hostile. It is difficult to say, at least, *prima facie*, that in the given scenario, the CBI, during investigation, would have compelled the witnesses to give statements against the Accused persons. In any case, that is also a matter to be finally tested at the time of trial. However, it is stated at the cost of repetition that requirement of a fair trial has to be fulfilled. When the trial takes place, as many as 105 witnesses turn hostile, out of 195 witnesses examined, is so eloquent that it does not need much effort to fathom into the reasons there for. However, when the aforesaid facts are considered cumulatively, it compels us to take a view that in the interest of fair trial, at least crucial witnesses need to be examined again.

As indicated by us in the beginning, prime consideration before us is to protect the fair trial and ensure that justice is done. This may happen only if the witnesses are able to depose without fear, freely and truthfully and this Court is convinced that in the present case, that can be ensured only if the Respondent is not enlarged on bail. This importance of fair trial was emphasised in *Panchanan Mishra v. Digambar Mishra*, while setting aside the order of the High Court granting bail in the following terms: (SCC pp. 147- 48, para 13)

13. We have given our careful consideration to the rival submissions made by the counsel appearing on either side. The object underlying the cancellation of bail is to protect the fair trial and secure justice being done to the society by preventing the Accused who is set at liberty by the bail order from tampering with the evidence in the heinous crime and if there is delay in such a case the underlying object of cancellation of bail practically loses all its purpose and significance to the greatest prejudice and the interest of the prosecution. It hardly requires to be stated that once a person is released on bail in serious criminal cases where the punishment is quite stringent and deterrent, the Accused in order to get away from the clutches of the same indulge in various

activities like tampering with the prosecution witnesses, threatening the family members of the deceased victim and also create problems of law and order situation.

Such sentiments were expressed much earlier as well by the Court in *Talab Haji Hussain v. Madhukar Purshottam Mondkar* in the following manner: (AIR p. 379, para 6)

6.. There can be no more important requirement of the ends of justice than the uninterrupted progress of a fair trial; and it is for the continuance of such a fair trial that the inherent powers of the High Courts are sought to be invoked by the prosecution in cases where it is alleged that Accused persons, either by suborning or intimidating witnesses, are obstructing the smooth progress of a fair trial. Similarly, if an Accused person who is released on bail jumps bail and attempts to run to a foreign country to escape the trial, that again would be a case where the exercise of the inherent power would be justified in order to compel the Accused to submit to a fair trial and not to escape its consequences by taking advantage of the fact that he has been released on bail and by absconding to another country. In other words, if the conduct of the Accused person subsequent to his release on bail puts in jeopardy the progress of a fair trial itself and if there is no other remedy which can be effectively used against the Accused person, in such a case the inherent power of the High Court can be legitimately invoked.

Vinod Kumar vs. State of Punjab

(2015) 3 SCC 220

3. The narration of the sad chronology shocks the judicial conscience and gravitates the mind to pose a question, is it justified for any conscientious trial Judge to ignore the statutory command, not recognize "the felt necessities of time" and remain impervious to the cry of the collective asking for justice or give an indecent and uncalled for burial to the conception of trial, totally ostracizing the concept that a civilized and orderly society thrives on rule of law which includes "fair trial" for the accused as well as the prosecution.

4. In the aforesaid context, we may recapitulate a passage from *Gurnaib Singh V. State of Punjab*, (2013) 7 SCC 108 2013 Indlaw SC 727.

"..... We are compelled to proceed to reiterate the law and express our anguish pertaining to the manner in which the trial was conducted as it depicts a very disturbing scenario. As is demonstrable from the record, the trial was conducted in an extremely haphazard and piecemeal manner. Adjournments were granted on a mere asking. The cross-examination of the witnesses was deferred without recording any special reason and dates were given after a long gap. The mandate of the law and the views expressed by this Court from time to time appears to have been totally kept at bay.

*The learned trial Judge, as is perceptible, seems to have ostracised from his memory that a criminal trial has its own gravity and sanctity. In this regard, we may refer with profit to the pronouncement in *Talab Haji Hussain v. Madhukar Purshottam Mondka*, AIR 1958 SC 376 1958 Indlaw SC 61 wherein it has been stated that an accused person by his conduct cannot put a fair trial into jeopardy, for it is the primary and paramount duty of the criminal courts to ensure that the risk to fair trial is removed and trials are allowed to proceed smoothly without any interruption or obstruction."*

A fair trial is to be fair both to the defense and the prosecution as well as to the victim. An offence registered under the Prevention of Corruption Act is to be tried with all seriousness. We fail to appreciate how the learned trial Judge could exhibit such laxity in granting so much time for cross- examination in a case of this nature. It would have been absolutely appropriate on the part of the learned trial Judge to finish the cross-examination on the day the said witness was examined. As is evident, for no reason whatsoever it was deferred and the cross-examination took place after 20 months. The witness had all the time in the world to be gained over.

It is anathema to the concept of proper and fair trial. The duty of the court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safe-guarded. It is distressing to note that despite series of judgments of this Court, the habit of granting adjournment, really an ailment, continues. How long shall we say, "Awake! Arise!" There is a constant discomfort. Therefore, we think it appropriate that the copies of the judgment be sent to the learned Chief Justices of all the High Courts for circulating the same among the learned trial Judges with a command to follow the principles relating to trial in a requisite manner and not to defer the cross-examination of a witness at their pleasure or at the leisure of the defence counsel, for it

eventually makes the trial an apology for trial and compels the whole society to suffer chicanery. Let it be remembered that law cannot allowed to be lonely; a destitute.

State of Haryana vs. Ram Mehar and others
(2016) 8 SCC 762

Bench: Dipak Misra, Uday Umesh Lalit

The Judgment was delivered by: Dipak Misra, J.

1. Present appeals, by special leave, assail the order dated 09.03.2016 passed by the High Court of Punjab and Haryana at Chandigarh in CRM-M No. 482 of 2016 and CRM-M No. 484 of 2016 whereby the learned single Judge in exercise of the power under Section 482 of the Code of Criminal Procedure (for short "CrPC") has annulled the order of the learned First Additional Sessions Judge, Gurgaon passed on 16.12.2015 wherein he had rejected the prayer of the accused persons seeking recall of the witnesses under Section 311 read with Section 231(2) CrPC.

2. The prosecution case before the trial court is that on 18.07.2012 about 7 p.m. the accused persons being armed with door beams and shockers went upstairs inside M1 room of the Manesar Factory of Maruti Suzuki Limited, smashed the glass walls of the conference room and threw chairs and table tops towards the management officials, surrounded the conference hall from all sides and blocked both the staircases and gave threats of doing away with the lives of the officials present over there. As the allegations of the prosecution further unfurl, the exhortation continued for quite a length of time. All kind of attempts were made to burn alive the officials of the management. During this pandemonium, the entire office was set on fire by the accused persons and the effort by the officials to escape became an exercise in futility as the accused persons had blocked the staircases. The police officials who arrived at the spot to control the situation were assaulted by the workers and they were obstructed from going upstairs to save the officials. Despite the obstruction, the officials were saved by the police and the fire was brought under control by the fire brigade. In the incident where chaos was the sovereign, Mr. Avnish Dev, General Manager, Human Resources of the Company was burnt alive. The said occurrence led to lodging of FIR No. 184/2012 at Police Station Manesar. After completion of the investigation, the police filed charge sheet against 148 workers in respect of various offences before the competent court which, in turn, committed the matter to the court of session and during trial the accused persons were charged for the offences punishable under Sections 147/ 148/ 149/ 452/ 302/ 307/ 436/ 323/ 332/ 353/ 427/ 114/ 201/ 120B/ 34/ 325/ 381 & 382 IPC.

3. The evidence of the prosecution commenced in August, 2013 and was concluded on 02.03.2015.

Recording of statements of the accused persons under Section 313 CrPC was concluded by 13.04.2015. After the statements under Section 313 CrPC were recorded, the defence adduced its evidence by examining number of witnesses.

5. When the matter stood thus, on 30.11.2015, two petitions under Section 311 CrPC were filed by different accused persons. The learned trial Judge noted the contentions advanced by the learned counsel for the defence and the prosecution and observed that:-

"7. The present application has been moved at a very belated stage at a time when 102 prosecution witnesses have already been examined during this trial in which larger number of 148 accused are involved and they have been examined way back as prosecution evidence was concluded on 2.3.15. Long time was consumed for recording the statements of the accused under section 313 Cr.P.C. and for the last more than six months, the case is being adjourned for recording the defence evidence and in this regard number of opportunities have been availed by the defence and 15 defence witnesses have been examined so far. At this juncture it may be recalled that Hon'ble Supreme Court has directed this court to decide this trial expeditiously. x x x x x x x

9. Nothing has been explained as to what are the left out questions and how the questions already put to the said witnesses created inroad into the defence of the said accused. In para 3 of the application, it is stated that the manner and circumstances as to how the incident took place and further the questions pertaining to weapons used and the injuries to the said witnesses and to others are certain other questions, which are to be put to them. A perusal of the statements of the aforesaid four witnesses clearly reveal that they have been cross examined at length and there is nothing that defence counsel faltered by not putting relevant questions to them. Putting it differently it is not a case of giving walk over by the defence to the prosecution witnesses by not properly conducting the cross examination. It is rightly argued by learned PP that if the present application is allowed then there will be no end of moving such applications and who knows that another changed defence counsel may come up with similar sort of application stating that the previous defence counsel inadvertently could not put

material questions. It may be recalled that the present applicants are in custody but that does not mean that they cannot move the application to delay the trial which has already been delayed considerably. The defence has already availed numerous opportunities. This court in order to ensure the fair trial allowed the successive applications moved by the defence to examine the witnesses to support their respective pleas. An old adage of a fair trial to accused does not mean that this principle is to be applied in favour of accused alone but this concept will take in its fold the fairness of trial to the victim as well as to the society. The court being neutral agency is expected to be fair to both the parties and its duty is also to ensure that the process of law is not abused by either of them for extraneous reasons. The speedy trial is essence of justice but such like applications like the present one should not come in the way of delivery of doing complete and expeditious justice to both the parties."

9. After so stating, the learned trial Judge came to hold that when the material questions had already been put, there was no point to entertain the application and mere change of the counsel could not be considered as a ground to allow the application for recalling the witnesses for the purpose of further cross-examination. It is worthy to note that two separate orders were passed by the trial court but the analysis is almost the same.

10. Dissatisfied with the aforesaid orders, the accused persons preferred CRM-M No. 482 of 2016 and CRM-M No. 484 of 2016 before the High Court under Section 482 CrPC. The High Court took note of the common ground that the leading counsel for the defence was critically ill during the trial and due to inadvertence, certain important questions, suggestions with respect to the individual roles and allegations against the respective accused persons, the injuries sustained by the witnesses, as well as the alleged weapons of offence used, had not been put to the said witnesses. It also took note of the fact that the senior lawyer had been engaged at the final stage and such inadvertent errors were discovered by him and they needed to be rectified in order to have a meaningful defence and a fair trial.

The High Court proceeded to opine that the accused-petitioners were charged with heinous offences including one under Section 302 IPC and recalling is not for the purpose of setting up a new case or make the witnesses turn hostile but only to have a proper defence as it is to be judicially noticed that for lack of proper suggestions by the defence to the prosecution witnesses, the trial courts at times tend to reject the raised defence on behalf of the accused.

12. On the basis of the aforesaid reasoning, the High Court allowed the petitions and set aside the impugned orders and directed as follows:-

"... in case the learned trial Court during the cross examination of the such recalled witnesses is of the opinion that such opportunity is being misused to make the witnesses resile from their earlier testimonies, in that eventuality the trial Court would be at full liberty to put a stop to that effort."

13. We have referred to the contents of the applications, delineation by the trial court and the approach of the High Court under Section 482 CrPC in extenso so that we can appreciate whether the order passed by the High Court really requires to be unsettled or deserves to be assented to.

16. Before we advert to the ambit and scope of Section 311 CrPC and its attractability to the existing factual matrix, we think it imperative to dwell upon the concept of "fair trial". There is no denial of the fact that fair trial is an insegregable facet of Article 21 of the Constitution. This Court on numerous occasions has emphasized on the fundamental conception of fair trial as the majesty of law so commands.

23. In Bablu Kumar and others v. State of Bihar and another [(2015) 8 SCC 787] the Court referred to the authorities in Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi) [(2010) 6 SCC 1], Rattiram 2012 Indlaw SC 43 (supra), J. Jayalalthaa 2013 Indlaw SC 646 (supra), State of Karnataka v. K. Yarappa Reddy [(1999) 8 SCC 715] and other decisions and came to hold that keeping in view the concept of fair trial, the obligation of the prosecution, the interest of the community and the duty of the court, it can irrefragably be stated that the court cannot be a silent spectator or a mute observer when it presides over a trial. It is the duty of the court to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding. They cannot expropriate or hijack the community interest by conducting themselves in such a manner as a consequence of which the trial becomes a farcical one. It has been further stated that the law does not countenance a "mock trial". It is a serious concern of society. Every member of the collective has an inherent interest in such a trial. No one can be allowed to create a dent in the same. The court is duty-bound to see that neither the prosecution nor the defence takes unnecessary adjournments and take the trial under their control. We may note with profit though the context was different, yet the message is writ large. The message is - all kinds of individual notions of fair trial have no room.

24. The decisions of this court when analysed appositely clearly convey that the concept of the fair trial is not in the realm of abstraction. It is not a vague idea. It is a concrete phenomenon. It is not rigid and there cannot

be any strait-jacket formula for applying the same. On occasions it has the necessary flexibility. Therefore, it cannot be attributed or clothed with any kind of rigidity or flexibility in its application. It is because fair trial in its ambit requires fairness to the accused, the victim and the collective at large. Neither the accused nor the prosecution nor the victim which is a part of the society can claim absolute predominance over the other. Once absolute predominance is recognized, it will have the effect potentiality to bring in an anarchical disorder in the conducting of trial defying established legal norm. There should be passion for doing justice but it must be commanded by reasons and not propelled by any kind of vague instigation. It would be dependent on the fact situation; established norms and recognized principles and eventual appreciation of the factual scenario in entirety. There may be cases which may command compartmentalization but it cannot be stated to be an inflexible rule. Each and every irregularity cannot be imported to the arena of fair trial. There may be situations where injustice to the victim may play a pivotal role. The centripetal purpose is to see that injustice is avoided when the trial is conducted. Simultaneously the concept of fair trial cannot be allowed to such an extent so that the systemic order of conducting a trial in accordance with CrPC or other enactments get mortgaged to the whims and fancies of the defence or the prosecution. The command of the Code cannot be thrown to winds. In such situation, as has been laid down in many an authority, the courts have significantly an eminent role. A plea of fairness cannot be utilized to build Castles in Spain or permitted to perceive a bright moon in a sunny afternoon. It cannot be acquiesced to create an organic disorder in the system. It cannot be acceded to manure a fertile mind to usher in the nemesis of the concept of trial as such.

From the aforesaid it may not be understood that it has been impliedly stated that the fair trial should not be kept on its own pedestal. It ought to remain in its desired height but as far as its applicability is concerned, the party invoking it has to establish with the support of established principles. Be it stated when the process of the court is abused in the name of fair trial at the drop of a hat, there is miscarriage of justice. And, justice, the queen of all virtues, sheds tears. That is not unthinkable and we have no hesitation in saying so.

25. Having dwelled upon the concept of fair trial we may now proceed to the principles laid down in the precedents of this Court, applicability of the same to a fact situation and duty of the court under Section 311 CrPC.

34. Keeping in mind the principles the defensibility of the order passed by the High Court has to be tested. We have already reproduced the assertions made in the petition seeking recall of witnesses. We have, for obvious reasons, also reproduced certain passages from the trial court judgment. The grounds urged before the trial court fundamentally pertain to illness of the counsel who was engaged on behalf of the defence and his inability to put questions with regard to weapons mentioned in the FIR and the weapons that are referred to in the evidence of the witnesses. That apart, it has been urged that certain suggestions could not be given. The marrow of the grounds relates to the illness of the counsel. It needs to be stated that the learned trial Judge who had the occasion to observe the conduct of the witnesses and the proceedings in the trial, has clearly held that recalling of the witnesses were not necessary for just decision of the case. The High Court, as we notice, has referred to certain authorities and distinguished the decision in Shiv Kumar Yadav 2015 Indlaw SC 619 (supra) and Fatehsinh Mohansinh Chauhan 2006 Indlaw SC 376 (supra). The High Court has opined that the court has to be magnanimous in permitting mistakes to be rectified, more so, when the prosecution was permitted to lead additional evidences by invoking the provisions under Section 311 CrPC. The High Court has also noticed that the accused persons are in prison and, therefore, it should be justified to allow the recall of witnesses.

35. The heart of the matter is whether the reasons ascribed by the High Court are germane for exercise of power under Section 311 CrPC. The criminal trial is required to proceed in accordance with Section 309 of the CrPC.

37. The decisions which have used the words that the court should be magnanimous, needless to give special emphasis, did not mean to convey individual generosity or magnanimity which is founded on any kind of fanciful notion. It has to be applied on the basis of judicially established and accepted principles. The approach may be liberal but that does not necessarily mean "the liberal approach" shall be the rule and all other parameters shall become exceptions. Recall of some witnesses by the prosecution at one point of time, can never be ground to entertain a petition by the defence though no acceptable ground is made out. It is not an arithmetical distribution. This kind of reasoning can be dangerous. In the case at hand, the prosecution had examined all the witnesses. The statements of all the accused persons, that is 148 in number, had been recorded under Section 313 CrPC. The defence had examined 15 witnesses. The foundation for recall, as is evincible from the applications filed, does not even remotely make out a case that such recalling is necessary for just decision of the case or to arrive at the truth. The singular ground which prominently comes to surface is that the earlier counsel who was engaged by the defence had not put some questions and failed to put some questions and give certain suggestions. It has come on record that number of lawyers were engaged by the defence. The accused persons had engaged counsel of their

choice. In such a situation recalling of witnesses indubitably cannot form the foundation. If it is accepted as a ground, there would be possibility of a retrial. There may be an occasion when such a ground may weigh with the court, but definitely the instant case does not arouse the judicial conscience within the established norms of Section 311 CrPC for exercise of such jurisdiction. It is noticeable that the High Court has been persuaded by the submission that recalling of witnesses and their cross-examination would not take much time and that apart, the cross-examination could be restricted to certain aspects. In this regard, we are obliged to observe that the High Court has failed to appreciate that the witnesses have been sought to be recalled for further cross-examination to elicit certain facts for establishing certain discrepancies; and also to be given certain suggestions. We are disposed to think that this kind of plea in a case of this nature and at this stage could not have been allowed to be entertained.

38. At this juncture, we think it apt to state that the exercise of power under Section 311 CrPC can be sought to be invoked either by the prosecution or by the accused persons or by the Court itself. The High Court has been moved by the ground that the accused persons are in the custody and the concept of speedy trial is not nullified and no prejudice is caused, and, therefore, the principle of magnanimity should apply. Suffice it to say, a criminal trial does not singularly centres around the accused. In it there is involvement of the prosecution, the victim and the victim represents the collective. The cry of the collective may not be uttered in decibels which is physically audible in the court premises, but the Court has to remain sensitive to such silent cries and the agonies, for the society seeks justice. Therefore, a balance has to be struck. We have already explained the use of the words "magnanimous approach" and how it should be understood. Regard being had to the concept of balance, and weighing the factual score on the scale of balance, we are of the convinced opinion that the High Court has fallen into absolute error in axing the order passed by the learned trial Judge. If we allow ourselves to say, when the concept of fair trial is limitlessly stretched, having no boundaries, the orders like the present one may fall in the arena of sanctuary of errors. Hence, we reiterate the necessity of doctrine of balance.

39. In view of the proceeded analysis we allow the appeals, set aside the order passed by the High Court and restore that of the learned trial Judge. We direct the learned trial judge to proceed with the trial in accordance with the law. Appeals allowed

State (NCT of Delhi) vs. Shiv Kumar Yadav and another
(2016) 2 SCC 402

Bench: Adarsh Kumar Goel, Jagdish Singh Khehar

The Judgment was delivered by: Adarsh Kumar Goel, J.

1. Leave granted. The issue raised for consideration in these appeals is **whether recall of witnesses, at the stage when statement of accused under Section 313 of the Code of Criminal Procedure ("Cr.P.C.") has been recorded, could be allowed on the plea that the defence counsel was not competent and had not effectively cross-examined the witnesses, having regard to the facts and circumstances of this case.**

2. On 6th December, 2014, a First Information Report was lodged alleging that the respondent accused who was the driver of cab, hired by the victim on 5th December, 2014 for returning home from her office committed rape on her. The statement of the prosecutrix was recorded under Section 164 Cr.P.C. on 8th December, 2014. After investigation, charge sheet was filed before the Magistrate on 24th December, 2014. Since the accused was not represented by counsel, he was provided legal aid counsel. Thereafter on 2nd January, 2015, the accused engaged his private counsel M/s. Alok Kumar Dubey and Ankit Bhatia in place of the legal aid counsel. Thereafter, the case was committed to the Court of Session. Charges were framed on 13th January, 2015. Prosecution evidence commenced on 15th January, 2015 and was closed on 31st January, 2015. The witnesses were duly cross-examined by the counsel engaged by the accused. Statement of the accused under Section 313 Cr.P.C. was recorded on 3rd February, 2015.

Thereafter, on 9th February, 2015, the accused engaged another counsel, who filed another application under Section 311 Cr.P.C. for recall of all the 28 prosecution witnesses on 16th February, 2015. The said application was dismissed on 18th February by the trial court but the same was allowed by the High Court vide impugned order dated 4th March, 2015 in a petition filed under Article 227 of the Constitution of India read with Section 482 Cr.P.C. Even though the specific grounds urged in the application were duly considered and rejected, it was observed that recall of certain witnesses was deemed proper for ensuring fair trial.

3. Aggrieved by the order of the High Court, the victim as well as the State have moved this Court.

4. On 10th March, 2015, when the matter came up for hearing before this Court, stay of further proceedings was granted but since the prosecutrix had already been recalled in pursuance of the impugned order and further

cross-examined, the said deposition was directed to be kept in the sealed cover and publication thereof by anyone in possession thereof was restrained.

10. It can hardly be gainsaid that fair trial is a part of guarantee under Article 21 of the Constitution of India. Its content has primarily to be determined from the statutory provisions for conduct of trial, though in some matters where statutory provisions may be silent, the court may evolve a principle of law to meet a situation which has not been provided for. It is also true that principle of fair trial has to be kept in mind for interpreting the statutory provisions.

11. It is further well settled that fairness of trial has to be seen not only from the point of view of the accused, but also from the point of view of the victim and the society. In the name of fair trial, the system cannot be held to ransom. The accused is entitled to be represented by a counsel of his choice, to be provided all relevant documents, to cross-examine the prosecution witnesses and to lead evidence in his defence. The object of provision for recall is to reserve the power with the court to prevent any injustice in the conduct of the trial at any stage. The power available with the court to prevent injustice has to be exercised only if the Court, for valid reasons, feels that injustice is caused to a party. Such a finding, with reasons, must be specifically recorded by the court before the power is exercised. It is not possible to lay down precise situations when such power can be exercised. The Legislature in its wisdom has left the power undefined. Thus, the scope of the power has to be considered from case to case. The guidance for the purpose is available in several decisions relied upon by the parties.

15. The above observations cannot be read as laying down any inflexible rule to routinely permit a recall on the ground that cross-examination was not proper for reasons attributable to a counsel. While advancement of justice remains the prime object of law, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant.

Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. Witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination.

16. The interest of justice may suffer if the counsel conducting the trial is physically or mentally unfit on account of any disability. The interest of the society is paramount and instead of trials being conducted again on account of unfitness of the counsel, reform may appear to be necessary so that such a situation does not arise. Perhaps time has come to review the Advocates Act and the relevant Rules to examine the continued fitness of an advocate to conduct a criminal trial on account of advanced age or other mental or physical infirmity, to avoid grievance that an Advocate who conducted trial was unfit or incompetent. This is an aspect which needs to be looked into by the concerned authorities including the Law Commission and the Bar Council of India.

20. In *Mir. Mohd. Omar vs. State of W.B.* (1989) 4 SCC 436 1989 Indlaw SC 681 after the statement of the accused under Section 313 was recorded, the public prosecutor filed an application for his re-examination on the ground that some more questions are required to be asked. The application was rejected by the trial court but allowed by the High Court. This Court disapproved the course adopted and held :

"16.Here again it may be noted that the prosecution has closed the evidence. The accused have been examined under Section 313 of the Code. The prosecution did not at any stage move the trial Judge for recalling PW 34 for further examination. In these circumstances, the liberty reserved to the prosecution to recall PW 34 for re-examination is undoubtedly uncalled for."

21. We may also note that the approach to deal with a case of this nature has to be different from other cases. We may refer to the judgment of this court in *Gurmit Singh* case, wherein it was observed:

"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....."

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21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity...."

22. We may now refer to the orders passed by the trial Court dated 18th February, 2015 and the High Court dated 4th March, 2015. Referring to the ground of the earlier counsel not being competent, the trial court observed that the counsel was of the choice of the accused. The accused was not facing a criminal trial for the first time. The cross-examination of witnesses was deferred time and again to enable the counsel to seek instructions from the accused. The cross-examination of the prosecutrix was deferred on 15th January, 2015 to enable the counsel to have legal interview with the accused. After part of cross-examination on 16th January, 2015, further cross-examination was concluded on 17th January, 2015. Cross-examination of PW 13 was deferred on the request of the accused. Similarly, cross-examination of PWs 22, 26 and 27 was deferred on the request of the defence counsel. After referring to the record, the trial court observed as under :

"22. The aforesaid proceedings clearly bely the claim of the accused/applicant that the case has been proceeding at a "hurried pace" or that he was not duly represented by a defence counsel of his choice. The claim of the applicant that he was unwilling to continue with his earlier counsel is also nothing but a bundle of lie in as much as the accused never submitted before the court that he wants to change his counsel. Rather, it is revealed from the record that the earlier counsel, Sh. Alok Kumar was acting as per his instructions and having legal interview with him. The accused cannot be permitted to take advantage of his submissions made on the first date i.e. 13/01/2015 that he wants to engage a new counsel as his subsequent conduct does not support this submission. I may also add that before proceeding with the case further, I had personally asked the accused in the open court whether he wants to continue with his counsels and only on getting a reply in the affirmative, were the proceedings continued further. It thus appears that the endeavor of the accused by filing this application is only to delay the proceedings despite the fact that all along the trial his request for adjournment have been duly considered and allowed and he has been duly represented by a private counsel of his choice.

23. *I am also unable to accept the plea of the accused that the counsel representing him earlier was incompetent, being a novice and that he is entitled to recall all the prosecution witnesses now that he has engaged a new counsel. Although, Sh. Alok Kumr Dubey and Sh. Ankit Bhatia, both have enrolment number of 2014 as per the Power of Attorney executed by the accused in their favour, however, to my mind the competence of a Lawyer is subjective and the date of his enrolment with the Bar Council can certainly not be said to be a yardstick to measure his competence.*

24. *Moreover, the competence of the new counsel may again be questioned by another counsel, who the accused may choose to engage in future. This fact was also admitted by Sh. D.K. Mishra during the course of arguments on the application under consideration.*

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27. *At this stage, to judge as to whether certain questions should have been put to the witnesses in cross examination or should not have been put to them, would in my view result in pre-judging as to what are the material portions of the evidence and would also amount to re-appraising the entire cross examination conducted by the earlier counsel to conclude whether he had done a competent job or not. This certainly is not within the scope and power of the court u/s. 311 Cr.P.C. I am supported in my view by the observations of Hon'ble Delhi High Court in its order dated 20/02/2008 in case titled as Raminder Singh vs. State 2008 Indlaw DEL 1171, Criminal MC 8479/2006, where it has been held as under :*

"In the first place, it requires to be noticed that scope of Section 311 CrPC does not permit a court to go into the aspect whether material portions of the evidence on record should have been put to the witness in cross-examination to elicit their contradictions. If the court is required to perform such an exercise every time an

application is filed under Section 311 then not only would it be pre-judging what according to it are 'material portions' of the evidence but it would end up reappraising the entire cross-examination conducted by a counsel to find out if the counsel had done a competent job or not. This certainly is not within the scope of the power of the trial court under Section 311 CrPC. No judgment has been pointed out by the learned Counsel for the petitioner in support of such a contention. Even on a practical level it would well-nigh be impossible to ensure expeditious completion of trials if trial courts were expected to perform such an exercise at the conclusion of the examination of prosecution witnesses every time."

28. It may also be relevant to mention that Article 22(1) of the Constitution of India confers a Fundamental Right upon an accused, who has been arrested by the police to be defended by a

legal practitioner of his choice. This Fundamental Right has been duly acknowledged by the Hon'ble Superior Courts in numerous pronouncements including the case of State of Madhya Pradesh vs. Shobha Ram and others, AIR 1966 SC 1910 1966 Indlaw SC 92 wherein it has been observed as under:

"Under Art. 22, a person who is arrested for whatever reason, gets three independent rights. The first is the right to be told the reasons for the arrest as soon as an arrest's made, the second is the right to be produced before a Magistrate within 24 hours and the third is right to be defended by advocate of his choice. When the Constitution lays down in absolute terms a right to be defended by one's own counsel, it cannot be taken away by ordinary law, and, it is not sufficient to say that the accused was so deprived, of the right, did not stand in danger of losing his personal liberty."

29. In the case of State vs. Mohd. Afzal & Ors. 2003 IV AD (Cr.) 205, the Hon'ble Delhi High Court addressed the issue of Fundamental Right of the accused to be represented by a counsel from the point of his arrest especially in a case involving capital punishment. The case of US Supreme Court in Strickland vs. Washington 466, U.S. 688 (1984) was cited before the Delhi High Court and the ld. Counsel for the accused in that case had argued that the law required a conviction to be set aside where counsel's assistance was not provided or was ineffective. Hon'ble Delhi High Court took note of the observations in the said case as well as the Rulings of the Hon'ble Supreme Court in the case of (1991) 1 SCC 286 Kishore Chand vs. State of Himachal Pradesh 1990 Indlaw SC 12, (1931) 1 SCC 627 Khatri & Ors. vs. State of Bihar & Ors., (1980) 1 SCC 108 Hussainara Khatun & Ors. vs. Home Secretary, State of Bihar 1979 Indlaw SC 558, (1983) 3 SCC 307 Rajan Dwivedi vs. Union of India 1983 Indlaw SC 276, (1978) 3 SCC 544 Madhav Hayawadanrao Hoskot vs. State of Maharashtra 1978 Indlaw SC 192 while dealing with this issue. It was however observed that from hindsight it is easy to pick wholes in the cross examination conducted but applying the test in Strickland's case, it cannot be said that it was the constructive denial of the counsels to accused Mohd. Afzal. The observations of the Hon'ble Delhi High Court were met with the approval by Hon'ble Supreme Court when the matter was decided by the Hon'ble Apex Court by its ruling titled as State vs. Navjot Sandhu & Ors. AIR 2005 SC 3820 2005 Indlaw SC 1026.

30. The Hon'ble Apex Court, after considering the facts of the case, nutshell that "we do not think that the court should dislodge the Counsel and go on searching for some other counsel to the liking of the accused. The right to legal aid cannot be taken thus far." While relying upon the ruling in the case Strickland's (supra), the Hon'ble Supreme Court observed that scrutiny of performance of a counsel who has conducted trial should be highly deferential.

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34. It may be noted that the recall of IO and prosecutrix has been sought on the ground besides others, that she has to be questioned as to why she did not give her sim of her mobile to the IO and why the IO did not ask her for the same. Similarly, it has been submitted that the accused though admitted his potency report but has not admitted the time and process of the potency test as stated by the IO and thus the IO needs to be recalled. Further, SI Sandeep is required to be recalled for cross examination in order to cross examine him with regard to the document given by the Transporter, who brought the cab in question from Mathura to Delhi. It may also be mentioned that in his zest to seek recall of all the prosecution witnesses, the applicant has also sought recall of one lady constable Manju, who as per record was not even examined as a prosecution witness.

35. It is further necessary to mention that on 04/02/2015 accused had moved an application u/s 311 Cr.P.C., thereby seeking recall of prosecutrix PW-2 and PW-23 Ayush Dabas. The application was dismissed. The present application has been filed now seeking recall of all PWs, including PW-2 and PW-23, while the order dated 04/02/2015 still remains unchallenged.

36. The application under consideration is thus nothing but an attempt to protract the trial and in fact seek an entire retrial. There is no change in circumstances except change of Counsel, which, to my mind, is no ground

to allow the application. Interestingly, in para 17 of the application, it has been contended that the present counsel is not aware of the scheme and design of defence of the previous counsel and is thus at a loss and disadvantageous position to defend the accused and for conducting the case as per his acumen and legal expertise, the recalling of PWs are necessary. It may be noted that the defence of an under trial is not expected to vary from counsel to counsel and irrespective of change of counsel, an under trial is expected to have a single and true line of defence which cannot change every time he changes a counsel. Nor can a new counsel defend the case of such an under trial as per the new scheme and design in accordance with his acumen and legal expertise."

23. The High Court made a reference to the Criminal Law Amendment Act, 2013 providing for trial relating to offences under Section 376 and other specified offences being completed within two months from the date of filing of the charge sheet. Reference has also been made to circular issued by the Delhi High Court drawing the attention of the judicial officers to the mandate of speedy disposal of session cases.

24. After rejecting the plea of the accused that there was any infirmity in the conduct of the trial after detailed reference to the proceedings, the High Court concluded:

"31. The aforesaid narration of proceedings before the learned Additional Sessions Judge clearly reflects that while posting the matter on day to day basis, the Court's only endeavour was to comply with the provisions of Section 309 Cr.P.C. as far as possible while ensuring the right of the accused to a fair trial. The earlier counsel had been seeking adjournment for consulting the petitioner which was duly granted and under these circumstances the submission of learned counsel for the petitioner that justice hurried is justice buried, deserves outright rejection."

25. It was then observed that competence of a counsel was a subjective matter and plea of incompetence of the counsel could not be easily accepted. It was observed :

"32. The other submission of learned counsel for the petitioner that Sh. Alok Dubey, Advocate was not competent to appear as an Advocate inasmuch as he had not even undergone screening test as required by Bar Council of Delhi Rules and was not issued practice certificate, this submission is not fortified by any record. Much was said against the competency of the earlier counsel representing the petitioner. However, learned standing counsel for the State was right in submitting that competency of an Advocate is a subjective issue which should not have been attacked behind the back of the concerned Advocate."

33. Learned Additional Standing counsel for the State has furnished details of the number of questions put by the earlier counsel to the prosecution witnesses for showing the performance of the earlier counsel. Moreover, one cannot lose sight of the fact that the Advocate was appointed by the petitioner of his own choice."

26. In spite of the High Court not having found any fault in the conduct of the proceedings, it held that "although recalling of all the prosecution witnesses is not necessary" recall of certain witnesses was necessary for the reasons given in para 15 (a) to (xx) on the application of the accused. It was observed that the accused was in custody and if he adopted delaying tactics it is only he who would suffer.

27. It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. Width of power under Section 311 Cr.P.C. is beyond any doubt. Not a single specific reason has been assigned by the High Court as to how in the present case recall of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. The High Court rejected on merits the only two reasons pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses, undue delay in the trial, and without any other cogent reason, allowing recall merely on the observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of harassment for the witnesses to be recalled which could not be justified on the ground that the accused was in custody and that he would only suffer by prolonging of the proceedings. Certainly recall could be permitted if essential for the just decision but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined.

28. It will also be pertinent to mention that power of judicial superintendence under Article 227 of the Constitution and under Section 482 Cr.P.C. has to be exercised sparingly when there is patent error or gross injustice in the view taken by a subordinate court 47 Jasbir Singh vs. State of Punjab (2006) 8 SCC 294 2006 Indlaw SC 1239. A finding to this effect has to be supported by reasons. In the present case, the High Court has allowed the prayer of the accused, even while finding no error in the view taken by the trial court, merely by saying that exercise of power was required for granting fair and proper opportunity to the accused. No reasons have been recorded in support of this observation. On the contrary, the view taken by the trial court rejecting the stand of the accused has been affirmed. Thus, the conclusion appears to be inconsistent with the reasons in the impugned order.

29. **We may now sum up our reasons for disapproving the view of the High Court in the present case:**

(i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel were given due opportunity and had duly conducted cross-examination. They were under no handicap;

(ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at back of such counsel;

(iii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;

(iv) The trial Court as well as the High Court rejected the reasons for recall of the witnesses;

(v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;

(vi) ***Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;***

(vii) Mere change of counsel cannot be ground to recall the witnesses;

(viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;

(ix) The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall, i.e., denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;

(x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted.

30. Accordingly, we allow these appeals, set aside the impugned order passed by the High Court and dismiss the application for recall. Appeals allowed

Bablu Kumar and others vs. State of Bihar and another

(2015) 8 SCC 787

Bench: Dipak Misra, Prafulla C. Pant

The Judgment was delivered by: Dipak Misra, J.

1. **The pivotal issues, quite disturbing and disquieting, that emanate in this appeal by special leave for scrutiny, deliberation and apposite delineation, fundamentally pertain to the role of the prosecution and the duty of the court within the requisite paradigm of fair trial which in the ultimate conceptual eventuality results in appropriate stability of criminal justice dispensation system.** The attitude of callousness and non-chalance portrayed by the prosecution and the total indifferent disposition exhibited by the learned trial Judge in shutting out the evidence and closing the trial after examining a singular formal witness, PW 1, in a trial where the accused persons were facing accusations for the offences punishable under Sections 147, 148, 149, 341, 342 and 302 of the Indian Penal Code (IPC), which entailed an acquittal u/s. 232 of the Criminal Procedure Code, 1973 (CrPC), are really disconcerting; and indubitably cause discomfort to the judicial conscience. It seems that everyone concerned with the trial has treated it as a farce where the principal protagonists compete with each other for gaining supremacy in the race of closing the case unceremoniously, burying the basic tenets of fair trial,

and abandoning one's duty to serve the cause of justice devoutly. It is a case where the prosecution has played truant and the learned trial Judge, with apathy, has exhibited impatience. Fortunately, the damage done by the trial court has been rectified by the High Court in exercise of the revisional jurisdiction u/s. 401 CrPC; but what is redemption for the conception of the fair trial has caused dissatisfaction to the accused persons, for they do not intend to face the retrial. It is because at one point of time, the High Court had directed for finalization of trial within a fixed duration and the learned trial Judge, in all possibility, harboured the impression that even if the prosecution witnesses had not been served the notice to depose in court, and the prosecution had not taken any affirmative steps to make them available for adducing evidence in court, yet he must conclude the trial by the target date as if it is a mechanical and routine act. The learned trial Judge, as it appears to us, has totally forgotten that he could have asked for extension of time from the High Court, for the High Court, and we are totally convinced, could never have meant to conclude the trial either at the pleasure of the prosecution or desire of the accused.

2. The sad scenario has to have a narration. The informant lodged an FIR on 29.11.2004 at Tikari Police Station about 8.00 p.m. that the accused persons came armed with various weapons, took away her husband Brahamdeo Yadav, the deceased, and threatened the family members not to come out from their house. The deceased was taken towards the house of Krishna Yadav and next morning he was found dead having several wounds. It was mentioned in the FIR that the occurrence had taken place as the family of the informant and the accused persons were in litigating terms. On the basis of the FIR, criminal law was set in motion and eventually, the investigating agency submitted the charge-sheet for the offences which we have already mentioned hereinbefore. After the accused persons were sent up for trial, charges were framed on 10.8.2007. Be it noted, the appellants in this case were tried as accused in Session Trial No. 350/2006 and trial of different accused-persons had been split up. It is apt to mention here that applications for grant of bail were preferred by certain accused persons before the High Court and the High Court by order dated 17.07.2007, while declining to admit the accused persons to bail, directed that the trial should be concluded as early as possible and in any case within nine months from the date of receipt/production of the copy of the order passed by the High Court. After the charges were framed, the learned trial Judge, that is, Additional Session Judge, FTC-II Gaya, passed orders to issue summons to the witnesses and they were issued on 17.8.2007. Thereafter the learned trial Judge issued bailable as well as non-bailable warrants against the informant on 5.12.2007. The learned trial Judge on various occasions recorded that witnesses were not present and ultimately vide order dated 17.5.2008 directed the matter to be posted on 23.5.2008 for orders u/s. 232 CrPC and on the dated fixed recorded the judgment of acquittal.

3. Being aggrieved by the aforesaid judgment, the informant preferred criminal revision no. 919 of 2008. The learned Single Judge upon perusal of the record found that there was no service report/execution of warrant of arrest against the informant and there was also no service report on record to show that either summons were served on other witnesses or bailable or non-bailable warrants issued against the witnesses were executed. The High Court also took note of the fact that after the accused persons were examined u/s. 313 CrPC, case was adjourned to 17.5.2008 for evidence of the defence and hearing and finally the matter was taken up for consideration u/s. 232 CrPC and judgment was passed acquitting the accused persons. It has been clearly stated by the High Court that the Superintendent of Police, Gaya had not taken steps to produce the evidence and the learned trial Judge had not taken effective steps for production of witnesses and tried to conclude the trial without being alive to the duties of the trial court. The learned Single Judge has placed reliance on the decision rendered in *Zahira Habibulla H. Sheikh and Another v. State of Gujarat and others* (2004) 4 SCC 158 2004 Indlaw SC 408 and opined there has been no fair trial and accordingly remanded the matter for retrial by the trial court.

6. On a scrutiny of the orders passed by the learned trial Judge from time to time, we find that the learned trial Judge has really not taken pains to verify whether the summons had really been served on the witnesses or not. The High Court has rightly observed that the trial court has also not tried to verify from the record whether the warrants had been executed or not. As is manifest, he had directed the prosecution to produce the witnesses and mechanically recorded that the witnesses were not present and proceeded to direct the prosecution to keep them present. Eventually, as we have stated earlier, the trial Judge posted the matter to 23.5.2008 and passed an order u/s. 232 CrPC. **The question that arises for consideration is whether under these circumstances the High Court while dealing with the revision u/s. 401 CrPC should have interfered and directed for retrial of the case.**

18. Keeping in view the concept of fair trial, the obligation of the prosecution, the interest of the community and the duty of the Court, it can irrefragably be stated that the Court cannot be a silent spectator or a mute observer when it presides over a trial. It is the duty of the court to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding. They cannot expropriate or highjack the community interest by conducting themselves in such a manner as a consequence of which the trial becomes a farcical one. Law does not countenance a 'mock trial'. It is a serious concern of the society. Every member of the collective has an inherent interest in such a trial. No one can be allowed to create a dent in the same. The court is

duty bound to see that neither the prosecution nor the defence takes unnecessary adjournments and take the trial under their control. The court is under the legal obligation to see that the witnesses who have been cited by the prosecution are produced by it or if summons are issued, they are actually served on the witnesses. If the court is of the opinion that the material witnesses have not been examined, it should not allow the prosecution to close the evidence. There can be no doubt that the prosecution may not examine all the material witnesses but that does not necessarily mean that the prosecution can choose not to examine any witness and convey to the court that it does not intend to cite the witnesses. The Public Prosecutor who conducts the trial, has a statutory duty to perform. He cannot afford to take things in a light manner. The Court also is not expected to accept the version of the prosecution as if it is sacred. It has to apply its mind on every occasion. Non-application of mind by the trial court has the potentiality to lead to the paralysis of the conception of fair trial.

19. In the case at hand, it is luculent that the High Court upon perusal of the record has come to hold that notices were not served on the witnesses. The agonised widow of deceased was compelled to invoke the revisional jurisdiction of the High Court against the judgment of acquittal as the trial was closed after examining a formal witness. The order passed by the High Court by no stretch of imagination can be regarded as faulty. That being the position, we have no spec of doubt in our mind that the whole trial is nothing, but comparable to an experimentation conducted by a child in a laboratory. It is neither permissible nor allowable. Therefore, we unhesitatingly affirm the order passed by the High Court as we treat the view expressed by it as unexceptionable, for by its order it has annulled an order which was replete with glaring defects that had led to miscarriage of justice.

20. Consequently, the appeal, being sans merit, stands dismissed. The order be communicated to the Registrar General of the High Court to communicate to the concerned learned trial Judge to proceed with the trial in accordance with law. Appeal dismissed

Dr. Vinod Bhandari vs. State of Madhya Pradesh

2015(2) SCALE 195

Bench: Adarsh Kumar Goel, T.S. Thakur

The Judgment was delivered by: Adarsh Kumar Goel, J.

2. This appeal has been preferred against final judgment and order dated 11th August, 2014 passed by the High Court of Madhya Pradesh at Jabalpur in Misc. Criminal Case No.10371 of 2014 whereby a Division Bench of the High Court dismissed the bail application filed by the appellant.

3. M.P. Vyavsayik Pareeksha Mandal (M.P. Professional Examination Board) known as Vyapam conducts various tests for admission to professional courses and streams. It is a statutory body constituted under the provisions of M.P. Professional Examination Board Act, 2007. As per FIR No.12 of 2013 registered on 30th October, 2013 at police station, S.T.F., Bhopal under Sections 420, 467, 468, 471, 120B of the Indian Penal Code ("IPC") read with S. 3(d), 1, 2/4 of the Madhya Pradesh Manyata Prapt Pariksha Adhiniyam, 1937 and u/ss. 65 and 66 of the I.T. Act, Shri D.S. Baghel, DSP (STF), M.P. Police Headquarters, Bhopal during the investigation of another case found that copying was arranged in PMT Examination, 2012 at the instance of concerned officers of the Vyapam and middlemen who for monetary consideration helped the undeserving students to pass the entrance examination to get admission to the M.B.B.S course in Government and Private Medical Colleges in the State of M.P. As per the material collected during investigation, in pursuance of conspiracy, the appellant Dr. Vinod Bhandari, who is the Managing Director of Shri Aurbindo Institute of Medical Sciences, Indore, received money from the candidates through co-accused Pradeep Raghuvanshi who was working in Bhandari Hospital & Research Centre, Indore as General Manager and who was also looking after the admissions and management work of Shri Aurbindo Institute of Medical Sciences, Indore, for arranging the undeserving candidates to pass through the MBBS Entrance Examination by unfair means. He gave part of the money to Nitin Mohindra, Senior Systems Analyst in Vyapam, who was the custodian of the model answer key, along with Dr. Pankaj Trivedi, Controller of Vyapam. During investigation, disclosure statement was made by Pradeep Raghuvanshi which led to the recovery of money and documents. The candidates, their guardians, some officers of the Vyapam and middlemen were found to be involved in the scam.

It appears that there are in all 516 accused out of which 329 persons have been arrested and 187 are due to be arrested. Substantial investigation has been completed and charge sheets filed but certain aspects are still being investigated and as per direction of this Court in a Petition for Special Leave to Appeal (C)... CC No.16456 of 2014 titled "Ajay Dubey versus State of M.P. & Ors.", final charge sheet is to be filed by the Special Task Force on or before March 15, 2015 against the remaining accused. Allegations also include that some high scorer candidates were arranged in the examination centre who could give correct answers and the candidates who paid

money were permitted to do the copying. Other modus operandi adopted was to leave the OMR sheets blank which blank sheets were later filled up with the correct answers by the corrupt officers of Vyapam.

Further, the model answer key was copied and made available to concerned candidates one night before the examination. Each candidate paid few lakhs of rupees to the middlemen and the money was shared by the middlemen with the officers of the Vyapam. The appellant received few crores of rupees in the process from undeserving candidates to get admission to the M.B.B.S. and, as per allegation in the other connected matter, i.e., FIR No.14 of 2013 registered on 20th November, 2013 with the same police station, to the PG medical courses.

4. In the present case, the appellant was arrested on 30th January, 2014 while in the other FIR he was granted anticipatory bail on 16th January, 2014. Second Bail application of the appellant in the present case was considered by the 9th Additional Sessions Judge, Bhopal and dismissed vide Order dated 9.5.2014. Earlier, first bail application had been dismissed on 5th February, 2014. While declining prayer for bail, it was, inter- alia, observed:

"In the present case, it is alleged against the accused that he in connivance with the officers of coordinator State level institution (VYAPAM) in lieu of huge amount got the candidates selected in the examination after getting them passed in the Pre-Medical Test (PMT) Examination, which is mandatory and important for admission in the medical education institution. According to the prosecution, applicant snatched right of deserving and scholar students, he got selected ineligible candidates in the field of medical education. This case is not only related to economic offence, rather apart from depriving rights of deserving and scholar students, it is related to the human life and health."

5. The Division Bench of the High Court, in its Order, referred to the supplementary challan filed against the appellant on 24th April, 2014, indicating the following material :

"Offence of the accused:

The accused Dr. Vinod Bhandari has been the Managing Director of S.A.I.M.S., Indore and prior to the P.M.T. Examination 2012 he had in collusion with Nitin Mohindra, Senior System Analyst of Vyapam, for getting some of his candidates passed in the P.M.T. Examination, 2012 and stating to send list of his candidates and cash amount through his

General Manager Pradeep Raghuvanshi, subsequently he sent list of his 08 candidates and 60 lakh rupees in cash through his General Manager and 07 candidates out of aforesaid candidates were got passed by using unfair means with the connivance of Nitin Mohindra by way of filling up the circles in their O.M.R. sheets and received the amount in illegally manner by hatching conspiracy which has been recovered/seized from his General Manager Pradeep Raghuvanshi. In this manner, the accused has committed a serious crime in well-designed conspiracy by hatching conspiracy and committed organized crime.

Evidences available against the accused:-

- (1) *The certified copy of the excel sheet of the data retrieved from the hard disc seized from the office of the accused Nitin Mohindra;*
- (2) *The documents, note sheets and the activity chart of P.M.T. Examination, 2012 seized from Vyapam;*
- (3) *The list of 150 candidates seized from Shri Aurbindo Institute of Medical Sciences College, Indore in respect of M.B.B.S. admission for the session 2012-13 at the instanced of the accused Dr. Bhandari;*
- (4) *Memorandums of other accused persons;*
- (5) *The seizure memo of the amount seized from Pradeep Raghuvanshi."*

6. While declining bail, the High Court observed:

"To put it differently after considering all aspects of the matter as the material already placed along with the first charge-sheet prima facie indicates complicity of the applicant in the commission of the crime and is not a case of no evidence against the applicant at all; coupled with the fact that if the charge is proved against the applicant, the offence is punishable with life sentence; as the role of the applicant is being part of the conspiracy and is the kingpin; further that the applicant is allegedly involved in huge money transaction including to sponsor 8 candidates who were to appear in the VYAPAM examination; and is also prosecuted for another offence of similar type of having sponsored 8 other candidates; and has the potential of influencing the witnesses and other evidence and more importantly the investigation of the large scale conspiracy is still incomplete; as also keeping in mind the past conduct of the applicant in going abroad soon after the registration of the Crime No.12/2013 and returning back to India on

21.1.2014 only after grant of anticipatory bail on 16.1.2014, for all these reasons, for the time being, the applicant cannot be admitted to the privilege of regular bail."

7. We have heard learned counsel for the parties.

8. Main contention advanced on behalf of the appellant is that the appellant has already been in custody for about one year and there is no prospect of commencement of trial in the near future. Even investigation is not likely to be completed before March 15, 2015. There are about 516 accused and large number of witnesses and documents. Thus, the trial will take long time. In these circumstances, the appellant cannot be kept in custody for indefinite period before his guilt is established by acceptable evidence. Our attention has been invited to order dated 27th November, 2014 passed by the trial Court, recording the request of the Special Public Prosecutor for deferring the proceedings of the case till the cases of other accused against whom supplementary charge sheets were filed were committed to the Court of Session and till supplementary charge sheet was filed against several other accused persons.

In the said order, the Court directed the Investigating Officer to indicate as to against how many accused persons investigation is pending and the time frame for filing charge sheets/supplementary charge sheets. In response to the said order, the Investigating Officer, vide letter dated 25th December, 2014 filed before the trial Court, stated that 329 persons had already been arrested and 187 were yet to be arrested and efforts were being made to file the charge sheets by March 15, 2015 in compliance of the directions of this Court. Thus, the submission on behalf of the appellant is that in view of delay in trial, the appellant was entitled to bail.

9. On the other hand, learned counsel for the State opposed the prayer for grant of bail by submitting that this Court ought not to interfere with the discretion exercised by the trial Court and the High Court in declining bail to the appellant. He points out that the trial Court and the High Court have dealt with the matter having regard to all the relevant considerations, including the nature of allegations, the material available, likelihood of misuse of bail and also the impact of the crime in question on the society. He pointed out that the Courts below have found that there is a clear prima facie case showing complicity of the appellant, the offence was punishable with life sentence, the appellant was the kingpin in the conspiracy, he had the potential of influencing the witnesses, investigation was still pending and the appellant had earlier gone abroad to avoid arrest.

10. Referring to the counter affidavit filed on behalf of the State, he points out that in the excel sheet recovered from Nitin Mohindra, the appellant has been named and in the statement u/s. 164 Cr.P.C. Dr. Moolchand Hargunani disclosed that he had met the appellant who asked him to meet Pradeep Raghuvanshi for admission to PMT and he was asked to pay Rs.20 lakhs. He could not pay the said amount and his son could not get the admission. A sum of Rs.50 lakh for PMT Examination and 1.2 crores for Pre PG Examination, 2012 was received from Pradeep Raghuvanshi who was General Manager of the appellant's hospital and in charge of admission to the institute of the appellant.

12. It is well settled that at pre-conviction stage, there is presumption of innocence. The object of keeping a person in custody is to ensure his availability to face the trial and to receive the sentence that may be passed. The detention is not supposed to be punitive or preventive. Seriousness of the allegation or the availability of material in support thereof are not the only considerations for declining bail. Delay in commencement and conclusion of trial is a factor to be taken into account and the accused cannot be kept in custody for indefinite period if trial is not likely to be concluded within reasonable time. Reference may be made to decisions of this Court in Kalyan Chandra Sarkar vs. Rajesh Ranjan, (2005) 2 SCC 42 2005 Indlaw SC 24, State of U.P. vs. Amarmani Tripathi, (2005) 8 SCC 21 2005 Indlaw SC 1225, State of Kerala vs. Raneef, (2011) 1 SCC 784 2011 Indlaw SC 1 and Sanjay Chandra vs. CBI, (2012) 1 SCC 40 2011 Indlaw SC 775.

13. In Kalyan Chandra Sarkar (supra), it was observed :

"8. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a Constitutional guarantee. However, Art. 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Art. 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled to bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances

then prevailing require that such persons be released on bail, in spite of his earlier applications being rejected, the courts can do so."

16. In Sanjay Chandra 2011 Indlaw SC 775 (supra), it was observed:

"21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

24. In the instant case, we have already noticed that the "pointing finger of accusation" against the appellants is "the seriousness of the charge". The offences alleged are economic offences which have resulted in loss to the State exchequer. Though, they contend that there is a possibility of the appellants tampering with the witnesses, they have not placed any material in support of the allegation.

In our view, seriousness of the charge is, no doubt, one of the relevant considerations while considering bail applications but that is not the only test or the factor: the other factor that also requires to be taken note of is the punishment that could be imposed after trial and conviction, both under the Penal Code and the Prevention of Corruption Act. Otherwise, if the former is the only test, we would not be balancing the Constitutional rights but rather "recalibrating the scales of justice".

17. In the light of above settled principles of law dealing with the prayer for bail pending trial, we proceed to consider the present case. Undoubtedly, the offence alleged against the appellant has serious adverse impact on the fabric of the society. The offence is of high magnitude indicating illegal admission to large number of undeserving candidates to the medical courses by corrupt means. Apart from showing depravity of character and generation of black money, the offence has the potential of undermining the trust of the people in the integrity of medical profession itself. If undeserving candidates are admitted to medical courses by corrupt means, not only the society will be deprived of the best brains treating the patients, the patients will be faced with undeserving and corrupt persons treating them in whom they will find it difficult to repose faith. In these circumstances, when the allegations are supported by material on record and there is a potential of trial being adversely influenced by grant of bail, seriously jeopardising the interest of justice, we do not find any ground to interfere with the view taken by the trial Court and the High Court in declining bail.

18. It is certainly a matter of serious concern that the appellant has been in custody for about one year and there is no prospect of immediate trial. When a person is kept in custody to facilitate a fair trial and in the interest of the society, it is duty of the prosecution and the Court to take all possible steps to expedite the trial. Speedy trial is a right of the accused and is also in the interest of justice. We are thus, of the opinion that the prosecution and the trial Court must ensure speedy trial so that right of the accused is protected. This Court has already directed that the investigation be finally completed and final charge sheet filed on or before March 15, 2015. We have also been informed that a special prosecutor has been appointed and the matter is being tried before a Special Court. The High Court is monitoring the matter. We expect that in these circumstances, the trial will proceed day to day and its progress will be duly monitored. Material witnesses may be identified and examined at the earliest. Having regard to special features of this case, we request the High Court to take up the matter once in three months to take stock of the progress of trial and to issue such directions as may be necessary. We also direct that if the trial is not completed within one year from today for reasons not attributable to the appellant, the appellant will be entitled to apply for bail afresh to the High Court which may be considered in the light of the situation which may be then prevailing.

19. The appeal is accordingly disposed of with the above observations. We make it clear that observations in our above judgment will not be treated as expression of any opinion on merits of the case and the trial Court may decide the matter without being influenced by any such observation.

Review Procedures: Appeals

24.1. Object and scope of the chapter—Human judgment is not infallible. Despite all the provisions for ensuring a fair trial and a just decision, mistakes are possible and errors cannot be ruled out. The Code therefore provides for “appeals” and “revisions” and thereby enables the superior courts to review and correct the decisions of the lower courts. Apart from its being a corrective device, the review procedure serves another important purpose. The very fact that the decision of the lower court is duly scrutinized by a superior court in ‘appeal’ or ‘revision’ gives certain satisfaction to the party “aggrieved” by that decision. The review of the case by superior courts, in a way, assures the aggrieved party that all reasonable efforts have been made to reach a just decision free from plausible errors, prejudice and mistakes. Review procedures are therefore importantly useful to inspire in the public mind a better confidence in the administration of criminal justice.

The Supreme Court has observed:

“One component of fair procedure is natural justice. Generally speaking and subject to just exceptions, at least a single right of appeal on facts, where criminal conviction is fraught with loss of liberty, is basic to civilized jurisprudence. It is integral to *fair procedure*, natural justice and normative universality save in special cases like the original tribunal being a high bench sitting on a collegiate basis. In short, a first appeal... as provided in the Criminal Procedure Code, manifests this value upheld in Article 21.”¹

Appeal is one of the two important review procedures, and the present chapter attempts to discuss all its aspects. The next chapter deals with ‘revision’.

An appeal is a complaint to a superior court of an injustice done or error committed by an inferior one, whose judgment or decision the court above is called upon to correct or reverse.²

An appeal is a creature of statute and there can be no inherent right of appeal from any judgment or determination unless an appeal is expressly provided for by the law itself.³

1. *M.H. Hoskot v. State of Maharashtra*, (1978) 3 SCC 544; 1978 SCC (Cr) 468, 476; 1978 Cri LJ 1678.

2. *Black's Law Dictionary*, 4th Edn., p. 124.

(4) When the accused is sentenced to death by any Court and an appeal lies from such judgment as of right the Court shall inform him of the period within which, if he wishes to appeal, his appeal should be preferred.

(5) Save as otherwise provided in sub-section (2), any person affected by a judgment or order passed by a Criminal Court shall, on an application made in this behalf and on payment of the prescribed charges, be given a copy of such judgment or order or of any deposition or other part of the record.

Provided that the Court may, if it thinks fit for some special reason, give it to him free of cost.

(6) The High Court may, by rules, provide for the grant of copies of any judgment or order of a Criminal Court to any person who is not affected by a judgment or order, on payment, by such persons, of such fees, and subject to such conditions, as the High Court may, by such rules, provide.

When any person is affected by a judgment or order passed by a criminal court, then on an application made in this behalf under Section 363(5) and on payment of prescribed charges, a copy of the order, deposition or any other part of the record has to be given to him irrespective of the fact whether he has appeared in court or not.⁶⁴

23.19. Translation of judgment when to be kept.—The original judgment is required to be filed with the record of the proceedings and where the original is recorded in a language different from that of the court and the accused so requires, a translation thereof into the language of the court shall be added to such record [Section 364].

23.20. Court of session to send copy of finding and sentence to District Magistrate.—In cases tried by the court of session or a Chief Judicial Magistrate, the court or such magistrate, as the case may be, shall forward a copy of its or his finding and sentence (if any) to the District Magistrate within whose local jurisdiction the trial was held [Section 365].

The purpose of sending a copy of the judgment as mentioned above is to enable the District Magistrate to be posted with information about serious offences.

⁶⁴ *Shree Lal Saraf v. State of Bihar*, 1976 Cri LJ 895, 896 (P-4).

The appeal as a corrective procedure would obviously be far less relevant in cases where the chances of error in the judgment of the trial court are very remote. Further, the review of the case in appeal means additional time and expense for the final disposal of the case. Therefore in petty cases where the possible error in the decision of the lower court is more likely to be of insignificant nature, it would be inexpedient to allow appeals in such cases. These considerations have found expression in the provisions of the Code. In cases where the accused has been convicted on his own plea of guilty, the Code justifiably disallows any appeal against the order of conviction, but fairly permits under certain circumstances an appeal as to the extent or legality of the sentence passed on the accused person. It will further be seen that the Code does not *generally* favour a second appeal.

The chapter would consider the circumstances in which appeals can be filed against the orders of convictions or of acquittals and also the conditions in which the Government can appeal on the ground of inadequacy of the sentence passed on the accused person. The chapter further deals with the form of appeal, the procedure for its filing, the manner in which it is heard, the powers of the appellate court in disposing of an appeal, the abatement of appeal under certain circumstances, and other ancillary matters.

A right of appeal carries with it a right of rehearing on law as also on facts. Generally there is no right of hearing on facts or appreciation of evidence in a revision.³ A rehearing of the case could, however, be ordered in exercise of revisional power.⁴

Provisions regarding appeals from orders requiring security or refusal to accept or rejecting surety for keeping peace or good behaviour are contained in Section 373, but they can be more conveniently discussed along with the main provisions relating to security proceedings. These would be discussed later in Chapter 28.

24.2. No appeal in certain cases.—(1) *No appeal unless provided by law.*—Section 372 lays down the general principle that no appeal shall lie from any judgment or order of a criminal court except as provided by the Code or by any other law for the time being in force. It is, therefore, necessary to bear in mind that an appeal is a creature of statute and that there is no inherent right of appeal.⁵

3. *Durga Sankar Mehta v. Raghubar Singh*, AIR 1954 SC 520.

4. *State of Kerala v. Sebastian*, 1983 Cri LJ 416, 418 (Ker).

5. *T.V. Hunited, In re*, 1986 CH LJ 1001 (Ker).

6. See observations of the Supreme Court in *Akshay Ahir v. Ramdeo Ram*, (1973) 2 SCC 583; 1973 SCC (Cri) 903, 905; 1973 Cri LJ 1404, 1405.

As will be seen later, this chapter provides for appeals in certain cases as mentioned in Sections 373, 374, 377, 378, 379, 380. Apart from these general sections, there are also other provisions in the Code giving the right of appeal in some specific areas. For example, Sections 86, 237(7), 250(6), 341, 351(1), 449, etc.⁷

(2) *No appeal in petty cases*.—Section 376 provides that there shall be no appeal by a convicted person in any of the following cases, namely—

(a) Where a High Court passes only a sentence of imprisonment for a term not exceeding six months or of the fine not exceeding one thousand rupees, or of both such imprisonment and fine;

(b) where a Court of Session or a Metropolitan Magistrate passes only a sentence of imprisonment for a term not exceeding three months or of fine not exceeding two hundred rupees, or of both such imprisonment and fine;

(c) where a magistrate of the first class passes only a sentence of fine not exceeding one hundred rupees; or

(d) where, in a case tried summarily, a magistrate empowered to act under Section 201⁸ passes only a sentence of fine not exceeding two hundred rupees.

However, the proviso to Section 376 explains that an appeal may be brought against the abovementioned non-appealable sentence if any other punishment is combined with it. But it is further explained that such sentence shall not be so appealable merely on the ground—

(i) that the person convicted is ordered to furnish security to keep the peace; or

(ii) that a direction for imprisonment in default of payment of fine is included in the sentence; or

(iii) that more than one sentence of fine is passed in the case, if the total amount of fine imposed does not exceed the amount hereinbefore specified in respect of the case.

It may be recalled here that according to Section 31(3), for the purpose of appeal by a convicted person, the aggregate of the consecutive sentences of imprisonment passed against him at one trial shall be deemed to be a single sentence.⁹

7. See *supra*, para 5, 14, 19.8, 20, 12, 10.5(2), 16, 19, 12, 13.

8. See *supra*, para 21.13.

9. See *supra*, para 23.9.

(3) *No appeal where the accused is convicted on his plea of guilty.*—Where an accused person has pleaded guilty and has been convicted on such plea, there shall be no appeal.—

- (a) if the conviction is by a High Court; or
- (b) if the conviction is by a court of session, metropolitan magistrate or magistrate of the first or second class, except as to the extent or legality of the sentence [Section 375].

The rationale behind the above Section 375 is that a person who deliberately pleads guilty cannot be aggrieved by being convicted. When a person is convicted by *any* court on the basis of his own plea of guilty, he cannot and should not have any grouse against the conviction and hence is not entitled to appeal from such a conviction. However, if the plea of guilty is not a *real* one and is obtained by trickery, it is not a plea of guilty for the purposes of the above rule.¹⁰ It is only when there is a genuine plea of guilty made freely and voluntarily that the bar under Section 375 would apply.¹¹ In *Thippaswamy v. State of Karnataka*,¹² the Supreme Court observed that it would be a violation of Article 21 of the Constitution to induce or lead an accused to plead guilty under a promise or assurance that he would be let off lightly and then in appeal or revision, to enhance the sentence. A person, by pleading guilty, does not commit himself to accept the punishment that would be passed against him irrespective of its nature and legality. Therefore, he is not denied the right to challenge the extent or legality of the sentence. However, this is subject to one exception. That is, where a High Court convicts and sentences a person on a plea of guilty, an appeal is not allowed even as regards the extent or legality of the sentence, because it can hardly be contemplated that the judgment of a High Court would suffer from a serious infirmity in respect of the extent or legality of the sentence.¹³

24.3. Appeals from convictions.—(1) *Appeal to the Supreme Court.*

- (a) Subject to the restrictions on appeals as mentioned in para 24.2 above, any person convicted “on a trial held by” a High Court in its extraordinary original criminal jurisdiction may appeal to the Supreme Court [Section 374(1)]. Since such trials are extremely rare, it was felt that, in the interests of finality to the proceedings appeal should lie direct to the Supreme Court and not to another bench of the same High Court.¹⁴

10. *Prafulla Kumar Roy v. Emperor*, AIR 1944 Cal 120; 45 Cr LJ 517, 518.

11. *State of Kerala v. Gopinath Pillai*, 1LR (1978) 2 Ker 267; 1980 Cr LJ 39 (Ker) (NOC).

12. (1983) 1 SCC 194; AIR 1983 SC 747.

13. See 41st Report, p. 259, para 31.11.

14. See 41st Report, p. 259, para 31.10.

- (b) Where the High Court has, on appeal, reversed an order of acquittal of an accused person and convicted and sentenced him to death or to imprisonment for life or to imprisonment for a term of ten years or more, he may appeal as of right to the Supreme Court (Section 379). By this Section 379 the provisions of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 have been incorporated in the Code.
- (c) The Constitution provides that an appeal shall lie to the Supreme Court from any judgment, decree or final order of a High Court, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution [Article 132(1)]. Further, where the High Court has refused to give such a certificate the Supreme Court may, if it is satisfied that the case involves a substantial question of law as to the interpretation of the Constitution, grant special leave to appeal from such judgment, decree or final order [Article 132(2)]. Where such a certificate is given, or such leave is granted, any party in the case may appeal to the Supreme Court on the ground that any such question as aforesaid has been wrongly decided and, with the leave of the Supreme Court, on any other ground [Article 132(3)].
- (d) Article 134(1) of the Constitution, *inter alia* provides that an appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court, if the High Court—
- (i) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or
 - (ii) certifies that the case is a fit one for appeal to the Supreme Court.
- (e) Article 136(1) of the Constitution provides that the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal.

However the above rule shall not apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the armed forces [Article 136(2)].

It has been reiterated by the Supreme Court that in cases which do not come under clauses (a) and (b) of Article 134(1) or under the Act of 1970 or Section 379 of the Code an appeal does not lie as of right to the Supreme Court against any order of conviction by

the High Court. In such cases appeal will lie only if a certificate is granted by the High Court under sub-clause (c) of Article 134(1) certifying that the case is fit one for appeal to the Supreme Court or by way of special leave under Article 136 when the certificate is refused by the High Court.¹⁵

(2) *Appeal to the High Court.*—Subject to the restrictions on appeals as mentioned in para 24.2 above, any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge or on a trial held by any other court in which a sentence of imprisonment for more than seven years has been passed against him or against any other person convicted at the same trial may appeal to the High Court [Section 374(2)]. And in that case the judgment can be stayed suspended pending appeal.¹⁶

In a case where the trial is held by an Assistant Sessions Judge and during the trial the Judge is invested with the powers of the Additional Sessions Judge or of the Sessions Judge, a question might arise as to whether an appeal from an order of conviction in such a trial shall lie to the High Court. Courts are not unanimous on this point. In a case where the Assistant Sessions Judge, after he had recorded the evidence in court and heard the arguments but before he had written and delivered the judgment was invested with the powers of an Additional Sessions Judge, the Allahabad High Court held that an appeal from conviction in the case would lie to the Sessions Judge and not to the High Court as the accused was convicted "on a trial held by" an Assistant Sessions Judge and not by an Additional Sessions Judge. The fact that the Assistant Sessions Judge had become the Additional Sessions Judge when he wrote and delivered the judgment would not affect that position.¹⁷

In a case tried and acquitted by the magistrates' court on appeal by the State, the High Court recorded conviction and sent the case to the trial court for awarding sentence. The accused's appeal of sentence by the trial court, to the Sessions Court was held not maintainable as the 'conviction part' was non-appealable to the Session Court.¹⁸

(3) *Appeal to the court of session.*—Subject to the restrictions on appeals as mentioned in para 24.2, and also subject to the provisions of Section 374(2) as mentioned in para 24.3(2) above, any person,

15. *Chandra Mohan Tiwari v. State of M.P.*, (1992) 2 SCC 105, 113-114; 1992 SCC (Cr) 252; 1992 Cri LJ 1091.

16. *V. Sandararamireddi v. State*, 1990 Cri LJ 167 (All); *S.M. Malik v. State*, 1990 Cri LJ 1919 (Del).

17. *Bakshi Ram v. Emperor*, AIR 1938 All 102; (1938) 39 Cri LJ 345.

18. *C. Gopinathan v. Krishnan Ayyappan*, 1991 Cri LJ 778 (Ker).

- (a) convicted on a trial by a Metropolitan Magistrate or Assistant Sessions Judge or Magistrate of the first class, or of the second class, or
- (b) sentenced under Section 325¹⁹, or
- (c) in respect of whom an order has been made or a sentence has been passed under Section 360 by any magistrate²⁰.

may appeal to the court of session [Section 374(3)].

(4) *Special right of appeal in certain cases*.—Notwithstanding anything contained in this chapter, when more persons than one are convicted in one trial, and an appealable judgment or order has been passed in respect of any of such persons, all or any of the persons convicted at such trial shall have a right of appeal [Section 380].

24.4. Appeal by Government against sentence.—Before Section 377 dealing with such appeals was enacted, it was considered somewhat unsatisfactory to invoke the revisional powers of the High Court for correcting any error in sentencing. Considering the frequent occurrence of inadequate sentences, there seemed no reason why the State Government should not be able to appeal against an inadequate sentence.²¹ Section 377 therefore provides as follows:

377. Appeal by the State Government against sentence.—(1) Save as otherwise provided in sub-section (2), the State Government may, in any case of conviction on a trial held by any Court other than a High Court, direct the Public Prosecutor to present [an appeal against the sentence on the ground of its inadequacy—

- (a) to the Court of Session, if the sentence is passed by the Magistrate; and
- (b) to the High Court, if the sentence is passed by any other Court.]

(2) If such conviction is in a case in which the offence has been investigated by the Delhi Special Police Establishment, constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may [also] direct the Public Prosecutor to present [an appeal against the sentence on the ground of its inadequacy—

- (a) to the Court of Session, if the sentence is passed by the Magistrate; and
- (b) to the High Court, if the sentence is passed by any other Court;]

(3) When an appeal has been filed against the sentence on the ground of its inadequacy, [the Court of Session or, as the case may be], the High Court

19. For the text of S. 325, see *supra* para 14.3(a).

20. For the text of S. 360, see *supra* para 23.5(a).

21. See 41st Report, p. 264, para 31.21.

shall not enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement and while showing cause, the accused may plead for his acquittal or for the reduction of the sentence.

Earlier an appeal for enhancement of sentence on the ground of its inadequacy could only be entertained by the High Court. However, as per the present scheme of Section 377 an appeal on the ground of inadequacy of sentence can also be entertained by the court of sessions in certain circumstances. An appeal for enhancement of a sentence passed by a Magistrate would now lie to the sessions court. This will not only make it easier for the administration to prefer appeals against unduly lenient sentences by Magistrates but will also deter the latter from passing sentences that are grossly inadequate.

The right to appeal against inadequacy of the sentence has been given only to the state and not to the complainant or any other person. However that does not mean that the complainant or any other person cannot move the High Court (or court of session) in revision for this purpose. The High Court or the court of session in an appropriate case may, in exercise of its revisional jurisdiction, decide to act *suo motu* and enhance the sentence.²² The provisions under Sections 399²³ and 401²⁴ dealing with the respective revisional powers of the court of session and of the High Court when read with Section 386(c)(iii)²⁵ are clearly supplemental to those under Section 377. The effect of reading Sections 377, 386 and 401 may however be noted. While in the exercise of the revisional jurisdiction the High Court or the court of session is competent to enhance the sentence, the accused has to be given an opportunity of being heard not only against the enhancement of the sentence but also against the conviction itself.²⁶

In a case where both the appeal and a petition for enhancement of sentence were heard by the High Court it was ruled that there was no need to hear the appellant as he could be permitted to lead evidence while hearing

22. *Nadir Khan v. State (Delhi Admn.)*, (1975) 2 SCC 406; 1975 SCC (Cri) 622, 624; 1976 Cri LJ 1721, 1722; *Bochan Singh v. State of Punjab*, (1979) 4 SCC 754; 1980 SCC (Cri) 174; 1980 Cri LJ 211; *Food Inspector, Mangalore Municipality v. K.S. Raphael*, 1981 Cri LJ 1149 (Kant); *Prabudal Chhaganlal v. Babubhai Virabhai Miteria*, 1977 Cri LJ 1666 (Guj); *Eknath Shankarrao Mukkarwar v. State of Maharashtra*, (1977) 3 SCC 25; 1977 SCC (Cri) 410, 413; 1977 Cri LJ 964; *State v. Babaji Sahoo*, 1977 Cri LJ 1591 (Or).

23. For the text of S. 399 see *infra* para 25.6.

24. For the text of S. 401 see *infra* para 25.8.

25. For S. 386(c)(iii) see *infra* para 24.12(4).

26. *Food Inspector, Mangalore Municipality v. K.S. Raphael*, 1981 Cri LJ 1149, 1154 (Kant); see also *U.J.S. Chopra v. State of Bombay*, AIR 1955 SC 633; 1955 Cri LJ 1410.

the appeal. Moreover, the court noted, the appellant have had opportunity of being heard under Section 235(2) at the time of conviction.²⁷

While the accused in an appeal under Section 377 can show that he is innocent of the offence, the prosecution is not entitled to show that he is guilty of a graver offence and on that basis the sentence should be enhanced. The prosecution will only be able to urge that the sentence is inadequate on the charge as found or even on an altered less grave charge.²⁸

In a case where the conviction is recorded by the trial court but instead of awarding sentence of imprisonment the convict is released on probation under the provisions of the relevant special law then it is a case where no sentence at all has been awarded and as such the provisions of Section 377(1) are not attracted.²⁹

The High Court or the court of session, while exercising the power of enhancing the sentence passed by the trial court must counter by clear ratio-cination the reasons given by the trial court in passing the sentence.³⁰

24.5. Appeal against the order of acquittal.—In this connection Section 378 provides as follows:

378. Appeal in case of acquittal.—(1) Save as otherwise provided in sub-section (2) and subject to the provisions of sub-sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court or an order of acquittal passed by the Court of Session in session.

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (23 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of sub-section (3), to the High Court from the order of acquittal.

(3) No appeal under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

27. *Surykhan Buddhi Khan v. State of Gujarat*, 1994 Cr. L.J. 1502 (Guj).

28. *Elnath Shantarrav Makkavar v. State of Maharashtra*, (1977) 3 SCC 25, 1977 SCC (Cri) 410, 416; 1977 Cr. L.J. 964.

29. *State of U.P. v. Nand Kishore Mann*, 1991 Supp (2) SCC 473; 1991 Cr. L.J. 456.

30. *Lingala Vijay Kumar v. Public Prosecutor*, (1978) 4 SCC 196; 1978 SCC (Cri) 579, 583; 1978 Cr. L.J. 1527.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If, in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section (1) or under sub-section (2).

Appeal against an order of acquittal is an extraordinary remedy. Where the initial presumption of innocence in favour of the accused has been duly vindicated by a decision of a competent court, an appeal against such a decision of acquittal means putting the interests of the accused once again in serious jeopardy. Therefore the restrictions on the preferring of an appeal against acquittal as envisaged by Section 378 are intended to safeguard the interests of the accused person and to save him from personal vindictiveness. According to the first four sub-sections of Section 378, an appeal against an order of acquittal can be preferred only (i) by the Government, and (ii) in a case instituted upon complaint, by the Government as well as by the complainant. Secondly, the right of such appeal can be exercised only after obtaining the leave of the High Court. Thirdly, whether the order of acquittal is passed by any magistrate or by any Sessions Judge, and whether the offence of which the accused is acquitted is a major or a minor offence, the appeal in every case of such acquittal could be made only to the High Court. Fourthly, according to sub-section (6) an appeal by the State under sub-section (1) or sub-section (2) is barred in case the private complainant has failed to obtain special leave to appeal under sub-section (4).

Fifthly, the application for grant of leave to appeal must be filed within the time prescribed by sub-section (5); and the appeal must be filed within the period of limitation prescribed by Article 114 of the schedule of the Limitation Act, 1963.

The methodology of filing an appeal lies with the state, and the High Court has no authority or jurisdiction to issue a directive to the state to file appeals against persons acquitted.³¹

Section 378 deals with appeals in cases of acquittals. It does not come into play against an order of discharge.³² Nor does it apply to cases where the proceedings are dropped as being found to be barred by the prescribed period of limitation or on account of lack of jurisdiction. An order of acquittal contemplates the complete exoneration of the accused of the offence with which he was charged.

31. *Dwarka Das v. State of Haryana*, 2003 Cri LJ 414 (SC).

32. *Alim v. Taufiq*, 1982 Cri LJ 1264, 1265 (All); *Public Prosecutor, High Court of A.P. v. F. Subhash Chandra Reddy*, 2003 Cri LJ 4776 (AP).

In an appeal against acquittal a court has to remind itself of set of cardinal rules. They are that:

- (i) there is a presumption of innocence in favour of the accused which has been strengthened by the acquittal of the accused by the trial court;
- (ii) if two views are possible, a view favourable to the accused should be taken;
- (iii) the trial judge had the advantage of looking at the demeanour of the witnesses, and
- (iv) the accused is entitled to a reasonable benefit of doubt, a doubt which a thinking man will reasonably, honestly and consciously entertain.³³

The court can interfere with the order of acquittal only when:

- (i) the appreciation of evidence by the trial court is perverse or the conclusion drawn by it cannot be drawn on any view of the evidence;
- (ii) where the application of law is improperly done;
- (iii) where there is substantial omission to consider the evidence existing on record;
- (iv) the view taken by the acquitting court is impermissible on the evidence on record; or
- (v) if the order of acquittal is allowed to stand it will result in the miscarriage of justice.³⁴

The appellate court should seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above questions in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then only reappraise the evidence to arrive at its own conclusion.³⁵

In the matter of preferring appeals against acquittals, appeals by the State Government or the Central Government have been treated differently from appeals by a complainant. This is obvious from the wording of sub-sections (3) and (4) of Section 378. In the case of an appeal preferred by the State Government or the Central Government under sub-section (1) or sub-section (2) of Section 378, the Code does not contemplate the making of an

33. *State v. Vazir Haddi*, 2005 Cri LJ 2719 (Bom).

34. *State of Maharashtra v. Jagannath Kisan Mane*, 2005 Ind. Law Bom 186.

35. *Ramesh Babulal Dasht v. State of Gujarat*, (1976) 9 SCC 225; 1976 SCC (Cri) 972.

application for leave under sub-section (3) thereof, while in the case of an appeal by a complainant, the making of an application for grant of 'special leave' is a condition precedent for the grant of 'special leave' to a complainant. Therefore the State Government or the Central Government may, while preferring an appeal against acquittal under Section 378(1) or Section 378(2), incorporate a prayer in the memorandum of appeal for grant of leave under Section 378(3) or make a separate application for grant of leave under Section 378(3), but the making of such an application is not a condition precedent for a State appeal.³⁶ It is not necessary as a matter of law, that an application for leave to entertain the appeal should be lodged first and only after grant of leave by the High Court an appeal may be preferred against an order of acquittal.³⁷ However, while refusing leave to appeal against an order of acquittal, the High Court is required to adduce sufficient reasons for the same.³⁸

Under Article 144 of the Limitation Act, in an appeal from an order of acquittal by the State, the period of limitation is ninety days from the date of the order appealed from; whereas in an appeal from an order of acquittal, in any case instituted upon complaint, the period is thirty days from the date of the grant of special leave. Thus there is a clear distinction between the two types of appeals with regard to terminus a quo under Article 144. It is, therefore, not necessary to wait until the grant of leave by the High Court to present a memorandum of appeal against acquittal at the instance of the State. Thus, an appeal can be filed by the State within ninety days from the date of the order of acquittal and a prayer may be included in that appeal for entertaining the appeal under Section 378(3). If the leave sought for is not granted by the High Court, the appeal is not entertained and stands dismissed.³⁹

It may further be noted that even if the State had in its capacity as the complainant conducted the proceedings in the trial court, yet it has an independent right as the State to prefer an appeal under Section 378(1). This right of the State cannot be trammelled by the provisions contained in sub-sections (4) and (5) of Section 378. This is a right which is independent of the right given to the complainant, whether the complainant in the trial court was the State or a public servant or any other private individual. The wide amplitude of phraseology used in Section 378(1) clearly shows that the State has a right to approach the High Court to challenge an order of

36. *State of M.P. v. Devadux*, (1982) 1 SCC 552; 1982 SCC (Cri) 275, 281; 1982 Cri LJ 614, 619.

37. *State of Rajasthan v. Ramdeo*, (1977) 2 SCC 630; 1977 SCC (Cri) 393, 396; 1977 Cri LJ 997.

38. *Suga Ram v. State of Rajasthan*, 2006 Cri LJ 4643; *Reema Aggarwal v. Anupam*, 2004 Cri LJ 892 (SC); *State of Punjab v. Bhag Singh*, 2004 Cri LJ 916 (SC).

39. (1977) 2 SCC 630; 1977 SCC (Cri) 393, 397.

acquittal passed in any case in the lower court. One restriction that is placed upon this right of appeal is that leave of the High Court under Section 378(3) has to be obtained. The other restriction is contained in Section 378(6).⁴⁰

The power to go in appeal against an order of acquittal should ordinarily be used by the Government in such cases only where there appears to be a serious miscarriage of justice.⁴¹ The Government can review or recall its decision under Section 378 to prefer an appeal against an order of acquittal before the appeal is actually presented in the High Court but not thereafter.⁴² The provisions regarding the leave of the High Court to file an appeal against acquittal were found desirable and expedient against the somewhat arbitrary exercise of the executive power of the Government to file such appeals.⁴³ Under sub-section (3) the High Court has got full discretion to grant or not to grant leave to appeal against acquittal. But quite obviously this discretion is to be used judicially and not arbitrarily. Leave to appeal should not be refused without assigning reasons.⁴⁴

According to Section 378(1), the appeal by the State against the order of acquittal is to be presented in the High Court by the Public Prosecutor upon the direction of the State Government. The object of this provision seems to be that the State should associate the Public Prosecutor in the matter of preferring an appeal against acquittal. Where there is a Public Prosecutor but the State has not associated him in preferring the appeal, the act of filing the appeal will be invalid. Section 378 is thus mandatory. Even though Section 382 allows the appeal to be presented in the form of a petition by the appellant or his lawyer, that section does not override the special requirement of Section 378 in respect of an appeal by the State. However, in a situation where it is impossible to have a Public Prosecutor for presenting an appeal on behalf of the State, it would be legitimate to invoke the maxim

40. *State of Maharashtra v. Deepchand Khushalchand Jain*, 1983 Cr LJ 561, 567 (Bom); see also *Khemraj v. State of M.P.*, (1976) 1 SCC 385; 1976 SCC (Cri) 3, 7; 1976 Cr LJ 192.

41. *King-Emperor v. Ganpati*, AIR 1944 Nag 130; 1945 Cr LJ 766, 767; *Public Prosecutor v. Mayandi Naidar*, AIR 1933 Mad 230; 34 Cr LJ 948 (1); *Deputy Legal Remembrancer v. Karim Baizidi*, ILR (1894) 22 Cal 164, 170; but see *State of Orissa v. Nirajima Panda*, 1989 Cr LJ 621 (Ori) where the State does not appear to have followed this standard.

42. *Lal Singh v. State of Punjab*, 1981 Cr LJ 1069, 1077 (P&H) (FB).

43. See Joint Committee Report, p. xxvii.

44. *State of Maharashtra v. Vilas Rao Prithvi Chawan*, (1981) 4 SCC 129; 1981 SCC (Cri) 807, 808; 1982 Cr LJ 1743(1); *Reema Aggarwal v. Anandam*, 2004 Cr LJ 892 (SC); *State of Punjab v. Bhag Singh*, 2004 Cr LJ 916 (SC); *State of Haryana v. Raj Pal*, (2005) 3 SCC 347; *State of Punjab v. Bhag Singh*, (2004) 1 SCC 547; *State of M.P. v. Anil*, (2005) 12 SCC 213; *State of M.P. v. Bala*, (2005) 8 SCC 1; *State of M.P. v. Dayanand Dohar*, (2005) 8 SCC 12; *Saga Ram v. State of Rajasthan*, 2006 Cr LJ 4643.

Lex non cogit ad impossibilia which means dispensing performance of what is prescribed when performance of it is impossible.⁴⁵

For the purposes of Section 378(1), the Public Prosecutor is a person appointed as such under Section 24(1).⁴⁶ It has been held that simply because the rules framed by the State Government under Article 165 provided that the Advocate-General shall represent the Government in the High Court in important civil and criminal proceedings, it will not give him the status and clothe him with the powers of a Public Prosecutor of the High Court as appointed under Section 24(1) of the Code.⁴⁷

The Public Prosecutor, according to Section 378(1), is to present the appeal against acquittal only under the direction of the State Government. He has no power to suo motu file such an appeal. In the absence of any direction from the Government, the appeal filed by him would be incompetent. A proposal of the Gujarat Govt. to get the appeals against acquittals to be vetted by the District Magistrates came to be adversely commented upon by the Gujarat High Court. However, on appeal by the State, the Supreme Court ordered that a copy of the proposal for filing appeals against acquittals should be sent to the District Magistrate though it need not be necessary for the Law Dept. to wait for their comments for filing appeals.⁴⁸ An ex-post sanction/direction granted by the Government after the expiry of limitation for appeal cannot cure the defect.⁴⁹ Because, the ex-post facto sanction if permitted would deprive the accused of a valuable right for the maintenance of the order of acquittal.

It is interesting to note that accepting the letter of the grandfather of the victim as petition an acquittal recorded by a sessions court came to be reviewed and set aside by the High Court which remanded the case to pass a fresh judgment after hearing or if need be, to hold a retrial. The Supreme Court okayed the orders of the High Court though the acquittal was challenged by the grandfather who was not the *de facto* complainant in the case.⁵⁰

The words "any case instituted upon complaint" in sub-section (4) mean only such cases where a complaint is filed and cognizance of the offence is taken by the magistrate upon such complaint. If the magistrate after receiving the complaint refers the same to the police without taking

45. *J.M. Aluwida v. State*, 1980 Cri LJ 145, 150 (Goa JCC); *Supra. & Remembrance of Legal Affairs v. Profulla Mujhi*, 1977 Cri LJ 853 (Cal).

46. For S. 24(1) see *supra* para 3.6.

47. *State of Kerala v. Kolarveetil Krishnan*, 1982 Cri LJ 301, 302-3 (Ker).

48. *State of Gujarat v. Ratilal Lalji Lal Tandel*, (1997) 7 SCC 227, 1997 SCC (Cri) 1046.

49. *State of Punjab v. Mohinder Singh*, 1983 Cri LJ 466, 469-70 (P&H).

50. *Kipton Singh v. State of M.P.*, (1997) 6 SCC 185, 1997 SCC (Cri) 870.

cognizance and subsequently cognizance is taken on the police report, the case is not one "instituted upon complaint" and is not covered by sub-section (4).⁵¹ The complainant in such a case is *de facto* complainant. Though he may be examined as witness, he will have no right to challenge the acquittal by way of appeal.⁵² However, the *de facto* complainant may file an application under Section 401 of the Code for revision of the order of acquittal.⁵³

Sub-section (5) prescribes a period of limitation of 60 days for making an application for grant of special leave to appeal against an order of acquittal at the instance of a complainant. In quite a few cases prosecutions are launched by means of complaints by public servants, such as prosecutions for offences under some special laws. In such cases, the administrative procedure for taking a decision in the matter takes quite a long time and in some cases such procedure is not completed within 60 days. In consequence there might be miscarriage of justice. Most of these special laws require to be enforced strictly with a view to put a stop to various types of anti-social activities and if wrong acquittals are not appealed against, there would be an adverse effect on the enforcement of such laws. It was, therefore, considered desirable to extend the period of limitation to 6 months whenever the complainant was a public servant.

An appeal from an order of acquittal in a case instituted upon a complaint must be presented within 30 days from the date of grant of special leave to appeal as provided by clause (b) of Article 114 of the Limitation Act.

A party is entitled to wait until the last day of limitation for filing an appeal. But when it allows limitation to expire and pleads sufficient cause for not filing the appeal earlier, the sufficient cause must establish that because of some event or circumstances arising before limitation expired it was not possible to file the appeal within time. No event or circumstance arising after the expiry of limitation can constitute such sufficient cause.⁵⁴

In a case where the accused was acquitted according to the then settled law, but subsequent to the order of acquittal the settled law was altered and unsettled by the view taken by the Supreme Court, the complainant was not granted special leave to appeal from the order of acquittal. Because unsettling

51. *S. Omiah Gani v. Bannaboo Singh*, AIR 1959 Cal 145, 146-147; 1959 Cr LJ 311; *Karver Singh v. Bafraji Lall*, AIR 1964 Pat 61, 62; (1964) 1 Cr LJ 213; *K. Dattasaram v. V.R. Sippi*, AIR 1960 Ker 339; 1960 Cr LJ 1600; *Bachappa v. Venkataswami*, AIR 1960 Mys 172; 1960 Cr LJ 964; see also *Husainuddin Manahil v. Golam Mubeeb*, 1988 Cr LJ 1900 (Cal).

52. *Ahamedkari v. Jahanir*, 1989 Cr LJ 2462 (Ker).

53. *Annapurna (Smt) v. State*, 2002 Cr LJ 2665 (Kan).

54. *Ajit Singh Thakur Singh v. State of Gujarat*, (1981) 1 SCC 491; 1981 SCC (Cr) 184; 1981 Cr LJ 293, 295.

the settled cases and converting acquittals into convictions was not considered conducive to justice.⁵⁵

It has been observed that if a convict's appeal is out of time it is the practice of the High Court to condone the delay as no right could be said to vest in the State to have the conviction of an innocent person upheld, but if the State itself is negligent in the presentation of an appeal against acquittal a very clear right comes to vest in the accused person and he is entitled to claim that, save in exceptional circumstances, delay in filing the appeal should not be condoned.⁵⁶

It has been opined that when the State has not appealed against acquittal, the complainant could invoke revisional jurisdiction of the Sessions Court.⁵⁷

24.6. Petition of appeal and its presentation.—(1) Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against [Section 382].

(2) If the appellant is in jail he may present his petition of appeal and the copies accompanying the same to the officer in charge of the jail, who shall thereupon forward such petition and copies to the proper appellate court [Section 383].

The appeals presented to jail authorities under Section 383 are usually called "jail appeals".

It is obvious that the right vested in the appellant is to present one appeal although there are different methods of presenting it, and strictly speaking, if one method is availed of and one appeal either under Section 382, or Section 383 is presented, no other appeal can be lodged.⁵⁸ In practice, however, it appears that frequently both appeals are presented and are dealt with as two appeals about the same matter. Thus, an appellant in jail sends an appeal through the jail superintendent and later a pleader instructed on his behalf presents another appeal against the same order. No practical difficulty arises if, as is normally the case, both the appeals are dealt with at the same time. Sometimes, however, through oversight, one appeal is disposed of and then the other appeal comes up for disposal causing considerable embarrassment to

55. *Municipal Corpn. of Delhi v. Madan Lal*, 1979 Cri LJ 426, 428 (Del).

56. *State v. Dittu Ram Pritam Dass*, AIR 1955 Punj 164; 1955 Cri LJ 1204; *State v. A.M. Pagarkar*, 1975 Cri LJ 71 (Goo JCC).

57. *Niranjan Kumar Das v. Ranadhir Roy*, 1990 Cri LJ 683 (Gau); *Krishnamoorty, In re*, 1984 Cri LJ 243 (DB) (Mad).

58. See 41st Report, p. 265, para 31.24.

the appellate court.⁵⁹ In order to meet such a situation fairly, specific provisions have been made in Section 384 which will be discussed later in para 24.8.

Where several persons are convicted at one trial, all of them or some of them can present one joint appeal.⁶⁰

The rule contained in Section 382 is a technical rule, it requires an aggrieved person filing an appeal to attach a copy of the judgment appealed against. The purpose of this rule is to give the appellate court an initial idea of what the case is about at the time of passing interim orders. The provision should not be read as creating a disability against a person from filing an appeal.⁶¹

Though there is no provision in the Code which requires that the petition of appeal should specify the grounds on which the appeal is based, yet the memorandum of appeal should contain a succinct statement of the grounds on which the appellant proposes to support the appeal.⁶²

24.7. Hearing of appeals in Court of Session.—For proper distribution of the appellate work in the court of session, Section 381 provides as follows:

381. Appeal to Court of Session how heard.—(1) Subject to the provisions of sub-section (2), an appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge:

Provided that an appeal against a conviction on a trial held by a Magistrate of the second class may be heard and disposed of by an Assistant Sessions Judge or a Chief Judicial Magistrate.

(2) An Additional Sessions Judge, Assistant Sessions Judge or a Chief Judicial Magistrate shall hear only such appeals as the Sessions Judge of the division may, by general or special order, make over to him or as the High Court may, by special order, direct him to hear.

Sub-section (2) of Section 381 restricts the jurisdiction conferred on Additional Sessions Judge, Assistant Sessions Judge or Chief Judicial Magistrate; it does not empower the Additional Sessions Judge or the Assistant Sessions Judge to receive appeals direct from parties and to admit them and take them on file.⁶³

59. See 41st Report p. 265, para 31, 25.

60. *Late Jelu v. State of Gujarat*, AIR 1962 Guj 125; (1962) 1 Cr. LJ 714 (FB); *Madan Bagal v. State*, AIR 1967 Cal 528, 529. See for joint appeal against acquittal of several persons, *State of Gujarat v. Ramprakash P. Patel*, (1969) 3 SCC 156, 158-59; 1970 SCC (Cr) 29.

61. *Mukund Lal v. State*, 1979 Cr. LJ 105, 106 (Del).

62. *Kant Doo Shukla v. State of U.P.*, AIR 1958 SC 121; 1958 Cr. LJ 262.

63. *Paromohan Ramjappa, In re*, AIR 1961 AP 471; (1961) 2 Cr. LJ 611 (FB); *Kanteshwar Singh v. Dharmulata Singh*, AIR 1957 Pat 375; (1957 Cr. LJ 870 (FB).

The reasonable interpretation of Section 381(2) appears to be that an Additional Sessions Judge, Assistant Sessions Judge or a Chief Judicial Magistrate is competent to hear only appeals properly filed under Section 374(3), entertained by the Sessions Judge and thereafter transferred to him.⁶⁴

24.8. Summary dismissal of appeals.—(1) Petition of appeal and copy of judgment to be examined.—If upon examining the petition of appeal and copy of the judgment received under Section 382 or Section 383 the appellate court considers that there is no sufficient ground for interfering it may dismiss the appeal summarily [Section 384(1)].

Dismissing the appeal summarily means dismissing it, "in an informal manner and without the delay of formal proceeding".⁶⁵ Of course the informal dismissal of the appeal can be thought of only after examining the petition of appeal and the copy of judgment accompanying the petition of appeal. There cannot be partial summary dismissal of appeal; and therefore an appeal cannot be admitted only on ground of sentence while summarily dismissing it as regards conviction.⁶⁶ The summary dismissal of appeal under Section 384 is as much an adjudication as an order of dismissal after a full hearing so far as the accused is concerned.⁶⁷ The power to dismiss the appeal summarily should be exercised judicially and with great care. If arguable and substantial points are raised the appellate court should not dismiss the appeal summarily.⁶⁸ It is true that the appellate court has the undoubted power to dismiss an appeal summarily. But it must be realised that in a criminal case the accused has only one right of appeal and that should not be denied to him where arguable questions of fact are involved or a *prima facie* case for investigation is made out. The appellate court should be careful in exercising its discretion in dismissing appeals summarily and should not do so as a matter of routine.⁶⁹

In *Sita Ram v. State of U.P.*⁷⁰, the Supreme Court felt that Section 384 dealing with summary dismissal of an appeal, even without the case-record

64. *Kochumilli Chettiar v. State of Kerala*, 1977 Cri LJ 1872, 1873 (Ker).

65. *Rash Behari Das v. Balgopal Singh*, ILR (1894) 21 Cal 92, 96.

66. *Babari Ghela Jadar v. State of Bombay*, AIR 1960 SC 748; 1960 Cri LJ 1156; *Sudhita Kumari v. Emperor*, AIR 1942 Pat 46; 43 Cri LJ 27; *Emperor v. Dattu Raut*, AIR 1935 PC 89; 36 Cri LJ 836; *Nafar Sheikh v. Emperor*, AIR 1914 Cal 276; 1914 Cri LJ 485.

67. *U.J.S. Chopra v. State of Bombay*, AIR 1955 SC 633; 1955 Cri LJ 1410.

68. *Dnyaneshwar Harihar Mali v. State of Maharashtra*, (1970) 3 SCC 7; 1970 SCC (Cri) 357; 1970 Cri LJ 893; *Gowinda Kalluji Kashani v. State of Maharashtra*, (1970) 1 SCC 469; 1970 SCC (Cri) 204; 1970 Cri LJ 995; *Siddhanna Apparao Patil v. State of Maharashtra*, (1970) 1 SCC 547; 1970 SCC (Cri) 224; 1970 Cri LJ 89; *Shyam Deo Panjaley v. State of Bihar*, (1971) 1 SCC 855; 1971 SCC (Cri) 353; 1971 Cri LJ 1177.

69. *Yasin Galam Haider v. State of Maharashtra*, (1979) 1 SCC 600; 1980 SCC (Cri) 145; 147; 1980 Cri LJ 568, 570.

70. (1979) 2 SCC 656; 1979 SCC (Cri) 576; 1979 Cri LJ 659.

and without the necessity of giving reasons for dismissal if the appellate court happened to be the High Court or the Supreme Court, was rather arbitrary in action and too broad in its sweep. The Court held that the section shall be restricted by certain criteria in its application. The section in action shall not mean that all appeals falling within its fold shall, in the ordinary course, be disposed of routinely on a preliminary hearing. The rule, in case of appeals under Article 134(1)(a) & (b) of the Constitution or under Section 379 of the Code⁷¹, is issuing notice to the State, calling for the records, and recording of reasons, for dismissal of appeal. In exceptional circumstances, an appeal may be summarily dismissed after preliminary hearing, and looking into the materials placed by the appellant before the courts and after recording brief grounds for dismissal. In cases of real doubt the benefit of doubt is to go to the appellant and notice is to go to the adversary—even if the chances of allowance of the appeal may not be bright.

However later the Supreme Court has held that *Sita Ram* case (supra) is no authority as to the scope of Section 384. Because in that case as the question of validity of Section 384 was neither raised nor argued, a discussion by the Supreme Court after "pondering over the issue in depth" would not be a precedent binding on the courts.⁷²

(2) *Calling for the case-record*.—Before dismissing an appeal summarily under this Section 384, the court may call for the record of the case [Section 384(2)].

(3) *Reasonable opportunity of being heard*.—No appeal presented under Section 382 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same. [proviso (a) to sub-section (1) of Section 384]

What would amount to a reasonable opportunity depends upon the facts and circumstances of each case. Appeal under Section 382 has been mentioned in earlier para 24.6.

(4) *Special provisions regarding jail appeals*.—No appeal presented under Section 383 shall be dismissed except after giving the appellant a reasonable opportunity of being heard in support of the same, unless the appellate court considers that the appeal is frivolous or that the production of the accused in custody before the court would involve such inconvenience as would be disproportionate in the circumstances of the case [proviso (b) to sub-section (1) of Section 384]. Further no appeal under

71. For S. 379, see supra para 24.3(A).

72. *Bijju Ram Mehta v. State of Gujarat*: 1980 1 SCC 672; 1980 SCC (Cr) 317; 320 (1980 Cr) LJ 1246.

Section 383 shall be dismissed summarily until the period for preferring such appeal has expired [proviso (c) to sub-section (1) of Section 384].

Appeals under Section 383 which are generally called "jail appeals" have already been described in para 24.6. It has been observed that except perhaps in the High Courts, "jail appeals" are not considered with particular care, and in many cases, the grounds of appeal drafted in jail do not attract sufficient attention and even if there may be any point in the appeal, it is liable to be dismissed.⁷³ The proviso (b) to sub-section (1) mentioned above would ensure that the "jail appeals" are not summarily dismissed without giving the appellant a reasonable opportunity of being heard unless the appellate court considers that the appeal is frivolous or the production of the accused in the court would involve inconvenience disproportionate in the circumstances of the case.⁷⁴ Further, proviso (c) to sub-section (1) mentioned above will ensure that an appellant wishing to avail of legal assistance will have presented an appeal under Section 382 before his appeal, if any, presented under Section 383 comes up for disposal. It has also been provided by sub-section (4) of Section 384 that, if in spite of this, a jail appeal happens to be dismissed summarily, that would not debar the court from considering an appeal under Section 382 on the merits, provided such appeal is otherwise duly presented and the court is satisfied that the interests of justice require that it should be heard.⁷⁵

(5) *Recording of reasons.*—Where the appellate court dismissing an appeal under this section (i.e., Section 384) is a court of session or of the Chief Judicial Magistrate, it shall record its reasons for doing so [sub-section (3) of Section 384].

The orders of summary dismissals of appeals as passed by the appellate courts mentioned above are liable to be revised by the High Court; therefore it would be very helpful if their reasons existed on record.⁷⁶ Where the appellate court dismissing an appeal summarily is the High Court, the above provision as such is not applicable; however as an appeal to the Supreme Court against such an order of High Court is possible under the provisions of the Constitution, it is equally necessary that the High Court records its reasons while dismissing any appeal summarily. Time and again, the Supreme Court has pointed out that an appeal which raises arguable questions, either factual or legal, should not be summarily dismissed

73. See 41st Report, p. 265, para 31.26.

74. See Joint Committee Report, p. xxvii.

75. See 41st Report, p. 265-266, para 31.27.

76. *Ibid.*, p. 266, para 31.28.

without recording a reasoned order.⁷⁷ It has been observed by the Supreme Court:

A summary dismissal of the appeal will... be legal if the appellate court considers that there is no sufficient ground for interference. But even in such circumstances it has been held that a summary decision is a judicial decision which vitally affects the convicted appellant and in a fit case, it is also open to be challenged on an appeal before this court. Though summary rejection, without giving any reasons, is not violative of any statutory provisions, such a manner of disposal removes every opportunity for detection of errors in the order. It has been further held that when an appeal in the High Court raises a serious and substantial point, which is prima facie arguable, it is improper for an appellate court to dismiss the appeal summarily without giving some indications of its view on the point. The interests of justice and fair play require that in such cases an indication must be given by the appellate court of its views on the point argued before it.⁷⁸

The Supreme Court has also pointed out⁷⁹ another valid reason for its insistence on a reasoned order of the High Courts disposing appeals:

"It may be thought that such orders are passed by this Court and therefore there is no reason why the High Courts should not do the same. We would like to point out respectfully that the orders passed by this court are final and no appeal lies against them. The Supreme Court is the final court in the hierarchy of our courts. Besides, orders without a reasoned judgment are passed by this court very rarely under

77. *Sangar Taranda Shinde v. State of Maharashtra*, (1974) 4 SCC 213; 1974 SCC (Cri) 382, 386; 1974 Cr LJ 674, 677; *Sr. Mohd. Ali v. State of Maharashtra*, (1972) 2 SCC 764; 1973 SCC (Cri) 111; 1973 Cr LJ 106; *Mashtar Hussain v. State of Bombay*, 1953 Cr LJ 1127; AIR 1953 SC 282; *Dattu Genu Gaikwad v. State of Maharashtra*, (1974) 3 SCC 679; 1974 SCC (Cri) 208; 1974 Cr LJ 446; *K. V. Sarathe v. State of Maharashtra*, (1974) 3 SCC 404; 1973 SCC (Cri) 969; 1974 Cr LJ 230; *Ilhandiba v. State of Maharashtra*, (1976) 1 SCC 162; 1975 SCC (Cri) 795; 1976 Cr LJ 856; *Babbu v. State of M.P.*, (1979) 4 SCC 74; 1979 SCC (Cri) 743, 748; 1979 Cr LJ 908, 912; *State of Punjab v. Jagdey Singh Tahwandt*, (1984) 1 SCC 596; 1984 SCC (Cri) 135; 1984 Cr LJ 177; *Rajhans Lalwan Mahadwala v. State of Maharashtra*, (1986) 2 SCC 90; 1986 SCC (Cri) 108; 1986 Cr LJ 358; *Jawhar Lal Singh v. Naresh Singh*, (1987) 2 SCC 222; 1987 SCC (Cri) 347; *Arun Ram Chandra Swani v. State of Maharashtra*, 1989 Supp. (2) SCC 410; *Ram Karan v. State of Rajasthan*, 1990 Supp. SCC 604; 1991 SCC (Cri) 162; *State (Delhi Admn.) v. Shiv Kumar*, 1990 Supp. SCC 673; 1991 SCC (Cri) 158; *State of U.P. v. Jagdish Singh*, 1990 Supp. SCC 150; 1990 SCC (Cri) 636.

78. *Sujan Deo Pandey v. State of Bihar*, (1971) 1 SCC 855; 1971 SCC (Cri) 353, 359-60; 1971 Cr LJ 1177; see also *Gironda Kadiji Kadam v. State of Maharashtra*, (1970) 1 SCC 469; 1970 SCC (Cri) 204; 1970 Cr LJ 993; *Challappa Ramitawani v. State of Maharashtra*, (1970) 2 SCC 426; 1970 SCC (Cri) 472; 1971 Cr LJ 19; *Dagadu v. State of Maharashtra*, (1981) 2 SCC 575; 1981 SCC (Cri) 364; 1981 Cr LJ 724; *Shiv Ram v. State of U.P.*, (1979) 2 SCC 656; 1979 SCC (Cri) 576; 1979 Cr LJ 659.

79. *State of Punjab v. Jagdey Singh Tahwandt*, (1984) 1 SCC 596; 1984 SCC (Cri) 135; 1984 Cr LJ 177.

exceptional circumstances. Orders passed by the High Court are subject to the appellate jurisdiction of this court under Article 136... and other provisions of the concerned states⁸⁰.

The Supreme Court therefore concluded that the High Courts should not dispose of appeals by bald orders.⁸¹

(6) *Summary dismissal of jail appeal is no bar to the hearing of regular appeal*.—Where an appeal presented under Section 383 (i.e. a jail appeal) has been dismissed summarily under this section and the appellate court finds that another petition of appeal duly presented under Section 382 (i.e. a regular appeal) on behalf of the same appellant has not been considered by it, that court may, notwithstanding anything contained in Section 393, if satisfied that it is necessary in the interests of justice so to do, hear and dispose of such appeal in accordance with law [sub-section (4) of Section 384].

Section 393 referred to in the above provision deals with the finality of judgments and orders and would be discussed later in para 24.15.

(7) *Non-appearance of the appellant*.—It is the duty of the appellant and his lawyer to remain present on the appointed day, time and place when the appeal is posted for hearing. However, a criminal appeal cannot be dismissed on the ground that no one appeared to support it.⁸² The appellate court must consider whether there is sufficient ground for interfering which implies judicial consideration on the merits.⁸³ It has also been pointed out that the right to dismiss criminal appeals for default for appearance and then to restore the same, are not at all available to the criminal appellate courts subordinate to the High Court, which are solely governed by Section 386 and are devoid of all inherent powers.⁸⁴

As regards the disposal of appeals when the appellant or his counsel is not present it has been clarified by the Supreme Court that the appellate

80. (1984) 1 SCC 596, 611; 1984 SCC (Cri) 135.

81. *State of U.P. v. Haripal Singh*, (1998) 8 SCC 747; 1999 SCC (Cri) 92; *Guesinder Singh v. Joga Singh*, 1999 SCC (Cri) 1311.

82. *Bani Singh v. State of U.P.*, (1996) 4 SCC 720; AIR 1996 SC 2439; *Mun Singh v. State of U.P.*, 2003 Cri LJ 3927 (All); *State v. Ram Gopal*, 2006 Cri LJ 2805 (Del).

83. *Trimbak Balwant Vaidya v. Emperor*, ILR (1926) 50 Bom. 673; *Gulab Das v. Emperor*, AIR 1935 Pat 460; 37 Cri LJ 93; *Ram Chandar v. Emperor*, AIR 1923 All 175; 24 Cri LJ 662; *Hiswanath v. Haripada*, AIR 1959 Cal 443; 1959 Cri LJ 831; see also *Shyam Deo Pandey v. State of Bihar*, (1971) 1 SCC 355; 1971 SCC (Cri) 353; 1971 Cri LJ 1177; AIR 1971 SC 1606; *Ram Naresh Yadav v. State of Bihar*, AIR 1987 SC 1500; 1987 Cri LJ 1856; *Sitaram Yadav v. State of Bihar*, 1989 Cri LJ 1602 (Pat); *Nathu Ram v. State of U.P.*, 1990 Cri LJ 452 (All); *M.D. Farooq v. State of Karnataka*, 1990 Cri LJ 286 (Kant).

84. *Radheshyam Saini v. State*, 1991 Cri LJ 2926 (Cal); see also discussions in *Kishan Singh v. State of U.P.*, (1996) 9 SCC 372; 1996 SCC (Cri) 1010.

court has ample powers to dispose of them on merits.⁸⁵ However, if the appellant happens to be in jail, the appellate court should, adjourn and fix another date for hearing.⁸⁶

In *Ram Nareish Yadav v. State of Bihar*⁸⁷, the Supreme Court had earlier held that the appellate court has no right to hear the appeal on merits in the absence of the appellant or his counsel. This view was overturned by the Supreme Court in *Bani Singh v. State of U.P.*⁸⁸, wherein the Supreme Court reaffirmed that the appellate court is entitled to dispose of appeals on merits in the absence of appellant or his counsel.

(8) *No power to allow withdrawal of appeal.*—Once an appeal has been entertained by the appellate court, the appellate court has no power to allow it to be withdrawn. It is the duty of the appellate court to decide the appeal irrespective of the fact that the appellant either does not choose to prosecute it or is unable to prosecute it for any reason.⁸⁹ An appeal can abate only on the death of the accused and not otherwise.⁹⁰

24.9. Procedure for hearing appeals not dismissed summarily.—Where the petition of appeal has not been summarily dismissed and the appeal is "admitted", Section 385 prescribes the further steps to be taken and the procedure to be followed for the hearing of the appeal. Section 385 reads as follows:

385. Procedure for hearing appeals not dismissed summarily.—(1) If the Appellate Court does not dismiss the appeal summarily, it shall cause notice of the time and place at which such appeal will be heard to be given—

- (i) to the appellant or his pleader;
- (ii) to such officer as the State Government may appoint in this behalf;
- (iii) if the appeal is from a judgment of conviction in a case instituted upon complaint, to the complainant;
- (iv) if the appeal is under Section 377, or Section 378, to the accused.

85. *Bani Singh v. State of U.P.*, (1996) 4 SCC 720; 1996 SCC (Cri) 848; *Kishan Singh v. State of U.P.*, (1996) 9 SCC 372; 1996 SCC (Cri) 1010; *Meha Lal v. State of U.P.*, 2003 Cri LJ 675 (All).

86. *Bani Singh v. State of U.P.*, (1996) 4 SCC 720; AIR 1996 SC 2439; *Meha Lal v. State of U.P.*, (2003) Cri LJ 675 (All).

87. AIR 1987 SC 1500.

88. (1996) 4 SCC 720; 1996 SCC (Cri) 848.

89. *Khadu Mahon v. State of Bihar*, (1970) 2 SCC 450; 1970 SCC (Cri) 479, 482; 1971 Cri LJ 20; *Sudhendra Nath Dutt v. State*, AIR 1957 Cal 677; 1957 Cri LJ 1245; *Biswanath v. Haripada*, AIR 1959 Cal 443; 1959 Cri LJ 831; see also *Siyam Deo Pandey v. State of Bihar*, (1971) 1 SCC 855; 1971 SCC (Cri) 353; AIR 1971 SC 1606; *Ram Nareish Yadav v. State of Bihar*, AIR 1987 SC 1500; 1987 Cri LJ 1856; *Sriram Yadav v. State of Bihar*, 1989 Cri LJ 1602 (Pat); *Narhu Ram v. State of U.P.*, 1990 Cri LJ 452 (All). But see *Algar Ali v. State of Assam*, 1988 Cri LJ 1486 (Gau) wherein the judge chose to dismiss the appeal.

90. *Khadu Mahon v. State of Bihar*, (1970) 2 SCC 450; 1970 SCC (Cri) 479, 482; 1971 Cri LJ 20.

and shall also furnish such officer, complainant and accused with a copy of the grounds of appeal.

(2) The Appellate Court shall then send for the record of the case, if such record is not already available to that Court, and hear the parties.

Provided that if the appeal is only as to the extent or the legality of the sentence, the Court may dispose of the appeal without sending for the record.

(3) Where the only ground for appeal from a conviction is the alleged severity of the sentence, the appellant shall not, except with the leave of the Court, urge or be heard in support of any other ground.

Non-compliance with Section 385 may amount to violation of principles of natural justice.⁹¹

In case the appeal is not dismissed summarily, Section 385(2) requires the appellate court to send for the record of the case. However the rigour of rule has been taken away by the proviso to Section 385(2) in a certain situation mentioned therein. Therefore if the appellant himself says that the appeal should be allowed on the findings recorded by the Sessions Judge and the respondent has not raised any objection to this, the non-summoning of the record cannot be considered as fatal to the case. Moreover this irregularity will be curable under Section 465.⁹²

In certain cases the Courts may have to ensure production of accused. In *Mahendra Harjivan Lohar v. State of Gujarat*⁹³, the elder brother of the accused was produced in the place of the real accused in the appeal against his acquittal. It was only at the stage of imposing punishment did he represent that he was not the real accused. It was doubted whether it could happen without the collusion of police. The Court desired to have investigation and in order to avoid recurrence issued a number of instructions one of which runs thus:—

"In all acquittal appeals also whenever notices and warrants are issued by the High Court, the photographs and marks of identification should be cross-checked with the accused and when the notices are returned duly served and the warrant executed, they should accompany a certificate by the concerned court forwarding them to the effect that the accused has been duly served after verifying his identity, name and address."

24.10. Powers of appellate court to grant bail.—Sections 389 and 390 deal with suspension of sentence pending the appeal, release of appellant on bail, arrest of the accused in appeal from acquittal and his

91. *Arun Bhawan Chakravarty v. State of Assam*, 1990 Cri LJ 531 (Gau).

92. *Hanuman Dass v. Vinay Kumar*, 1982 SCC (Cri) 379 (2), 385; (1982) 2 SCC 177; 1982 Cri LJ 977, 981.

93. 1999 Cri LJ 3025 (Guj).

release on bail etc. These sections have already been discussed in paras 12.7, 12.8, and 12.10, and the same need not be repeated here.

24.11. Power of the appellate court to obtain further evidence.—Section 391 provides as follows—

391. Appellate Court may take further evidence or direct it to be taken.—

(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry.

Chapter XXIII of the Code referred to in Section 391 deals with 'Evidence in Inquiries and Trials'. The sections contained in the said chapter, namely, Sections 272 to 299, have already been discussed in earlier chapters.

The object of the section evidently is to ensure that justice is done between the prosecutor and the person prosecuted. Of course additional evidence cannot be tendered at the appellate stage as of right and the appellate court has to exercise discretion vesting in it to permit additional evidence on sound judicial principles. Surely, it is not an arbitrary discretion as is manifest by the provision that it "shall record its reasons".⁹⁴

The power to take additional evidence should be exercised sparingly and only in suitable cases. Since a wide discretion is conferred on appellate courts, the limits of such courts' jurisdiction must obviously be dictated by the exigency of the situation, and fair play and good sense appear to be the only safe guides. However, once such action is justified there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must of course, not be received in such a way as to cause prejudice to the accused, as for example, it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made, if the prosecution has had a fair opportunity and has not availed of it, unless the requirements of justice dictate otherwise.⁹⁵ The section is not meant to remedy the negligence or

⁹⁴ *Tubb Sam v. State*, 1982 Cr LJ 1966, 1969 (Del).

⁹⁵ *Rajivur Prasad Misra v. State of W.B.*, AIR 1965 SC 1887; (1965) 2 Cr LJ 817, 825.

filling the latches left in the prosecution case or for allowing the prosecution to indulge in fishing of evidence.¹ It is also not meant to make out a case different from the one already on record.² Section 391 does not authorize the appellate judge to set aside the conviction and sentence and remand the case to the trial judge for recording evidence.³

In a case involving smuggling of gold, the prosecution under Section 391 prayed for formally proving the mint master's report to the effect that the gold was of specified purity⁴. The High Court rejected this prayer. On appeal, the Supreme Court ruled that societal interest should be adequately cared for and that the white collar offenders should be strictly dealt with. The Court's observations are instructive:

"Apart from the fact that the alleged lacuna was a technical lacuna in the sense that while the opinion of the Mint Master had admittedly been placed on record it had not been formally proved. The report completely supported the case of the prosecution that the gold was of the specified purity. To deny the opportunity to remove the formal defect was to abort a case against an alleged economic offender."⁵

The power to take additional evidence under Section 391 should not be used as a disguise for a retrial nor should it be used to direct fresh disposal of the case by the trial court.⁶

24.12. Powers of the appellate court in disposing of appeals.—Section 386 confers adequate powers on the appellate court for the proper disposal of different kinds of appeals. According to that section these powers are to be exercised only after satisfying two essential conditions:

- (a) Before deciding to exercise any of the powers hereinafter mentioned the court must peruse the record of the case. As has already been mentioned in para 24.9, Section 385(2) requires that after the admission of any appeal the appellate court shall send for the record of the case if such record is not already available in that court. This requirement is necessary to be complied with to enable the court to adjudicate upon the correctness or otherwise of the order or judgment appealed against not only with reference to the judgment but also with reference to the records which will be the

1. *Gopi Chand v. State*, 1969 Cri LJ 1153 (All); *Subramanian Gounder, In re*, 1976 Cri LJ 1200 (Mad); see also *Shiva Balak Rai v. State of Bihar*, 1985 Cri LJ 1727 (Pat).

2. *Thomas v. State of Kerala*, 1999 Cri LJ 1297.

3. *T. Venula v. Thangavel*, 2003 Cri LJ 4049 (Mad).

4. *State of Gujarat v. Mohanlal Jitmalji Porwal*, (1987) 2 SCC 364; 1987 SCC (Cri) 364; 1987 Cri LJ 1061.

5. (1987) 2 SCC 364 at 370; 1987 SCC (Cri) 364.

6. *Gorindam v. Food Inspector*, 1982 Cri LJ 784, 786 (Ker).

basis on which the judgment is founded. It has been observed that there must be a clear indication in the judgment or order of the appellate court that it has applied its judicial mind to the particular appeal with which it was dealing. Such an indication will be available when the appellate court has considered the material on record, which means not only the judgment and petition of appeal, but also the other relevant materials.⁷

Where the record has been lost or destroyed and it is not possible to reconstruct it, the appellate court cannot legally affirm the conviction of the appellant since perusal of the record of the case is one of the essential elements of the hearing of the appeal. The appellant has a right to satisfy the appellate court that the material on record did not justify his conviction and that right cannot be denied to him. Therefore if the time lag between the date of the incident of the alleged crime and the date on which the appeal comes up for hearing is short, the proper course would be to direct retrial of the case. Where, however, such time lag is too wide, it would neither be just nor proper to direct retrial of the case, more so when even the copies of FIR and statements of witnesses under Section 161 and other relevant papers have been weeded out or otherwise not available. In such circumstances, the High Court may prefer to set aside the order of conviction and to acquit the accused.⁸

- (b) The appellate court must hear the appellant or his pleader, if he appears, and the public prosecutor, if he appears, and in case of an appeal by the State Government against sentence under Section 377, or of an appeal in case of acquittal under Section 378, the accused, if he appears.

It is a basic rule of natural justice that before a case is decided by the court, the parties to the case must be given a reasonable opportunity of being heard. It may be noted that if the appeal is from a judgment of conviction in a case instituted upon a complaint, then according to Section 385(D)(iii), the appellate court admitting the appeal is required to give notice to the complainant of the time and place at which such appeal shall be heard.⁹ However in such a case, though it is obligatory to hear the Public Prosecutor on behalf of the State, Section 386 does not specifically require the appellate court to hear

7. *Sivan Dew Pandey v. State of Bihar*, (1971) 1 SCC 855; 1971 SCC (Cr) 353, 361; 1971 Cr LJ 1177.

8. *Sru Ram v. State*, 1981 Cr LJ 65, 66-67 (All); however, see *Sadhvi v. State*, 1981 Cr LJ 67 (All) where the High Court ordered retrial even though eleven years had elapsed since the occurrence of the incident and the record was burnt and hence not available.

9. See *supra* para 24.9.

the complainant (or his pleader) despite a notice being given to him of the hearing under Section 385(1)(iii). This lacuna in Section 386 appears to have crept in by oversight, and it would be fair to expect that the appellate court would give to the complainant an opportunity of being heard in such a case.

After the two essential conditions as mentioned in (a) and (b) above are complied with, the appellate court, according to Section 386, may exercise any of the following powers in disposing of any appeal.

(1) *In cases where no interference is needed.*—The appellate court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal.

(2) *In an appeal from an order of acquittal.*—The appellate court may reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law [Section 386(a)].

It may be noted that any appeal against an order of acquittal can lie only to the High Court. While deciding an appeal against acquittal the power of the appellate court is no less than the power exercised while hearing appeals against conviction.¹⁰

As to the exercise of the powers of the appellate court, the Supreme Court in *Sanyal Singh v. State of Rajasthan*¹¹ has laid down three principles. *First*, the appellate court has full powers to review the evidence upon which the order of acquittal is founded.¹² *Second*, the principles laid down by the Judicial Committee of the Privy Council in *Sheo Swarup v. King Emperor*¹³ afford a correct guide for the appellate court's approach to a case in disposing of such an appeal. These principles require that the appellate court should give proper weight and consideration to such matters as, the view of the trial judge as to the credibility of the witnesses, the presumption of innocence in favour of the accused, the right of the accused to the benefit of doubt, and the slowness of an appellate court in disturbing the finding of fact arrived at by a judge who had the advantage of seeing the witnesses. These matters and guidelines are the "rules and principles" in the administration of justice. *Thirdly*, the appellate court in coming to its conclusion should not only

10. *Kallu v. State of M.P.*, 2006 Cri LJ 799 (SC).

11. AIR 1961 SC 715, 719-20; (1961) 2 Cri LJ 179; see also observations in *Ganesh Bhuvan Patel v. State of Maharashtra*, (1978) 4 SCC 371; 1979 SCC (Cri) 1; 1979 Cri LJ 51; AIR 1979 SC 135; *Awadesh v. State of M.P.*, (1988) 2 SCC 557; 1988 SCC (Cri) 361; 1988 Cri LJ 1154.

12. Also see *State of M.P. v. Boochudas*, 2007 Cri LJ 1661; *V.N. Rathiesh v. State of Kerala*, 2006 Cri LJ 3634 (SC).

13. AIR 1934 PC 227; 1936 Cri LJ 786.

consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal, but should also express those reasons to hold that the acquittal was not justified.¹⁴ The appellate court should deal with each one of the reasons which prompted the trial court to record the acquittal and should point out how, if at all, those reasons were wrong or incorrect.¹⁵

It follows as a corollary from the above, that if two views of the evidence are reasonably possible, one supporting an acquittal and the other indicating conviction, the appellate court (i.e., the High Court) should not interfere merely because it feels, that it would, sitting as a trial court, have taken the other view.¹⁶ Two views and conclusions cannot be right and one

14. See the observations in *Damodarprasad Chaudharyprasad v. State of Maharashtra* (1972) 1 SCC 107, 1972 SCC (Cri) 110, 116; 1972 Cri LJ 451, 455; *Dhargalki v. State of U.P.*, (1976) 3 SCC 235; 1976 SCC (Cri) 388, 391; 1976 Cri LJ 1171, 1175; *Nisar Khan v. State of Rajasthan*, AIR 1964 SC 256; (1964) 1 Cri LJ 167; *Hahad Singh v. State of Haryana*, (1976) 3 SCC 564; 1976 SCC (Cri) 461, 462; 1976 Cri LJ 1568, 1569-70; *Siva Ram v. State of M.P.*, (1975) 4 SCC 171; 1975 SCC (Cri) 464, 467-68; 1975 Cri LJ 37, 39; *Ram Jug v. State of U.P.*, (1974) 4 SCC 201; 1974 SCC (Cri) 370, 373, 376; 1974 Cri LJ 479, 480, 483; *Solanki Chimanbhai Dikabhai v. State of Gujarat*, (1983) 2 SCC 174; 1983 SCC (Cri) 379, 383; 1983 Cri LJ 822, 824; *Jankun Hyam Kemkar v. State of Maharashtra*, (1974) 3 SCC 494; 1973 SCC (Cri) 1096, 1100; 1974 Cri LJ 809; *Ramji Sarjani v. State of Maharashtra*, (1983) 3 SCC 629; 1983 SCC (Cri) 748; 1983 Cri LJ 1105, 1110; *State of Orissa v. Truth Dash*, 1983 Cri LJ 942, 945-46 (Ori); *S.D. Usman v. State*, 1982 Cri LJ 255, 260-61 (Mad); *Ajit Singh Thakur Singh v. State of Gujarat*, (1981) 1 SCC 495; 1981 SCC (Cri) 184, 187-88; 1981 Cri LJ 293; *Ganesh Bhawan Patel v. State of Maharashtra*, (1978) 4 SCC 371, 376; 1979 SCC (Cri) 115; 1979 Cri LJ 51; *K. Gopal Reddy v. State of A.P.*, (1979) 1 SCC 355; 1979 SCC (Cri) 305, 310; 1980 Cri LJ 812; *Salim Zia v. State of U.P.*, (1979) 2 SCC 648; 1979 SCC (Cri) 568, 575-76; 1979 Cri LJ 525; *State of U.P. v. Harpal Singh*, 1999 SCC (Cri) 92; *Gurshinder Singh v. Joga Singh*, 1999 SCC (Cri) 1211; *Raj Kishore Jha v. State of Bihar*, 2002 Cri LJ 5940.
15. *Ram Chander v. State of Haryana*, (1983) 3 SCC 335, 341, 343; 1983 SCC (Cri) 628; 1983 Cri LJ 1072, 1075, 1077; *Harejona Thirugulu v. Public Prosecutor, High Court of A.P.*, 2002 SCC (Cri) 1370; *State of U.P. v. Fayyaz*, 2005 Cri LJ 331 (SC).
16. *Lalji Singh v. State of Punjab*, (1976) 1 SCC 181; 1976 SCC (Cri) 812, 813; 1976 Cri LJ 31, 34; *Bhan Singh v. State of Maharashtra*, 1974 Cri LJ 337, 338; (1974) 3 SCC 762; 1974 SCC (Cri) 238, 240; *Bhujirath Singh v. State of Bihar*, (1976) 1 SCC 614; 1976 SCC (Cri) 112, 119; 1976 Cri LJ 685, 690; *Mulawa v. State of M.P.*, (1976) 1 SCC 37; 1975 SCC (Cri) 759, 764; 1976 Cri LJ 717, 722, 869; *Nale v. State of Kerala*, (1975) 3 SCC 150; 1974 SCC (Cri) 774, 780; 1974 Cri LJ 1279, 1283; *Rajendra Rai v. State of Bihar*, (1975) 3 SCC 193; 1974 SCC (Cri) 811, 816; 1974 Cri LJ 1471, 1474; *State of Punjab v. Savitri Devi*, 1983 Cri LJ 1009 (P&H) (FB); *S.D. Usman v. State*, 1982 Cri LJ 255, 260-61 (Mad); *Babu v. State of U.P.*, (1983) 2 SCC 21; 1983 SCC (Cri) 332, 338; 1983 Cri LJ 334, 337; *State of U.P. v. Santan Dass*, (1972) 3 SCC 201, 211; 1972 SCC (Cri) 275, 285-86; 1972 Cri LJ 487; *Tara Singh v. State of M.P.*, 1980 Supp SCC 466; 1981 SCC (Cri) 375, 376; 1981 Cri LJ 483; *Dharam Singh v. State of Bihar*, (1980) 1 SCC 674; 1980 SCC (Cri) 320, 321; 1980 Cri LJ 921; *K. Gopal Reddy v. State of A.P.*, (1979) 1 SCC 355; 1979 SCC (Cri) 305, 310; 1980 Cri LJ 812. See observations in *Ganesh Bhawan Patel v. State of Maharashtra*, (1978) 4 SCC 371; 1979 SCC (Cri) 1; 1979 Cri LJ 51; AIR 1979 SC 135; *Amarendra v. State of M.P.*, (1988) 2 SCC 557; 1988 SCC (Cri) 361; 1988 Cri LJ

in favour of the acquittal of the accused must be preferred over the other because our criminal jurisprudence demands that the benefit of doubt must prevail.¹⁷ If two reasonably probable and evenly balanced views of the evidence are possible, one must necessarily concede the existence of reasonable doubt. But, fanciful and remote possibilities must be left out of consideration.

Where the trial court allows itself to be beset with fanciful doubts, rejects creditworthy evidence for slender reasons and takes a view of the evidence which is but barely possible, it is not only open to the High Court but it is also its obvious duty to interfere with the order of acquittal in the interest of justice, lest the administration of justice be brought to ridicule.¹⁸

It has been held by the Supreme Court that in the matter of appreciation of evidence the powers of appellate court are as wide as that of the trial court. If the trial court has resorted to perverse application of the principles of evidence or show lack of appreciation of evidence the appellate court may re-appreciate the evidence and reach its conclusion.¹⁹ The Supreme Court may re-appreciate evidence in cases where the High Court reverses conviction/acquittal and records acquittal/conviction.²⁰ When several persons were alleged to have committed an offence in furtherance of their common intention and all except one are acquitted, it is open to the appellate court under Section 386(1)(b) to find out on a reappraisal of the evidence who were the persons involved in the commission of the crime and although it could not interfere with the order of acquittal in the absence of a state appeal it was entitled to determine with the help of Section 34 IPC, the

1154; *Perrappa v. State of Karnataka*, (2005) 12 SCC 461; *State of U.P. v. Gombhar Singh*, (2005) 11 SCC 271; *Umrao v. State of Haryana*, (2006) 10 SCC 136; AIR 2006 SC 2152; *Kalyan Singh v. State of Maharashtra*, (2006) 12 SCC 570; *Satghajji Hariba Patil v. State of Karnataka*, (2006) 10 SCC 494; (2007) 1 SCC (Ch) 113; *State of Jharkhand v. Nithyanand Pandey*, 2006 Cri LJ 1591 (Jhar); *State v. Chakkeri Khader*, 2006 Cri LJ 3744 (Kant); *Public Prosecutor, High Court of A.P. v. Duguda Rajji Reddy*, 2005 Cri LJ 835 (AP).

17. *Davindarprasad v. State of Maharashtra*, (1972) 1 SCC 107; 1972 SCC (Ch) 110, 116; 1972 Cri LJ 451, 455; *Khezu Mohan v. State of Bihar*, (1970) 2 SCC 450; 1970 SCC (Cri) 479, 481; 1971 Cri LJ 20; *Dharamdeo Singh v. State of Bihar*, (1976) 1 SCC 610; 1976 SCC (Cri) 108, 112; 1976 Cri LJ 638, 641.

18. *K. Gopal Reddy v. State of A.P.*, (1979) 1 SCC 335; 1979 SCC (Ch) 305, 311; 1980 Cri LJ 812; see also *S.D. Usman v. State*, 1982 Cri LJ 255, 260 (Mad); *Khem Karan v. State of U.P.*, (1974) 4 SCC 603; 1974 SCC (Cri) 639, 642; 1974 Cri LJ 1033; *Aliar Pahu Vajshi v. State of Gujarat*, 1983 SCC (Cri) 607; 1983 Cri LJ 1049; *Ravinder Singh v. State of Haryana*, (1975) 3 SCC 742; 1975 SCC (Ch) 202, 211; 1975 Cri LJ 765; *State v. Des Raj*, 1979 Cri LJ 558, 562 (J&K); *State of M.P. v. Hachudat*, 2007 Cri LJ 1661; *Y.N. Ruthresh v. State of Kerala*, 2006 Cri LJ 3634 (SC).

19. *Lal Mandi v. State of W.B.*, (1995) 3 SCC 603; 1995 SCC (Cri) 560; *Dharma v. Nitinul Singh*, (1996) 7 SCC 471; 1996 SCC (Cri) 444; 1996 Cri LJ 1631. In such cases the complainant can approach the High Court by way of revision.

20. *Satbir v. Surat Singh*, (1997) 4 SCC 192; 1997 SCC (Cri) 538; *Madan Lal v. State of J&K*, (1997) 7 SCC 677; 1997 SCC (Cri) 1151.

guilt of the person who committed the crime, notwithstanding the acquittal of the co-accused.²¹ Also, in cases where the co-accused has not appealed the benefit of the appellate court's order could be extended to him.²²

If the appellate court finds the accused guilty it may reverse the order of acquittal and pass sentence on him according to law. But in such a case as the appellate court is to do what the trial court ought to have done, it should not impose a punishment higher than the maximum that could have been imposed by the trial court. An appeal court is after all 'a court of error', that is, a court established for correcting an error.²³ It has also been expressly provided by the second proviso to Section 386 that the appellate court shall not inflict greater punishment for the offence, which in its opinion the accused has committed, than might have been inflicted for that offence by the court passing the order or sentence under appeal.

In passing an order in appeal from an order of acquittal, the High Court has the same power, to convict the accused of an offence disclosed by the evidence on record, which the trial court has under Sections 221-222, even though no charge in respect of that offence has been framed against the accused.²⁴

In an appeal against acquittal, the High Court has power under Section 386(a) to direct further inquiry to be made. Here inquiry means according to Section 2(g), every inquiry other than a trial conducted under the Code by a magistrate or court. Therefore, the High Court can put the proceedings at the pre-trial stage and obviously at the stage before the framing of the charge but after the filing of the police report.²⁵

The expression "retrial" in Section 386(a) is used in an unlimited or unrestricted sense. In the absence of any indication to the contrary it can be taken to mean partial retrial also. An appellate court reversing the order of acquittal may order a retrial; and such a retrial can be ordered from the stage at which an error or illegality has crept in.²⁶

(3) In an appeal from a conviction—

21. *Khushi v. State of M.P.*, (1991) 3 SCC 627; 1991 SCC (Cri) 916; 1991 Cr LJ 2653; *Bhathi v. State of Punjab*, (1991) 1 SCC 519; 1991 SCC (Cri) 203; 1991 Cr LJ 403.

22. *Jashubhai Bharatling Gulit v. State of Gujarat*, (1994) 4 SCC 353; 1994 SCC (Cri) 1195; *Raja Ram v. State of M.P.*, (1994) 2 SCC 568; 1994 SCC (Cri) 573.

23. *Jagat Bahadur v. State of M.P.*, AIR 1966 SC 945; 1966 Cr LJ 709, 712; see also *Shankar Keshu Jadhav v. State of Maharashtra*, (1969) 2 SCC 793, 801; (1971) 1 Cr LJ 693, 697-99.

24. *Rameswamy Nadar v. State of Madras*, AIR 1958 SC 56; 1958 Cr LJ 228, 230/51; *Empire v. Ismail Khawariz*, AIR 1928 Bom 130; 29 Cr LJ 403.

25. *Jetha Nand v. State of Haryana*, 1983 Cr LJ 305, 308 (P&H).

26. *K. Subramaniam v. Kanchiam*, 1974 Cr LJ 543; 549 (Ker); *Lakshminarayanan v. State of Kerala*, 1991 Cr LJ 1800 (Ker).

- (i) The appellate court may reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by a court of competent jurisdiction subordinate to such appellate court or committed for trial, or
- (ii) the appellate court may alter the finding, maintaining the sentence; or
- (iii) the appellate court may with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same [Section 386(b)].

Where the appellate court, under sub-clause (i) above, reverses the finding and sentence, it has two courses open; it may acquit or discharge the accused, or it may order the accused to be retried or committed for trial. The expression "alter the finding" in Section 386(b) above has only one meaning and that is "alter the finding of conviction and not the finding of acquittal".²⁷ The words "reverse the finding and sentence" in sub-clause (i) above mean to set aside or annul the conviction and sentence.

A retrial is not to be ordered merely to enable the prosecution to adduce additional evidence for filling up the gaps or lacunae left at the trial.²⁸ An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate court is satisfied that the trial court had no jurisdiction to try the case or that the trial was vitiated by some serious illegality or irregularity, or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial, or that the prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge and in the interests of justice the appellate court deems it appropriate, having regard to all the circumstances of the case, that the accused should be put on his trial again.²⁹ Once retrial is ordered by the appellate court in exercise of powers under Section 386(b)(i), the evidence which is already on record is deemed to be obliterated off from the record.³⁰ It may also be noted that there is no power of remand except for the purpose of retrial. In a case where the trial court had failed to hear the accused on the question of sentence, the appellate court cannot, under Section 386(b) or under any

27. *State of A.P. v. Thathi Narayana*, AIR 1962 SC 340 (1962) 1 Cr LJ 207, 211.

28. *State of Gujarat v. Rajubhai Dhamiribhai Baryo*, 2004 Cr LJ 771 (Guj).

29. *Ukha Kallie v. State of Maharashtra*, AIR 1963 SC 1531 (1963) 2 Cr LJ 418, 423; see also *Akulu Ahir v. Ramdeo Ram*, (1973) 2 SCC 583; 1973 SCC (Cr) 903 (1973) Cr LJ 1404; *Rajeshwar Prasad Misra v. State of W.B.*, AIR 1965 SC 1887 (1965) 2 Cr LJ 817, 821; *Mamfihari Singh v. Jonardan Prasad*, AIR 1966 SC 356; 1966 Cr LJ 307, 310; *Chandra Lal Das v. State of Tripura*, 2003 Cr LJ 2162 (Gau).

30. *Chandra Lal Das v. State of Tripura*, 2003 Cr LJ 2162 (Gau).

other section of the Code, remand the case to the trial court for the purpose of hearing the accused on the question of sentence.³¹

The order of retrial which the appellate court can pass in the context of an appeal from a conviction is retrial for the same offence for which the accused was convicted and not of another since it would be wrong for the appellate court to assume that the whole case is before it.³²

The power of the appellate court to commit the accused person for trial is not confined to cases exclusively triable by a court of session, and it is within the power of the appellate court to commit even such cases as are triable by any magistrate.³³

The words "alter the finding" in sub-clause (ii) above mean only the alteration of the order of conviction and further these words only mean modification of the conviction and not its obliteration or annulment. It is now well settled that the power of the appellate court to alter the finding is confined to offences for which the accused could have been convicted by the trial Court under Sections 221 and 222.³⁴

Situations may arise in which the accused is convicted of an offence less grave than that for which he was prosecuted. In such cases, the view taken is that he is deemed to have been acquitted of the graver offence. Thus where a person is charged with an offence of murder under Section 302, IPC but convicted of culpable homicide not amounting to murder under Section 304, IPC, there is an implied acquittal of the offence of murder under Section 302, IPC.³⁵ If therefore the accused appeals against the conviction under Section 304, IPC and the State does not appeal against the acquittal under Section 302, the appellate court cannot alter the finding under Section 304, IPC into one of conviction for murder under Section 302 of the IPC.³⁶

In a case where an accused person is charged with several offences, the trial is no doubt one; but where the accused is acquitted of some offences, and convicted of others, the character of the appellate proceedings and their scope and extent is necessarily determined by the nature of the appeal preferred before the appellate court. If the accused files an appeal against his conviction, and the State does not appeal against the order of acquittal, then it is only the order of conviction that falls to be considered by the

31. *Pratap Chaudhary v. State*, 1979 Cri LJ 103, 104 (Del); *Mukund Lal v. State*, 1970 Cri LJ 105, 106 (Del).

32. *Jethu Nand v. State of Haryana*, 1983 Cri LJ 305, 308 (P&H); see also *State of A.P. v. Thulasi Narayana*, AIR 1962 SC 240; 1962 (1) Cri LJ 207.

33. *State of U.P. v. Shankar*, AIR 1962 SC 1154; (1962) 2 Cri LJ 261, 262.

34. For the text of Ss. 221 and 222, see *supra* para 15.11 and 15.14.

35. *Kishan Singh v. Emperor*, AIR 1928 PC 254; 29 Cri LJ 828; see also *Emperor v. Suroo Darsan Singh*, AIR 1922 All 487; 23 Cri LJ 202.

36. See 41st Report, pp. 269-270, para 31.38.

appellate court, and not the order of acquittal. Therefore, in construing the expression "alter the finding" in Section 386(b)(ii) above, it cannot be assumed that the whole case is before the appellate court when it entertains an appeal against conviction. The expression "alter the finding" has only one meaning, and that is, "alter the finding of conviction" and not "alter any finding of the trial court whether it be one of conviction or acquittal".³⁷ Similarly, where an appeal against acquittal is preferred by the State, the respondents are not entitled to challenge their conviction in respect of other offences when they have not preferred any appeal against the same. Further, since they have not availed themselves of the right of appeal, a revision at their instance is barred under Section 401(4). It is, however, open to the High Court to act *suo motu* to prevent a miscarriage of justice.³⁸

According to sub-clauses (ii) and (iii) of Section 386 (b) above, the appellate court may alter the finding and maintain the sentence or alter the nature or the extent or the nature and extent of the sentence but not so as to enhance the same; or the appellate court may even without altering the finding, alter the nature or the extent, or the nature and the extent, of the sentence but not so as to enhance the same.

A sentence is said to be enhanced when it is made more severe. If the sentence of fine is changed into one of imprisonment it would amount to enhancement of the sentence. However, an enhancement of fine was held not to amount to enhancement of sentence.³⁹ Where a court awards a sentence of fine and also directs that in default of payment of fine the offender shall undergo a term of imprisonment, the offender, according to Section 70 of IPC, is not relieved of the liability to pay the fine by undergoing the said term of imprisonment. Therefore, where the sentence of 4 months' imprisonment passed by the trial court was altered by the appellate court to "3 months' imprisonment and a fine of Rs 500 and in default to undergo rigorous imprisonment for one month", the sentence passed by the appellate court would amount to enhancement of the sentence as the fine would still be recoverable after undergoing the whole imprisonment of four months.⁴⁰ However, in a case where the aggregate sentence of imprisonment awarded by the appellate court is in any way less than the period of the original sentence of imprisonment, the fact that fine is in addition imposed by the appellate court would not be considered as an enhancement of the sentence by the appellate court.⁴¹

37. *State of A.P. v. Thadi Narayana*, AIR 1962 SC 240; (1962) 1 Cr LJ 207, 211.

38. *State of Orissa v. Mathuri Mallik*, 1979 Cr LJ 508, 510 (Ori); see also *Lakhan Mahto v. State of Bihar*, AIR 1966 SC 1742; 1966 Cr LJ 1349.

39. *Devu v. Excise Circle Inspector*, 1986 Cr LJ 1478 (Ker).

40. *Nandeswar Burna v. State*, AIR 1952 Ass 81; 1952 Cr LJ 917; see also *Ganga v. Inspector*, AIR 1942 Oudh 399; 43 Cr LJ 719.

41. *Bhaktisavatsala Naidu v. Emperor*, ILR (1906) 30 Mad 103 (FB).

(4) *In an appeal for enhancement of sentence—*

- (i) The appellate court may reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a court competent to try the offence, or
- (ii) the appellate court may alter the finding maintaining the sentence, or
- (iii) the appellate court may with or without altering the finding, alter the nature or the extent, or the nature and extent of the sentence, so as to enhance or reduce the same [Section 386(c)].

As already seen, the appellate court is not to inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the court passing the order or sentence under appeal [proviso 2 to Section 386].

The first proviso to Section 386 provides that the sentence shall not be enhanced unless the accused has had an opportunity showing cause against such enhancement. This provision is already included in Section 377(3).⁴²

The powers enumerated here in case of an appeal for enhancement of the sentence are almost the same powers as described in sub-para (3) above in respect of an appeal against the conviction. Here, of course additional powers to enhance or reduce the sentence have been given to the appellate court.

If a substantial punishment has been given for the offence of which a person is found guilty, after taking due regard of all the relevant circumstances, normally there should be no interference by an appellate court. On the other hand, interference will be justified when the sentence is manifestly inadequate or unduly lenient in the particular circumstances of the case. The interference will also be justified when the failure to impose a proper sentence may result in miscarriage of justice.⁴³

(5) *In an appeal from any other order—*The appellate court may in such a case alter or reverse such order [Section 386(d)].

(6) *Consequential or incidental orders—*The appellate court may make any amendment or any consequential or incidental order that may be just or proper [Section 386(e)].

⁴² See *supra* para 24.4.

⁴³ *Kodavandi Madhavi v. State of Kerala*, (1973) 3 SCC 469; 1973 SCC (Cr) 369, 371; 1973 Cr LJ 671, 673; see also *Red Raj v. State of U.P.*, AIR 1955 SC 778; 1955 Cr LJ 1642, 1644; *Shri Gaxind v. State of M.P.*, (1972) 3 SCC 399; 1972 SCC (Cr) 549; 1972 Cr LJ 1181.

Consequential and incidental orders are in fact the complements of the main order of the court and should necessarily follow the main order. In a case where the accused is convicted for more offences than one, it is the plain duty of the court to impose an appropriate sentence under each section of which the accused is convicted, and an omission to do so is an error in law. Therefore the appellate court in such a case would have the power under the above Section 386(e) to pass such order as to sentence as would be consequential upon the order of conviction.⁴⁴ The powers given to the appellate court under Section 386 are quite wide and the court can alter or amend a charge provided that the accused is not prejudiced either by keeping him in the dark about the charge or in not giving a full opportunity of meeting it and putting forward any defence open to him, on the charge finally preferred against him.⁴⁵ In view of the powers given by Section 386(e) above, the appellate court can pass orders under Sections 106(4), 335, 356(4), 357 (4), 359(2), 452, 454(3) and 456(2).

(7) *No dismissal of appeal for default or on the appeal becoming infructuous.*—The Code does not contain any provision for dismissal of an appeal for default.⁴⁶ Neither is there any provision for dismissal on the ground that the appeal has become infructuous. From the scheme of the code and in view of the finality attached to the appellate judgment, it appears that once the court decides not to dismiss an appeal summarily, it should dispose it of giving reasons for its conclusion except where it abates according to the provisions of Section 394.⁴⁷

24.13. Procedure where judges of court of appeal are equally divided.—When an appeal under this chapter is heard by a High Court before a bench of judges and they are divided in opinion, the appeal with their opinions, shall be laid before another judge of that court, and that judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow that opinion (Section 392). From this provision it is not appropriate to infer that the legislature intended that a criminal appeal should be laid only before a bench of two judges.⁴⁸ However the proviso to the above Section 392 provides that if one of the judges constituting the bench or, where the appeal is laid before another judge under this section, that judge, so requires, the appeal shall be reheard and decided by a larger bench of judges. A question may arise as to whether the third judge ought to consider himself bound by the views expressed by

44. *Jayaram Vithoba v. State of Bombay*, AIR 1956 SC 146; 1956 Cri LJ 318, 321

45. *K. L. Mehra v. State of Maharashtra*, (1969) 3 SCC 166; 1970 SCC (Cri) 19, 23; 1970 Cri LJ 510; see also *Thakur Shah v. Emperor*, AIR 1943 PC 192; 45 Cri LJ 126.

46. *State v. Rami Gopal*, 2006 Cri LJ 2805 (Del).

47. *Rohita v. State*, 1981 Cri LJ 1549, 1550 (Ker); for S. 394, see *infra*; para 24.16; *Narain Kumar v. State of U.P.*, 1981 Cri LJ 378, 379 (All).

48. *Sarwan Singh v. State*, 1986 Cri LJ 1352, 1354 (Del).

necessarily involves an examination of the validity of the order of conviction. The sentence follows the conviction and the validity of the two is interconnected.⁶⁶

The main object of the proviso to sub-section (2) above is to provide a machinery whereby the children or the members of the family of a convicted person who dies during appeal could test the conviction and get rid of the odium which would otherwise attach to them.⁶⁷ Further, the interest of the legal representatives of the deceased appellant in the appeal may not be purely sentimental, it can be pecuniary also even though the appeal might have been against the sentence of imprisonment. Thus, if the conviction is on a charge of murder of a near relation whose heir, or one of whose heirs, is the alleged murderer, he (if the conviction is not set aside) will be disqualified from inheriting his property. If he dies during the pendency of the appeal, his heirs have a pecuniary interest in prosecuting the appeal. If the appeal succeeds, their right of inheritance to the property of the deceased through the appellant will be saved.⁶⁸ Therefore, the principle underlying the above proviso appears to be eminently sound. The requirement of the leave of the court to continue the appeal, and the time-limit provided for filing an application for such leave, are the necessary safeguards against the probable misuse of the provision.

24.19. Legal aid in appeal cases.—An indigent accused person may be involved in an appeal case either as a respondent in an appeal against his acquittal, or as an appellant seeking redress against the mistakes and errors in the order of conviction passed against him by the trial court. In either case the liberty of indigent accused person may be in jeopardy and hence Article 21 of the Constitution would require the appeal procedure to be 'reasonable, fair and just' procedure. As an essential ingredient of such a procedure, as has been held by the Supreme Court in *Hussainara Khatun (IV) v. Home Secretary, State of Bihar*⁶⁹ it will be necessary to provide at State expense, a lawyer to an indigent accused person, be he the respondent or the appellant, if he is unable to engage one due to his poverty or indigence. If legal aid to an indigent accused person is an essential component of 'reasonable, fair and just' procedure in trial proceedings, it is equally, if not more, so in appellate proceedings. First it is not easy for a layman to understand all the legal implications of the judgment of the trial court in the context of the appellate proceedings. Secondly, in such proceedings, quite often, intricate questions of law and fact are involved. They would require the skilful and careful handling by a competent lawyer. Thirdly, the State is represented in appeals by well qualified and experienced Public Prosecutors. Therefore, for the proper and

66. (1975) 3 SCC 343; 1974 SCC (Cr) 951.

67. See 41st Report, p. 280, para 31.64.

68. *Ibid.*, at pp. 279-280, para 31.62.

69. (1980) 1 SCC 98; 1980 SCC (Cr) 40, 47; 1979 Cr LJ 1045.

just working of the adversary system at the appellate stage, it is necessary that the indigent accused person is represented by a competent lawyer. Though justice and fair play do require adequate provision for legal aid at the appellate stage, it has not so far attracted as much attention as it has in case of trial procedures. The Code does not make any specific provision for giving legal aid to indigent accused persons in appeal proceedings. However the Supreme Court has held that as a matter of prudence the court, may in an appropriate case appoint a counsel at the state's expense to argue for the cause of the accused.⁷⁰

As mentioned earlier in para [4.1] the Code has made provision to provide a lawyer at State expense to an indigent accused person in a trial before a court of session; the Code also enables a State Government to extend this right to any class of trials before other courts in the State. If in any such trial the accused is acquitted and the State prefers an appeal against the order of acquittal, even in such a situation, the Code surprisingly fails to make any specific provision for providing a lawyer to the indigent accused person to defend himself.

In accordance with civilised jurisprudence, the Code, subject to just exceptions, provides for a right of appeal against an order of conviction. However such a right would not mean much to the indigent convicted person without the able representation by a competent lawyer. The Code does not make any provision for legal aid even in such cases where the order of conviction is prima facie wrong and invoking the appellate jurisdiction is necessary to avoid miscarriage of justice. In this context, the existing provisions regarding "jail appeals"⁷¹ are far from adequate and can hardly be considered as a proper substitute for able representation of the indigent convicted person by a competent lawyer. Here it may be pertinent to note the observations of the Supreme Court in *M.H. Hoskot v. State of Maharashtra*⁷².

The Supreme Court observed:

*"Maneka Gandhi case*⁷³ has laid down that personal liberty cannot be cut out or cut down without fair legal procedure. Enough has been set out to establish that a prisoner, deprived of his freedom by court sentence but entitled to appeal against such verdict, can claim, as part of his protection under Article 21 and as implied in his statutory right to appeal, the necessary concomitant of right to counsel to prepare and argue his appeal.

70. *Rishi Nandan Prasad v. State of Bihar*, (2000) 3 SCC 409.

71. See *supra*, paras 24.6(2) and 24.8(4)(6).

72. (1978) 3 SCC 544; 1978 SCC (Cr) 468; 1978 CH LJ 1678.

73. (1978) 1 SCC 248.

If a prisoner sentenced to imprisonment, is virtually unable to exercise his constitutional and statutory right of appeal, inclusive of special leave to appeal, for want of legal assistance, there is implicit in the court under Article 142 read with Articles 21 and 39-A of the Constitution, power to assign counsel for such imprisoned individual 'for doing complete justice'. This is a necessary incident of the right of appeal conferred by the Code and allowed by Article 136 of the Constitution. The inference is inevitable that this is a State's duty and not government's charity.⁷⁴

The Supreme Court have had an opportunity to express its difficulty in processing an appeal when the petitioner in person appeared and argued his case.⁷⁵ The court suggested that such persons should be provided legal aid and it indicated various agencies offering legal aid to poor. At present the implementation of the Legal Services Authorities Act, 1986 may help the indigent appellants in getting legal aid.

74. 1978 SCC (Cr) 468 at 480-481; (1978) 3 SCC 544.

75. *Bhuvneshwar Singh v. Union of India*, (1993) 4 SCC 327; 1994 SCC (Cr) 1; 1993 Cr LJ 3454.

Review Procedures: Revision

25.1. Object and scope of the chapter.—In the earlier chapter it was considered how a person aggrieved by the decision of a criminal court could go in appeal to the higher court and obtain redress. However, the right of appeal is not available in each and every case and is confined to such cases as are specifically provided by law. Secondly, even in such specified cases, the Code ordinarily allows only one appeal, and a review of the decision of the appellate court is not normally permissible by way of further appeal to yet another higher court. In order to avoid the possibility of any miscarriage of justice in cases where no right of appeal is available, the Code has devised another review procedure, namely, "revision". Sections 397 to 405 deal with the powers of "revision" conferred on the higher courts and the procedure to regulate these powers. The powers of revision conferred on the higher courts are very wide and are purely discretionary in nature. Therefore, no party has any right as such to be heard before any court exercising such powers. The revisional powers, though quite wide, have been circumscribed by certain limitations. For instance, (a) in cases where an appeal lies but no appeal is brought, *ordinarily* no proceeding by way of revision shall be entertained at the instance of the party who could have appealed, (b) the revisional powers are not exercisable in relation to any interlocutory order passed in any appeal, inquiry or trial; (c) the court exercising revisional powers is not authorised to convert a finding of acquittal into one of conviction; (d) a person is allowed to file only one application for revision either to the court of session or to the High Court; if once such an application is made to one court, no further application by the same person shall be entertained by the other court. These matters have been discussed in this chapter in Part B.

The chapter also deals with other provisions contained in Sections 395-396 which enable an inferior court to consult the High Court on a matter of law in certain circumstances. If a criminal court other than a High Court has to decide whether a particular enactment is constitutionally valid, and is itself of opinion that it is not, but finds that neither the High Court to which the court is subordinate nor the Supreme Court has pronounced on that enactment, the court is required to make a reference to the High Court for the decision on that question. The intention here is that the validity of the laws possibly in conflict with the

Constitution should be decided authoritatively and quickly.¹ It has also been provided that a court of session or a metropolitan magistrate may in its or in his discretion refer for decision to the High Court, any other question of law arising in the hearing of a case pending before such court or magistrate. These provisions regarding reference to the High Court are contained in Sections 395 and 396 and have been discussed in Part A of this chapter.

PART A

Reference of High Court

25.2. Reference to High Court and post-reference procedure.—(1)

Reference to High Court.—A reference to High Court may be on a question of the constitutional validity of any law or it may be on any other question of law. In this connection Section 395 provides as follows:

395. Reference to High Court.—(1) Where any court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of the opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that court is subordinate or by the Supreme Court, the court shall state a case setting out its opinion and the reasons therefor, and refer the same for the decision of the High Court.

Explanation.—In this section, "Regulation" means any Regulation as defined in the General Clauses Act, 1897 (10 of 1897), or in the General Clauses Act of a State.

(2) A Court of Session or a Metropolitan Magistrate may, if it or he thinks fit in any case pending before it or him to which the provisions of sub-section (1) do not apply, refer for the decision of the High Court any question of law arising in the hearing of such case.

(3) Any court making a reference to the High Court under sub-section (1) or sub-section (2) may, pending the decision of the High Court thereon, either commit the accused to jail or release him on bail to appear when called upon.

Every court subordinate to the High Court is required to make a reference to the High Court under sub-section (1) above, if the following conditions are satisfied:

- (a) The Court is satisfied that a case pending before it, involves a question of the constitutional validity of any Act, Ordinance or Regulation or any provision contained therein. A mere plea raised by a party challenging the validity of the Act is not sufficient to

1. See 41st Report, p. 284, para 372.

interesting or important they may be.⁶ Nor does the sub-section empower a court of session or a metropolitan magistrate to refer the points of law settled by the decisions of the High Court, where such court or magistrate doubts the correctness of those decisions.⁷ In a recent decision, it has been held that the mere event that the Sessions Judge has entertained an application for revision under Section 379 and called for the record of any case pending in any inferior criminal court will not thereby transfer the pendency of the case to his court and clothe him with jurisdiction and power to make a reference under Section 395(2) on a question of law arising in the hearing of such revision.⁸ Sub-section (3) above deals with the powers of the referring court to commit the accused to jail or to release him on bail. This has already been considered in para 12.9.

(2) *Post-reference procedure*.—When a question has been so referred under Section 395, the High Court shall pass such order thereon as it thinks fit, and shall cause a copy of such order to be sent to the court by which the reference was made, which shall dispose of the case conformably to the said order [Section 396(1)].

The High Court may direct by whom the costs of such reference shall be paid [Section 396(2)].

PART B

Revisional Jurisdiction

Sections 397 to 405 relate to powers of revision. While Sections 399, 400 and 401 respectively deal with powers of revision of a Sessions Judge, an Additional Sessions Judge and the High Court, Section 397 (read with Section 400) empowers these judges and the High Court to call for the records of the subordinate courts for the purpose of exercising the powers of revision, and Section 398 empowers them to order further inquiry under certain circumstances. These sections, particularly Sections 397-401 are interlinked and should be read together.

25.3. Power to call for and examine the record of any proceeding before subordinate court.—In this connection Section 397 provides as follows:

397. Calling for records to exercise of powers of revision.—(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness,

6. *A.S. Krishna, In re*, AIR 1954 Mad 993; 1954 Cri LJ 1521, 1523.

7. *Emperor v. Ratan Singh*, ILR (1948) 2 Cal 117; 52 CWN 369, 369-70; *Emperor v. Ismail Hirji*, AIR 1930 Bom 49, 54; 31 Cri LJ 633.

8. *Narbadu v. Mohil Hanif*, 1982 Cri LJ 2330, 2332 (Raj).

legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation.—All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of Section 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

Under the above section, the High Court or the Sessions Court is empowered to call for and examine the record of any proceedings before any inferior court and satisfy itself as to the correctness, legality or propriety of any order passed by the inferior court⁹. If any defect, irregularity or illegality justifying corrective action, is found on the examination of the record, the subsequent sections, namely 398-401 empower the superior courts to pass suitable orders to remove the miscarriage of justice. The object of revisional jurisdiction is to confer upon superior criminal courts, a kind of paternal or supervisory jurisdiction¹⁰.

The term "proceeding" as mentioned in Section 397(1) above, cannot necessarily be said to have any reference by itself to the commission or trial of an offence. There are some provisions in the Code itself which are not concerned or necessarily concerned with the commission or prevention of an offence, for instance Sections 125-126, 133, 144 etc¹¹. The word "proceeding" cannot be given such a restrictive significance; a proceeding cannot be said to have any reference by itself to the commission or trial of an offence.¹² "Proceeding" is a very wide term, and would include any judicial proceeding taken before any inferior criminal court even though it may not relate to any specific offence. In several decided cases, it has been held that the test is not the nature of the proceeding but the nature of the court in which that proceeding is held.¹³

9. *Dinar Singh v. State of Punjab*, 1974 Cr LJ 231 (P&H); *Ganesha Narayan Dasgupta v. Eknath Hari Jhange*, 1978 Cr LJ 1009, 1012 (Bom); *S.P. Mishra v. State of Orissa*, 1982 Cr LJ 19, 22 (Ori).

10. *Pureshottam Vijay v. State*, 1982 Cr LJ 243, 248 (MP).

11. *Public Prosecutor v. L. Ramayya*, 1975 Cr LJ 144, 155 (AP) (FB).

12. *Ujanshi Govindji Sunghadla v. Emperor*, AIR 1946 Bom 533; 48 Cr LJ 152 (FB).

13. *Public Prosecutor v. L. Ramayya*, 1975 Cr LJ 144, 155-56 (AP) (FB); *Kumaravel Nair v. Shanmuga Nair*, (1940) 41 Cr LJ 769; AIR 1940 Mad 465 (FB); *Ram Gopal Guinika v. Corpn. of Calcutta*, AIR 1925 Cal 1251; (1925) 26 Cr LJ 533; *J.G. Hymanant, In re*, AIR 1933 Bom 50; (1933) 34 Cr LJ 239.

The word "inferior" in relation to court in Section 397(1) does not carry with it any stigma or any suggestion that the court is under the administrative orders of the superior court. Inferior criminal court only means judicially inferior to the High Court (or Sessions Court). A court is inferior to another court when an appeal lies from the former to the latter.¹⁴ The Sessions Judge is, therefore, inferior to the High Court within the meaning of Section 397(1) and the High Court may call for and examine the record of any proceeding before the Sessions Judge¹⁵. It has been held that the Sessions Judge has revisional jurisdiction in relation to appellate judgment of the Assistant Sessions Judge and the Chief Judicial Magistrate.¹⁶

The explanation to Section 397(1) merely clarifies that all magistrates, whether executive or judicial, shall be deemed to be inferior to the Sessions Judge for the purpose of Sections 397 and 398. A revision may therefore lie from the order of Additional District Magistrate ordering possession of a room to the landlord, to the Sessions Court.¹⁷ The constitutional position being well-settled that all the magistrates are inferior to the High Court and the High Court has got the superintending and supervisory jurisdiction under Article 227 of the Constitution, there was no necessity for the legislature also to say in the explanation that all magistrates are inferior to the High Court.¹⁸ It may, however, be noted that a magistrate holding an inquiry under Section 176 does not function as a criminal court, and therefore, the records of such an inquiry cannot be called and examined by the High Court under Section 397.¹⁹

The power of the revisional court to release the offender on bail or bond under Section 397(1) has already been considered in para 12.8.

From the nature of the powers given to the revisional courts (i.e. the High Court or the Court of Session), it seems to follow that the revisional court can act either on its own motion or on the motion of even a stranger who may be instrumental in bringing to the knowledge of the revisional court a matter which otherwise the revisional court may not have known. Of course, the normal course of the High Court or court of session to be seized of a matter is either at the instance of the prosecution or the accused or the High Court or court of session itself, but in some rare cases information

14. *Krishnaji Vishal v. Emperor*, AIR 1949 Bom 29; 49 Cri LJ 593.

15. *Ramachandri Pujia Panda Samant v. Jambeswar Patra*, 1975 Cri LJ 1921, 1922 (Ori); *Thakur Das v. State of M.P.*, (1978) 1 SCC 27; 1978 SCC (Cri) 21, 28; 1978 Cri LJ 1.

16. *Gopalan v. State of Kerala*, 1981 Cri LJ 1217, 1224 (Ker).

17. *Ahimesh Mohanta v. Jambeswar Mohanta*, 1989 Cri LJ 489 (Gau).

18. *Ramachandri Pujia Panda Samant v. Jambeswar Patra*, 1975 Cri LJ 1921, 1922-23 (Ori); see observations in *Anjanappa v. State of Karnataka*, 1988 Cri LJ 248 (Kant); *Mansur v. State of M.P.*, 1986 Cri LJ 57, 59 (MP). The Court categorically pointed out in this case that executive Magistrates are subordinate to the High Court.

19. *Imat Sara v. State of Karnataka*, 1982 Cri LJ 1076, 1080 (Kant).

may be received by the High Court or court of session even from a stranger. Thus, the revisional court can interfere on information contained in the newspaper or a placard on a wall or on an anonymous postcard, provided it considers that sufficient ground has been established to justify its doing so. At the same time the revisional court has to be loath to take action on an application for revision presented by a third party on its own responsibility and without authority from either of the parties. It becomes the duty of the revisional court to see that a stranger to the proceedings does not employ his information as an instrument of vengeance on the accused or attempt to serve his own private end.²⁰

Sub-section (2) of Section 397 bans the exercise of revisional power in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding. This provision has been introduced with a view to speeding up the disposal of criminal cases. It was thought that revision petitions against interlocutory orders would not only delay justice but might sometimes defeat it²¹. Therefore Section 397(2) enacts a statutory bar on the power of revision in relation to any interlocutory order and thereby intends to bring about expeditious disposal of criminal cases.²² The bar is not however likely to prejudice any party aggrieved by the interlocutory order as such party can always challenge it in due course if the final order goes against it.

What is an interlocutory order has not been defined in the Code. A reasonable interpretation of the term would suggest that an interlocutory order is one which is passed at some intermediate stage of a proceeding generally to advance the cause of justice for the final determination of the rights between the parties.²³ The test in determining the final or interlocutory nature of an order is one and the same both in civil as well as criminal cases. That test is whether or not the order in question finally disposes of the rights of the parties or leaves them to be determined by the court in the ordinary way. If the order does not finally dispose of the rights of the parties and the matters in dispute, and leaves the suit or case still a live suit in which the rights of the parties have to be determined, the order will remain interlocutory irrespective of the stage at which it is passed and also irrespective of the conclusive decision of the subordinate matters with

20. *Parshuram Vijay v. State*, 1982 Cri LJ 243, 248-49 (MP); see also *Simalabala Devi v. Emperor*, (1933) 34 Cri LJ 1115; AIR 1933 All 678 (FB); *Pratap v. State of U.P.*, (1973) 3 SCC 690; 1973 SCC (Cri) 496, 510; 1973 Cri LJ 565, 575.

21. See notes on Cls. 407 to 415.

22. *Parmeshwari Devi v. State*, (1977) 1 SCC 169; 1977 SCC (Cri) 74, 77; 1977 Cri LJ 245; *Madhun Laxmi v. State of Maharashtra*, (1977) 4 SCC 551; 1978 SCC (Cri) 10, 15; 1978 Cri LJ 165; *Anur Nath v. State of Haryana*, (1977) 4 SCC 137; 1977 SCC (Cri) 585, 589; 1977 Cri LJ 1891.

23. *Dhola v. State*, 1975 Cri LJ 1274, 1276 (Raj); *Parmeshwari Devi v. State*, (1977) 1 SCC 169; 1977 SCC (Cri) 74; 1977 Cri LJ 245.

which it deals.²⁴ The grant or refusal of a bail application is essentially an interlocutory order.²⁵ But a conflict of opinion with reference to this has however arisen. While the Allahabad High Court has, following the Supreme Court decisions²⁶ held²⁷ that a bail order is an interim order, the Bombay High Court has consistently been holding the view that it is not²⁸. In fact the Supreme Court has mentioned bail order as an example of interlocutory orders and the Allahabad High Court gave emphasis on it to arrive at its conclusion. The Bombay High Court has also relied on the observations and discussions in the abovesaid Supreme Court decisions to reach its conclusion.

Having regard to the nature of the bail orders in most criminal cases and the observations of the Supreme Court in *Madhu Limaye case*²⁹ that there are orders which are neither interlocutory nor final, it seems the view of the Bombay High Court is in consonance with the scheme of the code.

The difference between an application for cancellation of bail and a revision application against a bail order has been succinctly spelt out by the Bombay High Court thus:

"[W]hen an order is passed by the trial court and the High Court is later on approached for the purpose of the cancellation of the bail, the basic postulate is that the order was valid when it was passed, but that on account of supervening circumstances it needed to be varied or modified or cancelled. When you file a revision application against the order granting bail, your grievance is that the order was bad from its inception".³⁰ An order passed by a magistrate under Sections 107/111 is nothing but an interlocutory order.³¹

Generally speaking, the test for determining whether an order is of a final or interlocutory nature, is whether or not the order in question finally disposes of the rights of the parties or leaves them to be determined by the court in the ordinary way. The term "interlocutory order" is not to be understood in any broad or artistic sense; it merely denotes orders of a purely interim or

24. *Bindhani v. State of U.P.*, 1976 Cr LJ 1660, 1662 (All); see also *Parmeshwari Devi v. State*, (1977) 1 SCC 169; 1977 SCC (Cri) 74; 1977 Cr LJ 245.

25. *Dhola v. State*, 1975 Cr LJ 1274, 1276 (Ra).

26. *Amar Nath v. State of Haryana*, (1977) 4 SCC 137; 1977 SCC (Cri) 585; 1977 Cr LJ 1891; AIR 1977 SC 2185 and *Madhu Limaye v. State of Maharashtra*, (1977) 4 SCC 551; 1978 SCC (Cr) 10; 1978 Cr LJ 165; AIR 1978 SC 47.

27. *Bhola v. State of U.P.*, 1979 Cr LJ 718 (All); *State of U.P. v. Karam Singh*, 1988 Cr LJ 1434 (All).

28. *R. Shaktisati v. Roshanlal Agarwal*, 1985 Cr LJ 68 (Bom); *Prashant Kumar v. Manoharlal Bhagatram Bhatia*, 1988 Cr LJ 1463 (Bom).

29. (1977) 4 SCC 551; 1978 SCC (Cri) 10; 1978 Cr LJ 165; AIR 1978 SC 47 at 53.

30. *R. Shaktisati v. Roshanlal Agarwal*, 1985 Cr LJ 68 at 76 (Bom).

31. *Bindhani v. State of U.P.*, 1976 Cr LJ 1660, 1662 (All).

temporary nature which do not decide or touch the important rights or liabilities of the parties. For instance, orders summoning witnesses, adjourning cases, granting or cancelling bail, calling for reports and such other steps in the aid of the pending proceeding are all interlocutory orders.³² It may however be noted that the expression "interlocutory order" should not be equated as invariably being converse of the expression 'final order'. There may be an order passed during the course of a proceeding which may not be 'final' yet it may not be an interlocutory order — pure or simple. Some kind of order may fall in between the two, and the bar in Section 397(2) is not meant to be attracted to such kinds of intermediate orders. It is, according to the Supreme Court, neither advisable nor possible to make a catalogue of orders to demonstrate which kinds of orders would be merely, purely or simply interlocutory and which kinds of orders would be final, and then to prepare an exhaustive list of those types of orders which fall in between the two.³³ An order rejecting the plea of the accused on a point which when accepted, will conclude the particular proceeding, will not be considered as an interlocutory order within the meaning of Section 397(2).³⁴

According to the Supreme Court, the term 'interlocutory order' as used in Section 397(2) has to be given a very liberal construction in favour of the accused in order to ensure complete fairness of the trial because the bar contained in that section would apply to a variety of cases coming up before the courts not only being offences under the Penal Code but under numerous Acts. If, therefore, the right of revision was to be barred, the provision containing the bar must be confined within the four corners of the spirit and the letter of the law. In other words, the revisional power of the High Court or the Sessions Judge could be attracted if the order was not purely interlocutory but intermediate or quasi-final.³⁵

If an order is directed against a person who is not a party to the inquiry or trial, and he will have no opportunity to challenge it after a final order is made affecting the parties concerned, then for such a person the order could not be said to be interlocutory. An order may be conclusive with reference to the stage at which it is made, and it may also be conclusive as to a person, who is not a party to the enquiry or trial, against whom it is directed.³⁶

32. *Amur Nath v. State of Haryana*, (1977) 4 SCC 137; 1977 SCC (Cr) 585; 1977 Cr LJ 1891; see also *Hannath J. Jhaveri v. Sheila Daultani*, 1981 Cr LJ 958, 962 (Bom).

33. *Madhu Limaye v. State of Maharashtra*, (1977) 4 SCC 551; 1978 SCC (Cr) 10; 1978 Cr LJ 165.

34. *Madhu Limaye v. State of Maharashtra*, (1977) 4 SCC 551; 1978 SCC (Cr) 10; 1978 Cr LJ 165; *Antipudussami v. Papegowda*, 1978 Cr LJ 1233 (Kant); *Amur Nath v. State of Haryana*, (1977) 4 SCC 137; 1977 SCC (Cr) 585; 1977 Cr LJ 1891; *Abdul Jabbar Khan v. Kailash Chandra*, 1982 Cr LJ 128, 130 (Raj).

35. *V.C. Shinde v. State through CBI*, 1980 Supp SCC 92; 1980 SCC (Cr) 695, 707; 1980 Cr LJ 690.

36. *Parmeshwari Devi v. State*, (1977) 1 SCC 169; 1977 SCC (Cr) 74, 77; 1977 Cr LJ 245.

An order framing a charge has not been considered as an "interlocutory order" within the meaning of Section 397(2)³⁷. An order rejecting an application under Section 311 for recalling witnesses is an interlocutory order and hence revision is not maintainable against it.³⁸ In *Velmiki Faletro v. Lauriana Fernandes*³⁹, the Bombay High Court held that an order directing issuance of process is not interlocutory in nature. However in *Vardhman Stamping (P) Ltd. v. Sakira Seimitsu (I) Ltd.*⁴⁰, the Gujarat High Court seems to take the opposite view.

The order tendering pardon is a final order so far as the status and liability of the approvers are concerned. The other accused are clearly aggrieved by the order, and as such an order is not interlocutory in the context of Section 397(2), they can go in revision against the same⁴¹.

It may be noted that the restriction on revisional power in relation to interlocutory order is not applicable in respect of interlocutory order passed without jurisdiction. The reason is obvious. The object of enacting Section 397(2) was that by coming up in revision against interlocutory orders there would be delay in the disposal of criminal proceedings resulting in great harassment to the litigants. If interlocutory orders passed without jurisdiction cannot be interfered with by the revisional court at any earlier stage, then the harassment would be much greater and would be more oppressive. Interlocutory orders which are without jurisdiction and are nullities, have no existence in the eye of law. The litigants cannot escape harassment merely by ignoring them and that is why the jurisdiction of the High Court is invoked to quash such orders. Section 397(2) will have no application to such interlocutory orders which though have the form of interlocutory orders are no orders at all.⁴²

A question may arise as to whether the bar put by Section 397(2) on the revision of an interlocutory order can be circumvented by the aggrieved

37. *Madhu Limaye v. State of Maharashtra*, (1977) 4 SCC 551; 1978 SCC (Cri) 10; 1978 Cri LJ 165; *V.C. Shukla v. State through CBI*, 1980 Supp SCC 92; 1980 SCC (Cri) 695; 1980 Cri LJ 690; *Mohan Lal Dowlanbhai Chokshi v. J.S. Wagh*, 1981 Cri LJ 454, 460 (Bom); *Dattatraya Narayan Samant v. State of Maharashtra*, 1982 Cri LJ 1025, 1040 (Bom); *Sarojini Amma v. Sarojini*, 1988 Cri LJ 1362 (Ker); for contrary views, see *Jayaprakash v. State*, 1981 Cri LJ 460 (Ker); *State v. Mohd. Zaman*, 1981 Cri LJ 783 (J&K); *S.K. Mahajan v. Municipality Jammu*, 1982 Cri LJ 646, 653 (J&K); *Ramchandra v. State of M.P.*, 1989 Cri LJ 162 (MP); *Bhagabat Prasad Mohanty v. Kalarji Mahanty*, 1989 Cri LJ 410 (Ori); *N.K. Narayanan v. V. Vallyadharan*, 1991 Cri LJ 780 (Ker).

38. *Sanjay v. State of Haryana*, 2005 Cri LJ 287 (P&H).

39. 2005 Cri LJ 2498 (Bom).

40. 2007 Cri LJ 273 (Guj).

41. *R. Ravindran Nair v. Supdt. of Police*, 1981 Cri LJ 1424, 1426 (Ker).

42. *Rhimu Nark v. State*, 1975 Cri LJ 1923, 1930 (Ori); see also *Deena Nath v. Dattari Charan*, 1975 Cri LJ 1931, 1932 (Ori); *Saryabrata v. Jarnal Singh*, 1976 Cri LJ 446, 448 (Ori); *Shanmughasundaram Pillai v. State*, 1983 Cri LJ 115, 119 (Mad).

party by invoking the inherent powers of the High Court under Section 482.⁴³ Exceptions apart, the answer shall be in the negative. If the order assailed is purely of an interlocutory character, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power of the High Court.⁴⁴ But such cases would be few and far between. One such case would be the desirability of the quashing of the criminal proceedings initiated illegally, vexatiously or as being without jurisdiction.⁴⁵

Sub-section (3) of Section 397 lays down that if a revision application has been made by any person either to the High Court or to the Sessions Judge under Section 397(1), no further application by the same person shall be entertained by the other of them. Therefore once the Sessions Judge has passed an order on an application for revision this order is to be treated as final and no second revision petition lies before the High Court⁴⁶. The decision of the Sessions Judge, if he is approached first, is made final and conclusive (except in case of *suo motu* revision about which it *prima facie* appears that the powers of the High Court are not intended to be affected).⁴⁷ A person aggrieved by the Sessions Judge's decision would have no right to approach the High Court in revision. Such being the position under the (new) Code any rule or practice which requires such a person to first approach the Sessions Judge before going to the High Court would be out of place.⁴⁸ However in a later decision, the Bombay High Court has held that such a rule or practice is not ineffective and purposeless and an aggrieved

43. S. 482 is as follows: "Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

44. See discussions in *Charanjit Singh v. Garsharan Kaur*, 1990 Cri LJ 1264 (P&H); *I.R. Raviel v. Nalli Prakash*, 1990 Cri LJ 961 (All); *Devendra Dutt v. State*, 1990 Cri LJ 177 (Del).

45. *Muthu Limaye v. State of Maharashtra*, (1977) 4 SCC 551, 1978 SCC (Cri) 111, 15; 1978 Cri LJ 165; *Municipal Corpn. of Delhi v. Rani Kishan Rohtagi*, [1983] 1 SCC 1; 1983 SCC (Cri) 115, 118; 1983 Cri LJ 159.

46. *Chhall Das v. State of Haryana*, 1975 Cri LJ 129, 130 (P&H); see also *Rameshchandra Pujia Pandit Sanwant v. Jambhewar Patra*, 1975 Cri LJ 1921 (Or); *Deena Nath v. Dattari Charan*, 1975 Cri LJ 1931, 1932 (Or).

47. *Jagir Singh v. Runtle Singh*, (1979) 1 SCC 560; 1979 SCC (Cri) 348, 352, 353; 1979 Cri LJ 311; *Chhedilal v. Kamla*, 1978 Cri LJ 50 (All); *Jwambher Jain Sangrahalay v. Digamber Anand*, 1982 Cri LJ 701, 702 (Raj); *Babur v. Sambhanurthy*, 1980 Cri LJ 248 (AP).

48. *Saryanarayan v. Kannial*, 1976 Cri LJ 1806, 1812 (Guj). See also *P. Abhila v. State*, 1975 Cri LJ 139 (AP); *Kesavan Shiv Pillai v. Sreedharan Rajapochan*, 1978 Cri LJ 745 (Ker) (FB).

party cannot directly invoke the revisional jurisdiction of the High Court leapfrogging the Sessions Judge.⁴⁹

It may however be noted that the restriction on further revision as contained in Section 397(3) is confined to a second revision application filed by the same person only. In Section 397(3) the crucial words are: "no further application by the *same person* shall be entertained by the other of them". An illustration would make the position clear. A proceeding under Section 145 between X and Y terminated before the magistrate in favour of X. The criminal revision of Y before the Sessions Judge was dismissed. A criminal revision before the High Court at the instance of Y shall not be entertained. In the same illustration if Y's criminal revision before the Sessions Judge was allowed, a criminal revision to the High Court against the order of the Sessions Judge at the instance of X is maintainable. This is for the simple reason that the second criminal revision before the High Court is not at the instance of such person who filed the criminal revision before the Sessions Judge. On the language of Section 397(3) the conclusion is irresistible that a second revision at the instance of a successful party before a magistrate who lost the revision before the Sessions Judge would lie to the High Court⁵⁰.

25.4. Statement by Metropolitan Magistrate of grounds of his decision to be considered by the court of revision.—When the record of any trial held by a metropolitan magistrate is called for by the High Court or court of session under Section 397, the magistrate may submit with the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue; and the court shall consider such statement before overruling or setting aside the said decision or order. (Section 404)

According to Section 355⁵¹, a metropolitan magistrate is required to record specified particulars instead of writing a judgment; and in all cases in which an appeal lies from the final order either under Section 373 (Appeal from orders requiring security or refusal to accept or rejecting surety for keeping peace or good behaviour) or under Section 374(3) (i.e. appeals from convictions) the metropolitan magistrate is to record a brief statement of the reasons for the decision. The statement submitted under the above Section 404 supplements the meagre record of the case and helps the court of revision to consider whether the decision of the magistrate was justified.

49. *Arunkumar v. Chandanbai*, 1980 Cri LJ 601, 604 (Bom).

50. *Ramachandra Puja Panda Samant v. Jambhwar Patra*, 1975 Cri LJ 1021, 1023 (Or); *Imaytullah Rizvi v. Rahimullah*, 1981 Cri LJ 1398 (Bom); *Wajid Mirza v. Mohd. Ali Ahmed*, 1982 Cri LJ 890, 895-96 (AP).

51. See *supra* para 23.3.

25.5. Power to order inquiry—Section 398 provides as follows:

398. Power to order inquiry.—On examining any record under Section 397 or otherwise, the High Court or the Sessions Judge may direct the Chief Judicial Magistrate by himself or by any of the Magistrates subordinate to him to make, and the Chief Judicial Magistrate may himself make or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under Section 203 or sub-section (4) of Section 204, or into the case of any person accused of an offence who has been discharged:

Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made.

The power of the Sessions Judge, under Section 398 is to examine any record under Section 397 or otherwise and such power is exercisable to proceedings pending or concluded at the pre-charge stage. While records called for to exercise powers of revision under Section 397 are for the purpose of satisfying the court as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings, the power under Section 398 is not co-extensive with Section 397 but extends far wider as the record can "otherwise" be examined by the Sessions Judge without recourse to Section 397.⁵²

It is plain from the above section that so far as the orders of dismissal under Section 203⁵³ or sub-section(4) of Section 204⁵⁴ of the Code and of discharge under the relevant provisions of the Code are concerned, the bar provided in Section 397(2) against revision in relation to interlocutory orders has been removed.⁵⁵ So long as a dismissal of a complaint could not be said in the eye of law to be one falling under Section 203 [or Section 204(4)] the jurisdiction of the Sessions Judge or the High Court under Section 398 would not come into play.⁵⁶

The words "any person accused of an offence" indicate that the discharge relates to a person who has been accused of an offence. So these words do not include a person against whom proceedings have been taken under Sections 109, 110, 125, 133, and 145.

The proviso is imperative and requires that no order for further inquiry should be passed without giving an opportunity to the accused person to show cause why further inquiry should not be directed. It may be noted that the proviso applies only to cases where the accused has been discharged; it

52. *Gurbaksh Singh v. Vir Blam*, 1980 Cr. LJ 1154, 1156 (P&H).

53. See *supra* para 11.3.

54. See *supra* para 11.4.

55. *P.T. Dnyanesh v. Hanumanthappa*, 1976 Cr. LJ 1437, 1438 (Kant).

56. *H. Hanumanth v. H.G. Krishnappa*, 1973 Cr. LJ 1318, 1319 (Mys).

does not apply to the dismissal of a complaint. If a magistrate, on considering the facts, has found that there is no ground for proceeding against any person and therefore dismissed the complaint summarily, there is hardly any reason for the revising court to call anyone to court as an accused or as a respondent until of course, after a further inquiry has been made and that inquiry justifies the issuing of process.⁵⁷

The term 'further inquiry' in Section 398 has come to acquire a technical meaning. It does not mean 'fresh preliminary enquiry' but only the reappraisal of the very evidence which was examined prior to the passing of the order, which was set aside in revision or any other evidence cited in the complaint but not examined earlier, but examined after the remand.⁵⁸

It may however be noted that once a case is before the court of session in its revisional jurisdiction then the power under both the Sections 398 and 399 can be exercised by it and it is immaterial and academic to investigate as to which specific provision has been actually invoked.⁵⁹

25.6. Sessions Judge's powers of revision.—Section 399 provides as follows:

399. Sessions Judge's powers of revision.—(1) In the case of any proceeding the record of which has been called for by himself, the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under sub-section (1) of Section 401.

(2) Where any proceeding by way of revision is commenced before a Sessions Judge under sub-section (1), the provisions of subsections (2), (3), (4) and (5) of Section 401 shall, so far as may be, apply to such proceeding and references in the said sub-sections to the High Court shall be construed as references to the Sessions Judge.

(3) Where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision of the Sessions Judge thereon in relation to such person shall be final and no further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court.

Under Section 399(1) the Sessions Judge, in the case of any proceeding the record of which has been called for by himself under Section 397(1), may exercise all or any of the powers which are exercisable by the High Court under Section 401(1). As will be seen later in para 25.8, Section 401(1) enables the High Court to exercise in its revisional jurisdiction any of the powers conferred on a court of appeal by Sections 386, 389, 391 etc.⁶⁰ And in this view the Session Court does not have the power to order

57. See 41st Report, p. 288, para 32.10.

58. *Gurdial Singh v. Kartar Singh*, 1980 Cri LJ 955 (P&H).

59. *Bal Kishan Jain v. Indian Overseas Bank*, 1981 Cri LJ 796, 802 (P&H).

60. For the contents of Ss. 386, 389, 390, 391, see *supra* paras 24.12, 24.10, 24.11.

summoning of a person discharged by the magistrate⁶¹. It is interesting to note that though the Sessions Judge has no power to entertain any appeal against an order of acquittal under Section 378, or for enhancement of the sentence under Section 377, he can entertain applications for revision against acquittal or for enhancement of sentence from the complainant or from any person or the aggrieved party. In such cases, the Sessions Judge can invoke revisional jurisdiction even *no motu* without any application as such from any person. The Kerala High Court, however, in *T. Jayarajan v. P.R. Mohammed*⁶² explained that while under Section 401 the High Court can exercise its revisional powers *no motu*, the Sessions Court under Section 399 has powers of revision on being approached by a party. As such, the Sessions Court will have power to enhance sentence only on the request of the complainant.

The limitations on the exercise of the revisional powers of the High Court as contained in sub-sections (2), (3) and (4) of Section 401, and the enabling provision for treating the application for revision as a petition of appeal under certain circumstances as contained in Section 401(5), have all been made applicable by Section 399(2) to every proceeding by way of revision commenced before a Sessions Judge under Section 399(1). Section 401 will be discussed in detail in para 25.8.

As seen earlier, Section 397(3) provides that if an application under Section 397 to call for the records of an inferior criminal court has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them. Under Section 399 the Sessions Judges have been given the power to finally dispose of revision cases, the records of which have been called for by them. The motivation of the provisions appears to be to provide an easy remedy and secure expedition in the disposal of cases.⁶³ So Section 399(3) provides that where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision of the Sessions Judge thereon in relation to such a person shall be final and no further proceedings by way of revision at the instance of such person shall be entertained by the High Court. The effect of these two provisions is that, while a person has the choice to move either the High Court or the Sessions Judge under Section 397, if he chooses to go before the Sessions Judge he cannot thereafter go before the High Court even if the Sessions Judge rejects his revision application. Therefore the rule of practice under the old Code that except under exceptional circumstances, the High Court would not entertain a revision application unless that Sessions Judge was

61. *Baldev Singh v. State of Haryana*, 1988 Cri. LJ 534 (P&H).

62. 1999 Cri. LJ 1856 (Ker); also see *Mahendrabhai R. Patel v. Ambalal P. Patel*, 2005 Cri. LJ 840 (Guj).

63. *Wajid Mirza v. Mohd. Ali Ahmed*, 1982 Cri. LJ 890, 895-96 (AP).

moved in the first instance, is inconsistent with the scheme of the new Code i.e. the present Code; any insistence on following the old rule or practice hereafter would result in the destruction of the right of a person to move the High Court under Section 397. The rule of practice followed by many High Courts cannot any longer be followed in view of Sections 397(3) and 399(3).⁶⁴ However the Bombay High Court has held that such a rule or practice is not ineffective and purposeless and an aggrieved party cannot directly invoke the revisional jurisdiction of the High Court leapfrogging the sessions judge.⁶⁵

25.7. Powers of revision of Additional Sessions Judge.—An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him by or under any general or special order of the Sessions Judge [Section 400].

The powers given to Additional Sessions Judge under Section 400 include the power to dispose of an application for condoning the delay in a case transferred to him by the Sessions Judge, even if such an application is filed after the transfer.⁶⁶

25.8. High Court's powers of revision.—The powers of revision and the limitations on such powers of the High Court are contained in Section 401 which reads as follows:

401. High Court's powers of revision.—(1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a court of appeal by Sections 386, 389, 390 and 391 or on a Court of Session by Section 307 and, when the judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by Section 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is

64. *P. Abbuli v. State*, 1975 CrLJ 139, 140-41 (AP); *Kesavan Swan Pillal v. Sreedharan Rajamohan*, 1978 CrLJ 743 (Ker) (FB), *Brahmachari Satyanarayan v. Kantilal L. Dave*, 1976 CrLJ 1806 (Guj).

65. *Arunkumar v. Chandanbai*, 1980 CrLJ 601, 604 (Bom).

66. *K.M. Kurjakeru Chinnappan v. Neelakantan Chettiar*, 1981 CrLJ 1312, 1313 (Ker).

Mohd. Hashim v. State of U.P.

(2017) 2 SCC 198

Bench : Dipak Misra and Amitava Roy, JJ.

Dipak Misra, J.

2. Respondent Nos. 2 to 10 were prosecuted for the offences punishable Under Sections 498-A and 323 of the Indian Penal Code (Indian Penal Code) and Sections 3 and 4 of the Dowry Prohibition Act, 1961 (for short, 'the 1961 Act'). The Respondent Nos. 2 and 3 were convicted Under Section 498-A

Indian Penal Code and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs. 1,000/- (Rupees one thousand only) each with the default clause. The other accused, i.e., Respondent Nos. 4 to 10 were convicted for the offence punishable Under Section 498-A of the Indian Penal Code and sentenced to undergo simple imprisonment of six months and pay a fine of Rs. 1,000/- (Rupees one thousand only) each with the default clause. All the accused persons were convicted Under Section 323 of the Indian Penal Code and Section 4 of the 1961 Act and sentenced to undergo rigorous imprisonment for six months on the first count and for a period of one year on the second score. They were also sentenced to pay fine with the stipulation of the default clause.

3. The Respondents challenged the judgment of conviction and order of sentence before the learned Sessions Judge, Unnao, U.P. in Criminal Appeal No. 55 of 2013 who, in course of hearing, taking note of the fact that the counsel appearing for the Appellants had abandoned the challenge pertaining to the conviction but only confined the argument seeking benefit Under Section 4 of the Probation of Offenders Act, 1958 (for short, 'the PO Act'), extended the benefit as prayed for.

4. Being grieved by the aforesaid judgment of the learned appellate Judge, the informant preferred Criminal Revision No. 252 of 2013 before the High Court. In its assail, the counsel for the informant placed reliance on *Shyam Lal Verma v. Central Bureau of Investigation, State Through SP, New Delhi v. Ratan Lal Arora* (2004) 4 SCC 590, and State represented by *Inspector of Police, Pudukottai, T.N. v. A. Parthiban* (2006) 11 SCC 473 to buttress the submission that the benefit Under Section 4 of the PO Act could not have been extended to the convicts regard being had to the nature of the offences and the punishment provided for the same. The High Court repelling the argument concurred with the opinion expressed by the learned Sessions Judge.

6. There is no dispute over the fact that the Respondents were convicted as has been stated earlier. The question is **whether the approach of the learned appellate Judge which have been concurred by the High Court is legally sustainable.**

7. In this context, it is pertinent to appreciate the scheme of the PO Act. Section 3 of the PO Act confers power on the Court to release certain offenders after admonition.

8. Section 4 of the PO Act deals with the power of Court to release certain offenders on probation on good conduct.

9. Section 6 of the PO Act stipulates restrictions on imprisonment of offenders under twenty-one years of age.

10. It is submitted by the learned Counsel for the Appellant that as the Respondents were convicted Under Section 498-A of Indian Penal Code and Section 4 of the 1961 Act, the Respondents could not have been conferred the benefit of probation on good conduct, for Section 4 of the 1961 Act prescribes a minimum sentence. Additionally, it is also canvassed by him that even if the said provision is applicable, the Court has not considered the nature of offences and other requisite aspects to extend the benefit under the said provision.

11. We shall deal with the first aspect, that is, **whether Section 4 of the 1961 Act prescribes a minimum sentence**, first. In *Shyam Lal Verma* (supra), a two-Judge Bench, after referring to *Ratan Lal Arora* (supra), has held thus:

It is not in dispute that the issue raised in this appeal has been considered by this Court in State Through SP, New Delhi v. Ratan Lal Arora (supra) wherein in similar circumstances, this Court held that since Section 7 as well as Section 13 of the Prevention of Corruption Act provide for a minimum sentence of six months and one year respectively in addition to the maximum sentences as well as imposition of fine, in such circumstances claim for granting relief under the Probation of Offenders Act is not permissible. In other words, in cases where a specific provision prescribed a minimum sentence, the provisions of the Probation Act cannot be invoked. Similar view has been expressed in State Represented by Inspector of Police, Pudukottai, T.N. v. A. Parthiban (supra).

...

16. In Ratan Lal Arora (supra) the learned single Judge of the Delhi High Court while upholding conviction of the accused under the Prevention of Corruption Act, 1988 further held him to be entitled to the benefits of Section 360 of the Code of Criminal Procedure. The Court adverted to Section 7 and Section 13 of the Prevention of Corruption Act which provide for minimum sentence of six months and one year respectively in addition to the maximum sentence as well as imposition of fine. Reference was made to Section 28 that stipulates that the provisions of the Act shall be in addition to and not in derogation of any other law for the time being in force. Reliance was placed on the decision in Bahubali (supra) while interpreting the said provision and relying on the authority in Bahubali (supra) the Court ruled that Section 28 of the Prevention of Corruption Act had a tenor of Section 43 of the Defence of India Act. In that context, it observed:

Unlike the provisions contained in Section 5(2) proviso of the old Act providing for imposition of a sentence lesser than the minimum sentence of one year therein for any "special reasons" to be recorded in writing, the Act did not carry any such power to enable the court concerned to show any leniency below the minimum sentence stipulated. Consequently, the learned Single Judge in the High Court committed a grave error of law in extending the benefit of probation even under the Code.

17. The said principle has been reiterated in State represented by Inspector of Police, Pudukottai, T.N. v. A. Parthiban MANU/SC/8540/2006 : (2006) 11 SC 473.

18. The issue that arises for consideration is **whether minimum sentence is provided for offences under which the Respondents have been convicted**. On a plain reading of Section 323 and 498-A, it is quite clear that there is no prescription of minimum sentence. Learned Counsel for the Appellant would contend that Section 4 of the 1961 Act provides for minimum punishment. To appreciate the said contention, the provision is reproduced below:

4. Penalty for demanding dowry.--If any person demands, directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom, as the case may be, any dowry, he shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than six months.

19. Learned Counsel would submit that the legislature has stipulated for imposition of sentence of imprisonment for a term which shall not be less than six months and the proviso only states that sentence can be reduced for a term of less than six months and, therefore, it has to be construed as minimum sentence. The said submission does not impress us in view of the authorities in Arvind Mohan Sinha (supra) and Ratan Lal Arora (supra). We may further elaborate that when the legislature has prescribed minimum sentence without discretion, the same cannot be reduced by the Courts. In such cases, imposition of minimum sentence, be it imprisonment or fine, is mandatory and leaves no discretion to the court. However, sometimes the legislation prescribes a minimum sentence but grants discretion and the courts, for reasons to be recorded in writing, may award a lower sentence or not award a sentence of imprisonment. Such discretion includes the discretion not to send the accused to prison. Minimum sentence means a sentence which must be imposed without leaving any discretion to the court. It means a quantum of punishment which cannot be reduced below the period fixed. If the sentence can be reduced to nil, then the statute does not prescribe a minimum sentence. A provision that gives discretion to the court not to award minimum sentence cannot be equated with a provision which prescribes minimum sentence. The two provisions, therefore, are not identical and have different implications, which should be recognized and accepted for the PO Act.

20. Presently, we shall advert to the second plank of the submission advanced by the learned Counsel for the Appellant. In Rattan Lal v. State of Punjab MANU/SC/0072/1964: AIR 1965 SC 444. Subba Rao, J., speaking for the majority, opined thus:

The Act is a milestone in the progress of the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of criminal law is more to reform the individual offender than to punish him. Broadly stated, the Act distinguishes offenders below 21 years of age and those above that age, and offenders who are guilty of having committed an offence punishable with death or imprisonment for life and those who are guilty of a lesser offence. While in the case of offenders who are above the age of 21 years absolute discretion is given to the court to release them after admonition or on probation of good conduct, subject to the conditions laid down in the appropriate provisions of the Act, in the case of offenders below the age of 21 years an injunction is issued to the court not to sentence them to imprisonment unless it is satisfied that having regard

to the circumstances of the case; including the nature of the offence and the character of the offenders, it is not desirable to deal with them Under Sections 3 and 4 of the Act.

We have reproduced the aforesaid passage to understand the philosophy behind the Act.

21. In this regard, it is also seemly to refer to other authorities to highlight how the discretion vested in a court under the PO Act is to be exercised. In *Ram Prakash v. State of Himachal Pradesh* MANU/SC/0212/1972 : AIR 1973 SC 780, while dealing with Section 4 of the PO Act in the context of the Prevention of Food Adulteration Act, 1954, the Court opined that the word 'may' used in Section 4 of the PO Act does not mean 'must'. On the contrary, as has been held in the said authority, it has been made clear in categorical terms that the provisions of the PO Act distinguishes offenders below 21 years of age and those above that age and offenders who are guilty of committing an offence punishable with death or imprisonment for life and those who are guilty of a lesser offence. Thereafter, the Court has proceeded to observe:

While in the case of offenders who are above the age of 21 years, absolute discretion is given to the Court to release them after admonition or on probation of good conduct in the case of offenders below the age of 21 years, an injunction is issued to the Court not to sentence them to imprisonment unless it is satisfied that having regard to the circumstances of the case, including the nature of the offence and the character of the offenders, it is not desirable to deal with them Under Sections 3 and 4 of the Act. (Ratan Lal v. State of Punjab (supra) and Ramji Missir v. the State of Bihar AIR 1963 SC 1088).

22. Be it noted, in the said case, keeping in view the offence under the Prevention of Food Adulteration Act, 1954, the Court declined to confer the benefit Under Section 4 of the PO Act.

23. We have referred to the aforesaid authority to stress the point that the Court before exercising the power Under Section 4 of the PO Act has to keep in view the nature of offence and the conditions incorporated Under Section 4 of the PO Act. Be it stated in *Dalbir Singh v. State of Haryana and Ors.* MANU/SC/0345/2000 : AIR 2000 SC 1677 it has been held that Parliament has made it clear that only if the Court forms the opinion that it is expedient to release the convict on probation for the good conduct regard being had to the circumstances of the case and one of the circumstances which cannot be sidelined in forming the said opinion is "the nature of the offence". The Court has further opined that though the discretion as been vested in the court to decide when and how the court should form such opinion, yet the provision itself provides sufficient indication that releasing the convicted person on probation of good conduct must appear to the Court to be expedient.

9. *In State of Gujarat v. Jamnadas G. Pabri* AIR 1974 SC 2233 a three-Judge Bench of this Court has considered the word "expedient". Learned Judges have observed in para 21 thus:

Again, the word 'expedient' used in this provisions, has several shades of meaning. In one dictionary sense, 'expedient' (adj.) means 'apt and suitable to the end in view', 'practical and efficient'; 'politic'; 'profitable'; 'advisable', 'fit, proper and suitable to the circumstances of the case'. In another shade, it means a device 'characterised by mere utility rather than principle, conducive to special advantage rather than to what is universally right' (see Webster's New International Dictionary).

10. *It was then held that the court must construe the said word in keeping with the context and object of the provision in its widest amplitude. Here the word "expedient" is used in Section 4 of the PO Act in the context of casting a duty on the court to take into account "the circumstances of the case including the nature of the offence...". This means Section 4 can be resorted to when the court considers the circumstances of the case, particularly the nature of the offence, and the court forms its opinion that it is suitable and appropriate for accomplishing a specified object that the offender can be released on probation of good conduct.*

24. We have highlighted these aspects for the guidance of the appellate court as it has exercised the jurisdiction in a perfunctory manner and we are obligated to say that the High Court should have been well advised to rectify the error.

25. At this juncture, learned Counsel for the Respondents would submit that no arguments on merits were advanced before the appellate court except seeking release under the Po Act. We have made it clear that there is no minimum sentence, and hence, the provisions of the PO Act would apply. We have also opined that the court has to be guided by the provisions of the PO Act and the precedents of this Court. Regard being had to the facts and circumstances in entirety, we are also inclined to accept the submission of the learned Counsel for the Respondents that it will be open for them to raise all points before the appellate court on merits including seeking release under the PO Act.

26. Resultantly, the appeal is allowed, the judgment and order passed by the High Court and the appellate court are set aside and the matter is remitted to the appellate court for disposal in accordance with law.

Gurdev Singh v. Surinder Singh
2014(9) SCALE 556

Judges/Coram: *Ranjana Prakash Desai and N.V. Ramana, JJ*

1. The Petitioner and Respondents 1 and 2 are brothers. Respondents 1 and 2 filed complaint under Sections 420, 467, 468, 471, 120B of the Indian Penal Code ("the IPC") in the Court of Additional Chief Judicial Magistrate, Patiala ("the Addl. C.J.M.") being Complaint No. 55 dated 14/6/2008 against the Petitioner and Respondent 3. In the complaint, the complainants alleged that an agreement of exchange of land was entered into between the complainants and the Petitioner wherein land measuring 12 kanals, 3 marlas i.e. 243/852 share out of land measuring 42 kanals 12 marlas belonging to the complainants was transferred to the Petitioner and in lieu of this, land belonging to the Petitioner measuring 12 kanals 3 marlas i.e. 243/730 share out of total land measuring 36 kanals 10 marlas was transferred to the complainants. On execution of the said agreement, the possession of the land was also exchanged on 22/3/2005. Accordingly and as per the exchange agreement, Respondent 3 recorded the exchange mutation in the revenue record vide Rapat No. 616 dated 30/4/2005 and Exchange Mutation No. 14599 was sanctioned by the Tehsildar, Patiala. According to the complainants, Respondent 3 and the Petitioner hatched a conspiracy and tampered with the revenue record of village Sanaur, Tehsil and District Patiala in respect of the aforesaid land. According to the complainants, Respondent 3 and the Petitioner wrote the exchanged area as 14 kanals 3 marlas instead of 12 kanals 3 marlas causing wrongful gain to the Petitioner and wrongful loss to them. According to the complainants, on the basis of the illegal and fraudulent entries made by Respondent 3 in the revenue record, the Petitioner is trying to grab 2 kanals of land from the complainant. The Petitioner and Respondent 3 have, therefore, played a fraud upon the complainants and cheated them. According to the complainants, though they approached the police, the police did not take any action. The complainants, therefore, filed the present complaint before the Addl. C.J.M. as aforesaid.

2. By order dated 19/1/2009, the Addl. C.J.M., dismissed the complaint observing that the complainants should approach the revenue authorities for correction of revenue record. The complainants carried, a revision to the Additional Sessions Judge, Patiala. By order dated 6/7/2010, the Additional Sessions Judge, Patiala set aside order dated 19/1/2009 and remanded the complaint to the Addl. C.J.M. with a direction to hold further inquiry in the complaint filed by the complainants. The Addl. C.J.M. by order dated 24/2/2011, holding that there are sufficient grounds to proceed against both the Petitioner and Respondent 3, issued summoning order. Being aggrieved by the remand order passed by the Additional Sessions Judge, Patiala and the summoning order passed by the Addl. C.J.M., the Petitioner filed a petition under Section 482 of the Code of Criminal Procedure ("the Code") for quashing of Complaint No. 55 dated 14/6/2008; remand order dated 6/7/2010 passed by the Additional Sessions Judge and the summoning order dated 24/2/2011 passed by the Addl. C.J.M. By the impugned order, the Punjab & Haryana High Court dismissed the said petition. Hence, this special leave petition.

3. Before the High Court, only two submissions were advanced. It was argued that since the matter was remitted to the Addl. C.J.M., it was incumbent upon the Addl. C.J.M. to record fresh evidence before passing summoning order. This contention was rejected by the High Court observing that the zimni orders stated that fresh preliminary evidence was led by the complainants and the summoning order was not passed on the basis of the material which was already on record. The High Court also placed reliance on the judgment of this Court in *Subrata Das v. State of Jharkhand and Anr.* MANU/SC/0887/2010: AIR 2011 SC 177 where this Court has held that direction to hold further enquiry does not necessarily oblige the Addl. C.J.M. to record further evidence. The relevant portion of the said judgment reads thus:

"The matter as noticed by us earlier had been remanded back to the Chief Judicial Magistrate to hold a further enquiry. That direction did not necessarily oblige the Magistrate to record any further evidence in the case. The nature of the inquiry was in the discretion of the Magistrate which may or may not have included recording of further evidence on behalf of the complainant. The Magistrate could without recording any further evidence in the matter reappraise the averments made in the complaint and the material already on record to determine whether a prima facie case was made out against the accused persons. In as much as the Magistrate in the instant case summoned the witnesses and examined them afresh, he may have gone beyond what was legally necessary to do but that is no reason to hold that the recording of evidence by the Magistrate as a part of the further enquiry

directed by the High Court would vitiate the proceedings before him or the conclusion drawn on the basis of any such enquiry. So long as the Magistrate was satisfied that a prima facie case had been made out, he was competent to issue summons to the accused. All told, the alleged error sought to be pointed out by the Appellant is not of a kind that would persuade us to interfere with the proceedings at this stage. In the result this appeal fails and is hereby dismissed."

The High Court further held that preliminary evidence led in the shape of C-1 and C-2 as well as the documents Annexures P-1 to P-5 prima facie disclose the commission of offences punishable under Sections 420, 467, 468, 471, 120B of the IPC and whether wrong entry in the revenue record was mala fide or bona fide is an issue to be determined by the Addl. C.J.M. during the course of trial.

4. Mr. Luthra, learned senior counsel for the Petitioner raised only one contention before us. He submitted that the Addl. C.J.M. dismissed the complaint on 19/1/2009. The complainants carried a revision to the Additional Sessions Judge. By order dated 6/7/2010, the Additional Sessions Judge set aside the order dated 19/1/2009 and remanded the complaint to the Addl. C.J.M. with a direction to hold further enquiry. Counsel submitted that the Petitioner/accused was, however, not given a hearing at that stage, which was a must. In this connection, he relied on Manharibhai Muljibhai Kakadia and Anr. v. Shaileshbhai Mohanbhai Patel and Ors. MANU/SC/0819/2012: (2012) 10 SCC 517. Counsel submitted that it is therefore necessary to quash the proceedings as they are vitiated on account of failure to give a hearing to the Petitioner/accused by the revisional court while setting aside the dismissal of the complaint.

5. We find substance in this submission. Dismissal of the complaint terminates criminal proceedings against the accused. If the complainant carries the matter further by filing a revision and the Sessions Court sets aside the dismissal order and remands the matter to the Addl. C.J.M. for fresh enquiry, the complaint is revived. In this connection, it is necessary to refer to Section 401 of the Code which lays down the High Court's powers of revision. Subsection (2) thereof states that no order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence. Section 399 of the Code refers Sessions Judge's powers of revision. Sub-section (2) thereof states that where any proceeding by way of revision is commenced before a Sessions Judge under Subsection (1), the provisions of Subsections (2), (3), (4) and (5) of Section 401 shall, so far as may be, apply to such proceeding and reference in the said Subsections to the High Court shall be construed as reference to the Sessions Judge.

6. Thus, it was obligatory on the Additional Sessions Judge to hear the accused before setting aside the order of dismissal of complaint in his revisional jurisdiction. Of course, once the matter is remanded to the Addl. C.J.M., the accused will have no right of hearing because at pre-process stage, the law does not give him any such right. It is only in the aforementioned situation that the accused is entitled to a hearing. In Manharibhai Muljibhai Kakadia, this Court considered the question whether a suspect is entitled to hearing by the revisional court in a revision filed by the complainant challenging an order of the Magistrate dismissing the complaint under Section 203 of the Code. This Court considered the relevant provisions of the Code and observed as under:

"Section 202 of the Code has twin objects; one, to enable the Magistrate to scrutinize carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an unnecessary, frivolous or meritless complaint and the other, to find out whether there is some material to support the allegations made in the complaint. The Magistrate has a duty to elicit all facts having regard to the interest of an absent accused person and also to bring to book a person or persons against whom the allegations have been made. To find out the above, the Magistrate himself may hold an inquiry under Section 202 of the Code or direct an investigation to be made by a police officer. The dismissal of the complaint under Section 203 is without doubt a preissuance of process stage. The Code does not permit an accused person to intervene in the course of inquiry by the Magistrate under Section 202.

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The legal position is fairly well-settled that in the proceedings under Section 202 of the Code the accused/suspect is not entitled to be heard on the question whether the process should be issued against him or not. As a matter of law, up to the stage of issuance of process, the accused cannot claim any right of hearing. Section 202 contemplates postponement of issue of process where the

Magistrate is of an opinion that further inquiry into the complaint either by himself is required and he proceeds with the further inquiry or directs an investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. If the Magistrate finds that there is no sufficient ground for proceeding with the complaint and dismisses the complaint under Section 203 of the Code, the question is whether a person accused of crime in the complaint can claim right of hearing in a revision application preferred by the complainant against the order of the dismissal of the complaint. Parliament being alive to the legal position that the accused/suspects are not entitled to be heard at any stage of the proceedings until issuance of process under Section 204, yet in Section 401(2) of the Code provided that no order in exercise of the power of the revision shall be made by the Sessions Judge or the High Court, as the case may be, to the prejudice of the accused or the other person unless he had an opportunity of being heard either personally or by pleader in his own defence.

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The dismissal of complaint by the Magistrate under Section 203 --although it is at preliminary stage nevertheless results in termination of proceedings in a complaint against the persons who are alleged to have committed the crime. Once a challenge is laid to such order at the instance of the complainant in a revision petition before the High Court or the Sessions Judge, by virtue of Section 401(2) of the Code, the suspects get the right of hearing before the Revisional Court although such order was passed without their participation. The right given to "accused" or "the other person" under Section 401(2) of being heard before the Revisional Court to defend an order which operates in his favour should not be confused with the proceedings before a Magistrate under Sections 200, 202, 203 and 204. In the revision petition before the High Court or the Sessions Judge at the instance of the complainant challenging the order of dismissal of complaint, one of the things that could happen is reversal of the order of the Magistrate and revival of the complaint. It is in this view of the matter that the accused or other person cannot be deprived of hearing on the face of the express provision contained in Section 401(2) of the Code. The stage is not important whether it is pre-process stage or post process stage.

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If the Revisional Court overturns the order of the Magistrate dismissing the complaint and the complaint is restored to the file of the Magistrate and it is sent back for fresh consideration, the persons who are alleged in the complaint to have committed the crime have, however, no right to participate in the proceedings nor are they entitled to any hearing of any sort whatsoever by the Magistrate until the consideration of the matter by the Magistrate for issuance of process."

7. In view of this clear legal position, only on the aforementioned ground, we set aside the impugned order. Needless to say that order dated 6/7/2010 passed by the Additional Sessions Judge, Patiala setting aside order dated 19/1/2009 passed by the Addl. C.J.M. and remanding the complaint to the Addl. C.J.M. with a direction to hold further enquiry is set aside. We direct the Additional Sessions Judge, Patiala to hear the revision application afresh after hearing the Petitioner/accused and pass appropriate order at the earliest and in any event within two months from today. Needless to say further that in view of the above, summoning order dated 24/2/2011 passed by the Addl. C.J.M. is also set aside. We, however, make it clear that we have not quashed Complaint No. 55 dated 14/6/2008 nor have we expressed any opinion on the view expressed by the High Court on the question whether if a complaint is remanded to the Addl. C.J.M. for enquiry, fresh evidence must necessarily be taken. In fact, on the merits of the case, we have expressed no opinion. The special leave petition is disposed of in the aforestated terms.

Subhash Chand v. State (Delhi Administration)

Judges/Coram:

Aftab Alam and Ranjana Prakash Desai, JJ.

Ranjana Prakash Desai, J.

2. This appeal, by special leave, is directed against judgment and order dated 07/01/2011 passed by the High Court of Delhi in Criminal Misc. Case No. 427 of 2009 whereby the High Court dismissed the petition filed by the Appellant holding that an appeal filed by the State against an order of acquittal shall lie to the Sessions Court Under Section 378(1) of the Code of Criminal Procedure, 1973 (for short, "**the Code**") and not Under Section 378(4) of the Code to the High Court.

3. The Appellant is the supplier-cummanufacturer of the food article namely Sweetened Carbonated Water. He is carrying on business in the name and style of M/s. Subhash Soda Water Factory. On 6/6/1989 at about 4.15 p.m., one P.N. Khatri, Food Inspector, purchased a sample of sweetened carbonated water for analysis from one Daya Chand Jain, Vendor-cum-Contractor of Canteen at Suraj Cinema, Dhansa Road, Najafgarh, Delhi. After following the necessary procedure, the sample was sent to the Public Analyst for analysis. On analysis, the Public Analyst opined that the sample does not conform to the prescribed standard. After conclusion of the investigation, the Respondent-State through its Local Health Authority-P.K. Jaiswal filed a Complaint bearing No. 64 of 1991 against the Appellant and Daya Chand in the Court of the Metropolitan Magistrate, New Delhi alleging that the Appellant and the said Daya Chand had violated the provisions of Sections 2(ia), (a), (b), (f), (h), (l), (m), Section 2(ix) (j), (k) and Section 24 of the Prevention of Food Adulteration Act, 1954 (for short, "**PFA Act**") and Rule 32, Rule 42 (zzz)(i) and Rule 47 of the Prevention of Food Adulteration Rules, 1955 (for short, "**the Rules**") and committed an offence punishable Under Section 16(1)(1A) read with Section 7 of the PFA Act and the Rules. Since Daya Chand died during the pendency of the case, the case abated as against him. The Appellant was tried and acquitted by learned Magistrate by order dated 27/2/2007.

4. Being aggrieved by the said order dated 27/2/2007, the Respondent-State preferred Criminal Appeal No. 13 of 2008 in the Sessions Court under Section 378(1) (a) of the Code. The Appellant raised a preliminary objection in regard to the maintainability of the said Appeal before the Sessions Court in view of Section 378(4) of the Code. He contended that an appeal arising from an order of acquittal in a complaint case shall lie to the High Court. The said objection was rejected by the Sessions Court by order dated 4/2/2009.

5. Aggrieved by the said order dated 4/2/2009, the Appellant preferred Criminal Misc. Case No. 427 of 2009 before the High Court. By order dated 9/7/2009, the High Court held that the Sessions Court has no jurisdiction to entertain an appeal filed in a complaint case and directed that the appeal be transferred to it. Accordingly, Criminal Appeal No. 13 of 2008 pending before the Sessions Court was transferred to the High Court and re-numbered as Criminal Appeal No. 642 of 2009.

6. The Respondent-State carried the said order dated 9/7/2009 to this Court by Special Leave Petition (Crl.) No. 9880 of 2009 (Criminal Appeal No. 1514 of 2010). By order dated 13/8/2010, this Court remanded the matter to the High Court and directed that the matter be decided afresh after taking into consideration Sections 378(1) and 378(4) of the Code and the relevant provisions of the PFA. On remand, the High Court passed the impugned judgment and order dated 7/1/2011.

7. The short point which arises for consideration in this appeal is **whether in a complaint case, an appeal from an order of acquittal of the Magistrate would lie to the Sessions Court under Section 378(1) (a) of the Code or to the High Court under Section 378(4) of the Code.**

8. At our request, Mr. Sidharth Luthra, learned Additional Solicitor General has assisted us as Amicus Curiae. We have heard Ms. Meenakshi Lekhi, learned Counsel appearing for the Petitioner and Mr. P.P. Malhotra, learned Additional Solicitor General appearing for the State. Written submissions have been filed by the counsel which we have carefully perused. Mr. Luthra took us through the relevant excerpts of Law Commission's reports. He took us

through the Code of Criminal Procedure (Amendment) Bill, 1994 (Bill No. XXXV of 1994). He also took us through un-amended and amended Section 378 of the Code. After analyzing the relevant provisions, Mr. Luthra submitted that no appeal lies against an order of acquittal in cases instituted upon a complaint to the Sessions Court. Ms. Lekhi also adopted similar line of reasoning.

9. Mr. Malhotra learned Additional Solicitor General adopted a different line of argument and therefore, it is necessary to note his submissions in detail. Counsel pointed out how the law relating to appeals against orders of acquittal has evolved over the years. Counsel submitted that under the Code of Criminal Procedure, 1861 no appeal against an order of acquittal could be filed. The Code of Criminal Procedure, 1872 permitted only the State Government to file an appeal against acquittal order. Section 417 of the Code of Criminal Procedure, 1898 permitted only the State to file an appeal against acquittal order. In 1955 it was amended so as to permit the complainant to file an appeal against acquittal order. Under the Code of Criminal Procedure, 1973, Section 417 was substituted by Section 378. Counsel pointed out that Under Section 378(4) a complainant could prefer appeal against order of acquittal, if special leave was granted by the High Court. However, in all cases the State could present appeal against order of acquittal. Counsel then referred to Section 378 of the Code as amended by Act No. 25 of 2005 and submitted that the only change in Sub-section (1) is adding Clauses (a) and (b) to it. Counsel described this change as minor and submitted that the State's right to file appeal against orders of acquittal remains intact and is not taken away. Counsel relied on the words 'State Government may, in any case' and submitted that these words preserve the State's right to file appeal against acquittal orders of all types. There is no limitation on this right whatsoever. This right is preserved according to the counsel because the State is the protector of people. Safety and security of the community is its concern. Even if a complainant does not file an appeal against an order of acquittal, the State Government can in public interest file it. Counsel also addressed us on the question of plurality of appeals. That issue is not before us. It is, therefore, not necessary to refer to that submission. In support of his submissions counsel placed reliance on Khemraj v. State of Madhya Pradesh MANU/SC/0141/1975: 1976 (1) SCC 385, State (Delhi Administration) v. Dharampal MANU/SC/0671/2001: 2001 (10) SCC 372, Akalu Ahir and Ors. v. Ramdeo Ram MANU/SC/0076/1973 : 1973 (2) SCC 583, State v. Ram Babu and Ors. MANU/UP/0251/1970: 1970 AWR 288, Food Inspector v. Moidoo 1988 (2) KLT 205, Prasannachary v. Chikkapinachari and Anr. MANU/KA/0051/1959: AIR 1959 (Kant) 106, State of Maharashtra v. Limbaji Savaji Mhaske, Sarpanch Gram Panchayat 1976 (Mah.) LJ 475, State of Punjab and Anr. v. Jagan Nath MANU/PH/0389/1986: 1986 (90) PLR 466 and State of Orissa v. Sapaneswar Thappa MANU/OR/0323/1986: 1987 Cri. L.J. 612.

10. To understand the controversy, it is necessary to have a look at Section 378 of the Code prior to its amendment by Act 25 of 2005 and Section 378 amended thereby.

11. Section 378 of the Code prior to its amendment by Act 25 of 2005 read as under:

Appeal in case of acquittal.

378. Appeal in case of acquittal. (1) *Save as otherwise provided in Sub-section (2) and subject to the provisions of Sub-sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court 2*[or an order of acquittal passed by the Court of Session in revision.]*

(2) *If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may also direct the Public Prosecutor to present an appeal, subject to the provisions of Sub-section (3), to the High Court from the order of acquittal.*

(3) *No appeal under Sub-section (1) or Subsection (2) shall be entertained except with the leave of the High Court.*

(4) *If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.*

(5) *No application under Sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.*

(6) *If in any case, the application under Subsection (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under Sub-section (1) or under Sub-section (2).*

Thus, under earlier Section 378(1) of the Code, the State Government could, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court or an order of acquittal passed by the Court of Session in revision.

Section 378(2) covered cases where order of acquittal was passed in any case in which the offence had been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 or by any other agency empowered to make investigation into an offence under any Central Act other than the Code. In such cases, the Central Government could also direct the Public Prosecutor to present an appeal to the High Court from an order of acquittal. Section

378(3) stated that appeals under sub-sections (1) and (2) of Section 378 of the Code could not be entertained except with the leave of the High Court. Sub-section (4) of Section 378 of the Code provided for orders of acquittal passed in any case instituted upon complaint. According to this provision, if on an application made to it by the complainant, the High Court grants special leave to appeal from the order of acquittal, the complainant could present such an appeal to the High Court. Sub-section (5) of Section 378 of the Code provided for a period of limitation. Sub-section (6) of Section 378 of the Code stated that if in any case, the application under Sub-section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under Sub-sections (1) or (2). Thus, if the High Court refused to grant special leave to appeal to the complainant, no appeal from that order of acquittal could be filed by the State or the agency contemplated in Section 378(2). It is clear from these provisions that earlier an appeal against an order of acquittal could only lie to the High Court. Sub-section (4) was aimed at giving finality to the orders of acquittal.

12. Before we proceed to analyze the amended Section 378 of the Code, it is necessary to quote the relevant clause in the 154th Report of the Law Commission of India, which led to the amendment of Section 378 by Act 25 of 2005. It reads thus:

6.12. Clause 37: In order to guard against the arbitrary exercise of power and to reduce reckless acquittals, Section 378 is sought to be amended providing an appeal against an order of acquittal passed by a Magistrate in respect of cognizable and non-bailable offence filed on a police report to the Court of Session as directed by the District Magistrate. In respect of all other cases filed on a police report, an appeal shall lie to the High Court against an order of acquittal passed by any other court other than the High Court, as directed by the State Government. The power to recommend appeal in the first category is sought to be vested in the District Magistrate and the power in respect of second category would continue with the State Government.

The Code of Criminal Procedure (Amendment) Bill, 1994 has the same note on Clause 37.

13. Though, the Law Commission's 154th report indicated that Section 378 was being amended to provide that an appeal against an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence filed on a police report would lie to the court of Sessions, the words "police report" were not included in the amended Section 378. In this connection, it is necessary to refer to the relevant extract from the Law Commission's 221st report of April, 2009. After noting amendment made to Section 378 the Law Commission stated as under:

2.9 All appeals against orders of acquittal passed by Magistrates were being filed in High Court prior to amendment of Section 378 by Act 25 of 2005. Now, with effect from 23.06.2006, appeals against orders of acquittal passed by Magistrates in respect of cognizable and non-bailable offences in cases filed on police report are being filed in the Sessions Court, vide Clause (a) of Sub-section (1) of the said section. But, appeal against order of acquittal passed in any case instituted upon complaint continues to be filed in the High Court, if special leave is granted by it on an application made to it by the complainant, vide Sub-section (4) of the said section.

2.10 Section 378 needs change with a view to enable filing of appeals in complaint cases also in the Sessions Court, of course, subject to the grant of special leave by it.

These two extracts of the Law Commission's report make it clear that though the words 'police report' are not mentioned in Section 378(1) (a), the Law Commission noted that the effect of the amendment was that all appeals against an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence in cases filed on police report are being filed in the Sessions Court. The Law Commission lamented that there is no provision enabling filing of appeal in complaint cases in the Sessions Court subject to the grant of special leave by it. Thus, the Law Commission acknowledged that there is no provision in the Code under which appeals in complaint cases could be filed in the Sessions Court. We agree with this opinion for reasons which we shall now state.

14. Having analysed un-amended Section 378 it is necessary to have a look at Section 378 of the Code, as amended by Act 25 of 2005. It reads as under: **378. Appeal in case of acquittal.** [(1) Save as otherwise provided in Sub-section (2) and subject to the provisions of Sub-sections (3) and (5),-

(a) *the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and nonbailable offence;*

(b) *the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court [not being an order under Clause (a)] [or an order of acquittal passed by the Court of Session in revision].*

(2) *If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946) or by any other agency empowered to make investigation into an offence under any Central Act other than this Code. [the Central Government may, subject to the provisions of Subsection (3), also direct the Public Prosecutor to present an appeal-*

(a) *to the Court of Session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;*

(b) *to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under Clause (a)] or an order of acquittal passed by the Court of Session in revision.]*

(3) *[No appeal to the High Court] under Subsection (1) or Sub-section (2) shall be entertained except with the leave of the High Court.*

(4) *If such an order of acquittal is passed in any case instituted upon Complaint and the High Court, on an application made to it by the complainant in this behalf, grants, special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.*

(5) *No application under Sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.*

(6) *If in any case, the application under Subsection (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under Sub-section (1) or under Sub-section (2).*

15. **At the outset, it must be noted that as per Section 378(3) appeals against orders of acquittal which have to be filed in the High Court Under Section 378(1)(b) and 378(2)(b) of the Code cannot be entertained except with the leave of the High Court. Section 378(1)(a) provides that, in any case, if an order of acquittal is passed by a Magistrate in respect of a cognizable and nonbailable offence the District Magistrate may direct the Public Prosecutor to present an appeal to the court of Sessions. Sub-section (1)(b) of Section 378 provides that, in any case, the State Government may direct the Public Prosecutor to file an appeal to the High Court from an**

original or appellate order of acquittal passed by any court other than a High Court not being an order under Clause (a) or an order of acquittal passed by the Court of Session in revision. Sub-section (2) of Section 378 refers to orders of acquittal passed in any case investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 or by any other agency empowered to make investigation into an offence under any Central Act other than the Code. This provision is similar to Sub-section (1) except that here the words 'State Government' are substituted by the words 'Central Government'.

16. If we analyse Section 378(1)(a) & (b), it is clear that the State Government cannot direct the Public Prosecutor to file an appeal against an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence because of the categorical bar created by Section 378(1)(b). Such appeals, that is appeals against orders of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence can only be filed in the Sessions Court at the instance of the Public Prosecutor as directed by the District Magistrate. Section 378(1)(b) uses the words "in any case" but leaves out orders of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence from the control of the State Government. Therefore, in all other cases where orders of acquittal are passed appeals can be filed by the Public Prosecutor as directed by the State Government to the High Court.

17. Sub-section (4) of Section 378 makes provision for appeal against an order of acquittal passed in case instituted upon complaint. It states that in such case if the complainant makes an application to the High Court and the High Court grants special leave to appeal, the complainant may present such an appeal to the High Court. This Sub-section speaks of 'special leave' as against Sub-section (3) relating to other appeals which speaks of 'leave'. Thus, complainant's appeal against an order of acquittal is a category by itself. The complainant could be a private person or a public servant. This is evident from Subsection (5) which refers to application filed for 'special leave' by the complainant. It grants six months period of limitation to a complainant who is a public servant and sixty days in every other case for filing application. Sub-section (6) is important. It states that if in any case complainant's application for 'special leave' under Sub-section (4) is refused no appeal from order of acquittal shall lie under Subsection (1) or under Sub-section (2). Thus, if 'special leave' is not granted to the complainant to appeal against an order of acquittal the matter must end there. Neither the District Magistrate nor the State Government can appeal against that order of acquittal. The idea appears to be to accord quietus to the case in such a situation.

18. Since the words 'police report' are dropped from Section 378(1) (a) despite the Law Commission's recommendation, it is not necessary to dwell on it. A police report is defined Under Section 2(r) of the Code to mean a report forwarded by a police officer to a Magistrate under Sub-section (2) of Section 173 of the Code. It is a culmination of investigation by the police into an offence after receiving information of a cognizable or a non-cognizable offence. Section 2(d) defines a complaint to mean any allegation made orally or in writing to a Magistrate with a view to his taking action under the Code, that some person, whether known or unknown has committed an offence, but does not include a police report. Explanation to Section 2(d) states that a report made by a police officer in a case which discloses after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint, and the police officer by whom such report is made shall be deemed to be the complainant. Sometimes investigation into cognizable offence conducted Under Section 154 of the Code may culminate into a complaint case (cases under the Drugs and Cosmetics Act, 1940). Under the PFA Act, cases are instituted on filing of a complaint before the Court of Metropolitan Magistrate as specified in Section 20 of the PFA Act and offences under the PFA Act are both cognizable and non-cognizable. Thus, **whether a case is a case instituted on a complaint depends on the legal provisions relating to the offence involved therein. But once it is a case instituted on a complaint and an order of acquittal is passed, whether the offence be bailable or nonbailable, cognizable or noncognizable, the complainant can file an application Under Section 378(4) for special leave to appeal against it in the High Court. Section 378(4) places no restriction on the complainant. So far as the State is concerned, as per Section 378(1)(b), it can in any case, that is even in a case instituted on a**

complaint, direct the Public Prosecutor to file an appeal to the High Court from an original or appellate order of acquittal passed by any court other than High Court. But there is, as stated by us hereinabove, an important inbuilt and categorical restriction on the State's power. It cannot direct the Public Prosecutor to present an appeal from an order of acquittal passed by a Magistrate in respect of a cognizable and noncognizable offence.

In such a case the District Magistrate may Under Section 378(1)(a) direct the Public Prosecutor to file an appeal to the Session Court. This appears to be the right approach and correct interpretation of Section 378 of the Code.

19. Mr. Malhotra is right in submitting that it is only when Section 417 of the Code of Criminal Procedure, 1898 was amended in 1955 that the complainant was given a right to seek special leave from the High Court to file an appeal to challenge an acquittal order. Section 417 was replaced by Section 378 in the Code. It contained similar provision. But, Act No. 25 of 2005 brought about a major amendment in the Code. It introduced Section 378(1) (a) which permitted the District Magistrate, in any case, to direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence. For the first time a provision was introduced where under an appeal against an order of acquittal could be filed in the Sessions Court. Such appeals were restricted to orders passed by a Magistrate in cognizable and non-bailable offences. Section 378(1)(b) specifically and in clear words placed a restriction on the State's right to file such appeals. It states that the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any court other than a High Court not being an order under Clause (a) or an order of acquittal passed by the Sessions Court in revision. Thus, the State Government cannot present an appeal against an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence. We have already noted Clause 37 of the 154th Report of the Law Commission of India and Clause 37 of the Code of Criminal Procedure (Amendment) Bill, 1994 which state that in order to guard against the arbitrary exercise of power and to reduce reckless acquittals Section 378 was sought to be amended to provide appeal against an order of acquittal passed by a Magistrate in respect of cognizable and non-bailable offence. Thus, this step is taken by the legislature to check arbitrary and reckless acquittals. It appears that being conscious of rise in unmerited acquittals, in case of certain acquittals, the legislature has enabled the District Magistrate to direct the Public Prosecutor to present an appeal to the Sessions Court, thereby avoiding the tedious and time consuming procedure of approaching the State with a proposal, getting it sanctioned and then filing an appeal.

20. It is true that the State has an overall control over the law and order and public order of the area under its jurisdiction. Till Section 378 was amended by Act 25 of 2005 the State could prefer appeals against all acquittal orders. But the major amendment made in Section 378 by Act 25 of 2005 cannot be ignored. It has a purpose. It does not throw the concern of security of the community to the winds. In fact, it makes filing of appeals against certain types of acquittal orders described in Section 378(1)(a) easier, less cumbersome and less time consuming. The judgments cited by Mr. Malhotra pertain to Section 417 of the Code of Criminal Procedure, 1898 and Section 378 prior to its amendment by Act 25 of 2005 and will, therefore, have no relevance to the present case.

21. In view of the above, we conclude that a complainant can file an application for special leave to appeal against an order of acquittal of any kind only to the High Court. He cannot file such appeal in the Sessions Court. In the instant case the complaint alleging offences punishable Under Section 16(1) (1A) read with Section 7 of the PFA Act and the Rules is filed by complainant Shri Jaiswal, Local Health Authority through Delhi Administration. The Appellant was acquitted by the Metropolitan Magistrate, Patiala House Courts, New Delhi. The complainant can challenge the order of acquittal by filing an application for special leave to appeal in the Delhi High Court and not in the Sessions Court. Therefore, the impugned order holding that this case is not governed by Section 378(4) of the Code is quashed and set aside. In the circumstances the appeal is allowed.

Ghurey Lal v State of Uttar Pradesh

(2008) 10 SCC 450

Bench : Dalveer Bhandari, R.V. Raveendran

The Judgment was delivered by: Dalveer Bhandari, J.

1. This appeal is directed against the judgment of the High Court of Allahabad dated 11th November, 2005 passed in Criminal Appeal No. 365 of 1981.
2. This is a murder case in which the trial court acquitted the accused. The High Court reversed the trial court's decision, finding the accused guilty. In doing so, the appellate court failed to give proper weight to the views of the trial court as to credibility of witnesses, thereby ignoring the standards by which the appellate courts consider appeals against acquittals.
3. We have endeavoured to set out the guidelines for the appellate courts in dealing with appeals against acquittal. An overriding theme emanates from the law on appeals against acquittals. The appellate court is given wide powers to review the evidence to come to its own conclusions. But this power must be exercised with great care and caution. In order to ensure that the innocents are not punished, the appellate court should attach due weight to the lower court's acquittal because the presumption of innocence is further strengthened by the acquittal. The appellate court should, therefore, reverse an acquittal only when it has "very substantial and compelling reasons."
4. In giving our reasons for reversing the appellate court's judgment and restoring that of the trial court, we provide a brief review of the facts, the reasoning of the trial and High Court as well as the standards by which appeals against acquittals are reviewed according to settled principles of criminal jurisprudence in our country.
8. It appears that at the heart of this matter lies a property dispute. The accused testified in favour of his great-grand daughter, Ram Devi. This testimony went against the deceased, creating enmity between the parties.
9. On 14.3.1979, the deceased, Shiv Charan P.W.1, Brij Raj Singh P.W.2, Yad Ram P.W.4, Nathi Lal (not examined) and Bishambhar (not examined) had taken the customary Gur (Jaggery) during the Holi festival. On their way home, they happened to pass by the home of the accused. The accused was standing just outside his home and was holding a shot gun. The accused began to verbally abuse the deceased. Thereafter, the accused fired one single shot from his gun, killing the deceased with a bullet and causing injuries to Brij Raj Singh P.W. 2 with pellets. Hearing the gun shot, some people quickly assembled at the scene. The accused fled to his room, which he locked from inside. The uncle of the deceased, Shiv Charan, lodged the FIR that very evening, the 14th March, 1979 at 6.15 p.m., at the Barhan Police Station in the District of Agra.
11. The accused provided his own version of the event. According to the statement of the accused u/s. 313 of the Code of Criminal Procedure, he went to the place of Kanchan Singh where Gur (Jaggery) was being distributed. One Bal Mukand told the accused to leave the Gur distribution ceremony, as the deceased, Brij Raj Singh P.W. 2, Yad Ram P.W.4, Nathi Lal and Bishambhar had collected pharsa, lathis and kattas declaring that they will deal with him (accused) when he comes there. On hearing this, the accused returned to his home and grabbed his gun. The deceased and others then arrived at his home, brandishing weapons.
12. The deceased carried a pharsa, Nathi Lal had a katta, Brij Raj Singh a knife and Yad Ram and Bishambhar possessed lathis. To threaten and check them, the accused aimed his gun at them. This was to no avail. The deceased and others struck at the accused, hitting his gun. Nathi Lal fired his katta, causing pellet injuries to Brij Raj Singh P.W.2. A scuffle ensued in which the deceased's group tried to snatch away his gun. In the scuffle, the gun was accidentally fired, killing the deceased. The accused sustained pharsa and lathi blows on the butt and barrel of the gun. Fearing for his life, the accused went to his room and locked the door from inside.
13. Brij Raj Singh P.W. 2 was sent to the Government Hospital, Barhan for medical examination. Dr. Govind Prasad P.W.3 found the following injuries on the person of Brij Raj Singh, P.W. 2. The Doctor opined that the injuries were caused by a firearm.
15. He advised that x-rays be taken and that the injuries be kept in observation. In his opinion, the injuries were caused by a gun shot and were of fresh duration. In his opinion, the injuries could have been caused around 4 p.m. The doctor sent the memo Ex. Ka-4 on the same day, informing the case of Medico legal nature to the Barhan Police Station.

16. The autopsy on the deceased was conducted by Dr. Ram Kumar Gupta, P.W.5, Medical Officer, SNM Hospital, Firozabad, District Agra. The Doctor opined that the cause of death was due to shock and hemorrhage as a result of ante-mortem injury.

18. The prosecution examined Shiv Charan P.W.1, Brij Raj Singh P.W.2 and Yad Ram P.W.4 as eye witnesses of the occurrence. Dr. Govind Prasad P.W.3, Medical Officer Incharge, who had medically examined Brij Raj Singh, proved the injury report Ext. Ka 3. Dr. Ram Kumar Gupta P.W. 5, who had conducted autopsy on the dead body of the deceased, was also examined. On internal examination, he found semi digested food material in the small intestine and there was faecal matter present in the large intestines. He prepared the postmortem report Ex. Ka-5. In his opinion, the death of the deceased had taken place around 4 p.m. on 14.3.79 on account of the said injuries and shock.

19. The accused was charged with killing the deceased u/s. 302 of the Indian Penal Code (For short, IPC) and with causing simple injuries to the injured u/s. 323 IPC. He was also charged with attempting to murder Brij Raj u/s. 307 IPC. The accused appellant denied the charges, pleaded not guilty and asked to be tried.

20. The crucial question which arose for consideration was **whether the injuries caused to Brij Raj Singh P.W.2 could have been caused by the same shot that killed the deceased.** If that was possible, the prosecution version became probable. But if the shot that killed the deceased and the shot that caused injuries to Brij Raj Singh were from different weapons, then the defence version was more probable. Shri B. Rai, Ballistic Expert, Forensic Science Laboratory, U.P. was called as court witness No.1. He was asked to explain the nature of the 12 bore cartridges and give an opinion, for which he wanted time to carry out experiments in the laboratory.

21. The gun was given to him and he performed a test in his laboratory in the light of the statements of the eye-witnesses, medical report and site-plan. He submitted his report, Ex. CKa.1, wherein he clearly opined that injuries Nos. 1 and 2 of the deceased were possible by the gun Ex.3 of the accused and injuries Nos.1 and 2 of the injured Brij Raj Singh were possible by another fire. By "fire", it is clear from the record that the Ballistic Expert was referring to a "firearm".

22. Ultimately, we must answer the following question: **Whether the prosecution story of a single shot causing injury to two persons, that is bullet injury to deceased and pellet injury to Brij Raj Singh, with the accused as the aggressor, stands sufficiently proved beyond reasonable doubt?**

17. In order to decide whether a single shot was fired or in fact two different shots were fired, we must carefully examine the versions of the prosecution and the defence and the report of the Ballistic Expert. According to the trial court, the medical evidence coupled with the Ballistic Expert report revealed the existence of two fires from two weapons and as such was inconsistent with the prosecution story. The trial court further provided that it is difficult to separate falsehood from the truth, as some material aspects of the occurrence appeared to have been deliberately withheld. *"One has to separate the chaff from the grain and it is difficult to lay hand upon what part of the prosecution evidence is true and what part is untrue"*. According to the accused, the trial court had taken a reasonable and possible view of the entire evidence on record.

25. The trial court observed that injury no. 1 (wound of entry) on Brij Raj Singh P.W.2 was on the right side of his back 10 cm. away from the mid line, 9 cms below the lower border of scapula. Injury no. 2 (wound of exit) was on the right side of his back 8 cm. away and lateral from injury no.1. This means that the exit wound was by the side of the entry wound at a distance of 8 cm.

26. The dictionary meaning of 'lateral' is "by the side" and this means that the two injuries caused by pellets to Brij Raj Singh P.W.2 were horizontal and not vertical. The trial court opined that the single shot could not have caused vertical injury to one person and horizontal injury to another. It found it doubtful and not sufficiently proved that the same shot could have injured Brij Raj Singh and killed the deceased.

27. This conclusion is further fortified by the report of the Ballistic Expert Sri B. Rai court witness No.1. He has given a definite opinion after making actual experiments by firing shots. This was done from the distance at which the occurrence was said to have taken place. The eye-witnesses had testified to this distance. The Ballistic Expert opined that the injuries to Brij Raj Singh P.W.2 were from a different shot from the one that killed the deceased.

28. The relevant part of the evidence of the Ballistic Expert reads as under:

29. *"2. Question Whether bullet and Chharras both be used in 12 bore gun or not? Ans.12 bore gun have no bullet. It has small chharas, big chharas or one single ball shot with diameter about 0645."*

30. The Ballistic Expert after studying the postmortem report observed as under:

"Studying the Post Mortem report No. 51/79 of deceased Ghurey Lal and injury report of Brijraj Singh dated 14.3.79, statement of doctor and witnesses and site plan and keeping the result of above experiments in mind, I reached in conclusion that injury No. 1 and 2 possible to sustain to deceased Ghurey Lal by this gun from the distance of 10 feet and injury No. 1 and 2 of injured Brij Raj Singh seems to sustain by some other shot."

31. The Ballistic Expert categorically stated that in cartridges of standard 12 bore shot guns, bullets from other rifles cannot be used with small and big chharas (pellets). Therefore, the trial court concluded that both the injuries were not possible by a single firearm.

32. Leading experts of forensic science, particularly ballistic experts, do not indicate that from a single cartridge both bullets and pellets can be fired. Professor Apurba Nandy in his book "Principles of Forensic Medicine", first published in 1995 and reprinted in 2001, discussed cartridges. Professor Nandy mentioned that in some cases, instead of multiple pellets, a single shot or metallic ball, usually made of lead, is used. We note that the discussion regarding cartridges exclusively mentions pellets. No mention of bullets and pellets in cartridges is found in the numerous volumes of scholarly literature that we have consulted.

34. The trial court stated that in the FIR itself it is mentioned that the injuries to Brij Raj Singh were by pellets and that of the deceased by a bullet. The Ballistic Expert has stated that the cartridge containing pellets cannot contain a bullet.

Accordingly, the trial court reasoned that two weapons were used.

35. The Ballistic Expert is a disinterested, independent witness who has technical knowledge and experience. It follows that the trial judge was fully justified in placing reliance on his report.

36. The trial court also observed that removing the body of the deceased from the place of occurrence creates doubt that the prosecution was planning to substitute another story for the real facts. As such, the possibility that the deceased and his group were the aggressors is not ruled out. It is possible that pharsa and lathi blows had made the marks that were found on the gun. The gun may have snatched all of a sudden, causing it to fire upon the deceased and Brij Raj. Under the circumstances of the case, the use of another weapon, which had caused injuries to Brij Raj Singh P.W.2, is also not ruled out.

37. The trial court further observed that the substratum of the prosecution story about the injuries to Brij Raj Singh is not established beyond reasonable doubt and the story of shooting the deceased by the same shot fired by the accused is not separable from other doubtful evidence of eyewitnesses. The circumstances show that the possibility of aggression on the part of the complainant side is not ruled out, then the benefit of doubt for killing the deceased by the accused would also go to the accused.

38. The trial court also found force in the plea of right of private defence as set up by the accused.

39. The trial court mentioned that there is force in this argument where the circumstances of the case show that two fire arms were used in the occurrence.

The accused was all alone in his house at that time. The availability of a second weapon is possible only when the complainant side had brought it to the scene. This circumstance supports the defence case, that the complainants' side was the aggressor and they had come armed with weapons to the scene. It follows that the accused would apprehend grievous hurt and danger to his life. Accordingly, the right of self defence was open to him.

40. In the concluding paragraph of the judgment, the trial court observed that when neither the prosecution nor the defence version is complete, then it is obvious that both the parties are withholding some information from the court. The burden of proving the charge to the hilt lies upon the prosecution. It has failed to discharge its burden. Thus, the benefit has to go to the accused.

41. According to the trial court, the accused could not be convicted for the charges framed against him. He was entitled to get the benefit of doubt and, consequently, the accused had to be acquitted of the charges under sections 302, 307 and 323 IPC.

42. The State, aggrieved by the trial court's judgment, preferred an appeal before the High Court.

43. The High Court in appeal re-appreciated the entire evidence and came to the conclusion that the trial court's judgment was perverse and unsustainable. It therefore set aside the trial court judgment and convicted the accused u/s. 302 IPC for the murder of the deceased and u/s. 324 IPC for injuring Brij Raj Singh and sentenced him to life imprisonment and for six months R.I. respectively.

44. Against the impugned judgment of the High Court, the accused appellant has preferred appeal to this court. We have been called upon to decide whether the trial court judgment was perverse and the High Court was justified in setting aside the same or whether the impugned judgment is unsustainable and against the settled legal position?

45. We deem it appropriate to deal with the main reasons by which the trial court was compelled to pass the order of acquittal and the main reasons of the High Court in reversing the judgment of the trial court.

MAIN REASONS FOR ACQUITTAL BY THE TRIAL COURT:

The trial court acquitted the accused for the following reasons:

"1. The prosecution story of single shot injury to two persons one standing horizontally and the other vertically stands totally discredited by the medical and the evidence of Ballistic Expert.

2. According to the FIR, the deceased received a spherical ball (ball shot) bullet injury and Brij Raj Singh P.W.2 received pellet injuries.

The accused's gun had a cartridge that could only contain pellets. The Ballistic Expert has clearly stated that a cartridge containing pellets cannot contain a bullet. As such, it appears that two weapons were used.

3. Dr. Ram Kumar Gupta, P.W.5 who conducted the post-mortem of the deceased, clearly stated that the deceased received injuries from a bullet whereas Dr.

Govind Prasad Bakara who had examined Brijraj Singh P.W.2 clearly stated that both injuries were caused by a pellet.

Therefore, according to medical evidence coupled with the evidence of the Ballistic Expert, two firearms must have been used. This version is quite inconsistent with the prosecution story.

4. The injuries received by Brij Raj Singh P.W.2 were from the back side and the injury received by the deceased was from the front side and this shows that two weapons may have been used.

5. Removal of the body of the deceased from the place of occurrence also created doubt with regard to the veracity of the prosecution version.

6. The possibility that the deceased and the complainant's side were aggressors and had gone there and caused pharsa and lathi blows on the accused cannot be ruled out because of the marks on the gun Ex.3. That the said gun was fired in snatching all of a sudden, injuring the deceased also cannot be ruled out from the circumstances of the case.

7. The trial court did not discard the defence version of right of private defence as pleaded by the accused.

8. The trial court observed that it is difficult to separate falsehood from the truth, where some material aspects of the occurrence seem to have been deliberately withheld. It is a well established principle of criminal jurisprudence that when two possible and plausible explanations co-exist, the explanation favourable to the accused should be adopted."

MAIN REASONS FOR REVERSAL OF ACQUITTAL ORDER:

46. The High Court gave the following reasons for setting aside the acquittal:

"1. A perusal of the post-mortem report goes to show that autopsy conducted on the dead body of the deceased revealed antemortem gunshot wound of entry 2.5 cm x through and through on right side neck 2 cm lateral to midline of neck front aspect having corresponding wound of exit 5 cm x 4 cm on right side back of neck 5 cm below right ear. Therefore, this injury was almost horizontal.

2. Medical examination of injured Brij Raj Singh revealed a round lacerated wound of entry 0.3 cm x 0.5 cm on right side back 10 cm away from midline and 9 cm below lower border of scapula having wound of exit 1.5 cm x 0.5 cm x 0.5 on right side back 0.8 cm away and lateral from injury no. 1. Thus, this injury was also almost horizontal.

3. The observation made by the trial judge that firearm injury caused to the deceased was vertical and to that of Brij Raj Singh horizontal is wholly fallacious.

4. A layman does not understand the distinction between a cartridge containing pellets and the bullet. In common parlance, particularly in villages when a person sustains injuries by gun shot, it is said that he has received 'goli' injury. Ghurey Lal fired at his uncle with his gun causing him Goli (bullet) injury and Brij Raj Singh also received pellet (chhara) injury which goes to show that injuries received by them were caused by two different

weapons. There is hardly any difference between bullet and pellet for a layman. From 12 bore gun cartridge is fired and 12 bore cartridge always contain pellets though size of pellets may be different.

5. A perusal of the post-mortem reports goes to show that autopsy conducted on the dead body of the deceased revealed antemortem gun shot wound of entry 2.5 cms. through and through on right side neck 2 cm lateral to midline of neck front aspect having corresponding wound of exit 5 cm x 4cm on right side back of neck 5 cm below right ear. Therefore, this injury was almost horizontal.

6. The medical examination of injured Brij Raj Singh revealed a round lacerated wound of entry 0.3 cm x 0.5 cm on right side back 10 cm away from midline and 9 cm below lower border of scapula having wound of exit 1.5 cm x 0.5 cm x 0.5 cm on right side back 0.8 cm away and lateral from injury no.1.

Thus, this injury was also almost horizontal.

7. The learned trial judge had noted the evidence of B. Rai, Ballistic Expert, C.W.1 that both the injuries would have been caused by two shots. While B. Rai, Ballistic Expert, C.W.1 had given the said opinion, he had also stated in his cross examination by the prosecution that if the assailant fired from place 'C' and the person receiving pellet injury standing at place 'B' would have turned around, on dispersal of pellets he could have received the pellet injuries if deceased and injured both would have stood in the same line of firing."

OUR CONCLUSIONS:

47. We disagree with the High Court.

Admittedly, the deceased died of a bullet injury whereas Brij Raj Singh, P.W. 2 received pellet injuries. It is well settled that a cartridge cannot contain pellet and bullet shots together. Therefore, the injuries on deceased and injured P.W. 2 clearly establish that two shots were fired from two different fire arms.

48. The High Court also observed that the laymen, meaning thereby the villagers, hardly know the difference between a bullet and a pellet. This finding has no basis, particularly in view of the statement of all the witnesses on record. Wherever the witnesses wanted to use 'bullet' they have clearly used 'Goli' or 'bullet' and wherever they wanted to use 'pellet' they have clearly used the word 'Chharra' which means pellets, so to say that the witnesses did not understand the distinction between the two is without any basis or foundation.

52. We deem it appropriate to deal with some of the important cases which have been dealt with under the 1898 Code by the Privy Council and by this Court. We would like to crystallize the legal position in the hope that the appellate courts do not commit similar lapses upon dealing with future judgments of acquittal.

53. The earliest case that dealt with the controversy in issue was Sheo Swarup v. King Emperor AIR 1934 Privy Council 227. In this case, the ambit and scope of the powers of the appellate court in dealing with an appeal against acquittal has been aptly elucidated by the Privy Council. Lord Russell writing the judgment has observed as under:

"..the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.."

54. The law succinctly crystallized in this case has been consistently followed by this Court. On proper analysis of the ratio and findings of this case, it is revealed that the findings of the trial court are based on the fundamental principles of the criminal jurisprudence. Presumption of innocence in favour of the accused further gets reinforced and strengthened by the acquittal of the trial court. The appellate court undoubtedly has wide powers of reappreciating and reevaluating the entire evidence but it would be justified in interfering with the judgment of acquittal only when the judgment of the trial court is palpably wrong, totally illfounded or wholly misconceived, based on erroneous analysis of evidence and non-existent material, demonstrably unsustainable or perverse.

55. This Court again in the case of Surajpal Singh & Others v. State, AIR 1952 SC 52, has spelt out the powers of the High Court. The Court has also cautioned the Appellate Courts to follow well established norms while dealing with appeals from acquittal by the trial court. The Court observed as under:

"It is well established that in an appeal under S. 417 Criminal P.C., the High Court has full power to review the evidence upon which the order of acquittal was founded, but it is equally well-settled that the presumption of

innocence of the accused was further reinforced by his acquittal by the trial court, and the findings of the trial court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons."

56. This Court reiterated the principles and observed that presumption of innocence of accused is reinforced by an order of the acquittal. The appellate court could have interfered only for very substantial and compelling reasons.

57. In *Tulsiram Kanu v. The State*, AIR 1954 SC 1, this Court explicated that the appellate court would be justified in reversing the acquittal only when very substantial question and compelling reasons are present. In this case, the Court used a different phrase to describe the approach of an appellate court against an order of acquittal. There, the Sessions Court expressed that there was clearly reasonable doubt in respect of the guilt of the accused on the evidence put before it. Kania, C.J., observed that it required good and sufficiently cogent reasons to overcome such reasonable doubt before the appellate court came to a different conclusion.

58. In the same year, this Court had an occasion to deal with *Madan Mohan Singh v. State of Uttar Pradesh*, AIR 1954 SC 637, wherein it said that the High Court had not kept the rules and principles of administration of criminal justice clearly before it and that therefore the judgment was vitiated by nonadvertence to and mis-appreciation of various material facts transpiring in evidence. The High Court failed to give due weight and consideration to the findings upon which the trial court based its decision.

59. The same principle has been followed in *Atley v. State of U.P.* AIR 1955 SC 807, wherein the Court said:

"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."

63. In *Noor Khan v. State of Rajasthan*, AIR 1964 SC 286, this Court relied on the principles of law enunciated by the Privy Council in *Sheo Swarup* 1934 Indlaw PC 30 (supra) and observed thus:

"Sections 417, 418 and 423 give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

64. In *Khedu Mohton & Others v. State of Bihar*, (1970) 2 SCC 450, this Court gave the appellate court broad guidelines as to when it could properly disturb an acquittal. The Court observed as under:

"3. It is true that the powers of the High Court in considering the evidence on record in appeals under Section 417, Cr. P.C. are as extensive as its powers in appeals against convictions but that court at the same time should bear in mind the presumption of innocence of accused persons which presumption is not weakened by their acquittal. It must also bear in mind the fact that the appellate judge had found them not guilty. Unless the conclusions reached by him are palpably wrong or based on erroneous view of the law or that his decision is likely to result in grave injustice, the High Court should be reluctant to interfere with his conclusions. If two reasonable conclusions can be reached on the basis of the evidence on record then the view in support of the acquittal of the accused should be preferred. The fact that the High Court is inclined to take a different view of the evidence on record is not sufficient to interfere with the order of acquittal."

65. In *Shivaji Sahabrao Bobade & Another v. State of Maharashtra*, (1973) 2 SCC 793, the Court observed thus:

"An appellant aggrieved by the overturning of his acquittal deserves the final court's deeper concern on fundamental principles of criminal justice..... But we hasten to add even here that, although the learned judges of the High

Court have not expressly stated so, they have been at pains to dwell at length on all the points relied on by the trial court as favourable to the prisoners for the good reason that they wanted to be satisfied in their conscience whether there was credible testimony warranting, on a fair consideration, a reversal of the acquittal registered by the court below. In law there are no fetters on the plenary power of the Appellate Court to review the whole evidence on which the order of acquittal is founded and, indeed, it has a duty to scrutinise the probative material de novo, informed, however, by the weighty thought that the rebuttable innocence attributed to the accused having been converted into an acquittal the homage our jurisprudence owes to individual liberty constrains the higher court not to upset the holding without very convincing reasons and comprehensive consideration, In our view the High Court's judgment survives this exacting standard."

66. In *Lekha Yadav v. State of Bihar* (1973) 2 SCC 424, the Court following the case of *Sheo Swarup* 1934 Indlaw PC 30 (supra) again reiterated the legal position as under:

"The different phraseology used in the judgments of this Court such as- (a) substantial and compelling reasons; (b) good and sufficiently cogent reasons; (c) strong reasons.

are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion, but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal but should express the reasons in its judgment which led it to hold that the acquittal was not justified."

67. In *Khem Karan & Others v. State of U.P. & Another* AIR 1974 SC 1567 1974 Indlaw SC 396, this Court observed:

"Neither mere possibilities nor remote possibilities nor mere doubts which are not reasonable can, without danger to the administration of justice, be the foundation of the acquittal of an accused person, if there is otherwise fairly credible testimony."

68. In *Bishan Singh & Others v. The State of Punjab* (1974) 3 SCC 288, Justice Khanna speaking for the Court provided the legal position:

"22. It is well settled that the High Court in appeal u/s. 417 of the CrPC has full power to review at large the evidence on which the order of acquittal was founded and to reach the conclusion that upon the evidence the order of acquittal should be reversed. No limitation should be placed upon that power unless is be found expressly stated be in the Code, but in exercising the power conferred by the Code and before reaching its conclusion upon fact the High Court should give proper weight and consideration to such matters as (1) the views of the trial judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; & (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses." 69. In *Umedbhai Jadavbhai v. The State of Gujarat* (1978) 1 SCC 228, the Court observed thus:

"In an appeal against acquittal, the High Court would not ordinarily interfere with the Trial Court's conclusion unless there are compelling reasons to do so inter alia on account of manifest errors of law or of fact resulting in miscarriage of justice."

70. In *B.N. Mutto & Another v. Dr. T.K. Nandi* (1979) 1 SCC 361, the Court observed thus:

"It stems out of the fundamental principle of our criminal jurisprudence that the accused is entitled to the benefit of any reasonable doubt. If two reasonably probable and evenly balanced views of the evidence are possible, one must necessarily concede the existence of a reasonable doubt. But, fanciful and remote possibilities must be left out of account. To entitle an accused person to the benefit of a doubt arising from the possibility of a duality of views, the possible view in favour of the accused must be as nearly reasonably probable as that against him. If the preponderance of probability is all one way, a bare possibility of another view will not entitle the accused to claim the benefit of any doubt. It is, therefore, essential that any view of the evidence in favour of the accused must be reasonable even as any doubt, the benefit of which an accused person may claim, must be reasonable. "A reasonable doubt", it has been remarked, "does not mean some light, airy, insubstantial doubt that may flit through the minds of any of us about almost anything at some time or other, it does not mean a doubt begotten by sympathy out of reluctance to convict; it means a real doubt, a doubt founded upon reasons. [Salmond J. in his charge to the jury in R.V. Fantle reported in 1959 Criminal Law Review 584.]"

71. In *Tota Singh & Another v. State of Punjab* (1987) 2 SCC 529, the Court reiterated the same principle in the following words: *"This Court has repeatedly pointed out that the mere fact that the appellate court is inclined on a reappraisal of the evidence to reach a conclusion which is at variance with the one recorded in the order of acquittal passed by the court below will not constitute a valid and sufficient ground for setting aside the acquittal. The jurisdiction of the appellate court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the court below is such which could not have been possibly arrived at by any court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the court below has taken a view which is a plausible one, the appellate court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the court below on its consideration of the evidence is erroneous."*

72. In *Ram Kumar v. State of Haryana* 1995 Supp. (1) SCC 248, this Court had another occasion to deal with a case where the court dealt with the powers of the High Court in appeal from acquittal. The Court observed as under: *".. the High Court should not have interfered with the order of acquittal merely because another view on an appraisal of the evidence on record was possible. In this connection it may be pointed out that the powers of the High Court in an appeal from order of acquittal to reassess the evidence and reach its own conclusions u/ss. 378 and 379 CrPC are as extensive as in any appeal against the order of conviction. But as a rule of prudence, it is desirable that the High Court should give proper weight and consideration to the view of the trial court with regard to the credibility of the witness, the presumption of innocence in favour of the accused, the right of accused to the benefit of any doubt and the slowness of appellate court in justifying a finding of fact arrived at by a judge who had the advantage of seeing the witness.*

No doubt it is settled law that if the main grounds on which the Court below has based its order acquitting the accused, are reasonable and plausible, and the same cannot entirely and effectively be dislodged or demolished, the High Court should not disturb the order of acquittal. We shall, therefore, examine the evidence and the material on record to see whether the conclusions recorded by the Trial Court in acquitting the appellant are reasonable and plausible or the same are vitiated by some manifest illegality or the conclusion recorded by the Trial Court are such which could not have been possibly arrived at by any Court acting reasonably and judiciously which may in other words be characterized as perverse."

73. This Court time and again has provided direction as to when the High Courts should interfere with an acquittal. In *Madan Lal v. State of J & K*, (1997) 7 SCC 677 1997 Indlaw SC 1460, the Court observed as under:

"8. that there must be "sufficient and compelling reasons" or "good and sufficiently cogent reasons" for the appellate court to alter an order of acquittal to one of conviction....."

74. In *Sambasivan & Others v. State of Kerala* (1998) 5 SCC 412, while relying on the case of *Ramesh Babulal Doshi* (Supra), the Court observed thus:

"The principles with regard to the scope of the powers of the appellate court in an appeal against acquittal, are well settled. The powers of the appellate court in an appeal against acquittal are no less than in an appeal against conviction. But where on the basis of evidence on record two views are reasonably possible the appellate court cannot substitute its view in the place of that of the trial court. It is only when the approach of the trial court in acquitting an accused is found to be clearly erroneous in its consideration of evidence on record and in deducing conclusions therefrom that the appellate court can interfere with the order of acquittal."

75. In *Bhagwan Singh & Others v. State of M.P.* (2002) 4 SCC 85, the Court repeated one of the fundamental principles of criminal jurisprudence 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. The Court observed as under: *"7. The golden thread which runs through the web of administration of justice in criminal case is 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. Such is not a jurisdiction limitation on the appellate court but a Judge made guidelines for circumspection. The paramount consideration of the court is to ensure that miscarriage of justice is avoided."*

76. In *Harijana Thirupala & Others v. Public Prosecutor, High Court of A.P., Hyderabad* (2002) 6 SCC 470 2002 Indlaw SC 1635, this Court again had an occasion to deal with the settled principles of law restated by several decisions of this Court. Despite a number of judgments, High Courts continue to fail to keep them in mind before reaching a conclusion. The Court observed thus:

"10. The principles to be kept in mind in our system of administration of criminal justice are stated and restated in several decisions of this Court. Yet, sometimes High Courts fail to keep them in mind before reaching a conclusion as to the guilt or otherwise of the accused in a given case. The case on hand is one such case. Hence it is felt necessary to remind about the well-settled principles again. It is desirable and useful to remind and keep in mind these principles in deciding a case.

11. *In our administration of criminal justice an accused is presumed to be innocent unless such a presumption is rebutted by the prosecution by producing the evidence to show him to be guilty of the offence with which he is charged.*

Further if two views are possible on the evidence produced in the case, one indicating to the guilt of the accused and the other to his innocence, the view favourable to the accused is to be accepted. In cases where the court entertains reasonable doubt regarding the guilt of the accused the benefit of such doubt should go in favour of the accused. At the same time, the court must not reject the evidence of the prosecution taking it as false, untrustworthy or unreliable on fanciful grounds or on the basis of conjectures and surmises. The case of the prosecution must be judged as a whole having regard to the totality of the evidence. In appreciating the evidence the approach of the court must be integrated not truncated or isolated. In other words, the impact of the evidence in totality on the prosecution case or innocence of the accused has to be kept in mind in coming to the conclusion as to the guilt or otherwise of the accused. In reaching a conclusion about the guilt of the accused, the court has to appreciate, analyse and assess the evidence placed before it by the yardstick of probabilities, its intrinsic value and the animus of witnesses.

It must be added that ultimately and finally the decision in every case depends upon the facts of each case.

12. *Doubtless the High Court in appeal either against an order of acquittal or conviction as a court of first appeal has full power to review the evidence to reach its own independent conclusion. However, it will not interfere with an order of acquittal lightly or merely because one other view is possible, because with the passing of an order of acquittal presumption of innocence in favour of the accused gets reinforced and strengthened. The High Court would not be justified to interfere with the order of acquittal merely because it feels that sitting as a trial court it would have proceeded to record a conviction; a duty is cast on the High Court while reversing an order of acquittal to examine and discuss the reasons given by the trial court to acquit the accused and then to dispel those reasons. If the High Court fails to make such an exercise the judgment will suffer from serious infirmity."*

77. In *C. Antony v. K.G. Raghavan Nair*, (2003) 1 SCC 1 had to reiterate the legal position in cases where there has been acquittal by the trial courts. This Court observed thus:

"6. This Court in a number of cases has held that though the appellate court has full power to review the evidence upon which the order of acquittal is founded, still while exercising such an appellate power in a case of acquittal, the appellate court, should not only consider every matter on record having a bearing on the question of fact and the reasons given by the courts below in support of its order of acquittal, it must express its reasons in the judgment which led it to hold that the acquittal is not justified. In those line of cases this Court has also held that the appellate court must also bear in mind the fact that the trial court had the benefit of seeing the witnesses in the witness box and the presumption of innocence is not weakened by the order of acquittal, and in such cases if two reasonable conclusions can be reached on the basis of the evidence on record, the appellate court should not disturb the finding of the trial court."

78. In *State of Karnataka v. K. Gopalkrishna*, (2005) 9 SCC 291, while dealing with an appeal against acquittal, the Court observed:

"In such an appeal the Appellate Court does not lightly disturb the findings of fact recorded by the Court below. If on the basis of the same evidence, two views are reasonably possible, and the view favouring the accused is accepted by the Court below, that is sufficient for upholding the order of acquittal. However, if the Appellate Court comes to the conclusion that the findings of the Court below are wholly unreasonable or perverse and not based on the evidence on record, or suffers from serious illegality including ignorance or misreading of evidence on record, the Appellate Court will be justified in setting aside such an order of acquittal."

79. In *The State of Goa v. Sanjay Thakran*, (2007) 3 SCC 755, this Court relied on the judgment in *State of Rajasthan v. Raja Ram* (2003) 8 SCC 180 and observed as under:

"15. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is 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. ... The principle to be followed by appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference." The Court further held as follows:

"16. it is apparent that while exercising the powers in appeal against the order of acquittal the court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the court of appeal would not take the view which would upset the judgment delivered by the court below."

80. In *Chandrappa & Others v. State of Karnataka* (2007) 4 SCC 415, this Court held:

"(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

The following principles emerge from the cases above:

"1. The appellate court may review the evidence in appeals against acquittal u/ss. 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.

2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

3. Due or proper weight and consideration must be given to the trial court's decision. "

81. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that trial court was wrong.

82. **In light of the above, the High Court and other appellate courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:**

"1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

- (i) *The trial court's conclusion with regard to the facts is palpably wrong;*
- (ii) *The trial court's decision was based on an erroneous view of law;*
- (iii) *The trial court's judgment is likely to result in "grave miscarriage of justice";* (iv) *The entire approach of the trial court in dealing with the evidence was patently illegal;* (v) *The trial court's judgment was manifestly unjust and unreasonable;*
- (vi) *The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/ report of the Ballistic expert, etc.*
- (vii) *This list is intended to be illustrative, not exhaustive.*

2. *The Appellate Court must always give proper weight and consideration to the findings of the trial court.*

3. *If two reasonable views can be reached one that leads to acquittal, the other to conviction the High Courts/appellate courts must rule in favour of the accused."*

83. Had the well settled principles been followed by the High Court, the accused would have been set free long ago.

84. Though the appellate court's power is wide and extensive, it must be used with great care and caution.

85. We have considered the entire evidence and documents on record and the reasoning given by the trial court for acquitting the accused and also the reasoning of the High Court for reversal of the judgment of acquittal. We have also dealt with a number of cases decided by the Privy Council and this Court since 1934. In our considered opinion, the trial court carefully scrutinized the entire evidence and documents on record and arrived at the correct conclusion. We are clearly of the opinion that the reasoning given by the High Court for overturning the judgment of the trial court is wholly unsustainable and contrary to the settled principles of law crystallized by a series of judgment.

86. On marshalling the entire evidence and the documents on record, the view taken by the trial court is certainly a possible and plausible view. The settled legal position as explained above is that if the trial court's view is possible and plausible, the High Court should not substitute the same by its own possible views. The difference in treatment of the case by two courts below is particularly noticeable in the manner in which they have dealt with the prosecution evidence. While the trial court took great pain in discussing all important material aspects and to record its opinion on every material and relevant point, the learned Judges of the High Court have reversed the judgment of the trial court without placing the very substantial reasons given by it in support of its conclusion. The trial court after marshalling the evidence on record came to the conclusion that there were serious infirmities in the prosecution's story.

87. Following the settled principles of law, it gave the benefit of doubt to the accused. In the impugned judgment, the High Court totally ignored the settled legal position and set aside the well-reasoned judgment of the trial court.

88. The trial court categorically came to the finding that when the substratum of the evidence of the prosecution witnesses was false, then the prosecution case has to be discarded. When the trial court finds so many serious infirmities in the prosecution version, then the trial court was virtually left with no choice but to give benefit of doubt to the accused according to the settled principles of criminal jurisprudence.

89. On careful analysis of the entire evidence on record, we are of the view that the reasons given by the High Court for reversing the judgment of acquittal is unsustainable and contrary to settled principles of law. The trial court has the advantage of watching the demeanour of the witnesses who have given evidence, therefore, the appellate court should be slow to interfere with the decisions of the trial court. An acquittal by the trial court should not be interfered with unless it is totally perverse or wholly unsustainable.

90. On consideration of the totality of the circumstances, the appeal filed by the appellant is allowed and the impugned judgment passed by the High Court is set aside. The appellant would be set at liberty forthwith unless required in any other case.

Appeal allowed

IN THE SUPREME COURT OF INDIA

Bindeshwari Prasad Singh @ B.P. Singh and Ors. Vs. State of Bihar (Now Jharkhand) and Anr.

(2002) 6 SCC 650

Judges/Coram:

M.B. Shah and B.P. Singh, JJ.

CaseNote:

Code of Criminal Procedure, 1973 - Sections 397 and 401--Revision against acquittal--Jurisdiction of

High Court--High Court cannot convert finding of acquittal into one of conviction--Murder case-Acquittal by trial court affirmed by High Court--Revision by informant--Whether High Court justified in reappreciating evidence, setting aside acquittal and directing retrial?-- Held, "no" when no legal infirmity found.

Sub-section (3) of Section 401, Cr. P.C., in terms provides that nothing in Section 401 shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction. The aforesaid subsection, which places a limitation on the powers of the revisional court, prohibiting it from converting a finding of acquittal into one of conviction, is itself indicative of the nature and extent of the revisional power conferred by Section 401 of the Code of Criminal Procedure. If the High Court could not convert a finding of acquittal into one of conviction directly, it could not do so indirectly by the method of ordering a retrial. The High Court will not be justified in interfering with an order of acquittal merely because the trial court has taken a wrong view of the law or has erred in appreciation of evidence. It is neither possible nor advisable to make an exhaustive list of circumstances in which exercise of revisional jurisdiction may be justified.

In the absence of any legal infirmity either in the procedure or in the conduct of the trial, there was no justification for the High Court to interfere in exercise of its revisional jurisdiction. In the absence of manifest illegality resulting in grave miscarriage of justice, exercise of revisional jurisdiction in such cases is not warranted.

In exercise of revisional jurisdiction against an order of acquittal at the instance of a private party, the Court exercises only limited jurisdiction and should not constitute itself into an appellate court which has a much wider jurisdiction to go into questions of facts and law, and to convert an order of acquittal into one of conviction. It cannot be lost sight of that when a retrial is ordered, the dice is heavily loaded against the accused, and that itself must caution the Court exercising revisional jurisdiction. Therefore, there is no justification for the impugned order of the High Court ordering retrial of the appellants.

JUDGMENT

B.P. Singh, J.

1. Special leave granted.
2. The appellants herein were tried by the learned Sessions Judge, Dhanbad in Sessions Trial No. 193 of 1992 charged of the offence under Sections 302 and 302/114 of the Indian Penal Code. The learned Sessions Judge by judgment and order dated 21st January, 1994 acquitted the appellants of the charges leveled against them, finding that the prosecution had not proved its case beyond reasonable doubt.
3. The appeal preferred by the State against the acquittal of the appellants was dismissed by the High Court by its order dated 22nd November, 1994. No doubt the appeal was dismissed on the ground of limitation.
4. A revision was preferred by the informant to the High Court under Section 401 of the Code of Criminal Procedure which has been allowed by the impugned judgment and order dated 6th June, 2001 in Criminal Revision No. 48 of 1994. The judgment of acquittal was set aside and the case was remitted to the Sessions Judge for re-trial in accordance with law.
5. From the evidence on record it appears that an occurrence took place on 20th July, 1989 at about 4.00 p.m. The informant and appellant No. 1 entered into an altercation in connection with removal of creepers which had climbed up to the balcony of the informant. The informant as well as appellant 2 to 5 herein reside in the same

building. The altercation took an ugly turn and abuses were exchanged between appellant No. 1 and the informant. In the meantime son of the informant, namely Kumud came down and asked the appellants as to why they had not removed the creepers. The case of the prosecution is that appellant No. 1 and other appellants shouted and ordered assault on Kumud. In the assault that followed, deceased Kumud was hit on the head with an iron rod, as a result of which he sustained a serious injury. He was taken to the Bokaro General Hospital, where he was declared dead.

6. The matter was reported to the police. Thereafter the case was investigated and the appellants were put up for trial before the Sessions Judge, Dhanbad.

7. The prosecution relied upon the testimony of three eye witnesses, namely PWs. 1, 3 and 4, who were the mother, sister and father respectively of the deceased. The First Information Report was lodged by PW.4, the father of the deceased. The prosecution also relied upon the medical evidence on record, which according to the prosecution, corroborated the evidence of the witnesses. The learned Sessions Judge after a consideration of the evidence on record, acquitted the appellants of the charges leveled against them.

8. The State's appeal having been dismissed, a criminal revision was filed by the informant, PW.4 under Section 401 of the Code of Criminal Procedure before the High Court.

9. In the revision before the High Court it was sought to be urged on behalf of the informant that there was no reason to discard the testimony of PWs. 1, 3 & 4. The medical evidence on record corroborated their testimony. Therefore, on the basis of the evidence on record, it should have been held that the prosecution had proved its case beyond reasonable doubt.

10. On the other hand it was high-lighted by the appellants that the trial court had recorded its reasons for their acquittal. In the First Information Report a clear allegation was made against appellant No. 1 of having assaulted Kumud (deceased) on his head with an iron rod. However, other witnesses in the course of their deposition attributed the assault on Kumud to appellant No. 2, Anuj. The informant also, in his deposition before the Court, changed his version and in line with other witnesses deposed that it was Anuj, appellant No. 2 who gave the blow with an iron rod on the head of the deceased resulting in his death. The medical evidence on record discloses that there were two external injuries only, the first being a lacerated wound over the middle part of the left parietal area and the other being an abrasion on the back of the right elbow.

11. A mere perusal of the judgment of the High Court would disclose that the High Court re-appreciated the evidence on record and came to the conclusion that the learned Sessions Judge was not justified in recording the order of acquittal. The evidence of eye witnesses was consistent and so far as the informant is concerned, no doubt in the First Information Report he had attributed the fatal injury to appellant No. 1 but he later changed his version and deposed that the injury was caused by appellant No. 2. The High Court was impressed by the argument that the First Information Report not being a substantive piece of evidence, at best the evidence of the informant was not corroborated by the First Information Report. The High Court further found that the presence of eye witnesses was natural and the mere fact that they were related was no ground to discard their testimony. Rejecting the argument urged on behalf of the appellants that there was no mention in the First Information Report about the presence of the wife and the daughter of the informant as eye witnesses who witnessed the occurrence from the balcony, the learned Judge observed that it was not expected that every detail would be mentioned in the First Information Report. On such reasoning, the High Court set aside the order of acquittal and ordered re-trial of the appellants.

12. We have carefully considered the material on record and we are satisfied that the High Court was not justified in reappreciating the evidence on record and coming to a different conclusion in a revision preferred by the informant under Section 401 of the Code of Criminal Procedure.

Sub-section (3) of Section 401 in terms provides that nothing in Section 401 shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction. The aforesaid sub-section, which places a limitation on the powers of the revisional court, prohibiting it from converting a finding of acquittal into one of conviction, is itself indicative of the nature and extent of the revisional power conferred by Section 401 of the Code of Criminal Procedure. If the High Court could not convert a finding of acquittal into one of conviction directly, it could not do so indirectly by the method of ordering a retrial. It is well settled by a catena of decisions of this Court that the High Court will ordinarily not interfere in revision with an order of acquittal except in exceptional cases where the interest of public justice requires interference for the correction of a manifest illegality or the prevention of gross miscarriage of justice. The High Court will not be justified in interfering with an order of acquittal merely because the trial court has taken a wrong view of the law or has erred in appreciation of evidence. It is neither possible nor advisable to make an exhaustive list of circumstances in which exercise of revisional jurisdiction may be justified, but decisions of this

Court have laid down the parameters of exercise of revisional jurisdiction by the High Court under Section 401 of the Code of Criminal Procedure in an appeal against acquittal by a private party. (See MANU/SC/0023/1951 : 1951CriLJ510 : 1951CriLJ510 :D. Stephens v. Nosibolla; MANU/SC/0133/1962 : [1963]3SCR412 : K.C. Reddy v. State of Andhra Pradesh : MANU/SC/0076/1973 : 1973CriLJ1404 : Akalu Ahir and Ors. v. Ramdeo Ram MANU/SC/0179/1975 : AIR1975SC1854 : Pakalapati Narayana Gajapathi Raju and Ors.

v. Bonapalli Peda Appadu and Anr. and MANU/SC/0398/1967 : 1968CriLJ665 : 1968CriLJ665 : Mahendra Pratap Singh v. Sarju Singh).

13. The instant case is not one where any such illegality was committed by the trial court. In the absence of any legal infirmity either in the procedure or in the conduct of the trial, there was no justification for the High Court to interfere in exercise of its revisional jurisdiction. It has repeatedly been held that the High Court should not re-appreciate the evidence to reach a finding different from the trial court. In the absence of manifest illegality resulting in grave miscarriage of justice, exercise of revisional jurisdiction in such cases is not warranted.

14. We are, therefore, satisfied that the High Court was not justified in interfering with the order of acquittal in exercise of its revisional jurisdiction at the instance of the informant.

It may be that the High Court on appreciation of the evidence on record may reach a conclusion different from that of the trial court. But that by itself is no justification for exercise of revisional jurisdiction under Section 401 of the Code of Criminal Procedure against a judgment of acquittal. We cannot say that the judgment of the trial Court in the instant case was perverse. No defect of procedure has been pointed out. There was also no improper acceptance or rejection of evidence nor was there any defect of procedure or illegality in the conduct of the trial vitiating the trial itself.

At best the High Court thought that the prosecution witnesses were reliable while the trial court took the opposite view. This Court has repeatedly observed that in exercise of revisional jurisdiction against an order of acquittal at the instance of a private party, the Court exercises only limited jurisdiction and should not constitute itself into an appellate court which has a much wider jurisdiction to go into questions of facts and law, and to convert an order of acquittal into one of conviction. It cannot be lost sight of that when a re-trial is ordered, the dice is heavily loaded against the accused, and that itself must caution the Court exercising revisional jurisdiction. We, therefore, find no jurisdiction for the impugned order of the High Court ordering re-trial of the appellants.

15. The High Court has noticed the fact that the State had preferred an appeal against the acquittal of the appellants. That appeal was dismissed by the High Court on the ground of limitation. In principle that makes no difference, because the dismissal of the appeal even on the ground of limitation is a dismissal for all purposes. As observed earlier, the jurisdiction of the High Court in dealing with an appeal against acquittal preferred under Section 374 of the Code of Criminal Procedure is much wider than the jurisdiction of revisional court exercising jurisdiction under Section 401 of the Code of Criminal Procedure against an order of acquittal at the instance of a private party. All grounds that may be urged in support of the revision petition may be urged in the appeal, but not vice versa. The dismissal of an appeal preferred by the State against the order of acquittal puts a seal of finality on the judgment of the trial court. In such a case it may not be proper exercise of discretion to exercise revisional jurisdiction under Section 401 of the Code of Criminal Procedure against the order of acquittal at the instance of a private party. Exercise of revisional jurisdiction in such a case may give rise to an incongruous situation where an accused tried and acquitted of an offence, and the order of acquittal upheld in appeal by its dismissal, may have to face a second trial for the same offence of which he was acquitted.

16. For these reasons we allow this appeal and set aside the impugned judgment and order of the High Court.

IN THE SUPREME COURT OF INDIA

Rama and Ors. Vs. State of Rajasthan

AIR 2002 SC 1814

Judges/Coram:

M.B. Shah and B.N. Agrawal, JJ.

JUDGMENT

B.N. Agrawal, J.

1. Leave granted.

2. Judgment impugned in this appeal has been rendered by Jodhpur Bench of the Rajasthan High Court whereby criminal appeal preferred by the appellants has been dismissed confirming the convictions and sentences awarded against the appellants by the trial court under Sections 326 and 325 read with Sections 34 of the Indian Penal Code.

3. The said criminal appeal was filed in the year 1987 and duly admitted. The same was placed for hearing in the year 2001 and after hearing the parties, the High Court passed an order in four pages. The impugned judgment, runs into seven paragraphs and after referring to the prosecution case and defence version in paras 1 to 5, the Court has disposed of the appeal in two paragraphs which runs thus:-

"6. After re-appreciation of the evidence and re-scrutiny of the record, I find that there is no error apparent in the finding recorded by the learned Judge, therefore, there is no reason to interfere in the order of conviction passed by the learned Judge.

7. In the result, therefore, the present appeal is dismissed."

4. The impugned judgment has been challenged on the sole ground that the High Court has not disposed of the appeal in the manner postulated under law inasmuch as it does not appear from the impugned judgment as to how many witnesses were examined on behalf of the prosecution and on what point. The High Court has not even referred to any evidence much less considered the same. In our view, it is a novel method of disposal of criminal appeal against conviction by simply saying that after re-appreciation of the evidence and re-scrutiny of the records, the Court did not find any error apparent in the finding of the trial court even without reappraising the evidence. In our view, the procedure adopted by the High Court is unknown to law.

It is well settled that in a criminal appeal, a duty is enjoined upon the appellant court to reappraise the evidence itself and it cannot proceed to dispose of the appeal upon appraisal of evidence by the trial court alone especially when the appeal has been already admitted and placed for final hearing. Upholding such a procedure would amount to negation of valuable right of appeal of an accused which cannot be permitted under law.

Thus, we are of the view that on this ground alone, the impugned order is fit to be set aside and the matter remitted to the High Court.

5. Accordingly, the appeal is allowed, impugned order passed by the High Court is set aside and the matter is remitted to that Court for disposal of the appeal in accordance with law after giving opportunity of hearing to the parties.

Amar Nath and Others v. State of Haryana and Others
(1977) 4 SCC 137

Case No: Cr.A. No. 124 of 1977

Bench: S. Murtaza Fazal Ali, N.L. Untwalia

Summary : Criminal - Practice & Procedure - Code of Criminal Procedure, 1973, s.397 (2) - Charge sheet - Natural justice - Prejudice - Compulsion - Appellants and others were mentioned in F.I.R as participated in occurrence resulted in death of deceased and Charge-sheet was submitted - Police opined no weapon was recovered nor evidence about participation of appellants and submitted its report u/s. 173 of CrPC - Trial Court set appellants at liberty - Complainant filed revision was dismissed - Informant filed complaint against all accused including appellants was dismissed by Trial Court - Complainant filed revision was accepted and remanded to Trial Court - Trial Court issued summons to, appellants - Appellants filed W.P. u/ss. 482 ,397 of CrPC was dismissed and declared that order of, Trial Court summoning appellants was interlocutory order and revision was barred - Hence instant appeal - Whether appellants was competent to revision u/s. 397(1) of CrPC - Held, sometimes interlocutory orders caused harassment to accused by unnecessarily protracting trials - Accused person should get fair trial in accordance with principles of natural justice and effort should be made to avoid delay in investigation - Any order which affects right of accused, could not be said to be interlocutory order, as it would affect s. 397 of CrPC - Right of appellants was denied and were prejudiced by interlocutory order - Compelling appellants to face trial without proper application could not be interlocutory matter - Hence, revision against order was competent u/s. 397(1) of CrPC - Order accordingly.

The Judgment was delivered by: Syed Murtaza Fazalali, J.

1. This appeal by special leave involves an important question as to the interpretation, scope, ambit and connotation of the word "interlocutory order" as appearing in sub S. (2) of S. 397, of the Code of Criminal Procedure 1973. For the purpose of brevity, we shall refer to the Code of Criminal Procedure-, 1898 as "the 1898 Code," to the Code of Criminal Procedure, 1898 as amended in 1955 as "the 1955 Amendment" and to the Code of Criminal Procedure, 1973 as "the 1973 Code".

The appeal arises in the following circumstances.

2. An incident took place in village Amin on April 23, 1976 in the course of which three persons died and F.I.R. No. 139 dated April 23, 1976 was filed at police station Butana, District Karnal at about 5-30 P.M. The F.I.R. mentioned a number of accused persons in including the appellants as having participated in the occurrence which resulted in the death of the deceased. The police, after holding investigations, submitted a charge-sheet against the other accused persons except the appellants against whom the police opined that no case at all was made out as no, weapon was recovered nor was there any clear evidence about the participation of the appellants. The police thus submitted its final report under s. 173 of the 1973 Code insofar as the appellants were concerned. The report was placed before Mr. B. K. Gupta the Judicial Magistrate, 1st.Class, Karnal, who after perusing the same set the appellants at liberty after having accepted the report. It appears that the complainant filed a revision petition before the Additional Sessions Judge, Karnal against the order of the Judicial Magistrate, 1st Class, Karnal releasing the appellants, but the same

was dismissed on July 3, 1976. The informant filed a regular complaint before the Judicial Magistrate, 1st Class, on July 1, 1976 against all the 11 accused including the appellants.

3. The, Learned Magistrate, after having examined the complainant and going through the record, dismissed the, complaint as he was satisfied that no case was made out against the appellants. Thereafter the complainant took up the matter in revision before the Sessions Judge, Karnal, who this time accepted the revision petition and remanded the case to the Judicial Magistrate for further enquiry. On November 15, 1976, the learned Judicial Magistrate, on receiving the order of the Sessions Judge, issued summons to the, appellants straightaway. The appellants then moved the High Court under s. 482 and s. 397 of the 1973 Code for quashing the order of the Judicial Magistrate mainly on the ground that the Magistrate had issued the summons in a mechanical manner without applying his judicial mind to the facts of the case. The High Court dismissed the petition in limine and refused to entertain it on the ground that as the order of, the Judicial Magistrate dated November 15, 1976 summoning the appellants was an interlocutory order, a revision to the High Court was barred by virtue of sub s. (2) of s. 397 of the 1973 Code. The learned Judge further held that as the revision was barred, the Court could not take up the case under s. 482 in order. to quash the very order of the Judicial Magistrate under s. 397(1) of the 1973 Code. Otherwise the very object of s. 397(2) would be defeated.

4. While we fully agree with the view taken by the learned Judge that where a revision to the High Court against the order of the Subordinate Judge is expressly barred under sub-s. (2) of S. 397 of the 1973 Code the inherent powers contained in s. 482 would not be available to defeat the bar contained in s. 397(2). S. 482 of the 1973 Code contains the inherent powers of the Court and does not confer any 'new powers but preserves the powers which the High Court already possessed. A harmonious construction of ss. 397 and 482 would lead to the irresistible conclusion that where a particular order is expressly barred under s. 397(2) and cannot be the subject of revision by the High Court, then to such a case the provisions of s. 482 would not apply. It is well settled that the inherent powers of the, Court can ordinarily be exercised when there is no express provision on the subject-matter. Where there is an express provision, barring a particular remedy, the Court cannot resort to the exercise of inherent powers. So far as the second plank of the view of the learned Judge that the order of the Judicial Magistrate in the instant case was' an interlocutory order is concerned, it is a matter which merits serious consideration.

5. A history of the criminal legislation in India would manifestly reveal that so far as the Code of Criminal Procedure is concerned both in the 1898 Code and 1955 Amendment the widest possible powers of, revision had been given to the High Court under ss. 435 and 439 of those, Codes. The High Court could examine the propriety of any order-whether final or interlocutory-passed by any Subordinate Court in a criminal matter. No limitation and restriction on the powers of the High Court were placed. But this Court as also the various High Courts in India, by a long course of decisions, confined the exercise of revisional powers only to cases where the impugned order suffered from any error of law or any legal infirmity causing injustice or prejudice to the accused or was manifestly foolish or perverse. These restrictions were placed by the case law, merely as a rule of prudence rather than a rule of law and in suitable cases the High Courts had the undoubted power to interfere with the impugned order even on facts. Ss. 435 and 439 being identical in the 1898 Code and 1955 Amendment insofar as they are relevant run, thus:

"435(1) The High Court or any Sessions Judge or District Magistrate or any Sub-divisional Magistrate empowered by the State Government in this behalf, may call ,for and examine the

record of any proceeding before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court....."

"439.(1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of appeal by section 423, 426, 427 and 428 or on a Court by section 338, and may enhance the, sentence; and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in manner provided by s. 429.

(2) No order under this section shall be made to the prejudice of the, accused unless he has had an opportunity of being heard either personally or by pleader in his own defence."

6. In fact the only rider that was put under S. 439 was that where the Court enhanced the sentence the accused had to be given an opportunity of. being heard.

7. The concept of an interlocutory order qua the revisional jurisdiction of the High Court, therefore, was completely foreign to the earlier Code. Subsequently it appears that there had been large number of arrears and the High Courts were flooded with revisions of all kinds against interim or interlocutory orders which led to enormous delay in the disposal of cases and exploitation of the poor accused by the affluent prosecutors. Sometimes interlocutory orders caused harassment to the accused by unnecessarily protracting the trials. It was in the background of these facts that the Law Commission dwelt on this aspect of the matter and in the 14th and 41st Reports submitted by the Commission which formed the basis of the 1973 Code the said Commission suggested revolutionary changes to be made in the powers of the High Courts. The recommendations of the Commission were examined carefully by the Government, keeping in view, the following basic' considerations.

(i) an accused person should get a fair trial in accordance with the accepted principles of natural justice;

(ii) every effort should be made to avoid delay in investigation and trial which is harmful not only to the individuals involved but also to society; and

(iii) 'the procedure should not be complicated and should, to the utmost extent possible, ensure fair deal to the poorer sections of the community.

8. This is clearly mentioned, in the Statement of Objects and Reasons accompanying the 1973 Code. Cl. (d) of Paragraph 5 of the Statement of Objects and Reasons-runs thus :

"the, powers of revision against interlocutory orders are being takken away, as it has been found to be one of the main contributing factors in the delay of disposal of criminal cases Similarly, replying to the debate in the Lok Sabha on sub-cl. (2) of Clause 397, Shri Ram Niwas Mirdha, the Minister concerned, observed as follows :

"It was stated before the Select Committee that a large number of appeals against interlocutory orders are filed with the result that the appeals got delayed considerably. Some of the more notorious cases concern big business persons. So, this new provision was also welcomed by most

of the witnesses as well as the Select Committee..... This was a well-thought out measure so we do not want to delete it".

Thus it would appear that s. 397(2) was incorporated in the 1973 Code with the avowed purpose of cutting out delays and ensuring that the accused persons got a fair trial without much delay and the procedure was not made complicated. Thus the paramount object in inserting this new provision of sub- s. (2) of s. 397 was to safeguard the interest of the accused.

9. Let us now proceed to interpret the provisions of s. 397 against the historical background of these facts. Sub-s. (2) of s. 397 of the 1973 Code may be extracted thus :

"The powers of revision conferred by Sub- s. (1) shall not be exercised in relation to any interlocutory order passed ;in any appeal, inquiry, trial or other proceeding."

10. The main question which falls for determination in this appeal is as to, the what is the connotation of the term "interlocutory order" as appearing in sub-s. (2) of s. 397 which bars any revision of such an order by the High Court. The term "interlocutory order" is a term of well-known legal significance and does not present any serious diffident. It has been used in various statutes including the Code of Civil Procedure, Letters Patent of the High Courts and other like statutes. In Webster's New World Dictionary "interlocutory" has been defined as an order other than final decision. Decided cases have laid down that interlocutory orders to be appealable must be those which decide 'the rights and liabilities of the parties concerning a particular aspect. It seems to, us that the term "interlocutory order" in s. 397(2) of the 1973 Code has been used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights, or the liabilities of the parties. Any order which substantially affects the, right of the accused, or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order, because that would be against the very object which formed the basis for insertion of this particular provision in s. 397 of the, 1973 Code.

Thus, for instance, orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders against which no revision would lie under s. 397 (2) of the 1973 Code. But orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order so as to be. outside the purview of the revisional jurisdiction of the High Court. In *Central Bank of India v. Gokal Chand*, A.I.R. 1967 S.C. 799 1966 Indlaw SC 58 this Court while describing the incidents of an interlocutory order, observed as follows:

"In the context of s. 38(1), the words "every order of the Controller made under this Act", though very wide, do not include interlocutory orders, which are. merely procedural , 800. and do not affect the rights or liabilities of the parties. In a pending proceeding the Controller, may pass many interlocutory orders under ss. 36 and 37, such as orders regarding the summoning of witnesses, discovery, production and inspection of documents, issue of a commission for examination of witnesses, inspection of premises, fixing a date of hearing and the admissibility of a document or the relevancy of a question. All these interlocutory orders are steps taken towards the final adjudication and for assisting the parties in the prosecution of their case in the pending proceeding; they regulate the procedure only 'and do not affect any right or liability of the

parties."

11. The aforesaid decision clearly illustrates the nature and incidents of 'an interlocutory order and the incidents given by this Court constitute sufficient guidelines to interpret the connotation of the word "interlocutory order" as appearing in sub-s. (2) of s. 397 of the 1973 Code. Similarly in a later case in Mohan Lal Magan Lal Thacker v. State of Gujarat, [1968] 2 S.C.R. 685 1967 Indlaw SC 399 this Court pointed out that the finality of an order could not be judged by co-relating that order with the controversy in the complaint. The fact that the controversy still remained alive was irrelevant. In that case this Court held that even though it was an interlocutory order, the order was a final order. Similarly in Baldevdas v. Filmistan Distributors (India) Pvt. Ltd., A.I.R. [1970] S.C. 406 1969 Indlaw SC 184 while interpreting the import of the words "case decided" appearing in S. 115 of the Code of Civil Procedure, this Court observed as follows:

"A case may be said to be decided, if the Court adjudicates for the purposes of the suit some right or obligation of the parties in controversy;"

12. Apart from this it would appear that under the various provisions of the Letters Patent of the High Courts in India, an appeal lies to a Division Bench from an order passed by a Single Judge and some High Courts have held that even though the order may appear to be an interlocutory one where it does decide one of the aspect of the rights of the parties it is, appealable. For instance, an order of a Single Judge granting a temporary injunction was held by a Full Bench of Allahabad High Court in Standard Glass Beads Factory and Anr.v. Shri Dhar and Ors., A.I.R. [1960] All. 692 1960 Indlaw ALL 240 as not being an interlocutory order having decided some rights of the parties and was, therefore, appealable. To, the same, effect are the decisions of the Calcutta High Court in Union of India v. Khetra Mohan Banerjee, A.I.R. [1960] Cal. 190 1959 Indlaw CAL 88, of the Lahore High Court in Gokal Chand v. Sanwal Das and others, A.I.R. [1920] Lah. 326 of the Delhi High Court in Begum Aftab Zamani v. Shri Lal Chand Khanna, A.I.R. 1969 Delhi 85 1968 Indlaw DEL 56 and of the Jammu and Kashmir High Court in Har Parshad Wali and Anr. v. Naranjan Nath Matoo and others, A.I.R. 1959 J. and K. 139.

13. Applying the aforesaid tests, let us now see whether the order impugned in the instant case can be said to be an interlocutory order as held by the High Court. In the first place, so far as the appellants are concerned, the police had submitted its final report against them and they were released by the Judicial Magistrate. A revision against that order to the Additional Sessions Judge preferred by the complainant had failed. Thus the appellants, by virtue of the order of the Judicial Magistrate as' affirmed by the Additional Sessions Judge ,acquired a valuable right of not being put on trial unless a proper order was made against them. Then came the complaint by respondent No. 2 before the Judicial Magistrate which was also dismissed ,on merits. The Sessions Judge in revision, however, set aside the order dismissing the complaint and ordered further inquiry. The Magistrate on receiving the order of the Sessions Judge summoned the appellants straightaway which meant that the appellants were to, be put on trial. So long as the Judicial Magistrate had not passed this order, no proceedings were started against the appellants, nor were ,any such proceedings pending against them. It was only with the passing of the impugned order that the proceedings started and the question of the appellants being put up for trial arose for the first time.

14. This was undoubtedly a valuable right which the appellants possessed and which was being denied to them by the impugned order. It cannot, therefore, be said that the appellants were not at all prejudiced, ,or that any right of theirs was not involved by the impugned order. It is difficult to

hold that the impugned order summoning the appellants straightaway was merely an interlocutory order which could not be revised by the High Court under sub-ss. (1) and (2) of s. 397 of the 1973 Code. The order of the Judicial Magistrate 'summoning the appellants in the circumstances of the present case, particularly having regard to what had preceded, was undoubtedly a matter of moment, and a valuable right of the appellants had been taken away by the Magistrate's passing an order prima facie in a mechanical fashion without applying his mind. We are, therefore, satisfied that the order impugned was one which was a matter of moment and which did involve a decision regarding the rights of the appellants. If the appellants were not summoned, then they could not have faced the trial at all, but by compelling the appellants to face a trial without proper application of mind cannot be held to be an interlocutory matter but one which decided a serious question as to the rights of the appellants to be put on trial.

15. For these reasons, the order of the Judicial Magistrate, 1st Class, Karnal dated November 15, 1976 cannot be said to be an interlocutory order and does not fall within the mischief of sub-s. (2) of s. 397 of the 1973 Code and is not covered by the same. That being the position, a revision against this order was fully competent under S. 397(1) or under s. 482 of the same Code, because the scope of both these sections in a matter of this kind is more or less the same.

16. As we propose to remand this case to the High Court to decide the revision on merits, we refrain from making any observation regarding the merits of the case. The appeal is, therefore, allowed, the order of the High Court dated February 14, 1977 refusing to entertain the revision petition of the appellants is 'set aside. The High Court is directed to admit the revision petition filed by the appellants and to decide it on merits in accordance with the law.

Appeal allowed.

Madhu Limaye v State of Maharashtra
(1977) 4 SCC 551

Case No : Cr.A. No. 81 of 1977 (Arising as an appeal by Special Leave from the Judgment and Order Dt. 10 November 1975 of the Bombay High Court in Cr.R.A. 180 of 1975).

Bench : N.L. Untwalia, P.K. Goswami, D.A. Desai

Summary : Criminal - Practice & Procedure - Criminal Procedure Code, 1973, ss. 199(2), 199(4)(a), 397 (1) and (2) and 482 - Indian Penal Code, 1860, s. 500 - Statement of defamation - Trial challenged by appellant, but Sessions Judge rejecting all contentions framed charge - Revision dismissed by High Court on maintainability of revision application - *Whether revision to HC against order of Subordinate Judge is expressly barred u/s. 397(2) CrPC, 1973?* - Held, *situation which is an abuse of process of Court or for purpose of securing ends of justice interference by HC is absolutely necessary, then nothing contained in s. 397(2) can limit or affect exercise of inherent power by HC, therefore, case falls for exercise of power u/s. 482 CrPC, 1973 - Even assuming, although not accepting, that invoking revisional power of HC is impermissible* - Appeal allowed.

The Judgment was delivered by : N. L. Untwalia, J.

1. This is an appeal by special leave from the order of the Bombay High Court rejecting the application in revision filed by the appellant u/s. 397(1) of the Code of Criminal Procedure, 1973 hereinafter to be referred to as the 1973 Code or the new Code, on the ground that it was not maintainable in view of the provision contained in subs. (2) of section 397. The High Court has not gone into its merits.
2. It is not necessary to state the facts of the case in any detail for the disposal of this appeal. A bare skeleton of them will suffice. In a press conference held at New Delhi on the 27th September, 1974 the appellant is said to have made certain statements and handed over a press hand-out containing allegedly some defamatory statements concerning Shri A. R. Antulay, the then Law Minister of the Government of Maharashtra. The said statements were published in various newspapers. The State Government decided to prosecute the appellant for an offence u/s. 500 of the Indian Penal Code as it was of the view that the Law Minister was defamed in respect of his conduct in the discharge of his public functions. Sanction in accordance with s. 199 (4) (a) of the 1973 Code was purported to have been accorded by the State Government.
3. Thereupon the Public Prosecutor filed a complaint in the Court of the Sessions Judge, Greater Bombay. Cognizance of the offence alleged to have been committed by the appellant was taken by the Court of Sessions without the case being committed to it as permissible under sub-s. (2) of section 199. Process was issued against the appellant upon the said complaint.
4. The Chief Secretary to the Government of Maharashtra was examined on the 17th February, 1975 as a witness in the Sessions Court to prove the sanction order of the State Government. Thereafter on tile 24th February, 1975 Shri Madhu Limaye, the appellant, filed an application to dismiss the complaint on the ground that the Court had no jurisdiction to entertain the complaint. The stand taken on behalf of the appellant was that allegations were made against Shri Antulay in relation to what he had done in his personal capacity and not in his capacity of discharging his functions as a Minister. Chiefly on that ground and on some others, the jurisdiction of the Court to proceed with the trial was challenged by the appellant.

5. The appellant raised three contentions in the Sessions Court and later in the High Court assailing the validity and the legality of the trial in question. They are :-

6. That even assuming the allegations made against Shri Antulay were defamatory, they were not in respect of his conduct in the discharge of his public functions and hence the aggrieved person could file a complaint in the Court of a competent Magistrate who after taking cognizance could try the case or commit it to the Court of Sessions if so warranted in law. The Court of Sessions could not take cognizance without the committal of the case to it.

7. The sanction given was bad in as much as it was not given by the State Government but was given by the Chief Secretary.

8. The Chief Secretary had not applied his mind to the entire conspectus of the facts and had given the sanction in a mechanical manner. The sanction was bad on that account too. The Sessions Judge rejected all these contentions and framed a charge against the appellant u/s. 500 of the Penal Code. The appellant, thereupon, challenged- the order of the Sessions Judge in the revision filed by him in the High Court. As already 'stated, without entering into the merits of any of the contentions raised by the appellant, it upheld the preliminary objection as to the maintainability of the revision application. Hence this appeal.

9. The point which falls for determination in this appeal is squarely covered by a decision of this Court to which one of us (Untwalia was a party in *Amar Nath and Others v. State of Haryana & Anr* 1977 Indlaw SC 270 But on a careful consideration of the matter and on hearing learned counsel for the parties in this appeal we thought it advisable to enunciate and reiterate the view taken by two learned judges of this Court in *Amar Nath's case* 1977 Indlaw SC 270 but in a somewhat modified and modulated form. In *Amar Nath's case* 1977 Indlaw SC 270, as in this, the order of the Trial Court issuing process against the accused was challenged and the High Court was asked to quash the criminal proceeding either in exercise of its inherent power u/s. 482 of the 1973 Code corresponding to section 561A of the Code of Criminal Procedure, 1898-hereinafter called the 1898 Code or the old Code, or u/s. 397(1) of the new Code corresponding to s. 435 of the old Code. Two points were decided in *Amar Nath's case* 1977 Indlaw SC 270 in the following terms :-

"While we fully agree with-the view taken by the learned Judge that where a revision to the High Court against the order of the Subordinate Judge is expressly barred under sub-s. (2) of s. 397 of the 1973 Code the inherent powers contained in s. 482 would not be available to defeat the bar contained in s. 397(2)."

10. The impugned order of the Magistrate, however, was not an interlocutory order. For the reasons stated hereinafter we think that the statement of the law apropos point no. 1 is not quite accurate and needs some modulation. But we are-going to reaffirm the decision of the Court on the second point. Under s. 435 of the 1898 Code the High Court had the power to "call for and examine the record of any proceeding before any inferior Criminal Court 'situate within the local limits of its jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed. and as to the regularity of any proceedings of such inferior Court", and then to pass the necessary orders in accordance with the law engrafted in any of the sections following section 435. Apart from the revisional power, the High Court possessed and possesses the inherent powers to be exercised ex debito justitiae to do the real and the substantial 'justice for the administration of which alone Courts exist. In express language this power was recognized and saved in section 561A of the old Code. U/s. 397(1) of the 1973 Code, revisional power has been conferred on the High Court in terms which are identical to those found in s. 435 of the 1898 Code. Similar is the position apropos the inherent powers of the High Court. We may read the language

11. Criminal Appeal No. 124 of 1977 decided on the 29th July, 1977. of s. 482 (corresponding to section 561A of the old Code) of the Code. It says

"Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

12. At the outset the following principles may be noticed in relation to the exercise of the inherent power of the High Court which have been followed ordinarily and generally, almost invariably, barring a few exceptions :-

13. That the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party ;

14. That it should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice;

15. That it should not be exercised as against the express bar of law engrafted in any other provision of the Code.

16. In most of the cases decided during several decades the inherent power of the High Court has been invoked for the quashing of a criminal proceeding on one ground or the other. Sometimes the revisional jurisdiction of the High Court has also been resorted to for the same kind of relief by challenging the order taking cognizance or issuing processes or framing charge on the grounds that the Court had no jurisdiction to take cognizance and proceed with the trial, that the issuance of process was wholly illegal or void, or that no charge could be framed as no offence was made out on the allegations made or the evidence adduced in Court. In the background aforesaid we proceed to examine as to what is the correct position of law after the introduction of a provision like sub s. (2) of s. 397 in, the 1973 Code.

17. As pointed out in Amar Nath's case 1977 Indlaw SC 270 (supra) the purpose of putting a bar on the power of revision in relation to any interlocutory order passed in an appeal, inquiry, trial or other proceeding is to bring about expeditious disposal of the cases finally, More often than not, the revisional power of the High Court was resorted to in relation to inter-locutory orders delaying the final disposal of the proceedings. The Legislature in its wisdom decided to check this delay by introducing sub-section (2), in section 397. On the one hand, a bar has been put in the way of the High Court (as also of the Sessions Judge) for exercise of the revisional power in relation to any interlocutory order, on the other, the power has been conferred in almost the same terms as it was in the 1898 Code. On a plain reading of section 482, however, it would follow that nothing in the Code, which would include subs. (2) of s. 397 also, "shall be deemed to limit or affect the inherent powers of the High Court". But, if we were to say that the said bar is not to operate in the exercise of the inherent power at all, it will be setting at naught one of the limitations imposed upon the exercise of the revisional powers. In such a situation, what is the harmonious way out ? In our opinion, a happy solution of this problem would be to say that the bar provided in sub-s. (2) of s. 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order.

18. Then in accordance with one of the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code. the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation

which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in s. 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly. One such case would be the desirability of the quashing of, a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction. Take for example a case where a prosecution is launched under the Prevention of Corruption Act without a sanction. then the trial of the accused will be without jurisdiction and even after his acquittal a second trial after proper sanction will not be barred on the doctrine of Autrefois Acquit. Even assuming, although we shall presently show that it is not so, that in such a case an order of the Court taking cognizance or issuing processes is an interlocutory order. does it stand to reason to say that inherent power of the High Court cannot be exercised for stopping the criminal proceeding as early as possible, instead of harassing the accused upto the end ? The answer is obvious that the bar will not operate to prevent the abuse of the process of the Court and/or to secure, the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers. The present case undoubtedly falls for exercise of the power of the High Court in accordance with s. 482 of the 1973 Code. even assuming, although not accepting, that invoking the revisional power of the High Court is impermissible. In R. P. Kapur v. The State of Punjab ([1960] 3 SCR. 388) 1960 Indlaw SC 471 Gajendragadkar J.. as he then was, delivering the judgment of this Court pointed out, if we may say so with respect, very succinctly the scope of the inherent power of the High Court for the purpose of quashing a criminal proceeding. Says the learned Judge :--

"Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance, furnish cases under this category. Cases may also arise where the allegations in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the First Information Report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to. prove the charge'. In dealing with this class of cases it is important to bear in- mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may not support the accusation in question. In exercising its jurisdiction under s. 561-A the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate, and ordinarily it would not be open to any party to

invoke the High Court's inherent Jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained."

19. We think the law as stated above is not affected by s. 397(2) of the new Code. It still holds good in accordance with 'section 482.

20. Ordinarily and generally the expression 'interlocutory order' has been understood and taken to mean as a converse of the term 'final order'. In volume 22 of the third edition of Halsbury's Laws of England at page 742, however, it has been stated in para 1606

"..... a judgment or order may be final for one purpose and interlocutory for another, or final as to part and interlocutory as to part. The meaning of two words must therefore be considered separately in relation to the particular purpose for which it is required." In para 1607 it is said :

"In general a judgment or order which determines the principal matter in question is termed "final"."

21. In para 1608 at pages 744 and 745 we find the words

"An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declarations of right already given in the- final judgment are to be worked out, is termed "interlocutory". An interlocutory order, though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals."

22. In *S. Kuppuswami Rao v. The King* ([1947] Federal Court Reports, 1) Kania C. J., delivering the judgment of the Court has referred to some English decisions at pages 185 and 186. Lord Esher M. R. said in *Salaman v. Warner* ([1891] 1 Q.B. 734) "If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory." To the same effect are the observations quoted from the judgments of Fry L. J. and Lopes L. J. Applying the said test, almost on facts similar to the ones in the instant case, it was held that the order in revision passed by the High Court (at that time, there was no bar like s. 397 (2) was not a "final order" within the meaning of s. 205 (1) of the Government of India Act, 1935. It is to be noticed that the test laid down therein was that if the objection of the accused succeeded, the proceeding could have ended but not vice versa. The order can be said to be a final order only if, in either event, the action will be determined. In our opinion if this strict test were to be applied in interpreting the words "interlocutory order" occurring in s. 397(2), then the order taking cognizance of an offence by a Court, whether it is so done illegally or without jurisdiction, will not be a final order and hence will be an interlocutory one. Even so, as we have said above, the inherent power of the High Court can be invoked for quashing such a criminal proceeding. But in our judgment such an interpretation and the universal application of the principle that what is not a final order must be an interlocutory order is neither warranted nor justified. If it were so it will render almost nugatory the revisional power of the Sessions Court or the High Court conferred on it by s. 397(1). On such a 'strict interpretation, only those orders would be revisable which are orders passed on the final determination of the action but are not appealable under Chapter XXIX of the Code. This does not seem to be the intention of the Legislature when it retained the revisional power of the High Court in terms identical to the one in the, 1898 Code. In what cases then the High Court will examine the legality or the propriety of an order or the legality of any proceeding of an inferior Criminal court ? Is it circumscribed to examine only such proceeding which is brought for its examination after the final determination and wherein no appeal lies ? Such cases will be very few and far between. It has been pointed out repeatedly, vide, for example, *The River Wear Commissioners v.*

William Adamson([1876-77] 2 A.C. 743) and R. M. D. Chamarbaugwalla v. The Union of India ([1957] S.C.R. 930) 1957 Indlaw SC 49 that although the word occurring in a particular statute are plain and unambiguous, they have to be interpreted in a manner which would fit in the context of the other provisions of the statute and bring about the real intention of the legislature. On the one hand, the legislature kept intact the revisional power of the High Court and, on the other, it put a bar on the exercise of that power in relation to any interlocutory order. In such a situation it appears to us that the real intention of the legislature was not to equate the expression "interlocutory order" as invariably being converse of the words "final order". There may be an order passed during the course of a proceeding which may not be final in the sense noticed in Kuppaswami's case (supra), but, yet it may not be an interlocutory order-pure or simple. Some kinds of order may fall in between the two. By a rule of harmonious construction, we, think that the bar in sub-s. (2) of s. 397 is not meant to be attracted to such kinds of intermediate orders. They may not be final orders for the purposes of Art. 134 of the Constitution, yet it would not be correct to characterise them as merely interlocutory orders within the meaning of s. 397(2). It is neither advisable, nor possible, to make a catalogue of orders to demonstrate which kinds of orders would be merely, purely or simply interlocutory and which kinds of orders would be final, and then to prepare an exhaustive list of those types of orders which will fall in between the two. The first two kinds are well-known and can be culled out from many decided cases. We may, however, indicate that the type of order with which we are concerned in this case, even though it may not be final in one sense, is surely not interlocutory so as to attract the bar of subs. (2) of section 397. In our opinion it must be taken to be an order of the type falling in the middle course.

23. In passing, for the sake of explaining ourselves, we may refer to what has been said by Kania C. J. in Kuppaswami's case by quoting a few words from Sir George Lowndes in the case of Abdul Rahman V. D. K. Cassim and Sons([1933] 60 Indian Appeals, 76)1932 Indlaw PC 54. The learned law Lord said with reference to the order under consideration in that case :

24. The effect of the order from which it is here sought to appeal was not to dispose finally of the rights of the parties. It no doubt decided an important, and even a vital, issue in the case, but it left the suit alive, and provided for its trial in the ordinary way. Many a time a question arose in India as to what is the exact meaning of the phrase "case decided" occurring in s. 115 of the Code of Civil Procedure. Some High Courts had taken the view that it meant the final order passed on final determination of the action. Many others had however, opined that even interlocutory orders were covered by the said term. This Court struck a mean and it did not approve of either of the two extreme lines. In Baldevdas v. Filmistan Distributors (India) Pvt. Ltd 1969 Indlaw SC 184 it has been pointed out :

"A case may be said to be decided, if the Court adjudicates for the purposes of the suit some right or obligation of the parties in controversy :"

25. We may give a clear example of an order in a civil case which may not be a final order within the meaning of Art. 133 (1) of the Constitution, yet it will not be purely or simply of an interlocutory character. Suppose for example, a defendant raises the plea of jurisdiction of a particular Court to try the suit or the bar of limitation and succeeds, then the action is determined finally in that Court. But if the point is decided against him the suit proceeds. Of course, in a given case the point raised may be such that it is interwoven and interconnected with the other issues in the case, and that it may not be possible to decide it under Order 14 Rule 2 of the Code of Civil Procedure as I preliminary point of law. But, if it is a pure point of law and is decided one way or the other, then the order deciding such a point may not be interlocutory, albeit-may not be final either. Surely, it will be a case decided, as pointed out by this Court in some decisions, within the meaning of s. 115 of the Code of Civil

Procedure. We think it would be just and proper to apply the same kind to test for finding out the real meaning of the expression 'interlocutory order' occurring in s. 397(2).

26. In Amar Nath's case^{1977 Indlaw SC 270}, reference has been made to the decision of this Court in Mohan Lal Magan Lal Thacker v. State of Gujarat([1968] 2 S.C.R. 685) ^{1967 Indlaw SC 399} After an enquiry u/s. 476 of the 1898 Code an order was made directing the filing of a complaint against the appellant. It was affirmed by the High Court. The matter came to this Court on grant of a certificate u/art. 134(1) (c). A question arose whether the order was a "final order" within the meaning of the said constitutional provision. Shelat J., delivering the judgment on behalf of himself and two other learned Judges, said that it was a final order. The dissenting judgment was given by Bachawat J., on behalf of himself and one other learned Judge. In the majority decision four tests were culled out from some English decisions. They are found enumerated. One of the tests is "If the order in question is reversed would the action have to go on?" Applying that test to the facts of the instant case it would be noticed that if the plea of the appellant succeeds and the order of the Sessions Judge is reversed, the criminal proceeding as initiated and instituted against him cannot go on. If, however, he loses on the merits of the preliminary point the proceeding will go on. Applying the test of Kuppaswami case such an order will not be a final order. But applying the fourth test noted in Mohan Lal's case it would be a final order. The real point of distinction, however, is to be found in the judgment of Shelat, J. The passage runs thus :

"As observed in Ramesh v. Patni-[1966] 3 S.C.R. 198 1966 Indlaw SC 395 the finality of that order was not to be judged by correlating that order with the controversy in the complaint, viz. whether the appellant had committed the offence charged against him therein. The fact that that controversy still remained alive is irrelevant."

27. The majority view is based upon the distinction pointed out in the above passage and concluding that it is a final order within the meaning of Art. 134(1) (c). While Bachawat J., said : *"It is merely a preliminary step in the prosecution and therefore an interlocutory order."*

28. Even though there may be a scope for expressing different opinions apropos the nature of the order which was under consideration in Mohan Lal's case, in our judgment, undoubtedly, an order directing the filing of a complaint after enquiry made under a provision of the 1973 Code, similar to s. 476 of the 1898 Code will not be an interlocutory order within the meaning of s. 397(2). The order will be clearly revisable by the High Court. We must, however, hasten to add that the majority decision in Mohan Lal's case treats such an order as an order finally concluding the enquiry started to find out whether a complaint should be lodged or not, taking the prosecution launched on the filing of the complaint as a separate proceeding. From that point of view the matter under discussion may not be said to be squarely covered by the decision of this Court in Mohan Lal's case. Yet for the reasons already alluded to, we feel no difficulty in coming to the conclusion, after due consideration, that an order rejecting the plea of the accused on a point which, when accepted, will conclude the particular proceeding, will surely be not an interlocutory order within the meaning of s. 397(2).

29. We may also refer to the decision of this Court in Parmeshwari Devi v. State and Anr. ([1977] 2 S.C.R. 160) ^{1976 Indlaw SC 277} that an order made in a criminal proceeding against a person who is not a party to the enquiry or trial and which adversely affected him is not an interlocutory order within the meaning of s. 397 (2). Referring to a passage from the decision of this Court in Mohan Lal's case- the passage which is to be found in Halsbury's Laws of England, Volume 22, it has been said by Shinghal J., delivering the judgment of the Court, at page 164 :

"It may thus be conclusive with reference to the stage at which it is made, and it may also be conclusive as to a person who is not a party to the enquiry or trial, against whom it is directed."

30. As already mentioned, the view expressed in Mohan Lal's case may be open to debate or difference. One such example is to be found in the decision of this Court in Prakash Chand Agarwal & Ors. v. M/s Hindustan Steel Ltd 1970 Indlaw SC 160 wherein it was held that an order of the High Court setting aside an ex-parte decree in the suit and restoring the suit to the file of the Trial Court is not a final order within the meaning of Article 133. It is to be noticed that if the High Court would have refused to set aside the ex-parte decree, the proceeding for setting it aside would have finally ended and on some of the principles culled out by the majority in Mohan Lars case, such an order would have been a final order. We are, however, not under any necessity to enter into this controversial arena. In our opinion whether the type of the order aforesaid would be a final order or not, surely it will not be an interlocutory order within the meaning of sub-s. (2) of s. 397 of the 1973 Code. Before we conclude we may point out an obvious, almost insurmountable, difficulty in the way of applying literally the test laid down in Kuppaswami Rao's case and in holding that an order of the kind under consideration being not a final order must necessarily be an interlocutory one. If a complaint is dismissed u/s. 203 or u/s. 204(4), or the Court holds the proceeding to be void or discharges the accused, a revision to the High Court at the instance of the complainant or the prosecutor would be competent, otherwise it will make s. 398 of the new Code otiose. Does it stand to reason, then, that an accused will have no remedy to move the High Court in revision or invoke its inherent power for the quashing of the criminal proceeding initiated upon a complaint or otherwise and which is fit to be quashed on the face of it ? The legislature left the power to order further inquiry intact in 'section 398. Is it not, then, in consonance with the sense of justice to leave intact the remedy of the accused to move the High Court for setting aside the order adversely made against him in similar circumstances and to quash the proceeding ? The answer must be given in favour of the just and reasonable view expressed by us above.

31. For the reasons stated above, we allow this appeal, set aside the judgment and order of the High Court and remit the case back to it to dispose of the appellant's petition on merits, in the manner it may think fit and proper to do in accordance with the law and in the light of this judgment.

Appeal allowed.

STRUCTURED SENTENCING IN ENGLAND AND WALES: RECENT DEVELOPMENTS AND LESSONS FOR INDIA

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Sentencing in India falls squarely within the tradition of common law jurisdictions: courts are provided with wide discretion to determine a fit sentence, with appellate review constituting the only institutional mechanism to promote consistency, fairness and principled sentencing. Until relatively recently this, arrangement existed in every common law country except the United States, where formal, numerical guidelines were introduced in the late 1970s. ⁴ The US guidelines are usually in the form of a two dimensional sentencing grid, with the dimensions being crime seriousness and criminal history. Each grid contains a narrow range of sentence length and courts must sentence within this range - or justify "departures", i.e., sentences outside the range. The compliance requirement is that "The sentencing judge must find, and record, substantial and compelling reasons why the presumptive guidelines sentence would be too high or too low in a given case." ⁵ Guidelines have proliferated in that country and now can be found in most states and at the federal level.

Elsewhere, in other common law countries such as Canada, Australia, New Zealand and South Africa, trial courts have long enjoyed, and continue to enjoy, considerable freedom to determine sentence in the absence of any formal guidelines. None of these jurisdictions has to date implemented a formal guideline system for sentences. However, this state of affairs has now changed in England and Wales, where courts must now follow a system of guidelines which has slowly evolved over the past decade. This guideline system is the subject of this essay.

PURPOSE AND OVERVIEW OF THE ARTICLE

In this article, we explore the relevance and potential utility of sentencing guidelines and of a sentencing guidelines authority (such as the Sentencing Council of England and Wales) for India, drawing upon recent experience in England and Wales. The article is structured as follows: Part I provides some preliminary comments about sentencing under the adversarial model of justice followed in common law countries. Although differences exist across criminal justice systems in different jurisdictions, with respect to sentencing there are many common elements. This section is followed in Part II by a brief discussion of sentencing structures in India today. Part III contains a description of the English sentencing guidelines which have been in existence for a decade now, and we conclude in Part IV by drawing some lessons for the sentencing process in India.

I. SENTENCING AND ADVERSARIAL JUSTICE

Sentencing in the common law world has long been characterised by its discretionary nature. ⁶ In most jurisdictions, offences carry unrealistically high maximum penalties, many of which were derived from the late 19th century, and which bear little relation to the seriousness of the crimes for which they may be imposed. For example, even a first conviction for domestic burglary in England and Wales (and other countries such as Canada) is punishable by any sentence up to and including life imprisonment. This wide range of potential sentences creates much discretion for a sentencing court. Under an adversarial model the

two parties depose conflicting sentence submissions and the court ultimately decides on the sanction. In all jurisdictions except England and Wales, the State prosecutor submits a clear, often detailed, sentence recommendation to the sentencing court. Prosecutors in England generally identify important sources of aggravation but do not generally comment on the appropriate disposal or make a specific sentencing recommendation. *30

In countries such as the US and Canada, plea bargaining is commonplace. Guilty pleas account for up to 90% of all cases, with the result that a contested trial is rare. Most guilty pleas in North America arise out of an agreement between counsel; the defendant offers to plead guilty in return for some benefit. The benefit might take the form of a common submission on sentence (a joint submission), an agreement about the facts to be considered by the sentencing court, or an agreement by the State to accept a plea to a less serious charge. These are known, respectively, as fact and plea bargaining.

Even in jurisdictions where plea discussions play a more modest role, such as in England and Wales, the existence of a powerful discount for a guilty plea plays an important role in resolving cases. The English guidelines stipulate that a reduction of one-third is the appropriate discount for offenders who plead guilty at the first opportunity to do so.⁷

Appellate Review of Sentencing

Counsel obviously draw upon precedent in their sentencing submissions, but the case law can often sustain conflicting prior sentencing decisions. Sentencers are guided by the appellate courts as both parties enjoy the right of appeal. However, numerous academic commentators and Commissions of Inquiry have over the years identified the limitations on appellate guidance as means of ensuring consistent sentencing. Most sentence appeals address a specific point of law or provide a test for whether the sentence imposed was "manifestly unfit". Nigel Walker, for example, described the degree of guidance from the English Court of Appeal in the following way: "What emerges is the unsystematic approach of the Court of Appeal, resulting in contradictory decisions and special pleading."⁸ Elsewhere, the Canadian Sentencing Commission noted that "Research undertaken by the Commission has shown that a significant number of judgements just enumerate factors without specifying whether they are considered to be aggravating or mitigating"⁹. More recently, the Court of Appeal in England and Wales has provided detailed guidance for sentencers¹⁰ but this is less often the case in other common law jurisdictions. *31

Appellate review of sentencing, however, has long been subject to criticism on a number of grounds. First, few sentences are appealed;¹¹ this means that the Court of Appeal has few occasions on which to issue guidance by means of a guideline judgement. The reason for the relatively low rate of appeal by the offender or the prosecutor can be found in the high standard of review. Throughout the common law world a consistent position has emerged: an appellate court should not interfere with a sentence imposed by a court of first instance unless there has been an error in law or the sentence imposed was "manifestly unfit". This creates what may be termed a "high standard of review" and protects decisions by courts of first instance from frequently being overturned on appeal. A disagreement between the Court of Appeal and the trial court sentence is insufficient ground to overturn the sentence; it must be dearly out of the range. Secondly, appellate courts review only cases brought on appeal by one of the parties. This means that the appellate caseload is party-driven and this further limits the ability of appellate review to develop guidelines. Thirdly, few decisions of the courts of appeal may be considered "guideline" judgements; usually they address the sentence on appeal without providing broader guidance.

This state of affairs has long been criticised by sentencing scholars and practitioners for failing to ensure consistency of approach at sentencing. Over the years, repeated calls for legislatures to create a more

structured environment for sentencers have been made - calls which have passed unheeded in many common law countries such as Canada, South Africa, and the Caribbean states. More recently however, some jurisdictions have introduced significant reforms. New Zealand recently legislated for a sentencing council and the Law Commission in that jurisdiction has devised a comprehensive set of sentencing guidelines, although these have yet to be implemented.¹² In some Australian states such as Victoria and New South Wales sentencing advisory bodies have been created with a mandate to provide guidance to sentencers and information to the general public.¹³ However, the most radical reforms (outside the United States) have *32 emerged, somewhat improbably, in England and Wales¹⁴. We shall return to describe these guidelines later in this article.

II. SENTENCING IN INDIA

Indian criminal law largely has been, and indeed largely is today, based on British criminal law as it was introduced to India in the mid-19th century. It must be acknowledged that with a plethora of "localisation" through amendments over the years, Indian criminal law has acquired a more Indian character, but notwithstanding any changes, the underlying basis is still very much a creation of British law.

India's first systematic penal code was drafted in the 1830s by the First Law Commission, chaired by Lord Macaulay. The draft code subsequently underwent extensive examination and revision by Sir Barnes Peacock, Chief Justice of the Calcutta Supreme Court, before being passed into law on October 6, 1860 as the Indian Penal Code 1860. In terms of criminal procedure in India, one of the earlier vestiges of a British criminal procedure code (although by no means the earliest criminal procedure per se) was the Regulating Act 1773, which, inter alia, established various supreme courts around India (for example Calcutta/ Madras and Bombay) to adjudicate upon the cases of British citizens using British procedure. The accompanying criminal procedure statute to the Indian Penal Code 1860 was the Indian Criminal Procedure Code 1861 and, like the 1860 Code in regard to substantive criminal law, it was very much the bedrock of Indian criminal procedure for over 100 years before it was replaced by the Criminal Procedure Code 1973, following successive consultations and reports from the Indian Law Commission (1958, 1967 and 1969).

However, even with the revisions to the criminal procedure codes subsequent to 1861 (the major ones being in 1969 and then the 1973 replacement), the sentencing system in India does not appear to have modernised in either of the two classic directions used today - namely the flexible guideline system (as is in force in/ for example, England and Wales and which is described below) or the more restrictive grid-based system (as used, for example, in the state of Minnesota, USA). Indeed, the Indian sentencing system appears to have somewhat stagnated *33 and, with an infrequent caveat here or there, is very much more akin to the British sentencing model of the early to mid-19th century that was imported into India, namely one of wide unfettered discretion in which various minima and maxima are provided for with little by way of guidance between these two poles.

A preliminary observation to make on the sentencing regime in India, indicative of its nascent and underdeveloped state, is that sentencing does not have a separate or distinct chapter under the provisions of the Criminal Procedure Code 1973, resulting in the precise procedure being scattered around the 1973 Code - a Code that contains 484 sections, 2 schedules, and 56 forms. There are several such provisions related to sentencing. Collecting these provisions together within a single statute would, in our view, might prove to be very beneficial.

A Sentencing Framework in India

The general procedure for post-conviction hearings on sentence is set out in section 235 of the 1973 Code,

which provides that:

235. Judgement of acquittal or conviction

- 1) After hearing arguments and points of law (if any), the Judge shall give a judgement in the case.
- 2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360 hear the accused on the question of sentence, and then pass sentence on him according to law.

This is consistent with sentencing procedure in most jurisdictions where the offender has the opportunity to make representations to the sentencing judge (whether or not he is the trial judge), prior to the sentence being imposed, in order to mitigate the sentence that they will ultimately receive. The effect of this section (namely sentence post conviction and after representations from the convicted individual) is mirrored in other parts of the 1973 Code. The sentencing judge is instructed to "hear" the accused on the issue of sentence and then must pass the sentence in accordance with the statutory punishments as set out for the range of criminal offences. It is thus for the judge to adjudicate upon relevant mitigating factors and aggravating factors, with little or no guidance other than judicial experience and limited submissions from counsel.

S. 325 provides for the committal of the convicted person for sentence to a Chief Judicial Magistrate if the sentencing judge is of the opinion that his or her *34 legal powers of sentence are not great enough to provide for the imposition of a sufficiently severe sentence. S. 325 of the 1973 Code provides that:

325. Procedure when Magistrate cannot pass sufficiently severe sentence.(1) Whenever a Magistrate is of the opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or, being a Magistrate of the second class, is of opinion that the accused ought to be required to execute a bond under section 106, he may record the opinion and submit his proceeding, forward the accused, to the Chief Judicial Magistrate to whom he is subordinate.

However, as under s. 235, there is no guidance as to how a magistrate may form such an opinion, namely that the powers of sentence available to them are insufficient to adequately punish the convicted person.

S. 360(1) of the 1973 Code legislates for situations in which the offender has no previous convictions and (a) the offender is under 21 years of age and the offence is one punishable with less than life imprisonment or the death penalty, or (b) the offender is a woman and the offence is one punishable with less than life imprisonment or the death penalty, or (c) where the offender is over 21 and the offence is one punishable with seven years imprisonment or less. In such situations, the sentencing judge may, having regard to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, release the offender with a bond (with or without sureties) to keep the peace if it appears to the court that it is expedient to do so. Section 360(3) legislates for situations in which a first-time offender is convicted of theft, theft in a building, dishonest misappropriation, cheating or any other offence under the Indian Penal Code 1860 punishable with not more than two years imprisonment or any offence punishable with a fine only. In such situations the court may, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, release the offender after "due admonition".

Finally, s. 361 of the 1973 Code imposes a duty on the sentencing judge to provide reasons for the sentence that they have elected to impose in cases in which the offender might have been dealt with under the Probation of Offenders Act 1958, or the Children's Act 1960. Both of these Acts provide for alternative sentences rather than the conventional sentences in accordance with the statutory *35 minima and/or maxima as set out by statute, with the 1958 Act providing for sentences of probation/supervision for certain

offenders in some circumstances at the discretion of the court/ and the 1960 Act providing for detention in special schools/ safe custody, and the sentencing of delinquent children.

B. Judicial implementation

What is apparent from the foregoing is that aside from the limited restrictions created by statutory maxima and/or minima, sentencing judges essentially exercise unfettered discretion with regard to the choice of sentence they wish to impose on an offender after hearing any pleas in mitigation on their behalf or aggravation as against them. Indeed, where there is a primary alternative disposition available in relation to an offender, for example as can be seen in ss. 360(1) and (3) of the 1973 Code where the judge has a prerogative to award an alternative sentence other than the norm, there is no guidance as to how that prerogative can and should be exercised. These issues can be illustrated by examining, for example, s. 379 of the Indian Penal Code 1860, which provides for the offence of theft that "Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with a fine, or with both."

With the lack of judicial guidance for this offence, two similar first-time offenders perhaps having been found guilty of joint-enterprise theft may easily be sentenced to vastly differing sentences in terms of punitiveness, with Offender A, say, given 3 years imprisonment, and Offender B released to keep the peace without a surety. That is not to say that this discretion automatically offends the principles of sentencing *per se*. In our example, one offender may have significant mitigation which may render an appreciably lower sentence entirely appropriate. However, the lack of guidance as to levels of severity (as is present in the England and Wales guidelines system/ for example in cases of robbery - see subsequent sections of this paper) and mitigation, may result in an offender with the same or very similar profile as Offender B being sentenced to 3 years imprisonment by another judge in another court.

The system of unfettered discretion leaves the sentencing system open to the vagaries of individual judges, negating nationwide or even courthouse-wide consistency - the consistency that is a cardinal aim in any sentencing model. It thus seems that the primary controlling influence on sentences that are imposed by Indian trial courts is that of appellate review, as provided for in the 1973 Code in circumstances in where a sentence passed is excessive, where a sentence is insufficient, or where there has been an error of law in the sentencing process. *36 This is consistent with the high standard of review at sentencing found in all common law jurisdictions (see earlier sections of this paper).

The considerable discretion enjoyed by courts at sentencing has also meant that it takes a long time before a case is resolved. Judicial officers are keen to satisfy themselves that they have paid due attention to every evidential aspect of the case before a decision is taken. This also affords the defence ample opportunity to delay trials by insisting that courts deliberate over even the minutest details of the criminal act in question. This state of affairs has resulted in a huge backlog of cases and a judicial logjam that has assumed near epic proportions.¹⁵ It can take up to five years before a case has its first appearance before a trial court. If the accused is detained in custody he stands to lose several years of his freedom even if he is ultimately found not guilty. Efforts to remedy the situation have been made at several levels, all of which have had a bearing on both sentencing procedure and doctrine.

The most significant step in this direction was the Criminal Law (Amendment) Act 2005, passed in the winter session of the current Parliament, which for the first time introduced the concept of plea bargaining in India through the formal, statutory recognition of a discount for offenders who plead guilty. It is interesting that the reform was introduced despite signs that judicial opinion was opposed to the concept. In *State Uttar Pradesh v. Chandrika* 1999 Indlaw SC 802,¹⁶ the Supreme Court said: "It is settled law that on the basis of plea

bargaining courts cannot dispose criminal cases. The court has to decide it on merits. If the accused confesses to guilt, appropriate sentence is required to be implemented." The court further held in the same case: "Mere acceptance or admission of the guilt should not be a ground for reduction of sentence. Nor can the accused [claim] that since he is pleading guilty the sentence be reduced."

However, in 2005, the Government added sections 265-A to 26S-L to the Code of Criminal Procedure 1973 to provide for plea bargaining in certain types of cases. Currently, it is applicable only in respect of those offences for which punishment of imprisonment is up to a period of 7 years, but does not apply to offences that affect the socio-economic condition of the country, or which have been committed against a woman or a child below the age of 14 years. *37

An accused who enters a guilty plea can expect to serve as little as one fourth of the minimum sentence associated with his offence. First-time offenders can also be released on probation. Enthusiastic support for the concept of a guilty plea discount has come from prisoners¹⁷ and the judiciary alike, with a serving judge of the Bombay High Court even visiting a local prison to encourage individuals to take advantage of this criminal law reform.¹⁸ That the change has been well received was evident in the observation of a division bench of the Gujarat High Court in *State of Gujarat v. Natwar Harchanji Thakor* 2005 Indlaw GUJ 73¹⁹ where it said: the very of law is to provide easy, cheap and expeditious justice by resolution of disputes, including the trial of criminal cases..."

At this point we review developments in sentencing in England and Wales.

III. STRUCTURED SENTENCING IN ENGLAND AND WALES

In 1998, the Crime and Disorder Act created a statutory body to devise sentencing guidance for the Court of Appeal. The Sentencing Advisory Panel issued its first guideline in 1999, and further guidelines were issued over the next decade.²⁰ In 2009, sweeping reforms to the sentencing guideline arrangements were made, and these changes are the subject of the rest of this article.

Sentencing in England and Wales entered another era in 2010 as a result of reforms introduced by the Coroners and Justice Act 2009. A new statutory body, the Sentencing Council for England and Wales, headed by Lord Justice Leveson, replaces two previous organisations, the Sentencing Advisory Panel and the Sentencing Guidelines Council. The creation of a single guidelines authority will undoubtedly promote more effective development and dissemination of guidelines. A great deal has changed as a result of the latest legislation -for example, the Sentencing Council has a significantly wider range of duties than its predecessors (see below). These reforms are a creation of the Coroners and Justice Act 2009.

A. Recent Developments

The reforms introduced by the Coroners and Justice Act 2009 may be traced to two recent developments. First, the high and rising prison population in England and Wales prompted the government to commission a review of the use of imprisonment and of sentencing guidelines.²¹ The second development was a Working Group which recommended a revamp of the current arrangements rather than adoption of a completely new system of guidelines.²² US-style sentencing grids were rejected by the Sentencing Commission Working Group as being inappropriately restrictive for sentencing in this country.

(i) Duties of the Sentencing Council

Sentencing guidelines authorities around the world have functions and responsibilities far beyond providing guidance for courts, and the English Council is no exception. The Coroners and Justice Act 2009 imposes a wide range of duties on the new Council in addition to the obvious function of producing guidelines. The

Council also has to publish a resource assessment of, as well as monitor the operation and effects of its guidelines. In addition it must draw conclusions about the factors which influence sentences imposed by the courts, the effect of the guidelines on consistency in sentencing and the effect of the guidelines on public confidence in the criminal justice system. Promoting public confidence is likely to be a priority for the new Council. A number of commentators²³ regard this as a central function of a sentencing guidelines authority. It has been argued that sentencing councils and commissions need to do more than simply devise and distribute guidelines - they have to be promoted to stakeholders in the field of sentencing as well as to the general public.

The Coroners and Justice Act 2009 also states that the Council "may promote awareness of matters relating to the sentencing of offender...in particular the costs of different sentences, and their relative effectiveness in preventing re-offending". The Sentencing Council is further required to publish a report about "non-sentencing factors" which are likely to have an impact on the resources needed for sentencing. These *39 non-sentencing factors include (but are not limited to): recalls of prisoners released to the community; breaches of community orders; patterns of re-offending; decisions taken by the Parole Board of England and Wales/ and considerations relating to the remand prison population. Finally, the Council is also charged with a duty to assess the impact of all government policy proposals (or proposals for legislation) which may affect the provision for prison places, probation and youth justice services. Taken together, the tasks represent a radical departure from the far more restricted duties of the previous organisations responsible for devising and disseminating sentencing guidelines.

(ii) Size and Composition of Sentencing Council

Despite its expanded range of duties, the new Council is a smaller body than its predecessors. The SAP-SGC had a combined membership of up to 25 members while the new Council is composed of 14 individuals. Judicial members constitute a majority on the new council. Some commentators have argued in favour of a Council with more non-judicial members. However, the predominance of judicial members will not mean that the judiciary will dominate the nature and direction of the guidelines; indeed, the new Chair has made it clear that non-judicial members "will play an equal role on the Council."²⁴

B. Nature of the English Sentencing Guidelines

The guidelines are designed to provide courts with guidance regarding the nature and severity of sentence - but without unduly restricting a court's ability to impose a fit sentence. The Coroners and Justice Act 2009 introduced changes to the requirements for courts with respect to sentencing guidelines. The critical element of any sentencing guideline scheme is the degree of constraint imposed upon courts. A rigid system prevents courts from sentencing outside a specific range, unless exceptional circumstances justify a departure. Yet if the guidelines adopt a very relaxed approach to sentencing outside their ranges, consistency of approach in sentencing is hard to achieve. In evaluating the recent changes to the compliance requirement, it may be helpful to consider a specific guideline. Figure 1 summarises the definitive guideline ranges for robbery in England and Wales. As with many offences for which definitive guidelines exist/ this one is divided into three sub-categories based on crime seriousness. *40

Figure 1: Definitive Sentencing Guideline for Robbery in England and Wales

Category of Robbery	Starting Point	Sentence
Threat or use of minimal force	1 year custody	Up to 3 years custody

removal of property		
A weapon is produced and used or threatened, and/or force is used resulting in injury to the victim	4 years custody	2-7 years custody
Victim is caused serious physical injury by the use of significant force and/or use of weapon	8 years custody	7-12 years custody

(Source: Sentencing Council of England and Wales ²⁵)

C. Previous Statutory Compliance Requirement: Duty of a Court at Sentencing

Until 2009/ the compliance requirement in England and Wales was the following: courts were directed that in sentencing an offender, they "must have regard to any guidelines which are relevant to the offender's case" as per section 172(1) of the Criminal Justice Act 2003. In addition, section 174(2) of the same Act stated that: "Where guidelines indicate that a sentence of a particular kind, or within a particular range, would normally be appropriate for the offence and the sentence is of a different kind, or is outside that range, state the court's reasons for deciding on a sentence of a different kind or outside that range". In short, a court simply had to consider ("have regard to") the Council's guidelines and to give reasons in the event that a "departure" sentence was imposed.

D. The new test for compliance (duty of a court at sentencing) in England and Wales

The provisions attracted considerable debate during the course of Parliamentary review of the Coroners and Justice Act 2009. The version of the Bill ultimately proclaimed into law adopts the following formulation:

Every court must, in sentencing an offender, follow any sentencing guidelines which are relevant to the offender's case, and

(b) must, in exercising any other function relating to the sentencing of offenders, follow any sentencing guidelines which are relevant to the exercise of that function, unless the court is satisfied that it would be contrary to the interests of justice to do so.

The new statutory language is more directive than that which it replaces. Thus, from merely a duty to have regard to any relevant guideline, courts must now "follow" any relevant definitive guideline. The more forceful language is, of course, qualified by the words creating the discretion to impose some other sentence in the event that the court is satisfied that imposing a disposal consistent with the guideline would be contrary to the interests of justice.

The innovation of the Coroners and Justice Act 2009 is to be found in subsequent sections which provide further clarification. Recall the three levels of seriousness found in the robbery guideline, with separate (but overlapping) sentence length ranges for each level (see Figure 1). S.12S(3)(b) of the Act makes it clear that the duty of the court is to impose a sentence within the overall offence range, not the more restrictive category range. In the event that the court imposes a sentence outside the overall range in the interests of justice, it must give reasons for its decision. The new provisions focus a court's attention on the relevance of the guidelines, yet also allow judicial discretion to impose a fit sentence.

Where do these latest reforms leave us? Three conclusions may reasonably be drawn. First, the broader remit of the new Sentencing Council suggests that it will be more engaged in community outreach than its predecessors. It is likely that the Council will seek to promote public awareness and increase public knowledge of the sentencing process. Secondly, the new test for compliance in England and Wales is likely to create a heightened expectation that courts will impose a sentence consistent with any definitive guidelines issued by the Sentencing Council or its predecessors. Thirdly, the new Sentencing Council will be responsible for producing a far more comprehensive portrait of sentencing decisions in this jurisdiction, and this will benefit sentencers, criminal justice professionals, crime victims and indeed anyone with a stake in the sentencing process.

IV. LESSONS FROM THE ENGLISH EXPERIENCE

What lessons for common law countries such as India may be drawn from recent experiences in England and Wales? First, there is a consensus now among legal scholars around the common law world that consistency of approach at sentencing cannot be achieved by appellate review alone; some form of guidelines scheme is desirable, even necessary. Beyond this, there is far less agreement. The US jurisdictions favour relatively rigid two dimensional sentencing grids which compel courts to impose sentence within a relatively narrow range, or justify why a departure sentence outside the range is appropriate. This model of structuring discretion at sentencing has proved unpopular in other countries. Canada rejected the grid based system in 1987, Western Australia in 2000, New Zealand in 2002, and England and Wales in 2008. In our view, the US-style systems are too restrictive, and therefore have no utility for India.

Secondly, whether formal guidelines are adopted along the lines of those used in the United States or England and Wales, there is considerable utility in creating some kind of sentencing commission. Although the English guidelines have not been subject to any formal evaluation and many questions remain unanswered/ it is dear that sentencers benefit from a detailed and comprehensive system of guidance. This guidance relates to general issues, such as the appropriate discount for a guilty plea, the determination of offence seriousness and so forth, as well as the appropriate sentence for specific offences. Yet the guidelines preserve judicial discretion. Each offence-specific guideline contains considerable latitude with respect to the appropriate sentence. This means that courts can impose a relatively wide range of dispositions, and remain within the guidelines. On the other hand, if a court wishes to impose a sentence outside the guidelines range, this merely requires it to give reasons why it would be contrary to the interests of justice to follow the guidelines.

A number of Australian jurisdictions have created a sentencing advisory council which, although without the mandate to issue guidelines, serves a very useful function in terms of promoting public awareness of sentencing and conducting and disseminating research in sentencing. We are not the first to call for creation of some form of sentencing commission in India.²⁶ Creation of some form of council or commission would prove of great utility to sentencers in India, and indeed the wider justice community and general public.

Thirdly, guidelines are particularly beneficial and, we would argue, even necessary in a vast jurisdiction such as India, where local variation is likely to significantly threaten consistency.²⁷ This is not to argue for uniformity of sentencing without any local or regional variation. The perceived gravity of offences will vary from one part of the country to another, and some allowance for this variability must be made. However/ in a unitary jurisdiction such as India or England and Wales, it is important to set a national standard/ and then allow limited departures from that standard.

Fourthly, sentencing guidelines are capable of bringing other benefits besides promoting consistency. Although the English guidelines were not designed to act as a control upon the prison population, in other jurisdictions such as several US states, overcrowding in prison is controlled by making adjustments to the

sentencing guidelines. While the overall rate of prisoners per population in India is relatively low by western standards - 32 per 100/000 adult population according to the latest statistics ²⁸ - there is still a problem. Custodial facilities in India have for years housed more inmates than is desirable, at least in male correctional facilities. For example, the latest statistics show that for male institutions, the occupancy rate in 2008 was 132%. ²⁹

The burgeoning prison population of the country ³⁰ largely consists of males charged with petty offences. ³¹ Most of these offenders come from the impoverished strata of society and are unable to fulfil even bail conditions imposed by courts, much less be able to afford a lawyer to represent them during a lengthy criminal trial. There is general agreement around the common law world that prison should be reserved for the most serious cases, hence the custodial threshold in England and Wales. ³² But a statutory custodial threshold is seldom sufficient to constrain sentencers. ³³ For this reason, sentencing guidelines, which specify the kinds of cases that normally should attract a custodial penalty, are useful.

The experience with guidelines in other jurisdictions clearly demonstrates the benefits of providing guidance regarding the kinds of cases which should result in custody. For example, in many US jurisdictions including Minnesota, guidelines accomplished a transformation in the prison population: fewer offenders convicted of less serious property crimes were imprisoned, and custody became a more likely outcome for offenders convicted of crimes of violence. ³⁴

Since the Supreme Court declared in 2004 that life imprisonment in India means a prisoner is sent to jail for the rest of his or her natural life, ³⁵ the nature of punishment has undergone a drastic change from when life imprisonment meant detention for only 14 years. In practical terms, those imprisoned for life can still be released after serving 14 years behind bars, but they are now at the mercy of the government and prison administration to give them adequate remission on the basis of their conduct in jail. Only last year the State Government of Maharashtra declared that the offenders sentenced to life imprisonment in connection with the 1993 terrorist attack on Mumbai will have to serve a minimum of 60 years in prison before their plea for release is even considered. Given that a number of offences in India carry a maximum penalty of life imprisonment, guidance for judges from a sentencing council would be welcome.

Another practical problem that exists in India is that few prosecutors, judges and defence advocates in local courts are aware of latest criminal law reforms. For example, the option of plea bargaining has remained largely unused and five years after its introduction, very few courts have had such applications filed before them. Similarly, the option of release on probation had not been heard of by several lawyers when a famous Bollywood actor found guilty of illegal arms possession made a similar plea before the judge. ³⁶ A sentencing council in India along the lines of the Council in England and Wales would also serve the purpose of generating greater awareness of sentencing among members of the legal profession. Without such a reform, even well-meaning criminal law amendments will remain ineffective, and the problems of sentencing will continue.

Finally, India should be concerned about the rising cost of legal assistance ³⁷ which means that only a selected few defendants - those with ample financial resources at their disposal - are able to take their case through every stage of appeal. It is a country with a vast geographical area and population, but only one bench of the Supreme Court in Delhi. There have been persistent demands that the Supreme Court establish benches in at least the four major cities so that appellants do not have to travel large distances for their cases to be filed. ³⁸ Until now, the Indian Supreme Court has rejected all such calls. A sentencing council would ensure that at trial court level, prisoners are treated with a degree of fairness, so that even if they are unable to move up in appeal, they have not been unduly prejudiced in terms of their sentence.

CONCLUSION

We have argued in this essay that India has little to fear and much to gain from introducing some form of sentencing guidelines. Such a step would need to be preceded by creating a statutory body such as a sentencing council or commission to devise, consult upon and disseminate guidelines. The experience in England and Wales offers clear evidence of the benefits of more structure sentencing. These benefits include greater transparency in terms of the sentencing process, more consistent sentencing and greater public confidence in sentencers.

23(1) NLSI. Rev. 27 (2011)

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2. Barrister of the Honourable Society of the Middle Temple, Member of the Bar of England and Wales.
3. Centre for Criminology, Faculty of Law, University of Oxford.
4. Minnesota was the first state to introduce presumptively-binding sentencing guidelines; see R. Frase, Sentencing Guidelines in Minnesota, 1978-2003, in CRIME AND JUSTICE Tonry ed., 2005).
5. Minnesota Sentencing Commission, Minnesota Sentencing Guidelines and Commentary (2010).
6. See J.Y. Roberts and E. Baker, Sentencing in Common Law Jurisdictions, in INTERNATIONAL HANDBOOK OF PENOLOGY AND CRIMINAL JUSTICE (S. Shoham, O. Beck, and M. Kett eds., 2007); A. Ashworth, Sentencing, in THE OXFORD HANDBOOK OF CRIMINOLOGY (2007).
7. See, The Sentencing Council for England and Wales, Reduction in Sentence for a Guilty Plea. Definitive Guideline, available at www.sentencingcouncil.org.uk.
8. N. WALKER, SENTENCING THEORY, LAW AND PRTICE43 (1985).
9. CANADIAN SENTENCING COMMISSION SENTENCING REFORM: A CANADOAN APPROACH 321 (1987).
10. See, e.g., R. v. Saw and Others, [2009] EWCA Crim. 1 : [2009] 2 Cr. App. R. (S.) 54 (which sets out a list of factors for the offence of domestic burglary).
11. In 2009/2010, 2,136 sentence appeals were heard by the Court of Appeal, an infinitesimal fraction of all sentences imposed within a jurisdiction of 65 million. Of these appeals, 44% were dismissed. See, Court of Appeal Criminal Division, Review of the Legal Year, 2009/2010, Royal Courts of Justice (2010).
12. For further information, see, W. and A. King, Addressing problematic sentencing factors in the development of guidelines, AND AGGRAVATION AT SENTENCING (J.Y. Roberts ed., 2011); and W. Young and C. Browning New Zealand's Sentencing Council, CRIM. L. REV. 287-298 (Apr., 2008).
13. See, e.g., Sentencing Advisory Council, Annual Report, 2008-2009 (2010); PENAL POPULISM, SENTENCING COUNCILS AND SENTENCING POLICY (Victorian Sentencing Advisory Council, A. Freiberg and K. Gelb eds., Willan 2008).
14. For further information see, Ch. 6: Structuring Sentencing Discretion, in A. VON HIRSCH, A. ASHWORTH AND J.V. ROBERTS, PRINCIPLED SENTENCING. READINGS ON THEORY AND POLICY (3rdedn., 2009).
15. In March 2010, 54,864 cases were pending in the Supreme Court, 41,08,555 in various High Courts and 2,73,74,908 in subordinate courts. Full data available http://164.100.47.132/LssN_ew/psearch/QResult15.aspx?qref=99860.
16. State of Uttar Pradesh v. Chandrika, AIR 1999 SC 164 1999 Indlaw SC 802 (Supreme Court of India).
17. See, Jailbirds readily admit guilt for faster freedom, TIMES OF INDIA, Dec. 29, 2008.
18. HC judge tells inmates to take plea bargaining route to freedom, THE TIMES OF INDIA, Nov. 16, 2009.
19. State of Gujarat v. Natwar Harchanji Thakor, (2005) Cr. L.J. 2957 2005 Indlaw GUJ 73 (Supreme Court of India).
20. For a review of developments from 1998 to 2009, see A. Ashworth and M. Wasik, The Story of the Panel and Council, in Sentencing Guidelines Council, Annual Report, 2009-2010, available at <http://www.sentencingcouncil.org.uk>

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21. See, Lord Carter, Securing the Future Ministry of Justice (Dec., 2007), available at <http://www.justice.gov.uk/publications/docs/securing-future.pdf>.
 22. Sentencing Commission Working Group, Sentencing Guidelines in England and Wales: An Evolutionary Approach (July, 2008), available at <http://www.justice.gov.uk/publications/docs/sentencing-guidelines-evolutionary-approach.pdf>
 23. See, e.g., M. Hough and J. Jacobson, Creating a Sentencing Commission for England and Wales, Prison Reform Trust, London (2008), available at http://www.kd.ac.uk/depsta/law/research/icpr/publications/FINAL_SENTENCING.pdf.
 24. Lord Justice Leveson, Remarks to the Criminal Bar Association Conference (2010), available at <http://www.sentencingcouncil.org.uk/professional/speeches-articles/2010/05/08.htm>.
 25. All the definitive English sentencing guidelines are available at www.sentencing.council.org.
 26. See, R.K Raghavan, Sentencing Guidelines, THE HINDU, Apr. 15, 2003.
 27. On this point, see M.K. Chawla, Sentencing disparities bet between judges and disproportionately, in SENTENCING STRUCTURE AND POLICY IN INDIA - UNAFEI RESOURCE MATERIAL 54-57 (1976); and M.Z. Siddiqi, Problem of Disparity in Sentencing, 9(2) INDIAN J. CRIMINOLOGY 120-127 (1981).
 28. International Centre for Prison Studies, World Prison Brief; available at www.kcl.ac.uk.
 29. National Crime Records Bureau, Crime In India (2009), Table 2.1.
 30. Number of Jails, available capacity and inmate population in State/UTs as on 31.12.2007, Data tabled in Parliament in response to Lok Sabha Unstarred Question No. 2368, available at <http://164.100.47.132/Annexure/1sq15/2/au2368.htm>.
 31. See, Jailed, RTI activist takes up languishing convicts' case, TIMES OF INDIA, Sept. 24, 2009.
 32. According to § 152(2) of the Criminal Justice Act 2003, a court must not pass a custodial sentence unless the offence "was so serious that neither a fine alone nor a community sentence can be justified for the offence". Similar statutory provisions exist in other common law jurisdictions.
 33. The English experience is again illustrative. Despite the existence of a statutory threshold which must be met before a term of imprisonment is imposed, the size of the prison population has risen continuously over the period 1993-2009.
 34. Frase, supra, n. 1.
 35. Life term means jail till death, INDIAN EXPRESS, Sept. 20, 2005.
 36. Dutt Files Plea Seeking Release on Probation, INDIAN EXPRESS, Jan. 16, 2007.
 37. Check rising cost of litigation, says PM, TIMES OF INDIA, May 8, 2010.
 38. Starred Question No. 297 on Supreme Court Benches, raised before the Lok Sabha (answered on Apr. 15, 2010, available at <http://164.100.47.132/LssNew/psearch/QResult15.aspx?qref=88956>).

CHAPTER NINE

SENTENCING AND PUNISHMENT

The judicial trend in awarding punishment

1. Over the years, courts in India have consistently held that sexual offences ought to be dealt with sternly and severely as undue sympathy to impose inadequate sentence would do more harm to the system and undermine public confidence in the efficacy of law. We cite a few cases in support:

2. In *Mahesh v. State of M. P.*¹, the Supreme Court observed that:

“It will be a mockery of justice to permit these appellants [the accused] to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicing system of this country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon”. [Emphasis supplied]

3. *Sevaka Perumal v. State of T.N.*², is also in the same vein:

“Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats. If the courts did not protect the injured, the injured would then resort to private vengeance. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc.”

4. Later in *Dhananjay Chatterjee v. State of W.B.*³, the Supreme Court opined that:

“...shockingly large number of criminals go unpunished thereby increasingly encouraging the criminals and in the ultimate, making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the court responds to the society's cry for justice against the criminal. Justice demands that courts should impose punishment befitting the crime so that

¹ (1987) 3 SCC 80

² (1991) 3 SCC 471

³ (1994) 2 SCC 220



the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment”.

5. Then, in *Ravji v. State of Rajasthan*, (1996) 2 SCC 175, the Supreme Court observed that:

“It has been held in the said case that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should “respond to the society's cry for justice against the criminal”. If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance”.

6. Similarly, in *State of Karnataka v. Puttaraja*⁴, the Supreme Court held that:

“The object should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be.

Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women like the case at hand, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact and serious repercussions on social order and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic a view merely on account of lapse of time or considerations personal to the accused only in respect of such offences will be result wise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by the required string of deterrence inbuilt in the sentencing system”.

⁴ (2004) 1 SCC 475



7. And, in *State of M.P. v. Munna Choubey*⁵, it was said that the:

“Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result wise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system”

8. The same was the opinion in *Jugendra Singh v. State of U.P.*⁶, where the Supreme Court said that:

“Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere. The consequential death is more horrendous. It is to be kept in mind that an offence against the body of a woman lowers her dignity and mars her reputation. It is said that one’s physical frame is his or her temple. No one has any right of encroachment. An attempt for the momentary pleasure of the accused has caused the death of a child and had a devastating effect on her family and, in the ultimate eventuate, on the collective at large. When a family suffers in such a manner, the society as a whole is compelled to suffer as it creates an incurable dent in the fabric of the social milieu. The cry of the collective has to be answered and respected and that is what exactly the High Court has done by converting the decision of acquittal to that of conviction and imposed the sentence as per law.”

9. In fact, it is interesting to note that in *Swami Sharaddananda v. State of Karnataka*⁷, the Supreme Court lamented at paragraph 92 that:

“The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in

⁵ (2005) 2 SCC 710

⁶ (2012) 6 SCC 297

⁷ (2008) 13 SCC 787



endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all”.

10. It therefore becomes important to review the punishments provided under our penal laws.
11. Punishments for crimes involving sexual offences can be broadly classified into two categories: term sentences (e.g. imprisonment for 10 years) and life imprisonment. Of course, in appropriate cases, death penalty may be awarded if the evidence indicates that the crime in question falls within the scope of section 302 of the Indian Penal Code.

On term sentences

12. As far as term sentences are concerned, section 376 of the Indian Penal Code currently provides for punishment of either description for a term which shall not be less than 7 years but which may be for life or for a term which may extend to 10 years.
We however recommend that in the proposed Criminal Law Amendment Bill, 2012, the minimum sentence should be enhanced to 10 years with a maximum punishment being life imprisonment.

On life imprisonment

13. Before making our recommendation on this subject, we would like to briefly examine the meaning of the expression “life” in the term “life imprisonment”, which has attracted considerable judicial attention.



14. Mohd. Munna v. Union of India⁸ reiterates the wellsettled judicial opinion that a sentence of imprisonment for life must, prima facie, be treated as imprisonment for the whole of the remaining period of the convict's natural life. This opinion was recently restated in Rameshbhai Chandubhai Rathode v. State of Gujarat⁹, and State of U.P. v. Sanjay Kumar¹⁰, where the Supreme Court affirmed that life imprisonment cannot be equivalent to imprisonment for 14 or 20 years, and that it actually means (and has always meant) imprisonment for the whole natural life of the convict.
15. We therefore recommend a legislative clarification that life imprisonment must always mean imprisonment for 'the entire natural life of the convict'.

On death penalty

16. Justice Stewart in *Furman v. Georgia*¹¹, seminally noted that:

"The penalty of death differs from all other forms of criminal punishment, not in degree, but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity".

17. These words have formed the broad foundation for the evolution of modern jurisprudence on 'death penalty' and have prompted us to deliberate at length on this issue.
18. The Indian law on punishment with death has been concretized in a few leading judgments which narrow down the award of death sentences to the 'rarest of the rare' cases. The criteria for determining whether a given case is so rare can be found in *Bachhan Singh v. State of Punjab*¹², which was later cited with approval in *Macchi Singh v. State*¹³, and recently in *Mulla v. State of U.P.*¹⁴. The said criteria are as follows (see *Macchi Singh*):

"I. Manner of commission of murder

⁸ (2005) 7 SCC 417. See also *Gopal Vinayak Godse v. State of Maharashtra*, (1961) 3 SCR 440

⁹ (2011) 2 SCC 764

¹⁰ (2012) 8 SCC 537

¹¹ 408 U.S. 238

¹² (1980) 2 SCC 684

¹³ (1983) 3 SCC 470

¹⁴ (2010) 3 SCC 508



33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance, (i) when the house of the victim is set aflame with the end in view to roast him alive in the house;

(ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death;

(iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner;

II. Motive for commission of murder

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-à-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course of betrayal of the motherland.

III. Anti-social or socially abhorrent nature of the crime

35. (a) When murder of a member of a Scheduled Caste or minority community, etc. is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorise such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(b) In cases of 'bride burning' and what are known as 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. Magnitude of crime

36. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. Personality of victim of murder



37. When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-à-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

38. In this background the guidelines indicated in Bachan Singh case [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh case [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] :

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up 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.

39. In order to apply these guidelines inter alia the following questions may be asked and answered: (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

40. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions



posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.”

19. The philosophy behind the aforesaid tests was also explained in *Macchi Singh*: every member of the community is able to live his/her life because of the protection afforded by the community and rule of law. But, when one member of the community shows ‘ingratitude’ to the community by killing a fellow member of the community or when the community feels that its very existence is under threat, then for the purposes of self-preservation, the community withdraws its protection. This withdrawal of protection results in imposition of death penalty. The court further elaborated that the community will only do so –

“in rarest of rare cases’ when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty.”

20. The ‘rarest of rare’ doctrine has been intrinsically linked with the need to mandatorily give ‘special reasons’ before imposing a penalty as specified under Section 354 (1) of the Cr. P.C. *Bachhan Singh* has clarified the law by saying that ‘special reasons’ implies ‘exceptional reasons’ (at para. 161). We also notice that punishment with death is given only in the rarest of rare cases when the alternative option of reformation and rehabilitation of the convict is unquestionably foreclosed.
21. To sum up, the following are the tests for determining whether the accused deserves a death sentence (see *Mulla v. State of U.P.*):
- (a) The gruesome nature of the crime;
 - (b) The mitigating and aggravating circumstances in the case. These must take into consideration the position of the criminal, and
 - (c) Whether any other punishment would be completely inadequate. This rule emerges from the dictum of this Court that life imprisonment is the rule and death penalty an exception. Therefore, the court must satisfy itself that death penalty would be the only punishment which can be meted out to the convict.
22. While we believe that enhanced penalties in a substantial number of sexual assault cases can be adjudged on the basis of the law laid down in the aforesaid cases, certain



situations warrant a specific treatment. We believe that where the offence of sexual assault, particularly 'gang rapes', is accompanied by such brutality and violence that it leads to death or a Persistent Vegetative State (or 'PVS' in medical terminology), punishment must be severe – with the minimum punishment being life imprisonment. While we appreciate the argument that where such offences result in death, the case may also be tried under Section 302 of the IPC as a 'rarest of the rare' case, we must acknowledge that many such cases may actually fall within the ambit of Section 304 (Part II) since the 'intention to kill' may often not be established. In the case of violence resulting in Persistent Vegetative State is concerned, we are reminded of the moving story of Aruna Shanbagh, the young nurse who was brutally raped and lived the rest of her life (i.e. almost 36 years) in a Persistent Vegetative State.

23. In our opinion, such situations must be treated differently because the concerted effort to rape and to inflict violence may disclose an intention deserving an enhanced punishment. We have therefore recommended that a specific provision, namely, Section 376 (3) should be inserted in the Indian Penal Code to deal with the offence of "rape followed by death or resulting in a Persistent Vegetative State".
24. In our considered view, taking into account the views expressed on the subject by an overwhelming majority of scholars, leaders of women's organisations, and other stakeholders, there is a strong submission that the seeking of death penalty would be a regressive step in the field of sentencing and reformation. We, having bestowed considerable thought on the subject, and having provided for enhanced sentences (short of death) in respect of the above-noted aggravated forms of sexual assault, in the larger interests of society, and having regard to the current thinking in favour of abolition of the death penalty, and also to avoid the argument of any sentencing arbitrariness, we are not inclined to recommend the death penalty.
25. We must therefore end this topic with a note of caution. Undoubtedly, rape deserves serious punishment. It is a highly reprehensible crime in the moral sense, and demonstrates a total contempt for the personal integrity and autonomy of the victim. Short of homicide, it is the "ultimate violation of self." It is also a violent crime because it normally involves force or the threat of force or intimidation to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the victim and can also inflict mental and psychological damage. We have no doubt that it undermines the communicating sense of security and there is public injury. However, we believe that such offences need to be graded. There



are instances where the victim/survivor is still in a position from which she can, with some support from society, overcome the trauma and lead a normal life. In other words, we do not say that such a situation is less morally depraved, but the degree of injury to the person may be much less and does not warrant punishment with death.

26. The Working Group on Human Rights in India and the UN has made a submission before us. We have examined the submission carefully. We have noticed in the said submission that the Group has suggested that there should be no amendment to the existing law to either provide death penalty and/or chemical castration for the offence of rape or sexual assault.

27. The Group has placed emphasis on Article 6 of the International Covenant on Civil and Political

Rights which provides:-

“In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of commission of crime and not contrary to the provisions of the present Covenant....”

28. It has also been observed that death penalty will not be imposed on persons below 18 years and observes that:-

“Nothing in this Article should be invoked to delay or prevent the abolition of capital punishment....”

29. Article 7 of the Covenant provides that:-

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment in particular, no one shall be subjected without his free consent to medical or scientific experimentation.”¹⁵

30. This Committee is conscious of the provisions of the ICCPR¹⁶, the Universal Declaration of Human Rights¹⁷, the Convention on the rights of child, Convention

¹⁵ Article 7, Part 3 ICCPR 1966

¹⁶ Article 6 and 7, ICCPR 1966

¹⁷ Article 5, UDHR 1948



against torture and other cruel, inhuman and degrading treatment or punishment and other international Conventions.

31. We note that one of the standards before us is that the UN Commission on Human Rights has adopted the four resolutions to impose a moratorium on death penalty until such time as death penalty is fully abolished. The first such resolution is dated 18th December 2007. The resolution calls upon States which still retain the death penalty to “progressively restrict the use of the death penalty and reduce the number of offences for which it may be imposed”. The abolition of death penalty and the reduction of number of offences in statute books which notify capital punishment are stated to be a part of international customary law. It has also been pointed out that the UN Human Rights Committee in its concluding deliberations on 4th August 1997 observed that:-

“The Committee expresses concern of the lack of compliance of the Penal Code with Article 6, paragraphs 2 and 5 of the Covenant. Therefore, the Committee recommends that the State party abolish by law the imposition of the death penalty on minors and limit the offences carrying the death penalty in the most serious crimes with a view to its ultimate abolition....”

32. We also have noted the report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions with reference to his India mission in 2012.

“It is a matter of concern that the death penalty may be imposed for (seemingly a growing number of crimes that cannot be regarded as the most serious crimes referred to in Article 6 of the ICCPR as internationally understood, namely, crimes involving intentional killing)”¹⁸

33. The phrase ‘rarest of rare cases’ taken from *Bachhan Singh v. State of Punjab* is often used to describe the Indian approach to the death penalty. However, this may create a wrong impression since the list of crimes for which sentence may be imposed is still much wider than the one provided for under international law. Accordingly, he has recommended that India places a moratorium on the death penalty in accordance with General Assembly Resolution 65/206.

¹⁸ (Press Statement – Country Mission to India 2012 available at <http://www.ohcr.org>):-



34. This Committee is aware that over 150 States in the world have abolished death penalty or do not practice death penalty. The Committee is also aware that several States in the United States of America retain and implement the death penalty.

We are aware that there is a movement in the United States of America to impose death penalty for rape. The US Supreme Court has struck down the death penalty for rape as contrary to the US Constitution. We look at the judgment in *Coker v. Georgia*,¹⁹ where the US Supreme Court struck down the sentence of death for a convicted felon who had committed rape holding that the sentence of death for rape was disproportionate, violative of the 8th and 14th Amendments to the US Constitution and was also “barbaric and excessive”. It may be noted that this was a case of aggravated sexual assault.

35. We also note the decision in *Kennedy v. Louisiana* where the constitutional validity of a Louisiana statute permitted death penalty for raping a child under 12 years was challenged. It was noted that the crime of the petitioner was one which was repulsive to society and was full of horror and hurt. Yet, the US Supreme Court reached a finding that the death penalty for rape of a minor was unconstitutional and violative of the 8th Amendment being in the nature of “cruel and unusual punishment”.²⁰

36. Kennedy, J. observed that:-

“Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule.....”

As we shall discuss, punishment is justified under one or more or three principal rationales – rehabilitation, deterrence and retribution. It is the last of this retribution that most often can contradict the laws’ own ends. This is of particular concern when the Court interprets the meaning of the 8th Amendment in capital cases. When the law punishes by death, it risks its own dissent into brutality transgressing the constitutional commitment to decency and restraint.

37. Thus, there is a strong case which is made out before us that in India in the context of international law as well as the law as explained in the American Courts, it would be a regressive step to introduce death penalty for rape even where such punishment is restricted to the rarest of rare cases. It is also stated that there is considerable

¹⁹ 433 US 584

²⁰ 554 US 407 (2008)



evidence that the deterrent effect of death penalty on serious crimes is actually a myth. According to the Working Group on Human Rights, the murder rate has declined consistently in India over the last 20 years despite the slowdown in the execution of death sentences since 1980. Hence we do take note of the argument that introduction of death penalty for rape may not have a deterrent effect. However, we have enhanced the punishment to mean the remainder of life.

Castration

38. On the question of chemical castration as a cruel and unusual punishment, we find that chemical castration is an injection for sex offenders with drugs such as Depo-Provera which has the effect of reducing the levels of testosterone and thereby controlling libidinous urges. There are varying groups of drugs that effect libidinous urges, these have been categorized in the following way:

“For patients with obsessive sexual fantasies, antidepressants from the family of SSRIs that includes Prozac, often prescribed to treat obsessive compulsive disorder, can help them control their sexual thoughts. The second and more radical approach is an antiandrogen drug, such as leuprorelin, which reduces testosterone levels to those of a prepubescent boy, and makes the patient impotent.”²¹

39. It is important to understand that unlike surgical castration, the effects of chemical castration are temporary and therefore repeated monitored doses at regular intervals is a necessary prerequisite. It is pointed out before us that 9 States in the United States of America have introduced legislation which has permitted chemical castration of sex offenders, making it discretionary for the first time offenders and mandatory for repeat offenders as a pre-condition for release from imprisonment and/or release on parole. Till date, a challenge to the constitutionality of these laws has not been considered by the US Supreme Court. It is the stand of the Working Group on Human Rights that mandatory chemical castration for sex offenders is unconstitutional as it would violate the fundamental right to privacy and the right to refuse invasive medical treatment and would constitute a violation of the prohibition against “cruel and unusual punishment” contained in numerous international covenants including the ICCPR and CAT.

²¹ Decca Aitkenhead, Chemical Castration: The Soft Option. The Guardian, January 18, 2013. <http://www.guardian.co.uk/society/2013/jan/18/chemicalcastration-soft-option-sex-offenders>



40. We note that it would be unconstitutional and inconsistent with basic human rights treaties for the State to expose any citizen without their consent to potentially dangerous medical side effects. For this reason we do not recommend mandatory chemical castration of any type as a punishment for sex offenders. For the same reason the government of India also does not prescribe chemical castration as a family planning method.
41. However, we note that in the UK, sex offender treatment programs sometimes offer chemical castration of one of the two types mentioned to convicted sex offenders as a form of psychiatric treatment. This is done in consultation with doctors and psychiatrists with the consent of the sex offender. We recommend further research and study on the matter before commenting on its applicability or effectiveness in the Indian context.
42. We also notice from literature that side effects of chemical substances like Depo-Provera may include osteoporosis, hypertension, fatigue, weight gain, nightmares, muscle weakness and apart from that the long term side effects are still not known. We are further of the opinion that chemical castration fails to treat the social foundations of rape which is about power and sexually deviant behaviour. We therefore to hold that mandatory chemical castration as a punishment contradicts human rights standards.
43. We, therefore, reject the possibility of chemical castration as a means of punishment. We must take on record a suggestion from a leading doctor for permanent surgical castration. We think that a mutilation of the body is not permitted by the Constitution. 'Death' is a known form of penalty but mutilation has not been recognised in progressive jurisprudence as prescribed punitive action.

Reduction of age in respect of juveniles

44. We have heard experts on the question of reduction of the age of a juvenile from 18 to 16 for the purpose of being tried for offences under various laws of the country. We must confess that the degree of maturity displayed by all the women's organizations, the academics and a large body of thinking people have viewed this incident both in the criminological as well as societal perspective humbles us.



45. Assuming that a person at the age of 16 is sent to life imprisonment, he would be released sometimes in the mid-30s. There is little assurance that the convict would emerge a reformed person, who will not commit the same crime that he was imprisoned for (or, for that matter, any other crime). The attempt made by Ms. Kiran Bedi to reform Tihar Jail inmates was, and continues to be, a successful experiment. But we are afraid that that is only a flash in the pan. Our jails do not have reformatory and rehabilitation policies. We do not engage with inmates as human beings. We do not bring about transformation. We, therefore, breed more criminals including juveniles) in our prison and reformatory system by ghettoing them in juvenile homes and protective homes where they are told that the State will protect and provide for them, but which promise is a fruitless one.
46. Children, who have been deprived of parental guidance and education, have very little chances of mainstreaming and rehabilitations, with the provisions of the Juvenile Justice Act being reduced to words on paper.
47. We are of the view that the 3 year period (for which delinquent children are kept in the custody of special home) is cause for correction with respect to the damage done to the personality of the child. We are completely dissatisfied with the operation of children's institutions and it is only the magistrate (as presiding officer of the Juvenile Justice Board) who seems to be taking an interest in the situation. The sheer lack of counselors and therapy has divided the younger society into 'I' and 'them'.
48. We have also taken note of the fact that considering the recidivism being 8.2% in the year 2010, as against 6.9% during 2011, we are not inclined to reduce the age of a juvenile to 16.
49. It is time that the State invested in reformation for juvenile offenders and destitute juveniles. There are numerous jurisdictions like the United Kingdom, Thailand, and South Africa where children are corrected and rehabilitated; restorative justice is done and abuse is prevented. We think this is possible in India but it requires a determination of a higher order.
50. Further, we Articles 37 and 38 of the Convention on the Rights of Child clearly provide as follows:-



“37. States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

38. (1) States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

(2) States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

(3) States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

(4) In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible



measures to ensure protection and care of children who are affected by an armed conflict.

51. We have also taken certain scientific factors into account. Having regard to the development in neurosciences, we are of the view that adolescent brain development is one of the important issues in public policy. We have taken note of the reasons stated by the US Supreme Court for abolishing death penalty for juveniles in *Roper v.*

*Simmons*²² wherein it was quoted as follows:-

“When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.

... ..

Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”

52. We have also noted the decision of the US Supreme Court in *Graham v. Florida*²³ as follows:-

A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.

²² 543 U.S. 551 (2005)

²³ 560 U. S. ____ (2010)



53. We must also take note of the neurological state of the adolescent brain. Studies show that adolescence is a period of significant changes in the brain structure and function. There is consensus among developmental neuroscientists on the nature of this change, which is aptly set out in Laurence Steinberg's 'A Social Neuroscience Perspective on Adolescence Risk-Taking'²⁴ –

“(i) There is a decrease in grey matter in prefrontal regions of the brain, reflective of synaptic pruning, the process through which unused connections between neurons are eliminated. The elimination of these unused synapses occurs mainly during preadolescence and early adolescence, the period during which major improvements in basic cognitive abilities and logical reasoning are seen, in part due to these very anatomical changes.

(ii) Important changes in activity involving the neurotransmitter dopamine occur during early adolescence, especially around puberty. There are substantial changes in the density and distribution of dopamine receptors in pathways that connect the limbic system, which is where emotions are processed and rewards and punishments experienced, and the prefrontal cortex, which is the brain's chief executive officer. There is more dopaminergic activity in these pathways during the first part of adolescence than at any other time in development. Because dopamine plays a critical role in how humans experience pleasure, these changes have important implications for sensation-seeking.

(iii) There is an increase in white matter in the prefrontal cortex during adolescence. This is largely the result of myelination, the process through which nerve fibres become sheathed in myelin, a white, fatty substance that improves the efficiency of brain circuits. Unlike the synaptic pruning of the prefrontal areas, which is mainly finished by midadolescence, myelination continues well into late adolescence and early adulthood. More efficient neural connections within the prefrontal cortex are important for higher-order cognitive functions— planning ahead, weighing risks and rewards, and making complicated decisions, among others—that are regulated by multiple prefrontal areas working in concert.

(iv) There is an increase in the strength of connections between the prefrontal cortex and the limbic system. This anatomical change is especially important for emotion regulation, which is facilitated by increased connectivity between

²⁴ A social neuroscience perspective on adolescent risk-taking. L Steinberg - Developmental Review, 2008 – Elsevier.



regions important in the processing of emotional information and those important in self-control. These connections permit different brain systems to communicate with each other more effectively, and these gains also are on-going well into late adolescence.

54. We are of the view that the material before is sufficient for us to reach the conclusion that the age of 'juveniles' ought not to be reduced to 16 years.

Sentencing Guidelines

Australia • England and Wales • India
South Africa • Uganda

April 2014



India

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SUMMARY In India neither the legislature nor the judiciary has issued structured sentencing guidelines. Several governmental committees have pointed to the need to adopt such guidelines in order to minimize uncertainty in awarding sentences. The higher courts, recognizing the absence of such guidelines, have provided judicial guidance in the form of principles and factors that courts must take into account while exercising discretion in sentencing.

I. Absence of Structured Sentencing Guidelines

Currently India does not have structured sentencing guidelines that have been issued either by the legislature or the judiciary. In March 2003, the Committee on Reforms of Criminal Justice System (the Malimath Committee), a body established by the Ministry of Home Affairs, issued a report that emphasized the need to introduce sentencing guidelines in order to minimize uncertainty in awarding sentences, stating,

[t]he Indian Penal Code prescribed offences and punishments for the same. For many offences only the maximum punishment is prescribed and for some offences the minimum may be prescribed. The Judge has wide discretion in awarding the sentence within the statutory limits. There is now no guidance to the Judge in regard to selecting the most appropriate sentence given the circumstances of the case. Therefore each Judge exercises discretion accordingly to his own judgment. There is therefore no uniformity. Some Judges are lenient and some Judges are harsh. Exercise of unguided discretion is not good even if it is the Judge that exercises the discretion. In some countries guidance regarding sentencing option[s] is given in the penal code and sentencing guideline laws. There is need for such law in our country to minimise uncertainty to the matter of awarding sentence. There are several factors which are relevant in prescribing the alternative sentences. This requires a thorough examination by an expert statutory body.¹

The Committee advised further that, in order to bring “predictability in the matter of sentencing,” a statutory committee should be established “to lay guidelines on sentencing guidelines under the Chairmanship of a former Judge of Supreme Court or a former Chief Justice of a High Court experienced in criminal law with other members representing the prosecution, legal profession, police, social scientist and women representative.”² In 2008, the Committee on Draft National Policy on Criminal Justice (the Madhava Menon Committee), reasserted the need for statutory sentencing guidelines.³ In an October 2010 news report, the Law Minister is quoted as having

¹ I GOVERNMENT OF INDIA, MINISTRY OF HOME AFFAIRS, COMMITTEE ON REFORMS OF CRIMINAL JUSTICE SYSTEM REPORT 170 (Mar. 2003), http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf.

² *Id.* at 171.

³ *Id.* at 18–19.

stated that the government is looking into establishing a “uniform sentencing policy” in line with the United States and the United Kingdom in order to ensure that judges do not issue varied sentences.⁴

In 2008, the Supreme Court of India, in *State of Punjab v. Prem Sagar & Ors.*, also noted the absence of judiciary-driven guidelines in India’s criminal justice system, stating, “[i]n our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts[,] except [for] making observations with regard to the purport and object for which punishment is imposed upon an offender, had not issued any guidelines.”⁵ The Court stated that the superior courts have come across a large number of cases that “show anomalies as regards the policy of sentencing,”⁶ adding, “[w]hereas the quantum of punishment for commission of a similar type of offence varies from minimum to maximum, even where [the] same sentence is imposed, the principles applied are found to be different. Similar discrepancies have been noticed in regard to imposition of fine[s].”⁷ In 2013 the Supreme Court, in the case of *Soman v. State of Kerala*, also observed the absence of structured guidelines:

Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges.⁸

However, in describing India’s sentencing approach the Court has also asserted that “[t]he impossibility of laying down standards is at the very core of the Criminal law as administered in India, which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment.”⁹

Sentencing procedure is established under the Code of Criminal Procedure, which provides broad discretionary sentencing powers to judges.¹⁰ In a 2007 paper on the need for sentencing policy in India, author R. Niruphama asserted that, in the absence of an adequate sentencing policy or guidelines, it comes down to the judges to decide which factors to take into account and

⁴ *Govt for a Uniform Sentencing Policy by Courts*, ZEE NEWS (Oct. 7, 2010), http://zeenews.india.com/news/nation/govt-for-a-uniform-sentencing-policy-by-courts_660232.html.

⁵ *State of Punjab v. Prem Sagar & Ors.*, (2008) 7 S.C.C. 550, para. 2, <http://judis.nic.in/supremecourt/imgs1.aspx?filename=31541>.

⁶ *Id.* para. 8.

⁷ *Id.*

⁸ *Soman v. State of Kerala*, (2013) 11 S.C.C. 382, <http://judis.nic.in/supremecourt/imgs1.aspx?filename=39837>.

⁹ *Jagmohan Singh v. State of Uttar Pradesh*, (1973) 2 S.C.R. 541, para. 26, available at <http://indiankanoon.org/doc/1837051/>.

¹⁰ CODE OF CRIMINAL PROCEDURE, No. 2 of 1974, available at <http://www.oecd.org/site/adboecdanti-corruption/initiative/46814340.pdf>. Sentencing is covered under section(s) 235, 248, 325, 360 and 361 of the Code.

which to ignore. Moreover, he considered that broad discretion opens the sentencing process to abuse and allows personal prejudices of the judges to influence decisions.¹¹

II. Crimes and Judicial Sentencing Guidance

In the Supreme Court's judgment in *Soman v. Kerala*, the Court cited a number of principles that it has taken into account "while exercising discretion in sentencing," such as proportionality, deterrence, and rehabilitation.¹² As part of the proportionality analysis, mitigating and aggravating factors should also be considered, the Court noted.¹³

In *State of M.P. v. Bablu Natt*, the Supreme Court stated that "[t]he principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with."¹⁴ Moreover, in *Alister Anthony Pareira v. State of Maharashtra*, the Court held that

[s]entencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of [an] appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of [the] crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: [the] twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.¹⁵

A. Murder

The punishment for murder under India's Penal Code is life imprisonment or death and the person is also liable to a fine.¹⁶ Guidance on the application of the death sentence was provided by the Supreme Court of India in *Jagmohan Singh v. State of Uttar Pradesh*, where the Court enunciated an approach of balancing mitigating and aggravating factors of the crime when deciding on the imposition of capital punishment.¹⁷ However, this approach was called into question first in *Bachan Singh v. State of Punjab* where the Court emphasized that since an

¹¹ For a discussion on the deficiencies of the sentencing framework established in the Code, see R. Niruphama, Need for Sentencing Policy in India: Second Critical Studies Conference – "Spheres of Justice" Paper Presentation (Sept. 20–22, 2007), <http://www.mcrg.ac.in/Spheres/Niruphama.doc>.

¹² *Soman v. State of Kerala*, (2013) 11 S.C.C. 382, para. 13.

¹³ *Id.* para. 14.

¹⁴ *State of M.P. v. Bablu Natt*, (2009) 2 S.C.C. 272, para. 13, <http://judis.nic.in/supremecourt/imgs1.aspx?filename=33425>.

¹⁵ *Alister Anthony Pareira v. State of Maharashtra*, (2012) 2 S.C.C. 648, para. 69, available at <http://indiankanoon.org/doc/79026890/>.

¹⁶ PEN. CODE § 302, <http://punjabrevenue.nic.in/crime1.htm>.

¹⁷ *Jagmohan Singh v. State of Uttar Pradesh*, (1973) 2 S.C.R. 541, available at <http://indiankanoon.org/doc/1837051/>.

amendment was made to India's Code of Criminal Procedure, the rule has changed so that "the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so."¹⁸ The Court also emphasized that due consideration should not only be given to the circumstances of the crime but to the criminal also.¹⁹ However, more recently the Court in *Sangeet & Anr. v. State of Haryana*, noted that the approach in *Bachan* has not been fully adopted subsequently,²⁰ that "primacy still seems to be given to the nature of the crime," and that the "circumstances of the criminal, referred to in *Bachan Singh* appear to have taken a bit of a back seat in the sentencing process."²¹ The Court in *Sangeet* concluded as follows:

1. This Court has not endorsed the approach of aggravating and mitigating circumstances in [the 1971 case of] *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.²²

B. Theft

The punishment for theft is up to three years' imprisonment, a fine, or both.²³ No judicial guidance was found regarding sentencing for theft.

¹⁸ *Bachan Singh v. State of Punjab*, (1980) 2 S.C.C. 684, para. 165, available at <http://indiankanoon.org/doc/909940/>.

¹⁹ *Id.*

²⁰ *Sangeet & Anr. v. State of Haryana*, (2013) 2 S.C.C. 452, paras. 29 & 52–54, <http://judis.nic.in/supremecourt/imgs1.aspx?filename=39731> (citing the subsequent case of *Machhi Singh and Others v. State of Punjab*, (1983) 3 S.C.C. 470, <http://judis.nic.in/supremecourt/imgs1.aspx?filename=9766>, a *post-Bachan* decision that reaffirmed the balance sheet approach of weighing aggravating and mitigating circumstances of the crime).

²¹ *Id.* para. 34.

²² *Id.* para. 80 (citing *Bachan Singh v. State of Punjab*, (1980) 2 S.C.C. 684).

C. Manslaughter

Causing death by negligence is punishable by imprisonment of up to two years, a fine, or both.²⁴ Other crimes similar to manslaughter include punishment for culpable homicide not amounting to murder, addressed in section 304 of the Penal Code:

Whoever commits culpable homicide not amounting to murder shall be punished with [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death, or with imprisonment of either description for a term which may extend to ten years, or with [a] fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.²⁵

The Supreme Court looked at the question of sentencing involving sections 304 and 304A in a drunken driving case and found that punishment must be commensurate with the crime and that deterrence was a primary consideration when deciding on the severity of the sentence where rash or negligent driving was involved.²⁶

D. Rape

Recent changes have been made to the crime of rape in India's Penal Code. Absent any aggravating factors, the section stipulates a minimum punishment of imprisonment for seven years up to a maximum of life, and a mandatory fine. In situations where certain aggravated situations occur, punishment is for a minimum term of ten years up to a maximum of life imprisonment, and a mandatory fine. The new amended section on rape reads as follows:

Punishment for rape.

376. (1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever,—

(a) being a police officer, commits rape—

(i) within the limits of the police station to which such police officer is appointed; or

²³ PEN. CODE § 379.

²⁴ *Id.* § 304A.

²⁵ *Id.* § 304 (footnote in original omitted).

²⁶ Alister Anthony Pereira v. State of Maharashtra, (2012) 2 S.C.C. 648, para. 86–98, available at <http://indiankanoon.org/doc/79026890/>.

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(i) commits rape on a woman when she is under sixteen years of age; or

(j) commits rape, on a woman incapable of giving consent; or

(k) being in a position of control or dominance over a woman, commits rape on such woman; or

(l) commits rape on a woman suffering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.²⁷

In the previous section on the crime of rape, there was a proviso that empowered the Court to award a sentence that was less than the minimum for adequate and special reasons stipulated in the judgment. The Supreme Court provided direction in several cases on how such discretion should be exercised.²⁸

²⁷ PEN. CODE § 376, amended by Criminal Law (Amendment) Act, 2013, Gazette of India, section II(1) (Apr. 2, 2013), <http://indiacode.nic.in/acts-in-pdf/132013.pdf>.

²⁸ State of M.P. v. Bablu Natt, (2009) 2 S.C.C. 272, para. 14, available at <http://www.indiankanoon.org/doc/1155765/>.

E. Trafficking of Persons

The level of punishment under the new trafficking of persons crime set forth in section 370 of the Penal Code depends on the number of persons that have been trafficked, whether the victim was a minor, and whether the assailant was a public official:

(2) Whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine.

(3) Where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(4) Where the offence involves the trafficking of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

(5) Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years, but which may extend to imprisonment for life, and shall also be liable to fine.

(6) If a person is convicted of the offence of trafficking of minor on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

(7) When a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.²⁹

Other sections of the Code may also be used to prosecute traffickers, including sections 366A and 372. Section 5B of the Immoral Trafficking Prevention Act (ITPA) also punishes trafficking in persons with "rigorous imprisonment for a term which shall not be less than seven years and in the event of a second or subsequent conviction with imprisonment for life."³⁰

²⁹ PEN. CODE § 370, *amended* by Criminal Law (Amendment) Act, 2013, Gazette of India, section II(1) (Apr. 2, 2013), <http://indiacode.nic.in/acts-in-pdf/132013.pdf>.

³⁰ Immoral Trafficking (Prevention) Act (ITPA), No. 104 of 1956, <http://wcd.nic.in/act/itpa1956.htm>.

TOPIC : Latest view of sentencing policy with reference to the judgment of the Hon'ble Supreme Court & High Court.

INTRODUCTION

1] In India neither the legislature nor the judiciary has issued structured sentencing guidelines. Several governmental committees have pointed to the need to adopt such guidelines in order to minimize uncertainty in awarding sentences. The higher courts, recognizing the absence of such guidelines, have provided judicial guidance in the form of principles and factors that courts must take into account while exercising discretion in sentencing.

Currently India does not have structured sentencing guidelines that have been issued either by the legislature or the judiciary. In March 2003, the Committee on Reforms of Criminal Justice System (the Malimath Committee), a body established by the Ministry of Home Affairs, issued a report that emphasized the need to introduce sentencing guidelines in order to minimize uncertainty in awarding sentences, stating,

The Indian Penal Code prescribe offences and punishments for the same. For many offences only the maximum punishment is prescribed and for some offences the minimum is prescribed. The Judge has wide discretion in awarding the sentence within the statutory limits. There is now no guidance to the Judge in regard to selecting the most appropriate sentence given the circumstances of the case. Therefore each Judge exercises discretion accordingly to his own judgment. There is therefore no uniformity. Some Judges are

lenient and some Judges are harsh. Exercise of unguided discretion is not good even if it is the Judge that exercises the discretion. In some countries guidance regarding sentencing option[s] is given in the penal code and sentencing guideline laws. There is need for such law in our country to minimize uncertainty to the matter of awarding sentence. There are several factors which are relevant in prescribing the alternative sentences. This requires a thorough examination by an expert statutory body.

The Committee advised further that, in order to bring “predictability in the matter of sentencing,” a statutory committee should be established “to lay guidelines on sentencing guidelines under the Chairmanship of a former Judge of Supreme Court or a former Chief Justice of a High Court experienced in criminal law with other members representing the prosecution, legal profession, police, social scientist and women representative.” In 2008, the Committee on Draft National Policy on Criminal Justice (the Madhava Menon Committee), reasserted the need for statutory sentencing guidelines. In an October 2010 news report, the Law Minister is quoted as having stated that the government is looking into establishing a “uniform sentencing policy” in line with the United States and the United Kingdom in order to ensure that judges do not issue varied sentences.

In India no uniform sentencing policy exists and sentence awarded to an offender reflect the individual philosophy of the judges. This is evident from the following facts.

2] The following statements given by the three prominent judges of India shows the present condition of sentencing policy of India.

“Every saint has a past, every sinner has a future.”-- Krishna Iyer J

“Theory of reformation through punishment is grounded on the sublime philosophy that every man is born good, but circumstances transform him into a criminal.”-- K T Thomas J

“Reformative theory is certainly important but too much stress to my mind cannot be laid down on it that basic tenets of punishment altogether vanish”.-- D P Wadhwa J

3] Section 53 of the I.P.C in Chapter III deals with the kinds of punishments which can be inflicted on the offenders. They are as follows:

1. Death penalty,
2. Imprisonment for life,
3. Imprisonment,
4. Forfeiture of property and
5. Fine.

The main objectives of the criminal justice system can be categorized as follows:

To prevent the occurrence of crime.

To punish the transgressors and the criminals.

To rehabilitate the transgressors and the criminals.

To compensate the victims as far as possible.

To maintain law and order in the society.

To deter the offenders from committing any criminal act in the future.

RELEVANT PROVISIONS

4] In case of an offender other than a Juvenile, a Magistrate, under section 29 of Cr.P.C., may pass a sentence of imprisonment for a term not exceeding 3 years or fine not exceeding ten thousand

rupees (fifty thousand as per Mah. State amendment) or of both. Here it is important to note that under many categories of offences punishment prescribed is more than the above prescribed limit, however while passing sentence in such cases magistrate cannot exceed the sentencing limits but he has an option under S. 325 Cr.P.C. to forward accused to the Chief Judicial Magistrate. A sentence of imprisonment in default, as per S.30 Cr.P.C., should not be in excess of power u/s 29 Cr.P.C. and should not exceed 1/4th of the term of imprisonment which the magistrate is empowered to inflict. However, it may be in addition to substantive sentence of imprisonment for the maximum term awarded by the Magistrate u/s 29. In case of conviction of several offences at one trial, as per S.31 Cr.P.C., the court may pass separate sentences, subject to the provisions of S.71 of the I.P.C. The aggregate punishment and the length of the period of imprisonment must not exceed the limit prescribed by S.71 I.P.C. S. 71 I.P.C. provides (1) that where an offence is made up of parts each of which parts is itself an offence the offender can be punished only for one of such offences. (2) That where an offence falls under two or more definitions of offences or where several acts, each of which is a offence, constitute when combined a different offence, then the punishment could be awarded only for any one of such offences. These are rules of substantive law whereas S.31 Cr.P.C. is a procedural law.

In case of several sentences to run concurrently it is not necessary to send offender for trial before higher court only for the reason that aggregate punishment for several offences is in excess of punishment which the magistrate is competent to inflict on conviction of single offence. However, proviso to S.31 Cr.P.C. Provides that (a)

in no case shall such person be sentenced to imprisonment for a longer period than 14 years (b) the aggregate punishment shall not exceed twice the amount of punishment which the court is competent to inflict for single offence.

RELEVANT JUDGMENTS

5] In Bachansing vs State of Punjab (AIR 1980 SC 898) The hon'ble Apex court while interpreting S. 354(3) and 235(2) Cr.P.C. elaborated two aspects, firstly that the extreme penalty can be inflicted only in gravest cases of extreme culpability and secondly, in making the choice of sentence due regard must be paid to the circumstances of the offender also.

In Machhi Singh v. State of Punjab [(1983) 3 SCC 470], The hon'ble Apex court observed that the accused-appellants, as a result of a family feud and motivated by feeling of reprisal, committed as many as 17 murders of men, women and children. The Court, while justifying the death sentence imposed on the appellants, recollected with approval the principles laid down in Bachan Singh and supplemented them with a few more elaborate guidelines regarding the test of 'rarest of rare' cases as given below :

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

In the rarest of rare cases, when the collective conscience of the community is so shocked that it will expect the holders of the judicial

power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, death sentence can be awarded.

Aggravating Circumstances:

1. The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

2. The offence was committed while the offender was engaged in the commission of another serious offence.

3. The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

4. The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

5. Hired killings.

6. The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

7. The offence was committed by a person while in lawful custody.

8. The murder or the offence was committed, to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Code of Criminal Procedure.

9. When the crime is enormous in proportion like making an

attempt of murder of the entire family or members of a particular community.

10. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

11. When murder is committed for a motive which evidences total depravity and meanness.

12. When there is a cold blooded murder without provocation.

13. The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances:

1. The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

2. The age of the accused is a relevant consideration but not a determinative factor by itself.

3. The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

4. The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

5. The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent

harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

6. Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a pre-ordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

7. Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused.

While determining the questions relateable to sentencing policy, the Court has to follow certain principles and those principles are the load star besides the above considerations in imposition or otherwise of the death sentence.

The Hon'ble Apex Court in Rajendra Pralhadrao Wasnik Vs. State of Maharashtra, (AIR 2012 SC 1377). held that “Stated broadly, these are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the Court, while exercising its jurisdiction. It is difficult to state, it as an absolute rule. Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the Court may consider in its endeavour to do complete justice between the parties”.

The Hon'ble Apex court in State of Madhyapradesh-vs-Mehtab, (Cri. Appeal no. 290/2015, dated 13.02.2015) has observed that, “we find force in the submission, it is the duty of the court to award just sentence to a convict against whom charge is proved. While mitigating and aggravating circumstance may be given due weight, mechanical reduction of sentence to the period already undergone cannot be appreciated. Sentence has to be fair not only to the accused but also the victim and the society.”

In Gurubachan Sing Vs. Satpal Singh (AIR 1990 SC 209), the Apex Court cautioned saying that exaggerated devotion to rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion as they destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law.

In Norbetro V/s. Mrs. Prema Nalband, (2006 (1), AIR, Bom.R,481) The hon'ble Bombay High Court held that; “Admittedly, post dated cheques dated 30.9.1999 were given to the complainant in June of that year and till date the complainant has not received her dues except for the said sum of Rs.30,000/-. Considering the amount of cheques namely Rs.4.12 lacs, substantive sentence of five days would look lie a flee bite sentence. In my view considering the said amount of Rs.4.12 lacs substantive sentence of 15 days Simple Imprisonment could also not be considered to be adequate and considering the same in my views there is absolutely no scope for further reduction of the said sentence.” In this case the Trial Court

has sentenced the accused to undergo Simple Imprisonment for a period of 15 days and awarded the compensation to the complainant from accused of Rs.50,000/-. Till the revision before the Hon'ble High Court, accused had also undergone the period of five (5) days and it was urged from the side of accused that the sentence would be reduced to the said period of five days undergone by the accused. Hon'ble High court giving above observation confirmed the sentence passed by Trial Court.

In **Suganthi Suresh Kumar-Vs-Jagdeeshan** [2002 (2) SCC 420] The Hon'ble Apex Court held that Court can impose a sentence of imprisonment on the accused in default of payment of compensation ordered u/s 357 (3) of the Code. Similarly, in **R. Mohan -Vs- A.K. Vijaya Kumar [2012 Cri.L.J. 3953]** the Hon'ble Apex Court observed that accused was convicted for an offence u/s 138 of the Negotiable Instruments Act and sentenced to undergo three month's simple imprisonment and to pay compensation of Rs. 5 lakh to the complainant u/s 357(3) of the Cr.P.C., in default to undergo two month's simple imprisonment. The Judgment was confirmed by the Sessions Judge in appeal. In revision, the High Court was of opinion that no separate sentence could be awarded in default of payment of compensation when substantive sentence of imprisonment in default of payment of compensation. The said order of the High Court was challenged and the Apex Court held that “we find no illegality in the order passed by learned Magistrate and confirmed by the Sessions Court in awarding sentence in default of payment of compensation. High Court was in error in setting aside the sentence imposed in default of payment of compensation”

While dealing with the case in respect of offence of outraging modesty of woman punishable under Sec. 354 of I.P.C., The Hon'ble Bombay High Court in **Bhagwat Ganpat Taide V/s. The State of Maharashtra**, (2006 (3), A.I.R. Bom. R. 250), observed that; “The petitioner/accused was a teacher. Imparting knowledge is a noble profession. The petitioner was in a position of loco parentis to his pupil. Instead of imparting knowledge petitioner was indulging in molestations of young girls of tender age. If the conduct of the petitioner is considered this is not fit case for showing leniency.” In this case Trial Court convicted accused for this offence sentencing him to suffer Rigorous Imprisonment for three months and fine of Rs. 2,000/- in default R.I. for 20 days. This sentence was confirmed by the Hon'ble High Court.

In **Shailesh Jasvantbhai and Another v. State of Gujarat and Others**, [(2006)2 SCC 359] The hon'ble Hon'ble Apex Court held that “ In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

In **Alister Anthony Pereira Vs. State of Maharashtra** (AIR 2012 SC 3802) The hon'ble Hon'ble Apex Court held that

“Sentencing policy is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing and accused on proof of crime. The courts have evolved certain principles: twin objectives of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

In **Brajendrasingh Vs. State of Madhya Pradesh** (AIR 2012 SC 1552), The hon'ble Hon'ble Apex Court held that “ The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in the case of *Bachan Singh* and thereafter, in the case of *Machhi Singh*. The aforesaid judgments, primarily dissect these principles into two different compartments - one being the 'aggravating circumstances' while the other being the 'mitigating circumstance'. The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the

classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354(3) Code of Criminal Procedure.

In **Ankush Maruti Shinde & Ors. v. State of Maharashtra, (AIR 2009 SC 2609)** the Hon'ble Apex Court held that, protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of "order" should meet the challenges confronting the society. Friedman in his "Law in Changing Society" stated that, "State of criminal law continues to be- as it should be- a decisive reflection of social consciousness of society". Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. For instance a murder committed due to deep-seated mutual and personal rivalry may not call for penalty of death. But an organised crime or mass murders of innocent people would call for imposition of death sentence as deterrence.

In State of Andhra Pradesh v. Polamala Raju @ Rajarao [(2000) 7 SCC 75] Three-judge bench of hon'ble Apex Court set aside a judgment of the High Court for non-application of mind to the question of sentencing. And observed that “In that case, this Court reprimanded the High Court for having reduced the sentence of the accused convicted under Section 376, IPC from 10 years imprisonment to 5 years without recording any reasons for the same”. This Court said:

“We are of the considered opinion that it is an obligation of the sentencing court to consider all relevant facts and circumstances bearing on the question of sentence and impose a sentence commensurate with the gravity of the offence.....To say the least, the order contains no reasons, much less “special or adequate reasons”. The sentence has been reduced in a rather mechanical manner without proper application of mind...”

In State of M.P. - v - Bablu Natt [(2009)2 S.C.C. 272] The hon'ble Apex Court held that “ Keeping in view the nature of the offence and the helpless condition in which the prosecutrix a young girl of 13/14 years was placed, the High Court was clearly in error in reducing the sentence imposed upon the respondent and that too without assigning any reasons, much less special and adequate reasons. The High Court appears to have overlooked the mandate of the Legislature as reflected in Section 376(1) IPC.

In recent years, we have noticed that crime against women are on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly

against the mandate of the Legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal. The Courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the court's verdict in the measure of punishment. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape on a helpless 13/14 years old girl shakes our judicial conscience. The offence was inhumane. There are no extenuating or mitigating circumstances available on the record which may justify imposition of sentence less than the minimum prescribed by the Legislature under Section 376(1) of the Act."

In **State of Karnataka v. Raju** [2007 (11) SCALE 114], where the facts of the case were that the Trial Court imposed custodial sentence of seven years after convicting the respondent for rape of minor under Section 376 of the Indian Penal Code; on appeal, the High Court reduced the sentence of the respondent to three and half years.

The hon'ble Apex Court held that a normal sentence in a case where rape is committed on a child below 12 years of age, is not less than 10 years' rigorous imprisonment, though in exceptional cases "for special and adequate reasons" sentence of less than 10 years' rigorous imprisonment can also be awarded. It was, thus, opined that socio-economic status, religion, race, caste or creed of the accused or

the victim are irrelevant considerations in sentencing policy. To what extent should the judges have discretion to reduce the sentence so prescribed under the statute has remained a vexed question.

In **State of Punjab -Versus -Prem Sagar & Ors.** (CRIMINAL APPEAL [Arising out of SLP (Crl.) No.4285 of 2007]) The hon'ble Apex Court held that Respondents herein were convicted for commission of an offence under Section 61(1) of the Punjab Excise Act for carrying 2000 litres of rectified spirit. They were sentenced to undergo an imprisonment for a period of one year.

The High Court, however, by reason of the impugned judgment purported to be upon taking into consideration the fact that the offence was committed in the year 1987 and the appeal was dismissed in the year 1992, thought it fit to give an opportunity to the respondents to reform themselves, observing:

"The accused have suffered lot of agony of protracted trial. They having joined the main stream must have expressed repentance over the misdeed done by them about 19 years back. In the aforesaid circumstances and in the absence of any of their bad antecedents, it will not be appropriate to deny them to the benefit of probation under the Probation of Offenders Act, 1958 and to send them to jail at this stage."

We have noticed the development of law in this behalf in other countries only to emphasise that the courts while imposing sentence must take into consideration the principles applicable thereto. It requires application of mind. The purpose of imposition of sentence must also be kept in mind.

“Although ordinarily, we would not interfere the quantum of sentence in exercise of our jurisdiction under Article 136 of the

Constitution of India, but in a case of this nature we are of the opinion that the High Court having committed a serious error, interest of justice would be subserved if the decision of the High Court is set aside and the respondent is sentenced to undergo simple imprisonment for a period of six months and a fine of Rs. 5,000/- is imposed, in default to undergo imprisonment for a further period of one month.

In State (Government of NCT of Delhi) vs. Prem Raj, (2003) 7 SCC 121) Prem Raj, the accused respondent before the court was convicted by the trial court under Section 7 read with Section 13(1) (d) and 13(2) of the Prevention of Corruption Act and was sentenced to undergo rigorous imprisonment for two years and a fine of Rs. 500/- under Section 7. He was additionally sentenced to undergo imprisonment for 3-1/2 years and a fine of Rs.1, 000/- under Section 13(2) of the Act, subject to the direction that the two sentences would run concurrently. In appeal, on a plea made on the question of sentence, a learned Single Judge of the High Court enhanced the amount of fine to Rs.15, 000/- in lieu of the sentences of imprisonment and directed that on deposit of the amount of fine the State government, being the appropriate government' would formalize the matter by passing an appropriate order under Section 433 (c) of the Code of Criminal Procedure. This Court, on appeal by the State, held that the question of remission lay within the domain of the appropriate government and it was not open to the High Court to give a direction of that kind.

In Ishardas v/s St. of Punjab (AIR 1972 SC 1295) the hon'ble Apex court observed that the prevention of food Adulteration Act is enacted with aim of eradicating antisocial evil against public health

and court should not lightly resort to the provisions of probation of offenders Act. The 47th report of the Law Commission has recommended the exclusion of the probation Act to social and economic offences.

In Pyarali K. Tejani vs Mahadeo Ramchandra Dange (1974 SCR (2) 154) Five Judge bench of the hon'ble Apex Court held that "A successful prosecution for a food offence ended in a conviction of the accused, followed by a flea-bite fine of Rs. 100/-. Two criminal revisions ensued at the instance of the State and the Food Inspector separately since they were dissatisfied with the magisterial leniency. (Why two revision proceedings should have been instituted, involving duplication of cases and avoidable expenditure from the public exchequer is for the authorities to examine and inhibit in future). The High Court heard the accused against the conviction itself but upheld the guilt and enhanced the punishment to the statutory minimum of six months imprisonment and one thousand rupees fine. The finale in every criminal trial is sentence. Let us take stock of the social and personal facts, the features of the crime and the culprit. The Prevention of Food Adulteration Act, 1954, is meant to save society, and Parliament has by repeated amendments emphasized the statutory determination to stamp out food offenses by severe sentences. Indeed, dissatisfied with the indulgent exercise of judicial discretion, the legislature has deprived the court of its power to be lenient. In the light of escalating food adulteration this is understandable. Even so, there are violations and violations. Scented supari is neither a staple diet nor popular 'With the poor, being an expensive item. Nor is saccharin poisonous but prohibited more as a precaution. That may be the reason for the prosecution not leading

evidence of its injurious properties. The circular bearing on saccharin in supari, though irrelevant to nullify the rule, suggests that it is not so grave a danger and may perhaps be permitted again. Cyclamate stands on a somewhat different footing, although in a practical sense, the menace to health from it is not too serious except where unusually massive doses are consumed. The accused's non-knowledge has been rejected by us but he alleges that he has retired from the firm. He has undergone a week in jail and is not shown to be a repeater.

The Court has jurisdiction to bring down the sentence to less than the minimum prescribed in s. 16(1) provided there are adequate and special reasons in that behalf. The normal minimum is six months in jail and a thousand rupees fine. We find no good reason to depart from the proposition that generally food offenses must be deterrently dealt with. The High Court under the erroneous impression that the offence fell under S. 7 (i) read with s. 16 (1) (a) (i) actually it comes under s.7 (v) read with S. 16 (1) (a) (ii) did not address itself to the quantum of sentence. Even so the punishment fits the crime and the criminal.

In **Gopal Singh vs. State of Uttarakhand**, (AIR 2013 SC 3048), the Hon'ble Apex Court while reducing the sentence of three years of imprisonment to one year, for the offence under section 324 of the Indian Penal Code, 1860 observed that apart from other circumstances sometimes lapse of time in commission of the crime is a ground for reduction of the sentence.

In **State of M.P. v. Babulal**,(2013 (10) SCALE 230) the Hon'ble Supreme Court found fault with the Hon'ble High Court's

decision reducing the sentence to the period already undergone on the ground that a period of more than 7 years had elapsed from the date of the incident and observed that taking such a lenient view in awarding the sentence on the ground of delay in legal proceedings “tantamounts to doing injustice of a crude form against the innocent victims and the society as a whole”.

In **Shyam Narain v. The State of NCT of Delhi**, (AIR 2013 SC 2209), the Hon’ble Apex Court while dealing with the imposition of sentence on a rape convict observed that “the fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the social fabric. The purpose of just punishment is designed so that individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes.” This observation sounds that the Hon’ble Supreme Court has been moving towards crime control model of criminal justice and retributive theory of punishment, at least in the cases of the crimes committed against women.

The Hon’ble Supreme Court in **Shimbhu v. State of Haryana**, (AIR 2014 SC 739) disapproved the reduction of sentence, than the prescribed minimum, in case of rape convicts, on the ground that the accused was “unsophisticated and illiterate citizen belonging to a weaker section of the society” that he was “a chronic addict to drinking” and had committed rape on the girl while in state of “intoxication” and that his family comprising of “an old mother, wife and children” were dependent upon him. These factors, the court said, did not justify recourse to the proviso to Section 376(2) of the

I.P.C. to impose a sentence less than the prescribed minimum. In this judgment the court did not consider the compromise arrived between the victim and the accused as a ground for reduction of sentence.

In **State of M.P. v. Najab Khan** (AIR 2013 SC 2997) also the court did not consider the compromise between the convict of the offence under section 326 of the I.P.C., and victim as a ground for reduction of sentence.

In **Shankar Kisanrao Khade v. State of Maharashtra**, [2013 Cri.LJ 2595(SC)], the Hon'ble Apex Court held that, an attempt was made to do away with the preparation of balance sheet of aggravating and mitigating circumstances for arriving at a decision on death sentence by substituting the said exercise with "Crime test", "Criminal test", and "PR test." While restating the "rarest of rare case" rule, Hon'ble Justice K.S.P. Radhakrishnan opined that to award death sentence the crime test has to be fully satisfied i.e. 100% and the criminal test shall be 0% and later it shall pass through "PR test." One doubts whether there can be any such cases where there will be 100% and 0% of crime test and criminal test respectively.

In **Sunil Dutt Sharma v. State (Govt of NCT of Delhi)**, (AIR 2013 SC (Cri) 2342) the Hon'ble Apex Court has dealt with sentencing jurisprudence at length and opined that the principles of sentencing evolved by this Court over the years, though largely in the context of the death penalty, will be applicable to all lesser sentences so long as the sentencing Judge is vested with the discretion to award a lesser or a higher sentence. Thus the Hon'ble Supreme Court

evolved new principles on sentencing practices during 2013.

In Laxmi v. Union of India, (2013 (9) SCALE 291) the Hon'ble Apex court has taken note of increasing acid attacks on women and the need for regulating of the sale of acid and issued directions to the government to take appropriate action. The court also has found disparity in compensation provided to the victims of acid attacks in different States and directed that a minimum of three lakh rupees shall be fixed as compensation in such cases.

The Hon'ble Supreme Court in "Surya Baksh Singh Vs. State of Uttar Pradesh", [2014(1) Bom. C.R. (Criminal) 26] has observed that "Recent judgments of the Court contain a perceptible dilution of legal principles such as the right of silence of the accused. The Supreme Court has, in several cases, departed from this rule in enunciating, inter alia, that the accused are duty bound to give a valid explanation of facts within their specific and personal knowledge in order to dispel doubts on their complicity.

In Mohd. Arif @ Ashfaq Vs. The Registrar, Supreme Court of India, (2014 Cri.L.J. 4598), The Hon'ble Apex Court observed that Crime and punishment are two sides of the same coin. Punishment must fit to the crime. The notion of 'Just deserts' or a sentence proportionate to the offender's culpability was the principle which, by passage of time, became applicable to criminal jurisprudence. It is not out of place to mention that in all of recorded history, there has never been a time when crime and punishment have not been the subject of debate and difference of opinion. There are no statutory guidelines to regulate punishment. Therefore, in practice, there is much variance in

the matter of sentencing.

In **State of Madhya Pradesh Vs. Surendra Singh**, (AIR 2015 SC 3980), based on the theory of proportionality, it is laid down by Hon'ble Apex Court that, "Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment. Meager sentence imposed solely on account of lapse of time without considering the degree of the offence will be counter productive in the long run and against the interest of the society. One of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which commensurate with gravity, nature of crime and the manner in which the offence is committed. one should keep in mind the social interest and conscience of the society while considering the determinative factor of sentence with gravity of crime. The punishment should not be so lenient that it shocks the conscience of the society. It is, therefore, solemn duty of the court to strike a proper balance while awarding the sentence as awarding lesser sentence encourages any criminal and, as a result of the same, the society suffers. Imposition of sentence must commensurate with gravity of offence".

Compensation to Victims of Crime

6] Criminal law, which reflects the social ambitions and norms of the society, is designed to punish as well as to reform the criminals, but it hardly takes any notice of by product of crime- i.e. its victim.

The poor victims of crime are entirely overlooked in misplaced sympathy for the criminal. The guilty man is lodged, fed, clothed, warmed, lighted, and entertained in a model cell at the expense of the state, from the taxes that the victim pays to the treasury. And, the victim, instead of being looked after, is contributing towards the care of prisoners during his stay in the prison. In fact, it is a weakness of our criminal jurisprudence that the victims of crime don't attract due attention.

The code of criminal procedure, 1973, sec.357, 357A and Probation of Offenders Act, 1958, sec.5; empowers the court to provide compensation to the victims of crime. However it is noted with regret that the courts seldom resort to exercising their powers liberally and award adequate compensation to the victim, particularly when an accused is released on admonition, probation or when the parties enter into a compromise.

The 2008 amendments introduced Section 357A under which the Court is empowered to direct the State to pay compensation to the victim in such cases where “ the compensation awarded under Section 357 is not adequate for such rehabilitation, or where the case ends in acquittal or discharge and the victim has to be rehabilitated. Under this provision, even if the accused is not tried but the victim needs to be rehabilitated, the victim may request the State or District Legal Services Authority to award him/her compensation.

Besides above enactments, the Juvenile Justice (Care and

Protection of Children) Act, 2000 also provides for the release of children who have committed offences to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety, or any fit institution as the Board may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years.

The object of the criminal justice system is to reform the offender, and to ensure the society its security, and the security of its people by taking steps against the offender. It is thus a correctional measure. This purpose is not fulfilled only by incarceration, other alternative measures like parole, admonition with fine and probation fulfill the purpose equally well.

The benefit of Probation can also be usefully applied to cases where persons on account of family discord, destitution, loss of near relatives, or other causes of like nature, attempt to put an end to their own lives.

In **Sangeet & Anr. v. State of Haryana** [(2013) 2 SCC 452] the hon'ble Apex Court held that “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.”

Section 357 Cr.P.C. confers a duty on the Court to apply its mind to the question of compensation in every criminal case. It necessarily follows that the Court must disclose that it has applied its mind to

this question in every criminal case.

In State of Himachal Pradesh v. Ram Pal (2015) 42 SCD 438) the hon'ble Apex Court held that "On appeal, the view taken by the trial Court was reversed. It was held that even if the vehicle was going at slow speed and uphill, the vehicle could have been stopped and its striking to the girl could have been prevented. Undoubtedly, the death was because of vehicle hitting the girl which in the circumstances was clear result of rash and negligent act of driving. Accordingly, the appellate Court convicted the respondent under Section 279 and 304 A IPC and awarded sentence of imprisonment for six months and fine of Rs.1000, in default further imprisonment of one month under Section 304 A IPC and concurrent imprisonment for three months and fine of Rs.500, in default further imprisonment of fifteen days under Section 279 IPC."

In our view, the sentence of mere fine of Rs.40,000/- imposed by the High Court is not adequate and proportionate to the offence. We have been informed that a sum of Rs.3,60,000/- has been awarded as compensation by the insurance company to the heirs of the deceased. We are also of the view that where the accused is unable to pay adequate compensation to the victim or his heir, the Court ought to have awarded compensation under Section 357A against the State from the funds available under the Victim Compensation Scheme framed under the said section. Accordingly, we modify the impugned order passed by the High Court and enhance the compensation to be paid by the respondent accused to Rs.1 lakh to be paid within four months failing which the sentence awarded by the Court of Session shall stand revived. In addition, we direct the State of Himachal Pradesh to pay interim compensation of Rs.3 lakhs. In case the

respondent fails to pay any part of the compensation, that part of compensation will also be paid by the State so that the heirs of the victim get total sum of Rs. 4 lakhs towards compensation. The amount already paid may be adjusted.

CONCLUSION

7] The Code provides for wide discretionary powers to the judge once the conviction is determined. The Code talks about sentencing chiefly in S.235, S.248, S.325, S.360 and S.361. S.235 is a part of Chapter 18 dealing with a proceeding in the Court of Session. It directs the judge to pass a judgment of acquittal or conviction and in case conviction to follow clause 2 of the section. Clause 2 of the section gives the procedure to be followed in cases of sentencing a person convicted of a crime. The section provides a quasi trial to ensure that the convict is given a chance to speak for himself and give opinion on the sentence to be imposed on him. The reasons given by the convict may not be pertaining to the crime or be legally sound. It is just for the judge to get an idea of the social and personal details of the convict and to see if none of these will affect the sentence. Facts such as the convict being a breadwinner might help in mitigating his punishment or the conditions in which he might work. This section plainly provides that every person must be given a chance to talk about the kind of punishment to be imposed.

Thus, imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the

criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every Court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc.

Thus, the law on the issue of sentencing policy can be summarised to the effect that punishment should always be proportionate/commensurate to the gravity of offence. Religion, race, caste, economic or social status of the accused or victim are not the relevant factors for determining the quantum of punishment. The court has to decide the punishment after considering all aggravating and mitigating factors and the circumstances in which the crime has been committed. Conduct and state of mind of the accused and age of the victim and the gravity of the criminal act are the factors of paramount importance. The court must exercise its discretion in imposing the punishment objectively considering the facts and circumstances of the case. The power under the proviso is not to be used indiscriminately in a routine, casual and cavalier manner for the reason that an exception clause requires strict interpretation.

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Vasanta Sampat Dupare v State of Maharashtra

2017(5) SCALE 724

Bench : Uday Umesh Lalit, Dipak Misra, Rohinton Fali Nariman

The Judgment was delivered by : Uday Umesh Lalit, J.

1. These Review Petitions are directed against the Judgment and Order dated 26.11.2014 passed by this Court in Criminal Appeal Nos.2486-87 of 2014 affirming conviction of the petitioner for the offences punishable under Sections 302, 363, 367, 376(2)(f) and 201 IPC and various sentences imposed upon the petitioner including death sentence under Section 302 IPC and life imprisonment under Section 376(2)(f) IPC. In view of the decision of this Court in Mohd. Arif @ Ashfaq v. Registrar, Supreme Court of India and others (2014) 9 SCC 737, these review petitions were listed in Court for oral hearing.

2. The facts leading to the filing of criminal appeals in this Court including the nature and quality of evidence on record have been dealt with and considered in the Judgment of this Court dated 26.11.2014, (2015) 1 SCC 253. The charge against the petitioner was that the victim, a minor girl of four years was raped and battered to death by the petitioner. The petitioner allegedly lured the victim by giving her chocolates, kidnapped her and after satisfying his lust caused crushing injuries to her with the help of stones weighing about 8.5 kg and 7.5 kg. The prosecution relied upon the evidence of PW2 Manisha, PW3 Minal, PW5 Vandana and PW6 Baby Sharma who had seen the petitioner taking away the victim on a bicycle on the fateful day. In his disclosure statement under Section 27 of the Evidence Act the petitioner had shown the place where dead body of the victim was lying and the tap where he had washed his blood stained clothes. The medical evidence on record was dealt with in the Judgment under review as under:-

3. After taking into account the evidence and the circumstances on record, this Court in the Judgment under review concluded as under:-

"On a critical analysis of the evidence on record, we are convinced that the circumstances that have been clearly established are that the appellant was seen in the courtyard where the minor girl and other children were playing; that the appellant was seen taking the deceased on his bicycle; that he had gone to the grocery shop owned by PW-6 to buy Mint chocolate along with her; that the accused had told PW2 that the child was the daughter of his friend and he was going to 'Tekdi-Wadi' along with the girl; that the appellant had led to discovery of the dead body of the deceased, the place where he had washed his clothes and at his instance the stones smeared with blood were recovered; that the medical report clearly indicates about the injuries sustained by the deceased on her body; that the injuries sustained on the private parts have been stated by the doctor to have been caused by forcible sexual intercourse; that the stones that were seized were smeared with blood and the medical evidence corroborates the fact that injuries could have been caused by battering with stones; that the chemical analysis report shows that the blood group found on the clothes of the appellant; that the appellant has not offered any explanation with regard to the recovery made at his instance; and that nothing has been stated in his examination under Section 313 CrPC that there was any justifiable reason to implicate him in the crime in question. Thus, we find that each of the incriminating circumstances has been clearly established and the chain of circumstances are conclusive in nature to exclude any kind of hypothesis, but the one proposed to be proved, and lead to a definite conclusion that the crime was committed by the accused. Therefore, we have no hesitation in affirming the judgment of conviction rendered by the learned trial Judge and affirmed by the High Court."

4. On the issue of death sentence awarded to the petitioner, this Court first considered the principles governing the matter in issue as under:-

"39. Now we shall proceed to deal with the facet of sentence. In Bachan Singh v. State of Punjab³ 1980 Indlaw SC 624, the Court held thus:

"(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The Court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.

(b) While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the Court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the Court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the Court may impose the death sentence."

40. In Bachan Singh case (1980) 2 SCC 684, the Court referred to the decision in Furman v. Georgia 33

L.Ed. 2d 346 = 408 US 238 (1972) and noted the suggestion given by the learned counsel about the aggravating and the mitigating circumstances. While discussing about the aggravating circumstances, the Court noted the aggravating circumstances suggested by the counsel which read as follows: (Bachan Singh 1980 Indlaw SC 624 case)

"Aggravating circumstances.-A court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed-

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code." After reproducing the same, the Court opined:

"203. Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other."

41. Thereafter, the Court referred to the suggestions pertaining to mitigating circumstances: (Bachan Singh 1980 Indlaw SC 624 case)

"Mitigating circumstances.-In the exercise of its discretion in the above cases, the court shall take into account the following circumstances.-

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated.

The State shall by evidence prove that the accused does not satisfy Conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

After reproducing the above, the Court observed:

"207. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence.

42. In the said case, the Court has also held thus: (Bachan Singh 1980 Indlaw SC 624 case)

"209. ... It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

43. In Machhi Singh and others v. State of Punjab (1983) 3 SCC 470 1983 Indlaw SC 116 a three-Judge Bench has explained the concept of rarest of the rare cases by stating that:

"32. The reasons why the community as a whole does not endorse the humanistic approach reflected in 'death sentence-in-no-case' doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of 'reverence for life' principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realised that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent of those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection."

44. Thereafter, after adverting to the aspects of the feeling of the community and its desire for self-preservation, the Court opined that the community may well withdraw the protection by sanctioning the death penalty. The Court in that regard ruled thus: (*Machhi Singh 1983 Indlaw SC 116 case*)

"32. ... But the community will not do so in every case. It may do so 'in the rarest of rare cases' when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty."

It is apt to state here that in the said case, emphasis was laid on certain aspects, namely, manner of commission of murder, motive for commission of murder, anti-social or socially abhorrent nature of the crime, magnitude of crime and personality of the victim of murder.

45. After so enumerating, the propositions that emerged out from *Bachan Singh 1980 Indlaw SC 6243* were culled out which are as follows: (*Machhi Singh 1983 Indlaw SC 116 case*)

"38. ... The following propositions emerge from *Bachan Singh 1980 Indlaw SC 624 case*:

(i) *The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.*

(ii) *Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime".*

(iii) *Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.*

(iv) *A balance sheet of aggravating and mitigating circumstances has to be drawn up 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."*

46. Thereafter, the three-Judge Bench opined that to apply the said guidelines, the following questions are required to be answered: (*Machhi Singh 1983 Indlaw SC 116 case*)

"(a) *Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?*

(b) *Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"*

In the said case, the Court upheld the extreme penalty of death in respect of three accused persons."

5. In the light of the principles as stated above, the facts of the present matter were considered by this Court in the Judgment under review as under:-

"57. Keeping in view the aforesaid authorities, we shall proceed to adumbrate what is the duty of the Court when the collective conscience is shocked because of the crime committed. When the crime is diabolical in nature and invites abhorrence of the collective, it shocks the judicial conscience and impels it to react keeping in view the collective conscience, cry of the community for justice and the intense indignation at the manner in which the brutal crime is committed. We are absolutely conscious that Judges while imposing sentence, should never be swayed away by any kind of individual philosophy and predilections. It should never have the flavour of Judge-centric attitude or perception. It has to satisfy the test laid down in various precedents relating to the rarest of the rare case. We are also required to pose two questions that have been stated in *Machhi Singh 1983 Indlaw SC 116 case*.

58. Presently, we shall proceed to dwell upon the manner in which the crime was committed. Materials on record clearly reveal that the appellant was well acquainted with the inhabitants of the locality and as is demonstrable he had access to the house of the father of the deceased and the children used to call him "uncle". He had lured the deceased to go with him to have chocolates. It is an act of taking advantage of absolute innocence. He had taken the deceased from place to place by his bicycle and eventually raped her in a brutal manner, as if he had an insatiable and ravenous appetite. The injuries caused on the minor girl are likely to send a chill in the spine of the society and shiver in the marrows of human conscience. He had battered her to death by assaulting her with two heavy stones. The injured minor girl could not have shown any kind of resistance. It is not a case where the accused had a momentary lapse. It is also not a case where the minor child had died because of profuse bleeding due to rape but because of the deliberate cruel assault by the appellant. After the savage act was over, the coolness of the appellant is evident, for he washed the clothes on the tap and took proper care to hide things. As is manifest, he even did not think for a moment the trauma and torture that was caused to the deceased. The gullibility and vulnerability of the four year

girl, who could not have nurtured any idea about the maladroitly designed biological desires of this nature, went with the uncle who extinguished her life-spark. The barbaric act of the appellant does not remotely show any concern for the precious life of a young minor child who had really not seen life. The criminality of the conduct of the appellant is not only depraved and debased, but can have a menacing effect on the society. It is calamitous.

60. In the case at hand, as we find, not only was the rape committed in a brutal manner but murder was also committed in a barbaric manner. The rape of a minor girl child is nothing but a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a girl child and the soul of society and such a crime is aggravated by the manner in which it has been committed. The nature of the crime and the manner in which it has been committed speaks about its uncommonness. The crime speaks of depravity, degradation and uncommonality. It is diabolical and barbaric. The crime was committed in an inhuman manner. Indubitably, these go a long way to establish the aggravating circumstances.

61. We are absolutely conscious that mitigating circumstances are to be taken into consideration. The learned counsel for the appellant pointing out the mitigating circumstances would submit that the appellant is in his mid-fifties and there is possibility of his reformation. Be it noted, the appellant was aged about forty-seven years at the time of commission of the crime. As is noticeable, there has been no remorse on the part of the appellant. There are cases when this Court has commuted the death sentence to life finding that the accused has expressed remorse or the crime was not premeditated. But the obtaining factual matrix when unfolded stage by stage would show the premeditation, the proclivity and the rapacious desire. The learned counsel would submit that the appellant had no criminal antecedents but we find that he was a history-sheeter and had a number of cases pending against him. That alone may not be sufficient. The appalling cruelty shown by him to the minor girl child is extremely shocking and it gets accentuated, when his age is taken into consideration. It was not committed under any mental stress or emotional disturbance and it is difficult to comprehend that he would not commit such acts and would be reformed or rehabilitated. As the circumstances would graphically depict, he would remain a menace to society, for a defenceless child has become his prey. In our considered opinion, there are no mitigating circumstances."

6. The above quoted observations of this Court in Judgment under review show that the aggravating facts were considered in paragraphs 58 and 60 and the entirety of the matter including the mitigating circumstances were dealt with more particularly in paragraph 61. The aggravating facts not only showed the extreme depravity but in the opinion of this Court they brought to the fore the diabolical and barbaric manner in which the crime was committed. The Court did not find any mitigating circumstances in favour of the accused to tilt the balance in his favour for awarding lesser punishment.

7. At this juncture, it may be noted that the decision of this Court in Machhi Singh 1983 Indlaw SC 116 (supra) shows that after having laid down oft-quoted principles, this Court considered individual cases of accused Machhi Singh, Jagir Singh and Kashmir Singh. As regards Machhi Singh 1983 Indlaw SC 116, it was observed in paragraph 42:-

".....The offence committed was of an exceptionally depraved and heinous character. The manner of its execution and its design would put it at the level of extreme atrocity and cruelty.

.....The crime committed carries features which could be utterly horrendous especially when we know the weapons and the manner of their use. The victims could offer no resistance to the accused appellants. The law clamours for a sterner sentence; the crime being heinous, atrocious and cruel.

.....The crime was gruesome and cold-blooded revealing the propensity of the accused appellants to commit murder."

Similarly as regards Jagir Singh it was observed,

".....The crime committed carries features which could be utterly horrendous especially when we know the weapons and their manner of use. The victims could offer no resistance to the accused appellants. The law clamours for a sterner sentence; the crime being heinous, atrocious and cruel.

.....The helpless state of the victims and the circumstances of the case lead us to confirm the death sentence."

8. Further, paragraphs 44 and 45 show that one of the accused namely Kashmir Singh had caused the death of a defenceless child of six years and the matter as regards said accused Kashmir Singh in particular and with regard to all the accused in general, was dealt with as under:-

"44. Insofar as appellant Kashmir Singh s/o Arjan Singh is concerned death sentence has been imposed on him by the Sessions Court and confirmed by the High Court for the following reasons:

Similarly, Kashmir Singh appellant caused the death of a child Balbir Singh aged six years while asleep, a poor defenceless life put off by a depraved mind reflecting grave propensity to commit murder.

45. *We are of the opinion that insofar as these three appellants are concerned the rarest of rare cases rule prescribed in Bachan Singh 1980 Indlaw SC 624 case is clearly attracted and sentence of death is called for. We are unable to persuade ourselves that a sentence of imprisonment for life will be adequate in the circumstances of the crime. We therefore fully uphold the view concurrently taken by the Sessions Court and the High Court that extreme penalty of death requires to be imposed on appellants (1) Machhi Singh 1983 Indlaw SC 116 (2) Kashmir Singh s/o Arjan Singh (3) Jagir Singh. We accordingly confirm the death sentence imposed on them and dismiss their appeals."*

9. The assessment and the consideration bestowed by this Court in Machhi Singh 1983 Indlaw SC 116 (supra) shows that the aggravating circumstances namely the manner in which the crime was committed, the brutality and barbaric manner of execution, the status and helplessness of victims and the fact that the crime was gruesome and cold blooded were given due weightage. These facts themselves were found to be tilting the balance against the concerned accused. In the present case a minor girl of four years was raped and battered to death by the petitioner. The brutality and diabolical nature of the crime and the fact that the victim had reposed trust and confidence in the petitioner was taken into account and this Court found the aggravating circumstances completely outweighing the other factors. The evidence and circumstances were dealt with in the Judgment under review in great detail and this Court had no hesitation in affirming the death sentence.

10. In the present Review Petition, Mr. Anup Bhambhani, learned Senior Advocate appearing for the petitioner, at the outset, raised a grievance that in the light of principles laid down in Bachan Singh 1980 Indlaw SC 624 and Machhi Singh 1983 Indlaw SC 116 (supra) mitigating factors ought to have been taken into account and that proper and effective hearing in that behalf was not extended to the petitioner. This Court therefore by Order dated 31.08.2016 permitted the petitioner to file material to indicate mitigating factors for conversion of the death sentence to life imprisonment. This was in keeping with the principles laid down by this Court in Dagdu and Others v. State of Maharashtra (1977) 3 SCC 68 1977 Indlaw SC 74 wherein three Judge Bench of this Court had observed:-

"79The Court, on convicting an accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that Court to remedy the breach by giving a hearing to the accused on the question of sentence."

80.*For a proper and effective implementation of the provision contained in Section 235(2), it is not always necessary to remand the matter to the court which has recorded the conviction.....Remand is an exception, not the rule, and ought therefore to be avoided as far as possible in the interests of expeditious, though fair, disposal of cases."*

11. The petitioner thereafter filed Crl.M.P. Nos.16369-70 of 2016 placing on record certain facts and material. It was submitted:-

"Education and Activities undertaken by the Petitioner in Jail

(i) The Petitioner submits that he had to discontinue school after class 6th during childhood. Thereafter he worked in various jobs such as electrician, construction labourer, nursery worker, security guard. Death row prisoners in Maharashtra are not permitted to work, but the Petitioner as an undertial has worked in the jail nursery. During incarceration, the Petitioner has undertaken studies, art competitions as well as several programmes aimed at reforming himself. The Petitioner's counsel is informed that his drawings are exhibited in jail as well.

(ii) The Petitioner has in 2015 successfully completed the Bachelors Preparatory Programme offered by the Indira Gandhi National Open University. This course enables people who have discontinued schooling before matriculation to prepare for bachelors-level studies.

(iii) The Petitioner in 2015 also successfully completed the Gandhi Vichar Pariksha (Examination on Gandhian Thoughts). This examination seeks to rehabilitate prisoners who have committed violent crimes, by learning from the life and teaching of M.K. Gandhi. The course includes classes on the teachings of M.K. Gandhi, reading his autobiography, and a descriptive exam.

(iv) The Petitioner is quite proficient in drawing and has also participated in a drawing competition organized by the Nagpur Municipal Corporation and Kalajarn Foundation on 10.01.2016.

(v) It is therefore submitted that the Petitioner is on the path to reformation and rehabilitation and therefore the death sentence imposed on him deserves to be commuted to imprisonment for life."

The application then set out that the Disciplinary Record of the Petitioner in Jail was without any blemish and that there were no criminal antecedents.

12. The matter was thereafter posted for hearing. Mr. Anup Bhambhani, learned Senior Advocate principally submitted:-

a. The judgment of conviction and order of sentence were passed by the trial court on the same day namely on 23.02.2012 which was completely opposed to the law laid down by this Court in Allauddin Mian and Others v. State of Bihar (1989) 3 SCC 5 1989 Indlaw SC 577 and against the spirit of Section 235(2) of the CrPC.

b. As laid down in para 206 of Bachan Singh 1980 Indlaw SC 624 (supra) "the probability that the accused can be reformed" was an important facet and the burden was on the State to prove by evidence that the accused could not possibly be reformed. However, such burden was not discharged by the State and no evidence was led. In the absence of such evidence by the State, no death sentence could be awarded or confirmed.

13. Para 10 of the decision of this Court in Allauddin Mian v. State of Bihar 1989 Indlaw SC 577 (supra) on which reliance was placed, is to the following effect:-

"10. Even a casual glance at the provisions of the Penal Code will show that the punishments have been carefully graded corresponding with the gravity of offences; in grave wrongs the punishments prescribed are strict whereas for minor offences leniency is shown. Here again there is considerable room for manoeuvre because the choice of the punishment is left to the discretion of the judge with only the outer limits stated. There are only a few cases where a minimum punishment is prescribed. The question then is what procedure does the judge follow for determining the punishment to be imposed in each case to fit the crime? The choice has to be made after following the procedure set out in sub-section (2) of Section 235 of the Code. That sub-section reads as under:

If the accused is convicted, the judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.

*The requirement of hearing the accused is intended to satisfy the rule of natural justice. It is a fundamental requirement of fair play that the accused who was hitherto concentrating on the prosecution evidence on the question of guilt should, on being found guilty, be asked if he has anything to say or any evidence to tender on the question of sentence. This is all the more necessary since the courts are generally required to make the choice from a wide range of discretion in the matter of **sentencing**. To assist the court in determining the correct sentence to be imposed the legislature introduced sub-section (2) to Section 235. The said provision therefore satisfies a dual purpose; it satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at the same time helps the court to choose the sentence to be awarded. Since the provision is intended to give the accused an opportunity to place before the court all the relevant material having a bearing on the question of sentence there can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality. Mr Garg was, therefore, justified in making a grievance that the trial court actually treated it as a mere formality as is evident from the fact that it recorded the finding of guilt on 31-3-1987, on the same day before the accused could absorb and overcome the shock of conviction they were asked if they had anything to say on the question of sentence and immediately thereafter the decision imposing the death penalty on the two accused was pronounced. In a case of life or death as stated earlier, the presiding officer must show a high degree of concern for the statutory right of the accused and should not treat it as a mere formality to be crossed before making the choice of sentence. If the choice is made, as in this case, without giving the accused an effective and real opportunity to place his antecedents, social and economic background, mitigating and extenuating circumstances, etc., before the court, the court's decision on the sentence would be vulnerable. We need hardly mention that in many cases a sentencing decision has far more serious consequences on the offender and his family members than in the case of a purely administrative decision; a fortiori, therefore, the principle of fair play must apply with greater vigour in the case of the former than the latter. An administrative decision having civil consequences, if taken without giving a hearing is generally struck down as violative of the rule of natural justice. Likewise a sentencing decision taken without following the requirements of sub-section (2) of Section 235 of the Code in letter and spirit would also meet a similar fate and may have to be replaced by an appropriate order. The sentencing court must approach the question seriously and must endeavour to see that all the relevant facts and circumstances bearing on the question of sentence are brought on record. Only after giving due weight to the mitigating as well as the aggravating circumstances placed before it, it must pronounce the sentence. We think as a general rule the trial courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender. In the present case, as pointed out earlier, we are afraid that the learned trial Judge did not attach sufficient importance to the mandatory requirement of sub-section (2) of Section 235 of the Code."*

14. Sub-section (2) of Section 235 of Cr.P.C obliges the Court to hear the accused on the question of sentence and normally it is expected that after recording the conviction, the matter be adjourned to a future

date calling upon both the prosecution as well as the defence to place relevant material having bearing on the question of sentence. The effect of recording of the conviction and imposition of death sentence on the same day, was also considered by a bench of three learned Judges of this Court in Malkiat Singh and others v. State of Punjab (1991) 4 SCC 341 1991 Indlaw SC 1040. In that case, this Court did not deem it expedient to remand the matter after six years and converted the sentence of death to imprisonment for life. It was observed:-

"18. On finding that the accused committed the charged offences, Section 235(2) of the Code empowers the Judge that he shall pass sentence on him according to law on hearing him. Hearing contemplated is not confined merely to oral hearing but also intended to afford an opportunity to the prosecution as well as the accused to place before the court facts and material relating to various factors on the question of sentence, and if interested by either side, to have evidence adduced to show mitigating circumstances to impose a lesser sentence or aggravating grounds to impose death penalty. Therefore, sufficient time must be given to the accused or the prosecution on the question of sentence, to show the grounds on which the prosecution may plead or the accused may show that the maximum sentence of death may be the appropriate sentence or the minimum sentence of life imprisonment may be awarded, as the case may be. No doubt the accused declined to adduce oral evidence. But it does not prevent to show the grounds to impose lesser sentence on A-1. This Court in the aforesaid Allauddin and Anguswamy (1989) 3 SCC 33 1989 Indlaw SC 587 cases held that the sentence awarded on the same day of finding guilt is not in accordance with the law. That would normally have the effect of remanding the case to the Special Court for reconsideration. But in the view of the fact that A-1 was in incarceration for long term of six years from the date of conviction, in our considered view it needs no remand for further evidence. It is sufficient that the sentence of death awarded to A-1 is converted into rigorous imprisonment for life. The sentences of death is accordingly modified and A-1 is sentenced to undergo rigorous imprisonment for life for causing the deaths of all four deceased."

15. In a recent Judgment rendered by three learned Judges of this Court in B.A. Umesh v. High Court of Karnataka (2016) 9 SCALE 600, the facts were more or less similar, in that no separate date for hearing on sentence was given after recording conviction. Para 8 of that decision of this Court is quoted for ready reference:-

"8. In addition to above, it is contended on behalf of the petitioner (Review Applicant) that since no separate date for hearing on sentence was given in the present case by the trial court, as such for violation of Section 235(2) Cr.P.C, the sentence of death cannot be affirmed. We have considered the argument of Ms. Suri. It is true that the convict has a right to be heard before sentence. There is no mandate in Section 235(2) Cr.P.C to fix separate date for hearing on sentence. It depends on the facts and circumstances as to whether a separate date is required for hearing on sentence or parties feel convenient to argue on sentence on the same day. Had any party pressed for separate date for hearing on the sentence, or both of them wanted to be heard on some other date, situation could have been different. In the present case, the parties were heard on sentence by both the courts below, and finally by this Court, as is apparent from the Judgment under review. As such, merely for the reason that no separate date is given for hearing on the sentence, the Review Petition cannot be allowed."

This Court then relied on the principle laid down in Dagdu v. State of Maharashtra 1977 Indlaw SC 74 (supra) which was followed subsequently by another Bench of three learned Judges in Tarlok Singh v. State of Punjab (1977) 3 SCC 218. In the circumstances, merely because no separate date was given for hearing on sentence, we cannot find the entire exercise to be flawed or vitiated. Since we had allowed the petitioner to place the relevant material on record in the light of the principles laid down in Dagdu v. State of Maharashtra 1977 Indlaw SC 74 (supra), we will proceed to consider the material so placed on record and weigh these factors and the aggravating circumstances as found by the Court in the Judgment under review.

16. However, before such consideration we must deal with the second submission advanced by Mr. Bhambhani, learned Senior Advocate. In his submission, in terms of paragraph 206 of the decision of this Court in Bachan Singh 1980 Indlaw SC 624 (supra) the burden was upon the State in respect of conditions (3) and (4), which burden was not discharged at all. Consequently, according to him, the sentence of death would be required to be converted to life imprisonment. Paragraph 206 of the decision of this Court in Bachan Singh 1980 Indlaw SC 624 (supra) detailed certain mitigating circumstances and while dealing with conditions (3) and (4), this Court observed that it would be for the State to prove by evidence that the accused did not satisfy conditions (3) and (4). However, subsequent paragraphs show that those circumstances would certainly be relevant and great weight be attached to them but it was the cumulative effect of the mitigating circumstances on one hand and the aggravating facts on the other, which would be weighed to come to the final conclusion whether the case satisfied the requirement of being "rarest of rare". It is not as if mere failure on part of the State to lead such evidence would clinch the issue in favour of the

accused.

17. Mr. Bhambhani, learned Senior Advocate then relied on the decision of this Court in *Rajesh Kumar v. State through Government of NCT of Delhi* (2011) 13 SCC 706 2011 Indlaw SC 678, particularly paragraphs 73 and 74 thereof which paragraphs are as under:

"73. In the instant case the State has failed to show that the appellant is a continuing threat to the society or that he is beyond reform and rehabilitation. On the other hand, in para 77 of the impugned judgment the High Court observed as follows:

"We have no evidence that the appellant is incapable of being rehabilitated in society. We also have no evidence that he is capable of being rehabilitated in society. This circumstance remains a neutral circumstance."

74. It is clear from the aforesaid finding of the High Court that there is no evidence to show that the accused is incapable of being reformed or rehabilitated in the society and the High Court has considered the same as a neutral circumstance. In our view the High Court was clearly in error. The very fact that the accused can be rehabilitated in the society and is capable of being reformed, since the State has not given any evidence to the contrary, is certainly a mitigating circumstance and which the High Court has failed to take into consideration. The High Court has also failed to take into consideration that the appellant is not a continuing threat to the society in the absence of any evidence to the contrary. Therefore, in para 78 of the impugned judgment, the High Court, with respect, has taken a very narrow and a myopic view of the mitigating circumstances about the appellant. The High Court has only considered that the appellant is a first time offender and he has a family to look after. We are, therefore, constrained to observe that the High Court's view of mitigating circumstances has been very truncated and narrow insofar as the appellant is concerned."

The discussion shows that this Court found that mitigating circumstances in favour of the appellant were not properly considered and in the ultimate analysis the case did not satisfy being "rarest of rare" and therefore, this Court substituted the sentence of imprisonment for life to that of death sentence. The discussion in paragraphs 73 and 74 does not indicate that in the absence of any evidence led by the State in connection with conditions (3) and (4) as stated in paragraph 206 of *Bachan Singh* 1980 Indlaw SC 624 (supra), the entire exercise gets vitiated and the matter must always be answered in favour of the accused. It is undoubtedly a relevant consideration which will be weighed by the Court together with other circumstances on record. We, therefore, do not find any merit in the second submission.

18. In *Ramnaresh and Others v. State of Chhattisgarh* (2012) 4 SCC 257 this Court considered the import of governing principles regarding death sentence and summed up that it is the cumulative effect of both the aggravating and mitigating circumstances that need to be taken into account. Paragraphs 76 to 81 of the decision are as under:-

"76. The law enunciated by this Court in its recent Judgments, as already noticed, adds and elaborates the principles that were stated in Bachan Singh 1980 Indlaw SC 624 and thereafter, in Machhi Singh 1983 Indlaw SC 116. The aforesaid Judgments, primarily dissect these principles into two different compartments-one being the "aggravating circumstances" while the other being the "mitigating circumstances". The court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the court. It will be appropriate for the court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the court as contemplated under Section 354(3) Cr.P.C

Aggravating circumstances

- (1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.*
- (2) The offence was committed while the offender was engaged in the commission of another serious offence.*
- (3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.*
- (4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.*
- (5) Hired killings.*
- (6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.*
- (7) The offence was committed by a person while in lawful custody.*
- (8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful*

discharge of his duty under Section 43 CrPC.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold-blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused.

77. While determining the questions relatable to sentencing policy, the court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles

(1) The court has to apply the test to determine, if it was the "rarest of rare" case for imposition of a death sentence.

(2) In the opinion of the court, imposition of any other punishment i.e. life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

78. Stated broadly, these are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the court, while exercising its jurisdiction. It is difficult to state it as an absolute rule. Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the court may consider in its endeavour to do complete justice between the parties.

79. The court then would draw a balance sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The court has to strike a balance between the two and see towards which side the scale/balance of justice tilts. The principle of proportion between the crime and the punishment is the principle of "just deserts" that serves as the foundation of every criminal sentence that is justifiable. In other words, the "doctrine of proportionality" has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large.

80. Every punishment imposed is bound to have its effect not only on the accused alone, but also on the society as a whole. Thus, the courts should consider retributive and deterrent aspect of punishment while imposing the extreme punishment of death.

81. Wherever, the offence which is committed, manner in which it is committed, its attendant circumstances and the motive and status of the victim, undoubtedly bring the case within the ambit of "rarest of rare" cases and the court

finds that the imposition of life imprisonment would be inflicting of inadequate punishment, the court may award death penalty. Wherever, the case falls in any of the exceptions to the "rarest of rare" cases, the court may exercise its judicial discretion while imposing life imprisonment in place of death sentence."

19. It is thus well settled, "the Court would consider the cumulative effect of both the aspects (namely aggravating factors as well as mitigating circumstances) and it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes completely ignoring other classes under other heads and it is the primary duty of the Court to balance the two." Further, "it is always preferred not to fetter the judicial discretion by attempting to make excessive enumeration, in one way or another; and that both aspects namely aggravating and mitigating circumstances have to be given their respective weightage and that the Court has to strike the balance between the two and see towards which side the scale/balance of justice tilts." With these principles in mind we now consider the present review petition.

20. The material placed on record shows that after the Judgment under review, the petitioner has completed Bachelors Preparatory Programme offered by the Indira Gandhi National Open University enabling him to prepare for Bachelor level study and that he has also completed the Gandhi Vichar Pariksha and had participated in drawing competition organized sometime in January 2016. It is asserted that the jail record of the petitioner is without any blemish. The matter is not contested as regards Conditions 1, 2, 5, 6 and 7 as stated in paragraph 206 of the decision in Bachan Singh 1980 Indlaw SC 624 (supra) but what is now being projected is that there is a possibility of the accused being reformed and rehabilitated. Though these attempts on part of the petitioner are after the Judgment under review, we have considered the material in that behalf to see if those circumstances warrant a different view. We have given anxious consideration to the material on record but find that the aggravating circumstances namely the extreme depravity and the barbaric manner in which the crime was committed and the fact that the victim was a helpless girl of four years clearly outweigh the mitigating circumstances now brought on record. Having taken an overall view of the matter, in our considered view, no case is made out to take a different view in the matter. We, therefore, affirm the view taken in the Judgment under review and dismiss the present Review Petitions.

Order accordingly

(1) Mukesh and another; (2) Vinay Sharma and another v State for (NCT of Delhi)

2017(5) SCALE 506

Bench : Dipak Misra, Ashok Bhushan, R. Banumathi

Relevant Part of Judgment on Sentencing

The Judgment was delivered by : Dipak Misra, J.

1. The cold evening of Delhi on 16th December, 2012 could not have even remotely planted the feeling in the twenty-three year old lady, a para-medical student, who had gone with her friend to watch a film at PVR Select City Walk Mall, Saket, that in the next few hours, the shattering cold night that was gradually stepping in would bring with it the devastating hour of darkness when she, alongwith her friend, would get into a bus at Munirka bus stand to be dropped at a particular place; and possibly could not have imagined that she would be a prey to the savage lust of a gang of six, face brutal assault and become a playful thing that could be tossed around at their wild whim and her private parts would be ruptured to give vent to their pervert sexual appetite, unthinkable and sadistic pleasure. What the victims had not conceived of, it all happened, as the chronology of events would unroll. The attitude, perception, the bestial proclivity, inconceivable self-obsession and individual centralism of the six made the young lady to suffer immense trauma and, in the ultimate eventuate, the life-spark that moves the bodily frame got extinguished in spite of availing of all the possible treatment that the medical world could provide. The death took place at a hospital in Singapore where she had been taken to with the hope that her life could be saved.

464. The prosecution has established the presence of the accused in the bus and the heinous act of gang rape committed on the prosecutrix by the accused by the ample evidence - by the multiple dying declaration of the victim and also by the evidence of PW-1 and medical evidence and also by arrest and recovery of incriminating articles of the victim and that of PW-1 complainant. The scientific evidence in particular DNA analysis report clearly brings home the guilt of the accused.

465. Section 235(2), Criminal Procedure Code: Once the conviction of the accused persons is affirmed, what remains to be decided is the question of appropriate punishment imposed on them. On the aspect of sentencing, we were very effectively assisted by the learned Amicus Curiae. Accused were convicted vide judgment and order dated 10.09.2013 and on the very next day of judgment i.e. on 11.09.2013, the arguments on sentencing were concluded. Thereafter, a separate order on sentence was pronounced on 13.09.2013.

467. Section 235 Cr.P.C. deals with the judgments of acquittal or conviction. Under Section 235(2) Cr.P.C., where the accused is convicted, save in cases of admonition or release on good conduct, the Judge shall hear the accused on the question of sentence and then pass sentence in accordance with law. Section 235(2) Cr.P.C. imposes duty on the court to hear the accused on the question of sentence and then pass sentence on him in accordance with law. The only exception to the said rule is created in case of applicability of Section 360 Cr.P.C. i.e. when the court finds the accused eligible to be released on probation of good conduct or after admonition.

468. Section 354 Cr.P.C. specifies the language and contents of judgment, while delivering the judgment in a criminal case. Section 354(3) Cr.P.C. deals with judgments where conviction is for an offence punishable with death penalty or in the alternative with imprisonment for life. Section 354(3) Cr.P.C. mandates that when the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons for such sentence.

469. The statutory duty to state special reasons under Section 354(3) Cr.P.C. can be meaningfully carried out only if the hearing on sentence under Section 235(2) Cr.P.C. is effective and procedurally fair. To afford an effective opportunity to the accused, the Court must hear on the question of sentence to know about (i) age of the accused; (ii) background of the accused; (iii) prior criminal antecedents, if any; (iv) possibility of reformation, if any; and (v) such other relevant factors. The major deficiency in the complex criminal justice system is that important factors which have a bearing on sentence are not placed before the Court. Resultantly, the Courts are constantly faced with the dilemma to impose an appropriate sentence. In this context, hearing of the accused under Section 235(2) Cr.P.C. on the question of sentencing is a crucial exercise which is intended to enable the accused to place before the Court all the mitigating circumstances in his favour viz. his social and economic backwardness, young age etc. The mandate of Section 235(2) Cr.P.C. becomes more crucial when the accused is found guilty of an offence punishable with death penalty or with the life imprisonment.

470. It is well-settled that Section 235(2) Cr.P.C. is intended to give an opportunity of hearing to the prosecution as well as the accused on the question of sentence. The Court while awarding the sentence has to take into consideration various factors having a bearing on the question of sentence. In case, Section 235(2) Cr.P.C. is not complied with, as held in Dagdu's case, the appellate Court can either send back the case to the Sessions Court for complying with Section 235(2) Cr.P.C. so as to enable the accused to adduce materials; or, in order to avoid delay, the appellate Court may by itself give an opportunity to the parties in terms of Section 235(2) Cr.P.C. to produce the materials they wish to adduce instead of sending the matter back to the trial Court for hearing on sentence. In the present case, we felt it appropriate to adopt the latter course and accordingly asked the counsel appearing for the appellants to file affidavits/materials on the question of sentence. Consequently, vide order dated 03.02.2017, we directed the learned counsel for the accused to place in writing, before this Court, their submissions, whatever they desired to place on the question of sentence. In compliance with the order, Mr. M.L. Sharma, learned counsel on behalf of the accused A-2 Mukesh and A-5 Pawan and Mr. A.P. Singh, learned counsel on behalf of the accused Akshay Kumar Singh, Vinay Sharma and Pawan Gupta filed the individual affidavits of the accused.

471. Accused Mukesh (A-2) in his affidavit has stated that he was picked up from his house at Karoli, Rajasthan and brought to Delhi and reiterated that he is innocent and he denied his involvement in the occurrence. In their affidavits, accused Akshay Kumar Singh (A-3), accused Vinay Sharma (A-4) and accused Pawan Gupta (A-5) submitted in their individual affidavits have stated that they hail from an ordinary/ poor background and are not much educated. They have also stated that they have aged parents and other family members who are dependent on them and they are to be supported by them. Accused have also stated that they have no criminal antecedents and that after their confinement in Tihar Jail they have maintained good behavior.

472. Learned counsel Mr. M.L. Sharma submitted that accused Mukesh (A-2) is innocent and he has been falsely implicated only because he is the brother of accused Ram Singh.

473. Taking us through the affidavits filed by the accused, learned counsel Mr. A.P. Singh submitted that the accused namely Akshay Kumar Singh, Pawan Gupta and Vinay Sharma hail from very poor background; and have got large families to support; and have no criminal antecedents. It has been contended that having regard to the fact that the three accused have no prior criminal antecedents and are not hardened criminals, the case will not fall under "rarest of rare cases" to affirm the death sentence.

474. Supplementing the affidavits filed by the accused, the learned amicus and senior counsel Mr. Raju Ramachandran and Mr. Sanjay Hegde submitted that assuming that the conviction of the appellants are confirmed, the accused who hail from very ordinary poor background and having no criminal antecedents, the death sentence be commuted to life imprisonment.

475. Question of awarding sentence is a matter of discretion and has to be exercised on consideration of circumstances aggravating or mitigating in the individual cases. The courts are consistently faced with the situation where they are required to answer the new challenges and mould the sentence to meet those challenges. Protection of society and deterring the criminal is the avowed object of law. It is expected of the courts to operate the sentencing system as to impose such sentence which reflects the social conscience of the society. While determining sentence in heinous crimes, Judges ought to weigh its impact on the society and impose adequate sentence considering the collective conscience or society's cry for justice. While considering the imposition of appropriate punishment, courts should not only keep in view the rights of the criminal but also the rights of the victim and the society at large.

478. Whether the Case falls under rarest of rare cases: Law relating to award of death sentence in India has evolved through massive policy reforms-nationally as well as internationally and through a catena of judicial pronouncements, showcasing distinct phases of our view towards imposition of death penalty. Undoubtedly, continuing prominence of reformatory approach in sentencing and India's international obligations have been majorly instrumental in facilitating a visible shift in court's view towards restricting imposition of death sentence. While closing the shutter of deterrent approach of sentencing in India, the small window of 'award of death sentence' was left open in the category of 'rarest of rare case' in *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, by a Constitution Bench of this Court.

479. In *Bachan Singh* 1980 Indlaw SC 624 (supra), while upholding the constitutional validity of capital sentence, this Court revisited the law relating to death sentence at that point of time, by thoroughly discussing the law laid down in *Jagmohan Singh v. State of U.P.* (1973) 1 SCC 20; *Rajendra Prasad v. State of U.P.* (1979) 3 SCR 646 and other cases. The principles laid down in *Bachan Singh's* case 1980 Indlaw SC 624 is that, normal

rule is awarding of 'life sentence', imposition of death sentence being justified, only in rarest of rare case, when the option of awarding sentence of life imprisonment is unquestionably foreclosed'. By virtue of Bachan Singh 1980 Indlaw SC 624 (supra), 'life imprisonment' became the rule and 'death sentence' an exception. The focus was shifted from 'crime' to the 'crime and criminal' i.e. now the nature and gravity of the crime needs to be analysed juxtaposed to the peculiar circumstances attending the societal existence of the criminal. The principles laid down in Bachan Singh's case 1980 Indlaw SC 624 were considered in Machhi Singh and Ors. v. State of Punjab (1983) 3 SCC 470 1983 Indlaw SC 116 and was summarised as under:-

"38. In this background the guidelines indicated in Bachan Singh's case 1980 Indlaw SC 624 (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh's case 1980 Indlaw SC 624 (supra):

- (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.*
- (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.*
- (iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.*
- (iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up 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."*

480. In Machhi Singh's case 1983 Indlaw SC 116, this Court took the view that in every case where death penalty is a question, a balance sheet of aggravating and mitigating circumstances must be drawn up before arriving at the decision. The Court held that for practical application of the doctrine of 'rarest of rare case', it must be understood broadly in the background of five categories of cases crafted thereon that is 'Manner of commission of crime', 'Motive', 'Anti-social or socially abhorrent nature of the crime', 'Magnitude of crime', and 'Personality of victim of murder'. These five categories are elaborated in para nos. 32 to 37 as under:-

"32. The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I. Manner of commission of murder

33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

- (i) when the house of the victim is set aflame with the end in view to roast him alive in the house.*
- (ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.*
- (iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.*

II. Motive for commission of murder

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland.

III. Anti-social or socially abhorrent nature of the crime

35. (a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(b) In cases of "bride burning" and what are known as "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. Magnitude of crime

36. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. Personality of victim of murder

37. When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons."

481. The principle laid down in Bachan Singh 1980 Indlaw SC 624 (supra) and Machhi Singh 1983 Indlaw SC 116 (supra) came to be discussed and applied in all the cases relating to imposition of death penalty for committing heinous offences. However, lately, it was felt that the courts have not correctly applied the law laid down in Bachan Singh 1980 Indlaw SC 624 (supra) and Machhi Singh 1983 Indlaw SC 116 (supra), which has led to inconsistency in sentencing process in India; also it was observed that the list of categories of murder crafted in Machhi Singh 1983 Indlaw SC 116 (supra), in which death sentence ought to be awarded are not exhaustive and needs to be given even more expansive adherence owing to changed legal scenario. In Swamy Shradhananda alias Murali Manohar Mishra (2) v. State of Karnataka (2008) 13 SCC 767 2008 Indlaw SC 1128; a three-Judge Bench of this Court, observed as under in this regard:-

"43. In Machhi Singh the Court crafted the categories of murder in which 'the Community' should demand death sentence for the offender with great care and thoughtfulness. But the judgment in Machhi Singh was rendered on 20 July, 1983, nearly twenty five years ago, that is to say a full generation earlier. A careful reading of the Machhi Singh categories will make it clear that the classification was made looking at murder mainly as an act of maladjusted individual criminal(s). In 1983 the country was relatively free from organised and professional crime. Abduction for Ransom and Gang Rape and murders committed in course of those offences were yet to become a menace for the society compelling the Legislature to create special slots for those offences in the Penal Code. At the time of Machhi Singh, Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafia cornering huge government contracts purely by muscle power. There were no reports of killings of social activists and 'whistle blowers'. There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today. Relying upon the observations in Bachan Singh, therefore, we respectfully wish to say that even though the categories framed in Machhi Singh provide very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable. Further, even in those categories, there would be scope for flexibility as observed in Bachan Singh itself."

482. A milestone in the sentencing policy is the concept of 'life imprisonment till the remainder of life' evolved in Swamy Shradhananda (2) 2008 Indlaw SC 1128 (supra). In this case, a man committed murder of his wife for usurping her property in a cold-blooded, calculated and diabolic manner. The trial court convicted the accused and death penalty was imposed on him which was affirmed by the High Court. Though the conviction was

affirmed by this Court also on the point of sentencing, the views of a two-Judge Bench of this Court, in *Swamy Shradhananda v. State of Karnataka* (2007) 12 SCC 282 differed, and consequently, the matter was listed before a three-Judge Bench, wherein a mid way was carved. The three-Judge Bench, was of the view that even though the murder was diabolic, presence of certain circumstances in favour of the accused, viz. no mental or physical pain being inflicted on the victim, confession of the accused before the High Court etc., made them reluctant to award death sentence. However, the Court also realised that award of life imprisonment, which euphemistically means imprisonment for a term of 14 years (consequent to exercise of power of commutation by the executive), would be equally disproportionate punishment to the crime committed. Hence, in *Swamy Shradhananda (2) 2008 Indlaw SC 1128* (supra) the Court directed that the accused shall not be released from the prison till the rest of his life. Relevant extract from the judgment reads as under:

"92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment that subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then the Court should do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the court, i.e., the vast hiatus between 14 years' imprisonment and death. It needs to be emphasized that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years imprisonment would amount to no punishment at all."

483. After referring to a catena of judicial pronouncements post *Bachan Singh* 1980 Indlaw SC 624 (supra) and *Machhi Singh* 1983 Indlaw SC 116 (supra), in the case of *Ramnaresh and Ors. v. State of Chhattisgarh* (2012) 4 SCC 257 2012 Indlaw SC 81, this Court, tried to lay down a nearly exhaustive list of aggravating and mitigating circumstances.

It would be apposite to refer to the same here:

"Aggravating circumstances

- (1) *The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.*
- (2) *The offence was committed while the offender was engaged in the commission of another serious offence.*
- (3) *The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.*
- (4) *The offence of murder was committed for ransom or like offences to receive money or monetary benefits.*
- (5) *Hired killings.*
- (6) *The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.*
- (7) *The offence was committed by a person while in lawful custody.*
- (8) *The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty Under Section 43 Code of Criminal Procedure. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.*
- (9) *When murder is committed for a motive which evidences total depravity and meanness.*

(10) *When there is a cold-blooded murder without provocation.*

(11) *The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.*

Mitigating circumstances

(1) *The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.*

(2) *The age of the accused is a relevant consideration but not a determinative factor by itself.*

(3) *The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.*

(4) *The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.*

(5) *The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.*

(6) *Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.*

(7) *Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused."*

484. Similarly, this Court in *Sangeet and Another v. State of Haryana* (2013) 2 SCC 452, extensively analysed the evolution of sentencing policy in India and stressed on the need for further evolution. In para (77), this Court emphasized on making the sentencing process a principled one, rather than Judge-centric one and held that a re-look 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.

485. As dealing with sentencing, courts have thus applied the "Crime Test", "Criminal Test" and the "Rarest of the Rare Test", the tests examine whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community. Courts have further held that where the victims are helpless women, children or old persons and the accused displayed depraved mentality, committing crime in a diabolic manner, the accused should be shown no remorse and death penalty should be awarded. Reference may be made to *Holiram Bordoloi v. State of Assam* (2005) 3 SCC 793 2005 Indlaw SC 263 [Para 15-17], *Ankush Maruti Shinde and Ors. v. State of Maharashtra* (2009) 6 SCC 667 2009 Indlaw SC 825 (para 31-34), *Kamta Tiwari v. State of Madhya Pradesh* (1996) 6 SCC 250 1996 Indlaw SC 2125 (para 7-8), *State of U.P. v. Satish* (2005) 3 SCC 114 2005 Indlaw SC 83 (para 24-31), *Sundar alias Sundarajan v. State by Inspector of Police and Anr.* (2013) 3 SCC 215 2013 Indlaw SC 65 (para 36-38, 42-42.7, 43), *Sevaka Perumal and Anr. v. State of Tamil Nadu* (1991) 3 SCC 471 1991 Indlaw SC 683 (para 8-10, 12), *Mohfil Khan and Anr. v. State of Jharkhand* (2015) 1 SCC 67 2014 Indlaw SCO 494 (para 63-65).

486. Even the young age of the accused is not a mitigating circumstance for commutation to life, as has been held in the case of *Bhagwan Swarup v. State of U.P.* (1971) 3 SCC 759 (para 5), *Deepak Rai v. State of Bihar* (2013) 10 SCC 421 (para 91-100) and *Shabnam v. State of Uttar Pradesh* (2015) 6 SCC 632 (para 36).

487. Let me now refer to a few cases of rape and murder where this Court has confirmed the sentence of death. In *Molai & Anr. v. State of M.P.* (1999) 9 SCC 581 1999 Indlaw SC 786, death sentence awarded to both the accused for committing offences under Sections 376(2)(g) IPC, 302 read with Section 34 IPC and 201 IPC, was confirmed by this Court. The accused had committed gang rape on the victim, strangled her thereafter and threw away her body into the septic tank with the cycle, after causing stab injuries. It was held as under:

"36.....It cannot be overlooked that Naveen, a 16 year old girl, was preparing for her 10th examination at her house and suddenly both the accused took advantage of she being alone in the house and committed a most shameful act of rape. The accused did not stop there but they strangled her by using her under-garment and thereafter took her to the septic tank alongwith the cycle and caused injuries with a sharp edged weapon. The accused did not even stop there but they exhibited the criminality in their conduct by throwing the dead body into

the septic tank totally disregarding the respect for a human dead body. Learned Counsel for the accused (appellants) could not point any mitigating circumstances from the record of the case to justify the reduction of sentence of either of the accused. In a case of this nature, in our considered view, the capital punishment to both the accused is the only proper punishment and we see no reason to take a different view than the one taken by the courts below."

488. In *Bantu v. State of Uttar Pradesh* (2008) 11 SCC 113, the victim aged about five years was not only raped, but was murdered in a diabolic manner. The Court awarded extreme punishment of death, holding that for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed must be delicately balanced by the Court in a dispassionate manner.

489. In *Ankush Maruti Shinde and Ors. v. State of Maharashtra* (2009) 6 SCC 667, concerned accused were found guilty of offences under Sections 307 IPC, 376(2)(g) IPC and 397 read with 395 and 396 of IPC. This Court declined to interfere with the concurrent findings of the courts below and upheld death penalty awarded to the accused, taking into account the brutality of the incident, tender age of the deceased, and the fact of a minor girl being mercilessly gang raped and then put to death. The court also noted that there was no provocation from the deceased's side and the two surviving eye witnesses had fully corroborated the case of the prosecution.

490. In *Mehboob Batcha and Ors. v. State rep. by Supdt. of Police* (2011) 7 SCC 45 2011 Indlaw SC 193, accused were policemen who had wrongfully confined one Nandagopal in police custody in Police Station Annamalai Nagar on suspicion of theft from 30.05.1992 till 02.06.1992 and had beaten him to death there with lathis, and had also gang raped his wife Padmini in a barbaric manner. This Court could not award death penalty due to omission of the courts below in framing charge under Section 302, IPC. However, the observations made by this Court are worth quoting here:

"Bane hain ahal-e-hawas muddai bhi munsif bhi Kise vakeel karein kisse munsifi chaahen -- Faiz Ahmed Faiz

1. If ever there was a case which cried out for death penalty it is this one, but it is deeply regrettable that not only was no such penalty imposed but not even a charge under Section 302 IPC was framed against the accused by the Courts below.

9. We have held in Satya Narain Tiwari @ Jolly and Anr. v. State of U.P. (2010) 13 SCC 689 2010 Indlaw SCO 362 and in Sukhdev Singh v. State of Punjab, (2010) 13 SCC 656 2010 Indlaw SCO 374 that crimes against women are not ordinary crimes committed in a fit of anger or for property. They are social crimes. They disrupt the entire social fabric, and hence they call for harsh punishment....."

491. In *Mohd. Mannan @ Abdul Mannan v. State of Bihar* (2011) 5 SCC 317 2011 Indlaw SC 275, this Court upheld award of death sentence to a 43 year old accused who brutally raped and murdered a minor girl, while holding a position of trust. Relevant considerations of the Court while affirming the death sentence are extracted as under:

"26....The postmortem report shows various injuries on the face, nails and body of the child. These injuries show the gruesome manner in which she was subjected to rape. The victim of crime is an innocent child who did not provide even an excuse, much less a provocation for murder. Such cruelty towards a young child is appalling. The Appellant had stooped so low as to unleash his monstrous self on the innocent, helpless and defenseless child. This act no doubt had invited extreme indignation of the community and shocked the collective conscience of the society. Their expectation from the authority conferred with the power to adjudicate, is to inflict the death sentence which is natural and logical. We are of the opinion that Appellant is a menace to the society and shall continue to be so and he can not be reformed. We have no manner of doubt that the case in hand falls in the category of the rarest of the rare cases and the trial court had correctly inflicted the death sentence which had rightly been confirmed by the High Court."

In *Shivaji @ Dadya Shankar Alhat v. State of Maharashtra* (2008) 15 SCC 269; *Rajendra Pralhadrao Wasnik v. The State of Maharashtra* (2012) 4 SCC 37 2012 Indlaw SC 76 award of death penalty in case of rape and murder was upheld, finding the incident brutal and accused a menace for the society.

492. In *Dhananjay Chatterjee alias Dhana v. State of W.B.* (1994) 2 SCC 220 1994 Indlaw SC 1743, a security guard who was entrusted with the security of a residential apartment had raped and murdered an eighteen year old inhabitant of one of the flats in the said apartment, between 5.30 p.m. and 5.45 p.m. The entire case of the

prosecution was based on circumstantial evidence. However, Court found that it was a fit case for imposing death penalty. Following observation of the Court while imposing death penalty is worth quoting:-

"14. In recent years, the rising crime rate-particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished, thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences, in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an over-all view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.

15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment fitting to the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

(emphasis added)

493. In a landmark judgment *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC 546, Justice Madan B. Lokur (Concurring) after analysing various cases of rape and murder, wherein death sentence was confirmed by this Court, in para (122) briefly laid down the grounds which weighed with the Court in confirming the death penalty and the same read as under:-

"122. The principal reasons for confirming the death penalty in the above cases include:

(1) the cruel, diabolic, brutal, depraved and gruesome nature of the crime (Jumman Khan v. State of U.P. (1991) 1 SCC 752, Dhananjay Chatterjee v. State of W.B. (1994) 2 SCC 220, Laxman Naik v. State of Orissa (1994) 3 SCC 381, Kamta Tewari v. State of M.P. (1996) 6 SCC 250, Nirmal Singh v. State of Haryana (1999) 3 SCC 670, Jai Kumar v. State of M.P. (1999) 5 SCC 1, State of U.P. v. Satish (2005) 3 SCC 114 2005 Indlaw SC 83, Bantu v. State of U.P. (2008) 11 SCC 113, Ankush Maruti Shinde v. State of Maharashtra (2009) 6 SCC 667, B.A. Umesh v. State of Karnataka (2011) 3 SCC 85, Mohd. Mannan v. State of Bihar (2011) 5 SCC 317 2011 Indlaw SC 275 and Rajendra Pralhadrao Wasnik v. State of Maharashtra (2012) 4 SCC 37);

(2) the crime results in public abhorrence, shocks the judicial conscience or the conscience of society or the community (Dhananjay Chatterjee (1994) 2 SCC 220 1994 Indlaw SC 1743, Jai Kumar (1999) 5 SCC 1, Ankush Maruti Shinde (2009) 6 SCC 667 and Mohd. Mannan (2011) 5 SCC 317;

(3) the reform or rehabilitation of the convict is not likely or that he would be a menace to society (Jai Kumar (1999) 5 SCC 1, B.A. Umesh (2011) 3 SCC 85 and Mohd. Mannan (2011) 5 SCC 317) 2011 Indlaw SC 275;

(4) the victims were defenceless (Dhananjay Chatterjee (1994) 2 SCC 220, Laxman Naik (1994) 3 SCC 381, Kamta Tewari (1996) 6 SCC 250, Ankush Maruti Shinde (2009) 6 SCC 667, Mohd. Mannan (2011) 5 SCC 317 and Rajendra Pralhadrao Wasnik (2012) 4 SCC 37);

(5) the crime was either unprovoked or that it was premeditated (Dhananjay Chatterjee (1994) 2 SCC 220, Laxman Naik (1994) 3 SCC 381, Kamta Tewari (1996) 6 SCC 250, Nirmal Singh (1999) 3 SCC 670, Jai Kumar (1999) 5 SCC 1, Ankush Maruti Shinde (2009) 6 SCC 667, B.A. Umesh (2011) 3 SCC 85 and Mohd. Mannan (2011) 5 SCC 317) and in three cases the antecedents or the prior history of the convict was taken into consideration (Shivu v. High Court of Karnataka (2007) 4 SCC 713, B.A. Umesh (2011) 3 SCC 85 2011 Indlaw SC 101 and Rajendra Pralhadrao Wasnik (2012) 4 SCC 37)."

494. We also refer to para (106) of *Shankar Kisanrao Khade's* case where Justice Madan B. Lokur (Concurring) has exhaustively analysed the case of rape and murder where death penalty was converted to that of imprisonment for life and some of the factors that weighed with the Court in such commutation.

Para (106) reads as under:-

"106. A study of the above cases suggests that there are several reasons, cumulatively taken, for converting the death penalty to that of imprisonment for life. However, some of the factors that have had an influence in commutation include:

(1) the young age of the accused [*Amit v. State of Maharashtra* (2003) 8 SCC 93 aged 20 years, *Rahul v. State of Maharashtra* (2005) 10 SCC 322 aged 24 years, *Santosh Kumar Singh v. State* (2010) 9 SCC 747 aged 24 years, *Rameshbhai Chandubhai Rathod* (2) (2011) 2 SCC 764 aged 28 years and *Amit v. State of U.P.* (2012) 4 SCC 107 aged 28 years];

(2) the possibility of reforming and rehabilitating the accused (in *Santosh Kumar Singh* (2010) 9 SCC 747 and *Amit v. State of U.P.* (2012) 4 SCC 107 the accused, incidentally, were young when they committed the crime);

(3) the accused had no prior criminal record (*Nirmal Singh* (1999) 3 SCC 670, *Raju* (2001) 9 SCC 50, *Bantu* (2001) 9 SCC 615, *Amit v. State of Maharashtra* (2003) 8 SCC 93, *Surendra Pal Shivbalakpal* (2005) 3 SCC 127, *Rahul* (2005) 10 SCC 322 and *Amit v. State of U.P.* (2012) 4 SCC 107);

(4) the accused was not likely to be a menace or threat or danger to society or the community (*Nirmal Singh* (1999) 3 SCC 670, *Mohd. Chaman* (2001) 2 SCC 28, *Raju* (2001) 9 SCC 50, *Bantu* (2001) 9 SCC 615, *Surendra Pal Shivbalakpal* (2005) 3 SCC 127, *Rahul* (2005) 10 SCC 322 and *Amit v. State of U.P.* (2012) 4 SCC 107).

(5) a few other reasons need to be mentioned such as the accused having been acquitted by one of the courts (*State of T.N. v. Suresh* (1998) 2 SCC 372, *State of Maharashtra v. Suresh* (2000) 1 SCC 471, *State of Maharashtra v. Bharat Fakira Dhiwar* (2002) 1 SCC 622, *State of Maharashtra v. Mansingh* (2005) 3 SCC 131 and *Santosh Kumar Singh* (2010) 9 SCC 747);

(6) the crime was not premeditated (*Kumudi Lal v. State of U.P.* (1999) 4 SCC 108, *Akhtar v. State of U.P.* (1999) 6

SCC 60, *Raju v. State of Haryana* (2001) 9 SCC 50 and *Amrit Singh v. State of Punjab* (2006) 12 SCC 79);

(7) the case was one of circumstantial evidence (*Mansingh* (2005) 3 SCC 131 2004 Indlaw SC 1550 and *Bishnu Prasad Sinha* (2007) 11 SCC 467).

In one case, commutation was ordered since there was apparently no "exceptional" feature warranting a death penalty (*Kumudi Lal* (1999) 4 SCC 108) 1999 Indlaw SC 1670 and in another case because the trial court had awarded life sentence but the High Court enhanced it to death (*Hareesh Mohandas Rajput*) 2011 Indlaw SC 595."

495. In the same judgment in *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC 546, Justice Madan B. Lokur (concurring) while elaborately analysing the question of imposing death penalty in specific facts and circumstances of that particular case, concerning rape and murder of a minor, discussed the sentencing policy of India, with special reference to execution of the sentences imposed by the Judiciary. The Court noted the prima facie difference in the standard of yardsticks adopted by two organs of the government viz. Judiciary and the Executive in treating the life of convicts convicted of an offence punishable with death and recommended consideration of Law Commission of India over this issue. The relevant excerpt from the said judgment, highlighting the inconsistency in the approach of Judiciary and Executive in the matter of sentencing, is as under:

"148. It seems to me that though the Courts have been applying the rarest of rare principle, the Executive has taken into consideration some factors not known to the Courts for converting a death sentence to imprisonment for life. It is imperative, in this regard, since we are dealing with the lives of people (both the accused and the rape-murder victim) that the Courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal."

In *Shankar Kisanrao's* case, it was observed by Justice Madan B. Lokur that *Dhananjay Chatterjee's* case was perhaps the only case where death sentence imposed on the accused, who was convicted for rape was executed.

496. Another significant development in the sentencing policy of India is the 'victim-centric' approach, clearly recognised in *Machhi Singh* 1983 Indlaw SC 116 (Supra) and re-emphasized in a plethora of cases. It has been consistently held that the courts have a duty towards society and that the punishment should be corresponding to the crime and should act as a soothing balm to the suffering of the victim and their family. [Ref: *Gurvail Singh* @

Gala and Anr. v. State of Punjab (2013) 2 SCC 713; Mohfil Khan and Anr. v. State of Jharkhand (2015) 1 SCC 67; Purushottam Dashrath Borate and Anr. v. State of Maharashtra (2015) 6 SCC 652]. The Courts while considering the issue of sentencing are bound to acknowledge the rights of the victims and their family, apart from the rights of the society and the accused. The agony suffered by the family of the victims cannot be ignored in any case. In Mohfil Khan 2014 Indlaw SC 494 (supra), this Court specifically observed that 'it would be the paramount duty of the Court to provide justice to the incidental victims of the crime - the family members of the deceased persons.

497. The law laid down above, clearly sets forth the sentencing policy evolved over a period of time. I now proceed to analyse the facts and circumstances of the present case on the anvil of above-stated principles. To be very precise, the nature and the manner of the act committed by the accused, and the effect it casted on the society and on the victim's family, are to be weighed against the mitigating circumstances stated by the accused and the scope of their reform, so as to reach a definite reasoned conclusion as to what would be appropriate punishment in the present case- 'death sentence', life sentence commutable to 14 years' or 'life imprisonment for the rest of the life'.

498. The question would be whether the present case could be one of the rarest of rare cases warranting death penalty. Before the court proceed to make a choice whether to award death sentence or life imprisonment, the court is to draw up a balance-sheet of aggravating and mitigating circumstances attending to the commission of the offence and then strike a balance between those aggravating and mitigating circumstances. Two questions are to be asked and answered:- (i) Is there something uncommon about the crimes which regard sentence of imprisonment for life inadequate; (ii) Whether there is no alternative punishment suitable except death sentence. Where a crime is committed with extreme brutality and the collective conscience of the society is shocked, courts must award death penalty, irrespective of their personal opinion as regards desirability of death penalty. By not imposing a death sentence in such cases, the courts may do injustice to the society at large.

499. We are here concerned with the award of an appropriate sentence in case of brutal gang-rape and murder of a young lady, involving most gruesome and barbaric act of inserting iron rods in the private parts of the victim. The act was committed in connivance and collusion of six who were on a notorious spree running a bus, showcasing as a public transport, with the intent of attracting passengers and committing crime with them. The victim and her friend were picked up from the Munirka bus stand with the mala fide intent of ravishing and torturing her. The accused not only abducted the victim, but gang-raped her, committed unnatural offence by compelling her for oral sex, bit her lips, cheeks, breast and caused horrifying injuries to her private parts by inserting iron rod which ruptured the vaginal rectum, jejunum and rectum. The diabolical manner in which crime was committed leaves one startled as to the pervert mental state of the inflictor. On top of it, after having failed to kill her on the spot, by running the bus over her, the victim was thrown half naked in the wintery night, with grievous injuries.

500. If we look at the aggravating circumstances in the present case, following factors would emerge:

- Diabolic nature of the crime and the manner of committing crime, as reflected in committing gang-rape with the victim; forcing her to perform oral sex, injuries on the body of the deceased by way of bite marks; insertion of iron rod in her private parts and causing fatal injuries to her private parts and other internal injuries; pulling out her internal organs which caused sepsis and ultimately led to her death; throwing the victim and the complainant (PW-1) naked in the cold wintery night and trying to run the bus over them.
- The brazenness and coldness with which the acts were committed in the evening hours by picking up the deceased and the victim from a public space, reflects the threat to which the society would be posed to, in case the accused are not appropriately punished. More so, it reflects that there is no scope of reform.
- The horrific acts reflecting the in-human extent to which the accused could go to satisfy their lust, being completely oblivious, not only to the norms of the society, but also to the norms of humanity.
- The acts committed so shook the conscience of the society.

501. As noted earlier, on the aspect of sentencing, seeking reduction of death sentence to life imprisonment, three of the convicts/appellants namely A-3 Akshay, A-4 Vinay and A-5 Pawan placed on record, through their individual affidavits dated 23.03.2017, following mitigating circumstances:- (a) Family circumstances such as poverty and rural background,

- (b) Young age,
- (c) Current family situation including age of parents, ill health of family members and their responsibilities towards their parents and other family members,
- (d) Absence of criminal antecedents,
- (e) Conduct in jail, and
- (f) Likelihood of reformation.

In his affidavit, accused Mukesh reiterated his innocence and only pleaded that he is falsely implicated in the case.

502. In *Purushottam Dashrath Borate and Anr. v. State of Maharashtra* (2015) 6 SCC 652 2015 Indlaw SC 338, this Court held that age of the accused or family background of the accused or lack of criminal antecedents cannot be said to be the mitigating circumstance. It cannot also be considered as mitigating circumstance, particularly taking into consideration, the nature of heinous offence and cold and calculated manner in which it was committed by the accused persons.

503. Society's reasonable expectation is that deterrent punishment commensurate with the gravity of the offence be awarded. When the crime is brutal, shocking the collective conscience of the community, sympathy in any form would be misplaced and it would shake the confidence of public in the administration of criminal justice system. As held in *Om Prakash v. State of Haryana* (1999) 3 SCC 19 1999 Indlaw SC 972, the Court must respond to the cry of the society and to settle what would be a deterrent punishment for what was an apparently abominable crime.

504. Bearing in mind the above principles governing the sentencing policy, I have considered all the aggravating and mitigating circumstances in the present case. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the crime. Justice demands that the courts should impose punishments befitting the crime so that it reflects public abhorrence of the crime. Crimes like the one before us cannot be looked with magnanimity. Factors like young age of the accused and poor background cannot be said to be mitigating circumstances. Likewise, post-crime remorse and post-crime good conduct of the accused, the statement of the accused as to their background and family circumstances, age, absence of criminal antecedents and their good conduct in prison, in my view, cannot be taken as mitigating circumstances to take the case out of the category of "rarest of rare cases". The circumstances stated by the accused in their affidavits are too slender to be treated as mitigating circumstances.

505. **In the present case, there is not even a hint of hesitation in my mind with respect to the aggravating circumstances outweighing the mitigating circumstances and I do not find any justification to convert the death sentence imposed by the courts below to 'life imprisonment for the rest of the life'.** The gruesome offences were committed with highest viciousness. Human lust was allowed to take such a demonic form. The accused may not be hardened criminals; but the cruel manner in which the gang-rape was committed in the moving bus; iron rods were inserted in the private parts of the victim; and the coldness with which both the victims were thrown naked in cold wintery night of December, shocks the collective conscience of the society. The present case clearly comes within the category of 'rarest of rare case' where the question of any other punishment is 'unquestionably foreclosed'. If at all there is a case warranting award of death sentence, it is the present case. If the dreadfulness displayed by the accused in committing the gang-rape, unnatural sex, insertion of iron rod in the private parts of the victim does not fall in the 'rarest of rare category', then one may wonder what else would fall in that category. On these reasoning recorded by me, I concur with the majority in affirming the death sentence awarded to the accused persons.

506. The incident of gang-rape on the night of 16.12.2012 in the capital sparked public protest not only in Delhi but nation-wide. We live in a civilized society where law and order is supreme and the citizens enjoy inviolable fundamental human rights. But when the incident of gang-rape like the present one surfaces, it causes ripples in the conscience of society and serious doubts are raised as to whether we really live in a civilized society and whether both men and women feel the same sense of liberty and freedom which they should have felt in the ordinary course of a civilized society, driven by rule of law. Certainly, whenever such grave violations of human dignity come to fore, an unknown sense of insecurity and helplessness grabs the entire society, women in particular, and the only succour people look for, is the State to take command of the situation and remedy it effectively.

507. The statistics of National Crime Records Bureau which I have indicated in the beginning of my judgment show that despite the progress made by women in education and in various fields and changes brought in ideas of women's rights, respect for women is on the decline and crimes against women are on the increase. Offences against women are not a women's issue alone but, human rights issue. Increased rate of crime against women is an area of concern for the law-makers and it points out an emergent need to study in depth the root of the problem and remedy the same through a strict law and order regime. There are a number of legislations and numerous penal provisions to punish the offenders of violence against women. However, it becomes important to ensure that gender justice does not remain only on paper.

508. We have a responsibility to set good values and guidance for posterity. In the words of great scholar, Swami Vivekananda, "the best thermometer to the progress of a nation is its treatment of its women." Crime against women not only affects women's self esteem and dignity but also degrades the pace of societal development. I hope that this gruesome incident in the capital and death of this young woman will be an eye-opener for a mass movement "to end violence against women" and "respect for women and her dignity" and sensitizing public at large on gender justice. Every individual, irrespective of his/her gender must be willing to assume the responsibility in fight for gender justice and also awaken public opinion on gender justice. Public at large, in particular men, are to be sensitized on gender justice. The battle for gender justice can be won only with strict implementation of legislative provisions, sensitization of public, taking other pro-active steps at all levels for combating violence against women and ensuring widespread attitudinal changes and comprehensive change in the existing mind set. We hope that this incident will pave the way for the same. Order accordingly

State of Himachal Pradesh v Nirmala Devi

2017 Indlaw SC 473

Bench: A.K. Sikri, Ashok Bhushan

The Judgment was delivered by : A.K. Sikri, J.

2. Respondent herein faced trial for offence covered by Sections 328, 392, 397 read with Section 34 of the Indian Penal Code (IPC) alongwith co-accused Krishan Lal Sharma. When the trial was underway, both the accused persons were released on bail, pending trial. 12 prosecution witnesses (PWs) were examined and some more were yet to be examined. At that stage, respondent absented from court and was declared a proclaimed offender. Thereafter, trial proceeded against Krishan Lal Sharma, who was convicted for committing offences under the aforesaid provisions, for which he was charged, vide judgment dated 19th April, 2002. Later on, the respondent was apprehended and brought to trial and testimony of remaining prosecution witnesses were recorded in her case. It culminated in the judgment dated 27th February, 2003 whereby the Sessions Judge convicted the respondent also for the offences punishable under Sections 328, 307, 392 read with Section 34, IPC. As a consequence, order of sentence was passed on 5th March, 2003. She was inflicted with the punishments of simple imprisonment for a period of two years and fine in the sum of Rs. 2,000/-, in default of payment of which to undergo imprisonment for a further period of three months, for the offence each punishable under Sections 328, 307 and 392 IPC with direction that all the substantive sentences were to run concurrently. Fine of Rs. 6,000/- was directed to be paid to the complainant, Ramesh Kumar as compensation. A sum of Rs. 12,000/- was recovered from the respondent which was also ordered to be released to the complainant.

4. The respondent filed an appeal against the judgment dated 5th March, 2003 passed by the Sessions Judge in the High Court. The High Court has affirmed the conviction. However, insofar as award of sentence is concerned, it is drastically modified by removing imprisonment part of the sentence and substituting the same with fine simplicitor of Rs. 30,000/-. Concluding paragraph of the impugned judgment giving reasons for taking this course of action is reproduced below:

"I have given careful consideration to the submission made by the learned counsel appearing for the appellant, who submits that the appellant is a lady and looking after her three minor sons out of them two are mentally unsound and in these circumstances, the Court should take a lenient view. This fact was also urged before the learned trial court which has taken a lenient view of the case. What I find further is that the appellant has also absconded during the trial and cannot be considered to be such an innocent person. However, on the conspectus of the material on record, it would be in the fitness of things in the case the sentence of imprisonment under each head is set aside and instead a fine of Rs. 30,0/- is imposed upon the appellant with a direction that the amount be deposited in the Court of learned Sessions Judge, Chamba, Division Chamba within a period of six months from today failing which the sentence of imprisonment shall revive. On deposit of such fine, it shall be paid to the complainant. A direction is issued to the learned Sessions Judge, Chamba to comply with this judgment."

5. Respondent has not challenged the order against that part of the judgment whereby her conviction has been upheld by the High Court. To that extent, the judgment of the High Court has attained finality. On the contrary, it is the State which has filed the Special Leave Petition under Article 136 of the Constitution (out of which present appeal arises), questioning the validity, propriety and justification of the impugned order whereby the sentence of imprisonment is set aside and substituted by fine of Rs. 30,000/-. Therefore, the learned counsel for the parties confined their submissions on this aspect alone.

6. Before examining the issue raised, it would be apposite to take note of the prosecution case against the respondent for which she stands convicted. The case originated on the basis of complaint filed by the complainant, Ramesh Kumar (PW-13), resulting into registration of the FIR (Exh. PL). He stated therein that on 22nd August, 2000, he left his house situated at Preet Nagar, Jammu at around 8.40 A.M. in the morning to withdraw a sum of Rs. 27,000/- from his Bank account from the Bank Satbari for the purposes of purchasing an auto-tempo which he wanted to use for transporting children studying in his school. On way to the bank, he met Krishan Lal accused, who was driving Maruti Van No. JK-02M-4392, an old acquaintance of the complainant. He asked the complainant as to where he was going whereupon he disclosed that he was going to withdraw a sum of Rs. 27,000/- for purchasing an auto-tempo from Pathankot. At that point of time, the complainant had a sum of Rs. 4,000/- in his pocket. Accused Krishan Lal told him that he would get him a discount from an authorized auto-tempo dealer at Pathankot and that

he was willing to drive him to that place. Both went to the bank where the complainant withdrew a sum of Rs. 27,000/-. Thereafter, accused Krishan Lal took him to his house where he was offered a cup of tea. Then, Krishan Lal took him to the house of one lady (respondent herein). He informed the complainant that this lady would also go to Pathankot and they would go there together. The accused offered a glass of water and thereafter a cup of tea after which the complainant, Ramesh Kumar, suspected that he had been made to ingest some intoxicant. They boarded the Van where after the complainant lost consciousness. He regained his senses/consciousness in the Civil Hospital at Dalhousie in the early hours of 24th August, 2000. He had lost all the currency. The case is that the money had been looted from the complainant; he had been beaten up badly and dumped in a Nullah somewhere near Dalhousie.

7. It is on the aforesaid allegations that the respondent along with Krishan Lal were fasten with the charges under Sections 328, 392, 307 read with Section 34 of the IPC. As pointed above, prosecution was able to substantiate the aforesaid allegations resulting into the conviction of the respondent. To put it in nutshell, the prosecution succeeded in proving, beyond reasonable doubt, that respondent in furtherance of common intention with her co-accused had administered stupefying intoxicating substance to the complainant with intent to commission of offence, that is, theft of currency notes of the complainant and in the process attempted to kill the complainant as well.

9. At this juncture, I would like to reproduce the provisions under which the respondent has been convicted.

10. As is clear from the bare reading of the aforesaid sections, offence mentioned therein are of serious nature. Maximum 'imprisonment' for committing offence under Section 328 IPC is 10 years as well as fine. Likewise, the punishment stipulated in Section 392 IPC is 'rigorous imprisonment' for a term which may extend to 10 years, as well as fine. In case of highway robbery between sunset and sunrise, imprisonment can be extended even to 14 years, though that is not the case here. Insofar as Section 307 IPC is concerned, which relates to commission of offence by attempting to murder, again maximum sentence of imprisonment of either description (i.e. simple or rigorous) upto 10 years can be awarded, in addition to making the convict liable to pay fine. This punishment can go upto life imprisonment if hurt is caused to any person by an act which is done with the intention or knowledge that it may cause death.

11. In the instant case, hurt is caused. Following aspects are clearly discernible from the reading of these provisions:

(a) The offences mentioned under all these Sections are of serious nature.

(b) Maximum penalty, under normal circumstances, is 10 years which under certain circumstances can even be life imprisonment (Section 307 IPC) or 14 years (under Section 392 IPC)

(c) Whereas imprisonment under Sections 307 IPC and 328 IPC can be of either description, namely, 'simple imprisonment' or 'rigorous imprisonment' and, therefore, it is left to the discretion of the trial court to award any of these depending upon the circumstances of a case, insofar as punishment under Section 392 IPC is concerned there is no such discretion and the imprisonment has to be rigorous in nature.

12. In the instant case, as noticed above, trial court awarded imprisonment of two years, that too, simple imprisonment for all the three offences which was to run concurrently. The record shows that it was pleaded before the trial court that respondent is a lady and further that she had three minor sons. These considerations persuaded the trial court to take a lenient view. In the appeal filed by the respondent before the High Court, on the question of sentence same very circumstances were pleaded, which resulted in mellowing the High Court further by setting aside the imprisonment part of sentencing and modifying the sentence to that of fine of Rs. 30,000/- alone.

13. In this context and factual background, two points arise for consideration, viz.:

(i) Whether the High Court was permitted, in law, to do away with the punishment of imprisonment altogether and substitutes the same with fine alone?

(ii) Whether the circumstances pleaded by the respondent were so mitigating that punishment of fine alone could be justified?

14. Coming to the first question, as can be seen from the language of Sections 307, 328 and 392 of IPC, all

these sections provide for imprisonment 'and' fine. In fact, after specifying particular term of imprisonment, all these sections use the words 'and shall also be liable to fine'. This expression came up for consideration in *Zunjarrao Bhikaji Nagarkar v. Union of India & Ors.* (1999) 7 SCC 409 1999 Indlaw SC 97 and the Court explained that in such circumstances, it is imperative to impose both the sentences i.e. imprisonment as well as fine. Thus, there has to be punishment of imprisonment in respect of these offences, and in addition, the convict is also liable to pay fine. Therefore, awarding the punishment of imprisonment is a must and there cannot be a situation where no imprisonment is imposed at all. The High Court was, therefore, clearly wrong in not inflicting a sentence of imprisonment, by modifying the sentence awarded by the trial court and obliterating the sentence of imprisonment altogether. Thus, the very approach of the High Court in substituting the sentence by fine alone is impermissible in law.

15. Section 386 of the Code of Criminal Procedure enlists the powers of the appellate court while hearing the appeals from the trial court. In an appeal from conviction, if the conviction is maintained, the appellate court has the power to alter the nature or the extent, or the nature and extent, of the sentence (though it cannot enhance the same). However, such a power has to be exercised in terms of the provisions of Indian Penal Code etc. for which the accused has been convicted. Power to alter the sentence would not extend to exercising the powers contrary to law. It clearly follows that the High Court committed a legal error in doing away with the sentence of imprisonment altogether.

16. The second question is as to whether the circumstances pleaded by the respondent justify taking a lenient view in the matter. The acts committed by the respondent constitute heinous offences. Having common intention along with co-accused, she administered poison like substance to the complainant; robbed him of his money; and even attempted to kill him. As already held, award of sentence is imprisonment is a must. The question is, in the wake of the commission of crime of this nature, to what extent the mitigating factor viz. the respondent being a woman and having three minor children, be taken for the purposes of sentencing?

18. The offences for which the respondent is convicted prescribe maximum imprisonment and there is no provision for minimum imprisonment. Thus, there is a wide discretion given to the Court to impose any imprisonment which may be from one day (or even till the rising of the court) to ten years/life. However, at the same time, the judicial discretion which has been conferred upon the Court, has to be exercised in a fair manner keeping in view the well established judicial principles which have been laid down from time to time, the prime consideration being reason and fair play.

19. Likewise, stressing upon the principle of proportionality in sentencing in the case of *Hazara Singh v. Raj Kumar & Ors.* (2013) 9 SCC 516, this Court stressed that special reasons must be assigned for taking lenient view and undue sympathy for accused is not justified. It was equally important to keep in mind rights of victim as well as society at large and the corrective theory on the one hand and deterrence principle on the other hand should be adopted on the basis of factual matrix.

20. Following principles can be deduced from the reading of the aforesaid judgment:

(i) Imprisonment is one of the methods used to handle the convicts in such a way to protect and prevent them to commit further crimes for a specific period of time and also to prevent others from committing crime on them out of vengeance. The concept of punishing the criminals by imprisonment has recently been changed to treatment and rehabilitation with a view to modify the criminal tendency among them.

(ii) There are many philosophies behind such sentencing justifying these penal consequences. The philosophical/jurisprudential justification can be retribution, incapacitation, specific deterrence, general deterrence, rehabilitation, or restoration. Any of the above or a combination thereof can be the goal of sentencing.

(iii) Notwithstanding the above theories of punishment, when it comes to sentencing a person for committing a heinous crime, the deterrence theory as a rationale for punishing the offender becomes more relevant. In such cases, the role of mercy, forgiveness and compassion becomes secondary.

(iv) In such cases where the deterrence theory has to prevail, while determining the quantum of sentence, discretion lies with the Court. While exercising such a discretion, the Court has to govern itself by reason and fair play, and discretion is not to be exercised according to whim and caprice. It is the duty of the Court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the

society and a legitimate response to the collective conscience.

(v) While considering as to what would be the appropriate quantum of imprisonment, the Court is empowered to take into consideration mitigating circumstances, as well as aggravating circumstances.

21. When the Indian Penal Code provides discretion to Indian Judges while awarding the sentence, the Court will have undoubtedly regard to extenuating and mitigating circumstances. In this backdrop, the question is as to whether the respondent being a lady and having three minor children will be extenuating reasons? I may observe that in many countries of the world, gender is not a mitigating factor. Some jurists also stress that in this world of gender equality, women should be treated at par with men even as regards equal offences committed by them. Women are competing men in the criminal world; they are emulating them in all the crimes; and even surpassing men at times.

Therefore, concept of criminal justice is not necessarily synonymous with social justice. Eugene Mc Laughlin shows a middle path. She finds that predominant thinking is that 'paper justice' would demand giving similar penalty for similar offences. However, when it comes to doing 'real justice', element of taking the consequences of a penalty cannot be ignored. Here, while doing 'real justice' consequences of awarding punishment to a female offender are to be seen. According to her, 'real justice' would consider the likelihood that a child might suffer more from a mother's imprisonment than that of his father's. Insofar as Indian judicial mind is concerned, I find that in certain decisions of this Court, gender is taken as the relevant circumstance while fixing the quantum of sentence. I may add that it would depend upon the facts of each case, whether it should be treated as a relevant consideration and no hard and fast rule can be laid down. For example, where a woman has committed a crime being a part of a terrorist group, mercy or compassion may not be shown.

22. In the present case, two mitigating circumstances which are pressed into service by the respondent are that she is a woman and she is having three minor children. This has to be balanced with the nature of crime which the respondent has committed. As can be seen, these circumstances were taken into consideration by the trial court and on that basis, the trial court took a lenient view by awarding imprisonment for two years in respect of each of the offences under Sections 307, 328 and 392 of the IPC, which were to be run concurrently. There was no reason to show any further mercy by the High Court. Further, as found above, removing the element of imprisonment altogether was, in any case, erroneous in law. I, thus, allow this appeal and set aside the sentencing part of the judgment of the High Court and restore the judgment of the trial court.

ORDER OF THE COURT

The appeal is allowed. Judgment of the High Court is set aside to the extent it modifies the sentence and the sentence of imprisonment as awarded by the trial court is restored herewith. The respondent shall be taken into custody to serve the sentence.

Ravada Sasikala v State of Andhra Pradesh and another
AIR 2017 SC 1166

Bench : Dipak Misra, R. Banumathi

The Judgment was delivered by : Dipak Misra, J.

3. The necessary facts. On the basis of the statement of the injured, an FIR under Sections 448 and 307 of the Indian Penal Code (IPC) was registered at police station Vallampudi. The injuries sustained by the victim-informant required long treatment and eventually after recording the statements of the witnesses, collecting various materials from the spot and taking other aspects into consideration of the crime, the investigating agency filed the charge sheet for the offences that were originally registered under the FIR before the competent court which, in turn, committed the matter to the Court of Session, Vizianagaram. The accused abjured his guilt and expressed his desire to face the trial.

5. The learned Assistant Sessions Judge, Vizianagaram did not find the accused guilty under Section 307 IPC but held him guilty under Section 326 and 448 IPC. At the time of hearing of the sentence under Section 235(2) of the Code of Criminal Procedure (CrPC), the convict pleaded for mercy on the foundation of his support to the old parents, the economic status, social strata to which he belongs and certain other factors. The learned trial judge, upon hearing him, sentenced him to suffer rigorous imprisonment for one year and directed to pay a fine of Rs. 5,000/- with a default clause under Section 326 IPC and sentenced him to pay a fine of Rs. 1000/- for the offence under Section 448 IPC with a default clause.

6. The State preferred Criminal Appeal No. 1731 of 2007 under Section 377(1) CrPC before the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh for enhancement of sentence. Being grieved by the judgment of conviction and order of sentence, the accused-respondent had preferred Criminal Appeal No. 15 of 2006 before the Sessions Judge, Vizianagaram which was later on transferred to the High Court and registered as Transferred Criminal Appeal No. 1052 of 2013.

7. Both the appeals were heard together by the learned Single Judge who concurred with the view taken by the learned trial judge as regards the conviction. While dealing with the quantum of sentence, the learned Judge opined thus:-

"However, the sentence of imprisonment imposed by the trial Court for the offence under Section 326 I.P.C. is modified to the period which the accused has already undergone, while maintaining the sentence of fine for both the offences."

8. At the outset, we must note that the State has not assailed the said judgment. The appellant, after obtaining permission of this Court, filed the special leave petition which we entertained for the pure reason it has been asserted that the period of custody suffered by the accused is 30 days. It is apt to note here that the accused-respondent has not challenged the conviction and, therefore, it has to be assumed that apart from accepting the judgment of conviction, he must have celebrated the delight and jubilation of liberty inasmuch as despite the sustenance of the judgment of conviction, he was not required to suffer any further imprisonment.

9. The centripetal question, indubitably a disquieting one, **whether the High Court has kept itself alive to the precedents pertaining to sentencing or has been guided by some kind of unfathomable and incomprehensible sense of individual mercy absolutely ignoring the plight and the pain of the victim;** a young girl who had sustained an acid attack, a horrendous assault on the physical autonomy of an individual that gets more accentuated when the victim is a young woman. Not for nothing, it has been stated stains of acid has roots forever.

10. As the factual matrix gets unfolded from the judgment of the learned trial Judge, the appellant after completion of her intermediate course had accompanied her brother to Amalapuram of East Godavari District where he was working as an Assistant Professor in B.V.C. Engineering College, Vodalacheruvu and stayed with him about a week prior to the occurrence. Thereafter, she along with her brother went to his native place Sompuram. At that time, the elder brother of the accused proposed a marriage alliance between the accused and the appellant for which her family expressed unwillingness. The reason for expressing the unwillingness is not borne out on record but the said aspect, needless to say, is absolutely irrelevant. What matters to be stated is that the proposal for marriage was not accepted. It is evincible from

the material brought on record that the morning of 24.05.2003 became the darkest and blackest one in her life as the appellant having a head bath had put a towel on her head to dry, the accused trespassed into her house and poured a bottle of acid over her head. It has been established beyond a trace of doubt by the ocular testimony and the medical evidence that some part of her body was disfigured and the disfiguration is due to the acid attack.

11. In this backdrop, the heart of the matter is whether the imposition of sentence by the learned Single Judge is proportionate to the crime in question.

14. We have noted earlier that the conviction under Section 326 IPC stands established. The singular issue is the appropriateness of the quantum of sentence. Almost 27 years back in *Sham Sunder v. Puran* and another (1990) 4 SCC 731, the accused-appellant therein was convicted under Section 304 Part I IPC and while imposing the sentence, the appellate court reduced the sentence to the term of imprisonment already undergone, i.e., six months. However, it enhanced the fine. This Court ruled that sentence awarded was inadequate. Proceeding further, it opined that:-

"No particular reason has been given by the High Court for awarding such sentence. The court in fixing the punishment for any particular crime should take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender. The measure of punishment should be proportionate to the gravity of the offence. The sentence imposed by the High Court appears to be so grossly and entirely inadequate as to involve a failure of justice. We are of opinion that to meet the ends of justice, the sentence has to be enhanced."

After so stating the Court enhanced the sentence to one of rigorous imprisonment for a period of five years.

15. In *Shyam Narain v. State (NCT of Delhi)* (2013) 7 SCC 77, it has been ruled that primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in the life of the victim but also a concavity in the social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. The Court further observed that on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. It has to be borne in mind that while carrying out this complex exercise, it is obligatory on the part of the court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

16. In *State of Madhya Pradesh v. Najab Khan and others* (2013) 9 SCC 509, the High Court of Madhya Pradesh, while maintaining the conviction under Section 326 IPC read with Section 34 IPC, had reduced the sentence to the period already undergone, i.e., 14 days. The two-Judge Bench referred to the authorities in *Shailesh Jasvantbhai v. State of Gujarat* (2006) 2 SCC 359, *Ahmed Hussain Vali Mohammed Saiyed v. State of Gujarat* (2009) 7 SCC 254, *Jameel v. State of Uttar Pradesh* (2010) 12 SCC 532 and *Guru Basavaraj v. State of Karnataka* (2012) 8 SCC 734 2012 Indlaw SC 262 and held thus:-

"In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice dispensation system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The courts must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment."

In the said case, the Court ultimately set aside the sentence imposed by the High Court and restored that of the trial Judge, whereby he had convicted the accused to suffer rigorous imprisonment for three years.

17. In *Sumer Singh v. Surajbhan Singh & others* (2014) 7 SCC 323, while elaborating on the duty of the Court while imposing sentence for an offence, it has been ruled that it is the duty of the court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the guiding

laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has reposed faith in the court of law to curtail the evil. While imposing the sentence it is the court's accountability to remind itself about its role and the reverence for the rule of law. It must evince the rationalised judicial discretion and not an individual perception or a moral propensity. The Court further held that if in the ultimate eventuate the proper sentence is not awarded, the fundamental grammar of sentencing is guillotined and law does not tolerate it; society does not withstand it; and sanctity of conscience abhors it. It was observed that the old saying "the law can hunt one's past" cannot be allowed to be buried in an indecent manner and the rainbow of mercy, for no fathomable reason, should be allowed to rule. The conception of mercy has its own space but it cannot occupy the whole accommodation. While dealing with grant of further compensation in lieu of sentence, the Court ruled:-

"We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the oasis. It cannot assume the centre stage for all redemption. Interference in manifestly inadequate and unduly lenient sentence is the justifiable warrant, for the Court cannot close its eyes to the agony and anguish of the victim and, eventually, to the cry of the society."

18. In *State of Punjab v. Bawa Singh* (2015) 3 SCC 441, this Court, after referring to the decisions in *State of Madhya Pradesh v. Bablu* (2014) 9 SCC 281 and *State of Madhya Pradesh v. Surendra Singh* (2015) 1 SCC 222, reiterated the settled proposition of law that one of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which is commensurate with the nature of crime regard being had to the manner in which the offence is committed. It has been further held that one should keep in mind the social interest and conscience of the society while considering the determinative factor of sentence with gravity of crime. The punishment should not be so lenient that it would shock the conscience of the society. Emphasis was laid on the solemn duty of the court to strike a proper balance while awarding the sentence as imposition of lesser sentence encourages a criminal and resultantly the society suffers.

19. Recently, in *Raj Bala v. State of Haryana and others* (2016) 1 SCC 463, on reduction of sentence by the High Court to the period already undergone, the Court ruled thus:-

"Despite authorities existing and governing the field, it has come to the notice of this Court that sometimes the court of first instance as well as the appellate court which includes the High Court, either on individual notion or misplaced sympathy or personal perception seems to have been carried away by passion of mercy, being totally oblivious of lawful obligation to the collective as mandated by law and forgetting the oft quoted saying of Justice Benjamin N. Cardozo, "Justice, though due to the accused, is due to the accuser too" and follow an extremely liberal sentencing policy which has neither legal permissibility nor social acceptability."

And again:-

"A Judge has to keep in mind the paramount concept of rule of law and the conscience of the collective and balance it with the principle of proportionality but when the discretion is exercised in a capricious manner, it tantamounts to relinquishment of duty and reckless abandonment of responsibility. One cannot remain a total alien to the demand of the socio-cultural milieu regard being had to the command of law and also brush aside the agony of the victim or the survivors of the victim. Society waits with patience to see that justice is done. There is a hope on the part of the society and when the criminal culpability is established and the discretion is irrationally exercised by the court, the said hope is shattered and the patience is wrecked."

20. Though we have referred to the decisions covering a period of almost three decades, it does not necessarily convey that there had been no deliberation much prior to that. There had been. In *B.G. Goswami v. Delhi Administration* (1974) 3 SCC 85, the Court while delving into the issue of punishment had observed that punishment is designed to protect society by deterring potential offenders as also by preventing the guilty party from repeating the offence; it is also designed to reform the offender and reclaim him as a law abiding citizen for the good of the society as a whole. Reformatory, deterrent and punitive aspects of punishment thus play their due part in judicial thinking while determining the question of awarding appropriate sentence.

21. The purpose of referring to the aforesaid precedents is that they are to be kept in mind and adequately weighed while exercising the discretion pertaining to awarding of sentence. Protection of society on the one hand and the reformation of an individual are the facets to be kept in view. In *Shanti Lal Meena v. State (NCT of Delhi)* (2015) 6 SCC 185, the Court has held that as far as punishment for offence under the Prevention of Corruption Act, 1988 is concerned, there is no serious scope for reforming the convicted

public servant. Therefore, it shall depend upon the nature of crime, the manner in which it is committed, the propensity shown and the brutality reflected. The case at hand is an example of uncivilized and heartless crime committed by the respondent No. 2. It is completely unacceptable that concept of leniency can be conceived of in such a crime. A crime of this nature does not deserve any kind of clemency. It is individually as well as collectively intolerable. The respondent No. 2 might have felt that his ego had been hurt by such a denial to the proposal or he might have suffered a sense of hollowness to his exaggerated sense of honour or might have been guided by the idea that revenge is the sweetest thing that one can be wedded to when there is no response to the unrequited love but, whatever may be the situation, the criminal act, by no stretch of imagination, deserves any leniency or mercy. The respondent No. 2 might not have suffered emotional distress by the denial, yet the said feeling could not to be converted into vengeance to have the licence to act in a manner like he has done.

22. In view of what we have stated, the approach of the High Court shocks us and we have no hesitation in saying so. When there is medical evidence that there was an acid attack on the young girl and the circumstances having brought home by cogent evidence and the conviction is given the stamp of approval, there was no justification to reduce the sentence to the period already undergone. We are at a loss to understand whether the learned Judge has been guided by some unknown notion of mercy or remaining oblivious of the precedents relating to sentence or for that matter, not careful about the expectation of the collective from the court, for the society at large eagerly waits for justice to be done in accordance with law, has reduced the sentence. When a substantive sentence of thirty days is imposed, in the crime of present nature, that is, acid attack on a young girl, the sense of justice, if we allow ourselves to say so, is not only ostracized, but also is unceremoniously sent to "Vanaprastha". It is wholly impermissible.

23. In view of our analysis, we are compelled to set aside the sentence imposed by the High Court and restore that of the trial court. In addition to the aforesaid, we are disposed to address on victim compensation. We are of the considered opinion that the appellant is entitled to compensation that is awardable to a victim under the CrPC. In *Ankush Shivaji Gaikwad v. State of Maharashtra* (2013) 6 SCC 770 the two-Judge Bench referred to the amended provision, 154th Law Commission Report that has devoted entire chapter to victimology, wherein the growing emphasis was on the victim.

24. In *Laxmi v. Union of India and others* (2014) 4 SCC 427, this Court observed thus:-

"12. Section 357-A came to be inserted in the Code of Criminal Procedure, 1973 by Act 5 of 2009 w.e.f. 31-12-2009. Inter alia, this section provides for preparation of a scheme for providing funds for the purpose of compensation to the victim or his dependants who have suffered loss or injury as a result of the crime and who require rehabilitation.

13. We are informed that pursuant to this provision, 17 States and 7 Union Territories have prepared "Victim Compensation Scheme" (for short "the Scheme"). As regards the victims of acid attacks, the compensation mentioned in the Scheme framed by these States and Union Territories is un-uniform. While the State of Bihar has provided for compensation of Rs 25,000 in such Scheme, the State of Rajasthan has provided for Rs 2 lakhs of compensation. In our view, the compensation provided in the Scheme by most of the States/Union Territories is inadequate. It cannot be overlooked that acid attack victims need to undergo a series of plastic surgeries and other corrective treatments. Having regard to this problem, the learned Solicitor General suggested to us that the compensation by the States/Union Territories for acid attack victims must be enhanced to at least Rs 3 lakhs as the aftercare and rehabilitation cost. The suggestion of the learned Solicitor General is very fair."

25. The Court further directed that the acid attack victims shall be paid compensation of at least Rs 3 lakhs by the State Government/Union Territory concerned as the aftercare and rehabilitation cost. Of this amount, a sum of Rs. 1 lakh was directed to be paid to such victim within 15 days of occurrence of such incident (or being brought to the notice of the State Government/Union Territory) to facilitate immediate medical attention and expenses in this regard. The balance sum of Rs.2 lakhs was directed to be paid as expeditiously as possible and positively within two months thereafter and compliance thereof was directed to be ensured by the Chief Secretaries of the States and the Administrators of the Union Territories.

26. In *State of M.P. v. Mehtaab* (2015) 5 SCC 197, the Court directed compensation of Rs.2 lakhs to be fixed regard being had to the limited final resources of the accused despite the fact that the occurrence took place in 1997. It observed that the said compensation was not adequate and accordingly, in addition to the said compensation to be paid by the accused, held that the State was required to pay compensation under Section 357-A CrPC. For the said purpose, reliance was placed on the decision in *Suresh v. State of Haryana* (2015) 2 SCC 227.

27. In State of Himachal Pradesh v. Ram Pal (2015) 11 SCC 584, the Court opined that compensation of Rs. 40,000/- was inadequate regard being had to the fact that life of a young girl aged 20 years was lost. Bestowing anxious consideration the Court, placing reliance on Suresh 2014 Indlaw SC 815 (supra), Manohar Singh v. State of Rajasthan and Ors. (2015) 3 SCC 449 and Mehtaab 2015 Indlaw SC 95 (supra), directed that ends of justice shall be best subserved if the accused is required to pay a total sum of Rs.1 lakh and the State to pay a sum of Rs.3 lakhs as compensation.

28. Regard being had to the aforesaid decisions, we direct the accused-respondent No. 2 to pay a compensation of Rs.50,000/- and the State to pay a compensation of Rs.3 lakhs. If the accused does not pay the compensation amount within six months, he shall suffer further rigorous imprisonment of six months, in addition to what has been imposed by the trial court. The State shall deposit the amount before the trial court within three months and the learned trial Judge on proper identification of the victim, shall disburse it in her favour. The criminal appeals are allowed to the extent indicated above.

Vikas Yadav v State of U. P. and others
AIR 2016 SC 4614

Bench : Dipak Misra, C. Nagappan

The Judgment was delivered by : Dipak Misra, J.

1. The appellants in this batch of appeals stand convicted for the offences under Sections 302, 364, 201 read with Section 34 of the Indian Penal Code (IPC). This Court while hearing the special leave petitions on 17.08.2015 had passed the following order:-

"Delay condoned.

Having heard senior counsel for the petitioners at great length, we are of the view, that the impugned orders call for no interference whatsoever insofar as the conviction of the petitioners is concerned. The conviction of the three petitioners, as recorded by the courts below, is accordingly upheld. Issue notice, on the quantum of sentence, returnable after six weeks."

2. On 16.06.2015 leave was granted. Thus, we are only concerned with the legal defensibility and the justifiability of the imposition of sentence.

3. The arguments in these appeals commenced on issues of law. Mr. U.R. Lalit and Mr. Shekhar Naphade, learned senior counsel appearing for the appellant in Criminal Appeal Nos. 1531-1533 of 2015 and Mr. Atul Nanda, learned senior counsel appearing for the appellant in Criminal Appeal Nos. 1528-1530 of 2015 questioned the propriety of the sentence as the High Court has imposed a fixed term sentence, i.e., 25 years for the offence under Section 302 IPC and 5 years for offence under Section 201 IPC with the stipulation that both the sentences would run consecutively. It is apt to note here that separate sentences have been imposed in respect of other offences but they have been directed to be concurrent. After advancing the arguments relating to the jurisdiction of the High Court as well as this Court on imposition of fixed term/period sentence, more so when the trial court has not imposed death sentence, the learned counsel argued that the factual score in the instant case did not warrant such harsh delineation as a consequence disproportionate sentences have been imposed.

4. Keeping in view the chronology of advancement of arguments, we think it apt to deal with the jurisdictional facet. If we negative the proposition advanced by the learned counsel for the appellants, then only we shall be required to proceed to deal with the facts as requisite to be stated for the purpose of adjudicating the justifiability of imposition of such sentence. If we accede to the first submission, then the second aspect would not call for any deliberation. At this juncture, it is necessary to state that the learned trial judge by order dated 30.05.2008 sentenced Vikas Yadav and Vishal Yadav to life imprisonment as well as fine of one lakh each under Section 302 IPC and, in default of payment of fine, to undergo simple imprisonment for one year. They were sentenced to undergo simple imprisonment for ten years and fine of Rs. 50,000/- each for their conviction under Section 364/34 IPC, in default to undergo simple imprisonment for six months and rigorous imprisonment for five years and fine of Rs. 10,000/- each under Section 201/34 IPC, in default, simple imprisonment for three months.

All sentences were directed to run concurrently. Sukhdev Yadav @ Pehalwan who was tried separately because of his abscondence in SC No. 76 of 2008 was convicted for the offences under Sections 302/364/34 IPC and Section 201 and by order dated 12.07.2011, he was sentenced to undergo life imprisonment and fine of Rs. 10,000/- for commission of the offence under Section 302 IPC, in default, to undergo rigorous imprisonment for two years; rigorous imprisonment for seven years and fine of Rs. 5,000/- for commission of the offence under Section 364 IPC, in default, to suffer rigorous imprisonment for six months; rigorous imprisonment for three years and fine of Rs. 5,000/- for his conviction under Section 201 IPC, in default, to undergo further rigorous imprisonment for six months. All sentences were directed to be concurrent.

5. Be it noted, the prosecution, - State of NCT of Delhi preferred an appeal under Section 377 CrPC for enhancement of sentence of imprisonment of life to one of death for the offence under Section 302 IPC.

The High Court addressed to number of issues, namely, (a) statutory provisions and jurisprudence regarding imposition of the death penalty; (b) death sentence jurisprudence - divergence in views; (c) life imprisonment - meaning and nature of; (d) the authority of the judiciary to regulate the power of the executive to remit the sentence or to put in other words jurisdiction of the court to direct minimum term sentence in excess of imposition of 14 years; (e) if there are convictions for multiple offences in one case, does the court have the option of directing that the sentences imposed thereon shall run consecutively and not concurrently; (f) honour killing - whether penalty of only the death sentence; (g) contours of the jurisdiction of the High Court to enhance a sentence imposed by the trial court and competency to pass orders under Section 357 of the CrPC in the appeal by the State or revision by a complainant seeking enhancement of sentence; (h) sentencing procedure and pre-sentencing hearing nature of; (i) concerns for the victims - award of compensation to heal and as a method of reconciling victim to the offender; (j) State's liability to pay compensation; (k) fine and compensation - constituents, reasonability and adequacy; (l) sentencing principles; (m) jurisdiction of the appellate court while considering a prayer for enhancement of the sentence; (n) if not death penalty, what would be an adequate sentence in the present case; and (o) what ought to be the fitness in the present case.

6. Apart from the said aspects, the High Court also addressed to certain aspects which are specific to the case at hand to which we will advert to at a later stage. The High Court, after addressing the aspects which we have catalogued and some other fact specific

8. We think it appropriate to deal with the aspect of legal permissibility of the imposition of sentence first as the learned senior counsel appearing for the appellants had argued quite astutely with regard to the non-acceptability of such fixed term sentences and other facets relating to it. After we answer the said issue, if needed, we shall dwell upon the sustainability and warrantableness of the sentences in the facts of the case.

17. We shall first see how the Constitution Bench in *V. Sriharan* 2015 Indlaw SC 879 (supra) has dealt with this aspect. The three-Judge Bench in *Union of India v. V. Sriharan alias Murugan and others* (2014) 11 SCC 1 2014 Indlaw SC 304 framed certain questions for consideration by the Constitution Bench. The Constitution Bench in *V. Sriharan* 2015 Indlaw SC 879 (supra) reproduced the said questions and thereafter formulated the core questions for answering the same. After adverting to the same, the Court observed that the issues raised were of utmost critical concern for the whole country as the decision on the questions would determine the procedure for awarding sentence and the criminal justice system. Thereafter, the Court referred to the authority in *Swamy Shraddananda (2) v. State of Maharashtra* (2008) 13 SCC 767 2008 Indlaw SC 1128 and framed the following questions:-

- "2.1. Maintainability of this writ petition under Article 32 of the Constitution by the Union of India.*
- 2.2. (i) Whether imprisonment for life means for the rest of one's life with any right to claim remission?*
(ii) Whether as held in Shraddananda case (2), a special category of sentence; instead of death; for a term exceeding 14 years and put that category beyond application of remission can be imposed?
- 2.3. Whether the appropriate Government is permitted to grant remission under Sections 432/433 of the Criminal Procedure Code, 1973 after the parallel power was exercised under Article 72 by the President and under Article 161 by the Governor of the State or by the Supreme Court under its constitutional power(s) under Article 32?*
- 2.4. Whether the Union or the State has primacy for the exercise of power under Section 432(7) over the subject-matter enlisted in List III of the Seventh Schedule for grant of remission?*
- 2.5. Whether there can be two appropriate Governments under Section 432(7) of the Code?*
- 2.6. Whether the power under Section 432(1) can be exercised suo motu, if yes, whether the procedure prescribed under Section 432(2) is mandatory or not?*
- 2.7. Whether the expression "consultation" stipulated in Section 435(1) of the Code implies "concurrence"?"*

18. We have reproduced the entire paragraph for the sake of completeness and understanding. The issues that have been raised by Mr. Lalit and Mr. Naphade fundamentally relate to the issues in para 2.2. The majority in the Constitution Bench, after referring to the decisions in *Maru Ram v. Union of India* and others (1981) 1 SCC 107, *Gopal Vinayak Godse v. State of Maharashtra* and others AIR 1961 SC 600 and *State of Madhya Pradesh v. Ratan Singh and others* (1976) 3 SCC 470, opined that the legal position is quite settled that the life imprisonment only means the entirety of the life unless it is curtailed by remissions validly granted under the Criminal Procedure Code by the appropriate Government or under Articles 72 and 161 of the Constitution by the Executive Head viz. the President or the Governor of the

State respectively. The Court referred to the decision in Ashok Kumar alias Golu v. Union of India and others (1991) 3 SCC 498, wherein it was specifically ruled that the decision in Bhagirath v. Delhi Administration (1985) 2 SCC 580 does not run counter to Godse (supra) and Maru Ram 1980 Indlaw SC 577 (supra).

19. Referring to Section 57 IPC, the decision in Ashok Kumar 1991 Indlaw SC 58 (supra) reiterated the legal position as under:-

'9. ... The provision contained in Section 57 that imprisonment for life has to be reckoned as equivalent to imprisonment for 20 years is for the purpose of calculating fractions of terms of punishment. We cannot press that provision into service for a wider purpose.'

20. It has been held in V. Sriharan 2015 Indlaw SC 879 (supra) that the said observations are consistent with the ratio laid down in Godse 1961 Indlaw SC 227 (supra) and Maru Ram 1980 Indlaw SC 577 (supra).

21. Thereafter, the majority in V. Sriharan 2015 Indlaw SC 879 (supra) quoted a paragraph from Bhagirath's case 1985 Indlaw SC 427 (supra) which pertained to set-off under Section 428 CrPC which is to the following effect:-

"11. ... The question of setting off the period of detention undergone by an accused as an undertrial prisoner against the sentence of life imprisonment can arise only if an order is passed by the appropriate authority under Section 432 or Section 433 of the Code. In the absence of such order, passed generally or specially, and apart from the provisions, if any, of the relevant Jail Manual, imprisonment for life would mean, according to the rule in Gopal Vinayak Godse, imprisonment for the remainder of life."

22. Thereafter, the Court in V. Sriharan 2015 Indlaw SC 879 (supra) observed:-

"We fail to see any departure from the ratio of Godse case 1961 Indlaw SC 227; on the contrary the aforequoted passage clearly shows approval of that ratio and this becomes further clear from the final order passed by the Court while allowing the appeal/writ petition. The Court directed that the period of detention undergone by the two accused as undertrial prisoners would be set off against the sentence of life imprisonment imposed upon them, subject to the provisions contained in Section 433-A and, 'provided that orders have been passed by the appropriate authority under Section 433 of the Criminal Procedure Code'.

These directions make it clear beyond any manner of doubt that just as in the case of remissions so also in the case of set-off the period of detention as undertrial would enure to the benefit of the convict provided the appropriate Government has chosen to pass an order under Sections 432/433 of the Code. The ratio of Bhagirath case 1985 Indlaw SC 427, therefore, does not run counter to the ratio of this Court in Godse or Maru Ram.

61. Having noted the abovereferred to two Constitution Bench decisions in Godse and Maru Ram which were consistently followed in the subsequent decisions in Sambha Ji Krishan Ji (1974) 1 SCC 196 1973 Indlaw SC 392, Ratan Singh 1976 Indlaw SC 590, Ranjit Singh (1984) 1 SCC 31 1983 Indlaw SC 322, Ashok Kumar 1991 Indlaw SC 58 and Subash Chander (2001) 4 SCC 458 2001 Indlaw SC 20876. The first part of the first question can be conveniently answered to the effect that imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for rest of the life of the prisoner subject, however, to the right to claim remission, etc. as provided under Articles 72 and 161 of the Constitution to be exercisable by the President and the Governor of the State and also as provided under Section 432 of the Criminal Procedure Code".

23. After so stating, the majority addressed to the concept of remission. It opined that:-

"As far as remissions are concerned, it consists of two types. One type of remission is what is earned by a prisoner under the Prison Rules or other relevant rules based on his/her good behaviour or such other stipulations prescribed therein. The other remission is the grant of it by the appropriate Government in exercise of its power under Section 432 of the Criminal Procedure Code. Therefore, in the latter case when a remission of the substantive sentence is granted under Section 432, then and then only giving credit to the earned remission can take place and not otherwise. Similarly, in the case of a life imprisonment, meaning thereby the entirety of one's life, unless there is a commutation of such sentence for any specific period, there would be no scope to count the earned remission. In either case, it will again depend upon an answer to the second part of the first question based on the principles laid down in Swamy Shraddananda (2)."

24. After dwelling upon the said aspect, the Court referred to the principles stated in paragraphs 91 and 92 in Swamy Shraddananda (2) 2008 Indlaw SC 1128 (supra). It adverted to the facts in Swamy Shraddananda

(2) 2008 Indlaw SC 1128 (supra) and analysed that this Court had made a detailed reference to the decisions in *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, *Machhi Singh and others v. State of Punjab* (1983) 3 SCC 470, and *Jagmohan Singh v. State of U.P.* (1973) 1 SCC 20 where the principle of rarest of the rare case was formulated. After referring to the said decisions, the majority reproduced paragraphs 34, 36, 43, 45, and 47 of *Swamy Shraddananda* (2) 2008 Indlaw SC 1128 (supra) and came to hold that:-

"66. After noting the above principles, particularly culled out from the decision in which the very principle, namely, "the rarest of rare cases", or an "exceptional case" or an "extreme case", it was noted that even thereafter, in reality in later decisions neither the rarest of the rare case principle nor Machhi Singh categories were followed uniformly and consistently. In this context, the learned Judges also noted some of the decisions, namely, Alope Nath Dutta v. State of W.B. (2007) 12 SCC 230 2006 Indlaw SC 1278 This Court in Swamy Shraddananda (2) also made a reference to a report called "Lethal Lottery, The Death Penalty in India" compiled jointly by Amnesty International India and People's Union for Civil Liberties, Tamil Nadu, and Puducherry wherein a study of the Supreme Court judgments in death penalty cases from 1950 to 2006 was referred to and one of the main facets made in the Report (Chapters 2 to 4) was about the Court's lack of uniformity and consistency in awarding death sentence. This Court also noticed the ill effects it caused by reason of such inconsistencies and lamented over the same in the following words in para: [Swamy Shraddananda case, SCC p. 790]

"The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the criminal justice system. Thus, the overall larger picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice. This situation is a matter of concern for this Court and needs to be remedied."

25. The larger Bench endorsed the anguish expressed by the Court and opined that the situation is a matter of serious concern for this Court and it wished to examine whether the approach made thereafter by this Court does call for any interference or change or addition or mere confirmation. Be it noted, the three-Judge Bench in *Swamy Shraddananda* 2008 Indlaw SC 1128 (supra) took note of the plan devised by the accused, the betrayal of trust, the magnitude of criminality and the brutality shown in the commission of the ghastly crime and the manner in which the deceased was sedated and buried while she was alive. The Court, taking into consideration the materials brought on record in entirety, imposed the sentence of fixed term imprisonment instead of sentence of death.

26. The issue arose before the Constitution Bench with regard to the mandate of Section 433 CrPC. The majority took note of the fact that the said provision was considered at length and detailed reference was made to Sections 45, 53, 54, 55, 55A, 57 and other related provisions in the IPC in *Swamy Shraddananda*(2) 2008 Indlaw SC 1128 (supra) to understand the sentencing procedure prevalent in the Court. Thereafter, the majority reproduced paragraphs 91 and 92 from the said judgment which we think are required to be reproduced to appreciate the controversy:-

"91. The legal position as enunciated in Kishori Lal Kishori Lal v. King Emperor, 1914 SCC OnLine PC 81, Gopal Vinayak Godse 1961 Indlaw SC 227, Maru Ram 1980 Indlaw SC 577, Ratan Singh 1976 Indlaw SC 590 and Shri Bhagwan (2001) 6 SCC 296 2001 Indlaw SC 20087 and the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission.

*92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh *or it may be highly disproportionately inadequate*. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and*

the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all."
[Emphasis supplied]

27. Thereafter, the majority adverted to the concurring opinion of Fazal Ali, J. in Maru Ram's case 1980 Indlaw SC 577 and reproduced copiously from it and opined thus:-

"Keeping the above hard reality in mind, when we examine the issue, the question is "whether as held in Shraddananda (2), a special category of sentence; instead of death; for a term exceeding 14 years and putting that category beyond application of remission is good in law? When we analyse the issue in the light of the principles laid down in very many judgments starting from Godse, Maru Ram, Sambha Ji Krishan Ji, Ratan Singh, it has now come to stay that when in exceptional cases, death penalty is altered as life sentence, that would only mean rest of one's lifespan".

28. At that juncture, the issue arose with regard to the interpretation of Section 433-A CrPC. In that context, the majority opined:-

"In this context, the submission of the learned Solicitor General on the interpretation of Section 433-A CrPC assumes significance. His contention was that under Section 433-A CrPC what is prescribed is only the minimum and, therefore, there is no restriction to fix it at any period beyond 14 years and up to the end of one's lifespan. We find substance in the said submission. When we refer to Section 433-A, we find that the expression used in the said section for the purpose of grant of remission relating to a person convicted and directed to undergo life imprisonment, it stipulates that "such person shall not be released from prison unless he had served at least fourteen years of imprisonment" (emphasis supplied). Therefore, when the minimum imprisonment is prescribed under the statute, there will be every justification for the court which considers the nature of offence for which conviction is imposed on the offender for which offence the extent of punishment either death or life imprisonment is provided for, it should be held that there will be every justification and authority for the court to ensure in the interest of the public at large and the society, that such person should undergo imprisonment for a specified period even beyond 14 years without any scope for remission. In fact, going by the caption of the said Section 433-A, it imposes a restriction on powers of remission or commutation in certain cases. For a statutory authority competent to consider a case for remission after the imposition of punishment by court of law it can be held so, then a judicial forum which has got a wider scope for considering the nature of offence and the conduct of the offender including his mens rea to bestow its judicial sense and direct that such offender does not deserve to be released early and required to be kept in confinement for a longer period, it should be held that there will be no dearth in the authority for exercising such power in the matter of imposition of the appropriate sentence befitting the criminal act committed by the convict."
(Emphasis Supplied)

29. As we notice, there has been advertence to various provisions of IPC, namely, Sections 120-B(1), 121, 132, 194, 195-A, 302, 305, 307 (Second Part), 376-A, 376-E, 396 and 364-A and certain other provisions of other Acts. The Court observed that death sentence is an exception rather than a rule and where even after applying such great precautionary prescription when the trial courts reach a conclusion to impose the maximum punishment of death, further safeguards are provided under the Criminal Procedure Code and the special Acts to make a still more concretised effort by the higher courts to ensure that no stone is left unturned before the imposition of such capital punishments. After so stating, the majority referred to the report of Justice Malimath Committee and Justice Verma Committee, and in that context, observed that:-

"91. We also note that when the Report of Justice Malimath Committee was submitted in 2003, the learned Judge and the members did not have the benefit of the law laid down in Swamy Shraddananda (2). Insofar as Justice Verma Committee Report of 2013 is concerned, the amendments introduced after the said Report in Sections 370(6), 376-A, 376-D and 376-E, such prescription stating that life imprisonment means the entirety of the convict's life does not in any way conflict with the well-thought out principles stated in Swamy Shraddananda (2). In fact, Justice Verma Committee Report only reiterated the proposition that a life imprisonment means the whole of the remaining period of the convict's natural life by referring to Mohd. Munna (2005) 7 SCC 764, Rameshbhai Chandubhai Rathod (2) v. State of Gujarat (2011) 2 SCC 764 2011 Indlaw SC 62 and State of U.P. v. Sanjay Kumar (2012) 8 SCC 537 2012 Indlaw SCO 172 and nothing more. Further, the said amendment can only be construed to establish that there should not be any reduction in the life sentence and it should remain till the end of the convict's lifespan.

30. The purpose of referring to the aforesaid analysis is only to understand the gravity and magnitude of a

case and the duty of the Court regard being had to the precedents and also the sanction of law.

31. Dealing with the procedure as a substantive part, the majority opined that:-

"Such prescription contained in the Criminal Procedure Code, though procedural, the substantive part rests in the Penal Code for the ultimate confirmation or modification or alteration or amendment or amendment of the punishment. Therefore, what is apparent is that the imposition of death penalty or life imprisonment is substantively provided for in the Penal Code, procedural part of it is prescribed in the Criminal Procedure Code and significantly one does not conflict with the other. Having regard to such a dichotomy being set out in the Penal Code and the Criminal Procedure Code, which in many respects to be operated upon in the adjudication of a criminal case, the result of such thoroughly defined distinctive features have to be clearly understood while operating the definite provisions, in particular, the provisions in the Penal Code providing for capital punishment and in the alternate the life imprisonment".

32. We need not advert to other aspects that have been dwelt upon by the Constitution Bench, for we are not concerned with the same. The submission of the learned senior counsel for the appellants is that there is an apparent error in the Constitution Bench decision as it has treated the provisions of CrPC as procedural. On a reading of the decision, it is manifest that the majority has explained how there is cohesive co-existence of CrPC and IPC. We may explain it in this manner.

Section 28 CrPC empowers the court to impose sentence authorized by law. Section 302 IPC authorizes the court to either award life imprisonment or death. As rightly submitted by Mr. Lalit and Mr. Naphade, there is a minimum and maximum. Life imprisonment as held in Gopal Vinayak Godse 1961 Indlaw SC 227 (supra), Ratan Singh 1976 Indlaw SC 590 (supra), Sohan Lal v. Asha Ram and others (1981) 1 SCC 106 1980 Indlaw SC 434 and Zahid Hussein and others v. State of W.B. and another (2001) 3 SCC 750 2001 Indlaw SC 20686 means the whole of the remaining period of the convict's natural life. The convict is compelled to live in prison till the end of his life. Sentence of death brings extinction of life on a fixed day after the legal procedure is over, including the ground of pardon or remission which are provided under Articles 71 and 161 of the Constitution. There is a distinction between the conferment of power by a statute and conferment of power under the Constitution. The same has been explained in Maru Ram 1980 Indlaw SC 577 (supra) and V. Sriharan 2015 Indlaw SC 879 (supra).

Recently, a two-Judge Bench in State of Gujarat & Anr. v. Lal Singh @ Manjit Singh & Ors. AIR 2016 SC 3197 : 2016 (6) SCALE 105 in that context has observed thus:-

"In Maru Ram 1980 Indlaw SC 577 (supra) the constitutional validity of Section 433-A CrPC which had been brought in the statute book in the year 1978 was called in question. Section 433-A CrPC imposed restrictions on powers of remission or commutation in certain cases. It stipulates that where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by laws, or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he has served at least fourteen years of imprisonment. The majority in Maru Ram 1980 Indlaw SC 577 (supra) upheld the constitutional validity of the provision. The Court distinguished the statutory exercise of power of remission and exercise of power by the constitutional authorities under the Constitution, that is, Articles 72 and 161. In that context, the Court observed that the power which is the creature of the Code cannot be equated with a high prerogative vested by the Constitution in the highest functionaries of the Union and the States, for the source is different and the substance is different. The Court observed that Section 433-A CrPC cannot be invalidated as indirectly violative of Articles 72 and 161 of the Constitution. Elaborating further, the majority spoke to the following effect:-

"... Wide as the power of pardon, commutation and release (Articles 72 and 161) is, it cannot run riot; for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course. Here, we come upon the second constitutional fundamental which underlies the submissions of counsel. It is that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power. ..."

33. In Kehar Singh and another v. Union of India and another (1989)1 SCC 204 the Constitution Bench has opined that the power to pardon is part of the constitutional scheme and it should be so treated in the Indian Republic. There has been further observation that it is a constitutional responsibility of great significance to be exercised when the occasion arises in accordance with the discretion contemplated by the context. The Court has also held that exercise of the said power squarely falls within the judicial

domain and can be exercised by the court by judicial review.

34. We have referred to the aforesaid aspect extensively as it has been clearly held that the power of the constitutional authorities under Article 71 and Article 161 of the Constitution has to remain sacrosanct but the power under Section 433-A CrPC which casts a restriction on the appropriate functionary of the Government can judicially be dealt with.

35. To elaborate, though the power exercised under Article 71 and Article 161 of the Constitution is amenable to judicial review in a limited sense, yet the Court cannot exercise such power. As far as the statutory power under Section 433-A is concerned, it can be curtailed when the Court is of the considered opinion that the fact situation deserves a sentence of incarceration which be for a fixed term so that power of remission is not exercised. There are many an authority to support that there is imposition of fixed term sentence to curtail the power of remission and scuttle the application for consideration of remission by the convict. It is because in a particular fact situation, it becomes a penological necessity which is permissible within the concept of maximum and the minimum. There is no dispute over the maximum, that is, death sentence. However, as far as minimum is concerned the submission of the learned counsel for the appellants is courts can say "imprisonment for life" and nothing else. It cannot be kept in such a strait-jacket formula. The court, as in the case at hand, when dealing with an appeal for enhancement of sentence from imprisonment of life to death, can definitely say that the convict shall suffer actual incarceration for a specific period. It is within the domain of judiciary and such an interpretation is permissible. Be it noted, the Court cannot grant a lesser punishment than the minimum but can impose a punishment which is lesser than the maximum. It is within the domain of sentencing and constitutionally permissible.

36. We must immediately proceed to state that similar conclusion has been reached by the majority in V. Sriharan 2015 Indlaw SC 879 (supra) and other cases, Mr. Lalit and Mr. Naphade would submit that the said decision having not taken note of the principles stated in K.M. Nanavati 1960 Indlaw SC 186 (supra) and Sarat Chandra Rabha 1960 Indlaw SC 434 (supra) is not a binding precedent. In K.M. Nanavati 1960 Indlaw SC 186 (supra), the question that arose before the Constitution Bench pertained to the extent of the power conferred on the Governor of a State under Article 161 of the Constitution; and whether the order of the Governor can impinge on the judicial power of this Court with particular reference to its power under Article 142 of the Constitution. Be it stated, the petitioner therein was convicted under Section 302 IPC and sentenced to imprisonment for life. After the judgment was delivered by the High Court and the writ was received by the Sessions Judge, he issued warrant of arrest of the accused for the purpose of sending him to the police officer in-charge of the City Sessions Court. The warrant was returned unserved with the report that it could not be served in view of the order passed by the Governor of Bombay suspending the sentence upon the petitioner. In the meantime, an application for leave to appeal to Supreme Court was made soon after the judgment was pronounced by the High Court and the matter was fixed for hearing. On that day, an unexecuted warrant was placed before the concerned Bench which directed that the matter is to be heard by a larger Bench in view of the unusual and unprecedented situation. A Special Bench of five Judges of the High Court heard the matter and the High Court ultimately held that as the sentence passed upon the accused had been suspended, it was not necessary for the accused to surrender and, therefore, Order XXI Rule 5 of the Supreme Court Rules would not apply to the case. The High Court opined that the order passed by the Governor was not found to be unconstitutional. A petition was filed for special leave challenging the conviction and sentence and an application was filed seeking exemption stating all the facts. The matter was ultimately referred to the Constitution Bench, and the larger Bench analyzing various facets of the Constitution, came to hold thus:-

"21. In the present case, the question is limited to the exercise by the Governor of his powers under Article 161 of the Constitution suspending the sentence during the pendency of the special leave petition and the appeal to this court; and the controversy has narrowed down to whether for the period when this court is in seizin of the case the Governor could pass the impugned order, having the effect of suspending the sentence during that period. There can be no doubt that it is open to the Governor to grant a full pardon at any time even during the pendency of the case in this court in exercise of what is ordinarily called "mercy jurisdiction". Such a pardon after the accused person has been convicted by the court has the effect of completely absolving him from all punishment or disqualification attaching to a conviction for a criminal offence. That power is essentially vested in the head of the Executive, because the judiciary has no such "mercy jurisdiction". But the suspension of the sentence for the period when this court is in seizin of the case could have been granted by this court itself. If in respect of the same period the Governor also has

power to suspend the sentence, it would mean that both the judiciary and the executive would be functioning in the same field at the same time leading to the possibility of conflict of jurisdiction. Such a conflict was not and could not have been intended by the makers of the Constitution. But it was contended by Mr Seervai that the words of the Constitution, namely, Article 161 do not warrant the conclusion that the power was in any way limited or fettered. In our opinion there is a fallacy in the argument insofar as it postulates what has to be established, namely, that the Governor's power was absolute and not fettered in any way. So long as the judiciary has the power to pass a particular order in a pending case to that extent the power of the Executive is limited in view of the words either of Sections 401 and 426 of the Code of Criminal Procedure and Articles 142 and 161 of the Constitution. If that is the correct interpretation to be put on these provisions in order to harmonise them it would follow that what is covered in Article 142 is not covered by Article 161 and similarly what is covered by Section 426 is not covered by Section 401. On that interpretation Mr Seervai would be right in his contention that there is no conflict between the prerogative power of the sovereign state to grant pardon and the power of the courts to deal with a pending case judicially."

And again:-

"As a result of these considerations we have come to the conclusion that the order of the Governor granting suspension of the sentence could only operate until the matter became sub judice in this court on the filing of the petition for special leave to appeal. After the filing of such a petition this court was seized of the case which would be dealt with by it in accordance with law. It would then be for this Court, when moved in that behalf, either to apply Rule 5 of Order 21 or to exempt the petitioner from the operation of that Rule. It would be for this court to pass such orders as it thought fit as to whether the petitioner should be granted bail or should surrender to his sentence or to pass such other or further orders as this court might deem fit in all the circumstances of the case. It follows from what has been said that the Governor had no power to grant the suspension of sentence for the period during which the matter was sub judice in this court."

37. Relying on the same, it is urged that when a constitutional court adds a third category of sentence, it actually enters into the realm of Section 433-A CrPC which rests with the statutory authority. According to the learned senior counsel for the appellants, after the conviction is recorded and sentence is imposed, the court has no role at the subsequent stage. But when higher sentence is imposed, there is an encroachment with the role of the executive. In this context, learned senior counsel have drawn our attention to the principles stated in another Constitution Bench judgment in Sarat Chandra Rabha 1960 Indlaw SC 434 (supra), wherein it has been held that the effect of pardon is different than remission which stands on a different footing altogether. The Constitution Bench, explaining the same, proceeded to state thus:-

"4. ... In the first place, an order of remission does not wipe out the offence; it also does not wipe out the conviction. All that it does is to have an effect on the execution of the sentence; though ordinarily a convicted person would have to serve out the full sentence imposed by a court, he need not do so with respect to that part of the sentence which has been ordered to be remitted. An order of remission thus does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the court, though the order of conviction and sentence passed by the court still stands as it was. The power to grant remission is executive power and cannot have the effect which the order of an appellate or revisional court would have of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court. This distinction is well brought out in the following passage from Weater's Constitutional Law on the effect of reprieves and pardons vis-a-vis the judgment passed by the court imposing punishment, at p. 176, para 134:

"A reprieve is a temporary suspension of the punishment fixed by law. A pardon is the remission of such punishment. Both are the exercise of executive functions and should be distinguished from the exercise of judicial power over sentences. 'The judicial power and the executive power over sentences are readily distinguishable,' observed Justice Sutherland. To render a judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it qua judgment'."

Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched. In this view of the matter the order of remission passed in this case though it had the effect that the appellant was released from jail before he had served the full sentence of three years' imprisonment, and had actually served only about sixteen months' imprisonment, did not in any way affect the order of conviction and sentence passed by the court which remained as it was. Therefore the terms of Section 7(b) would be satisfied in the present case and the appellant being a person convicted and sentenced to three years' rigorous imprisonment would be disqualified, as five years had not passed since his release and as the Election Commission had not removed his disqualification."

38. The analysis made in the aforesaid passage is to be appropriately appreciated. In the said case, the controversy arose with regard to the rejection of the nomination paper of the returned candidate on the ground that he was not disqualified under Section 7(b) of the Representation of the People Act, 1951. The Election Tribunal came to hold that the nomination paper of the candidate was wrongly rejected and the allegation pertaining to corrupt practice was not established. On the first count, the election was set aside. The successful candidate preferred an appeal before the High Court which came to hold that the nomination paper of the respondent before it was properly rejected. However, it concurred with the view expressed as regards corrupt practice by the tribunal. The rejection of nomination paper of the candidate was found to be justified by the High Court as he had been sentenced to undergo rigorous imprisonment for three years and five years had not passed since his release. He was sentenced to three years but the sentence was remitted by the government in exercise of power under Section 401 of old CrPC. The contention of the appellant before the tribunal was that in view of the remission, sentence, in effect, was reduced to a period of less than two years and, therefore, he could not be said to have incurred disqualification within the meaning of Section 7(b) of the said Act. The High Court formed the opinion that the remission of sentence did not have the same effect as free pardon and would not have the effect on reducing the sentence passed on the appellant. In that context, this Court has held what we have quoted hereinabove. What is being sought to be argued on the basis of the aforequoted passage is that the court does not have any role in the matter of remission. It is strictly within the domain of the executive.

39. On a careful reading of both the decisions, we have no iota of doubt in our mind that they are not precedents for the proposition that the court cannot impose a fixed term sentence. The power to grant remission is an executive power and it cannot affect the appeal or revisional power of the court. The powers are definitely distinct. However, the language of Section 433-A CrPC empowers the executive to grant remission after expiry of 14 years and it only enables the convict to apply for remission. There can be a situation as visualized in *Swamy Shraddananda (2) 2008 Indlaw SC 1128 (supra)*.

40. Learned senior counsel would submit that it is a judicial innovation or creation without sanction of law and according to them, the majority view of the Constitution Bench is not a seemly appreciation of Section 433-A CrPC. In our considered opinion, the majority view is absolutely correct and binding on us being the view of the Constitution Bench and that apart, we do not have any reason to disagree with the same for referring it to a larger Bench. We are of the convinced opinion that the situation that has been projected in *Swamy Shraddananda (2) 2008 Indlaw SC 1128 (supra)* and approved in *V. Sriharan 2015 Indlaw SC 879 (supra)* speaks eloquently of judicial experience and the fixed term sentence cannot be said to be unauthorized in law. Section 302 IPC authorizes imposition of death sentence. The minimum sentence is imprisonment for life which means till the entire period of natural life of the convict is over. The courts cannot embark upon the power to be exercised by the Executive Heads of the State under Article 71 and Article 161 of the Constitution. That remains in a different sphere and it has its independent legal sanctity. The court while imposing the sentence of life makes it clear that it means in law whole of life. The executive has been granted power by the legislature to grant remission after expiry of certain period. The court could have imposed the death sentence. However, in a case where the court does not intend to impose a death sentence because of certain factors, it may impose fixed term sentence keeping in view the public concept with regard to deterrent punishment. It really adopts the view of "expanded option", lesser than the maximum and within the expanded option of the minimum, for grant of remission does not come in after expiry of 14 years. It strikes a balance regard being had to the gravity of the offence. We, therefore, repel the submission advanced by the learned senior counsel for the appellants.

41. In this context, another submission deserves to be noted. It is canvassed by the learned senior counsel for the appellants that the issue of enhancement and scope of enhancement was not referred to the Constitution Bench. The reference order which has been quoted in *V. Sriharan 2015 Indlaw SC 879 (supra)* has been brought to our notice to highlight the point that in the absence of a reference by the concerned Bench, the Constitution Bench could not have adverted to the said aspect. The said submission is noted only to be rejected. The larger Bench has framed the issues which deserve to be answered and, as seen from the entire tenor of the judgment, it felt that it is obliged to address the issue regard being had to the controversy that arises in number of cases. In fact, as is evincible, question Nos. (i) and (ii) of paragraph 2.2 have been specifically posed in this manner. We do not think that there is any impediment on the part of the Constitution Bench to have traversed on the said issues. In fact, in our view, the Constitution Bench has

correctly adverted to the same and clarified the legal position and we are bound by it.

42. The next contention which is canvassed on behalf of the appellants is that when the High Court exercised the power under Section 368 CrPC and thinks of commuting the death sentence, then only it can pass a fixed term sentence and not otherwise. In this regard, we have been commended to the authorities in Sahib Hussain 2013 Indlaw SC 256 (supra) and Gurvail Singh 2013 Indlaw SCO 1493 (supra). In Sahib Hussain 2013 Indlaw SC 256 (supra), the Court took note of the decision in Shri Bhagwan v. State of Rajasthan (2001) 6 SCC 296 wherein this Court had commuted the death sentence imposed on the appellant therein and directed that the appellant shall undergo the sentence of imprisonment for life with the further direction that the appellant shall not be released from the prison unless he had served out at least 20 years of imprisonment including the period already undergone by him. The authority in Prakash Dhawal Khairnar (Patil) v. State of Maharashtra (2002) 2 SCC was noticed wherein the Court set aside the death sentence and directed that the appellant therein shall suffer imprisonment for life but he shall not be released unless he had served out at least 20 years of imprisonment including the period already undergone by him.

The two-Judge Bench referred to Ram Anup Singh and others v. State of Bihar (2002) 6 SCC 686, Nazir Khan and others vs. State of Delhi (2003) 8 SCC 461, Swamy Shraddananda (2) 2008 Indlaw SC 1128 (supra), Haru Ghosh v. State of West Bengal (2009) 15 SCC 551, Ramraj v. State of Chhattisgarh (2010) 1 SCC 573, Neel Kumar alias Anil Kumar v. State of Haryana (2012) 5 SCC 766, Sandeep v. State of U.P. (2012) 6 SCC 107 and Gurvail Singh 2013 Indlaw SCO 1493 (supra) and held that:-

"It is clear that since more than a decade, in many cases, whenever death sentence has been commuted to life imprisonment where the offence alleged is serious in nature, while awarding life imprisonment, this Court reiterated minimum years of imprisonment of 20 years or 25 years or 30 years or 35 years, mentioning thereby, if the appropriate Government wants to give remission, the same has to be considered only after the expiry of the said period...."

Thereafter, the Court referred to Swamy Shraddananda (2) 2008 Indlaw SC 1128 (supra) and the pronouncement in Shri Bhagwan 2001 Indlaw SC 20087 (supra) and opined thus:-

"36. It is clear that in Swamy Shraddananda, this Court noted the observations made by this Court in Jagmohan Singh v. State of U.P. 1972 Indlaw SC 736 and five years after the judgment in Jagmohan case, Section 433-A was inserted in the Code imposing a restriction on the power of remission or commutation in certain cases. After the introduction of Section 433-A another Constitution Bench of this Court in Bachan Singh v. State of Punjab 1980 Indlaw SC 624, with reference to power with regard to Section 433-A which restricts the power of remission and commutation conferred on the appropriate Government, noted various provisions of the Prisons Act, Jail Manual, etc. and concluded that reasonable and proper course would be to expand the option between 14 years' imprisonment and death. The larger Bench has also emphasised that: [Swamy Shraddananda (2) case 2008 Indlaw SC 1128, SCC p. 805, para 92]

*"92. ... the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all."
In the light of the detailed discussion by the larger Bench, we are of the view that the observations made in Sangeet case⁴² 2012 Indlaw SC 466 are not warranted. Even otherwise, the above principles, as enunciated in Swamy Shraddananda are applicable only when death sentence is commuted to life imprisonment and not in all cases where the Court imposes sentence for life."*

43. Learned senior counsel have emphasized on the last part of the aforequoted passage to buttress the stand that when the trial judge had not imposed the death sentence, the question of commutation did not arise and hence the 42 Sangeet v. State of Haryana, (2013) 2 SCC 452 2012 Indlaw SC 466 High Court could not have imposed a fixed term sentence and could have only affirmed the sentence of imprisonment for life.

44. In Gurvail Singh 2013 Indlaw SCO 1493 (supra), the Court was dealing with the petition under Article 32 of the Constitution for issue of a direction to convert the sentence of the petitioner from 30 years without remission to a sentence of life imprisonment and further to declare that this Court is not competent to fix a particular number of years (with or without remission) when it commutes the death sentence to life

imprisonment while upholding the conviction of the accused under Section 302 IPC. The two-Judge Bench referred to the decision in Sangeet 2012 Indlaw SC 466 (supra) which has also been referred in Sahib Hussain 2013 Indlaw SC 256 (supra) and, thereafter, the Court observed:-

"6. The issue involved herein has been raised before this Court time and again. Two-Judge as well as three-Judge Benches have several times explained the powers of this Court in this regard and it has consistently been held that the Court cannot interfere with the clemency powers enshrined under Articles 72 and 161 of the Constitution of India or any rule framed thereunder except in exceptional circumstances. So far as the remissions, etc. are concerned, these are executive powers of the State under which, the Court may issue such directions if required in the facts and circumstances of a particular case."

After so stating, the Court referred to Swamy Shraddananda 2008 Indlaw SC 1128 (supra) and State of Uttar Pradesh. v. Sanjay Kumar (2012) 8 SCC 537 2012 Indlaw SCO 172 and reproduced a passage from Sanjay Kumar 2012 Indlaw SCO 172 (supra) which we think seemly to quote:-

"24. ... The aforesaid judgments make it crystal clear that this Court has merely found out the via media, where considering the facts and circumstances of a particular case, by way of which it has come to the conclusion that it was not the 'rarest of rare cases', warranting death penalty, but a sentence of 14 years or 20 years, as referred to in the guidelines laid down by the States would be totally inadequate. The life imprisonment cannot be equivalent to imprisonment for 14 years or 20 years, rather it always meant as the whole natural life. This Court has always clarified that the punishment so awarded would be subject to any order passed in exercise of the clemency powers of the President of India or the Governor of the State, as the case may be. Pardons, reprieves and remissions are granted in exercise of prerogative power. There is no scope of judicial review of such orders except on very limited grounds, for example, non-application of mind while passing the order; non-consideration of relevant material; or if the order suffers from arbitrariness. The power to grant pardons and to commute sentences is coupled with a duty to exercise the same fairly and reasonably. Administration of justice cannot be perverted by executive or political pressure. Of course, adoption of uniform standards may not be possible while exercising the power of pardon. Thus, such orders do not interfere with the sovereign power of the State. More so, not being in contravention of any statutory or constitutional provision, the orders, even if treated to have been passed under Article 142 of the Constitution do not deserve to be labelled as unwarranted. The aforesaid orders have been passed considering the gravity of the offences in those cases that the accused would not be entitled to be considered for premature release under the guidelines issued for that purpose i.e. under the Jail Manual, etc. or even under Section 433-A of the Code of Criminal Procedure."

45. Thereafter, the two-Judge Bench referred to the pronouncement in Sahib Hussain 2013 Indlaw SC 256 (supra) and opined thus:-

"12. Thus, it is evident that the issue raised in this petition has been considered by another Bench and after reconsidering all the relevant judgments on the issue the Court found that the observations made in Sangeet were unwarranted i.e. no such observations should have been made. This Court issued orders to deprive a convict from the benefit of remissions only in cases where the death sentence has been commuted to life imprisonment and it does not apply in all the cases wherein the person has been sentenced to life imprisonment."

47. In the instant case, the prosecution had preferred an appeal under Section 377 CrPC before the High Court for enhancement of sentence of imposition of life to one of death. On a reading of the said provision, there can be no trace of doubt that the High Court could have enhanced the sentence of imposition of life to death. In this context, we may usefully refer to Jashubha Bharatsinh Gohil and others v. State of Gujarat (1994) 4 SCC 353 1994 Indlaw SC 1475 wherein it has been ruled thus:-

"12. It is needless for us to go into the principles laid down by this Court regarding the enhancement of sentence as also about the award of sentence of death, as the law on both these subjects is now well settled. There is undoubtedly power of enhancement available with the High Court which, however, has to be sparingly exercised. No hard and fast rule can be laid down as to in which case the High Court may enhance the sentence from life imprisonment to death. ..."

Thus, the power is there but it has to be very sparingly used. In the instant case, the High Court has thought it appropriate instead of imposing death sentence to impose the sentence as it has done. Therefore, the sentence imposed by the High Court cannot be found fault on that score.

48. At this stage we think it appropriate to deal with another facet of the said submission. It is strenuously urged that the High Court can impose the punishment what the trial court can impose. In Jagat Bahadur 1965 Indlaw SC 275 (supra) it has been held that:-

"An appeal court is after all 'a Court of error', that is, a court established for correcting an error. If, while purporting to correct an error, the court were to do something which was beyond the competence of the trying court, how could it be said to be correcting an error of the trying court? No case has been cited before us in which it has been held that the High Court, after setting aside an acquittal, can pass a sentence beyond the competence of the trying court. Therefore, both on principle and authority it is clear that the power of the appellate court to pass a sentence must be measured by the power of the court from whose judgment an appeal has- been brought before it."

49. In Jadhav 1969 Indlaw SC 496 (supra) the Court ruled that:-

"An appeal is a creature of a statute and the powers and jurisdiction of the appellate court must be circumscribed by the words of the statute. At the same time a Court of appeal is a "Court of error" and its normal function is to correct the decision appealed from and its jurisdiction should be co-extensive with that of the trial court. It cannot and ought not to do something which the trial court was not competent to do. There does not seem to be any fetter to its power to do what the trial court could do."

50. We have reproduced the said passages as the learned senior counsel appearing for the appellant would contend as the court of appeal is only a "Court of error" and its jurisdiction should be co-extensive with that of the trial court. Both the decisions dealt with different kind of offences where the sentence has been prescribed to be imposed for a particular by the trial court and in that context the Court held that the appellate court could not have imposed a sentence beyond the competence of the trial court. If the trial court has no jurisdiction to impose such a sentence, the High Court as a "Court of error" cannot pass a different harsher sentence. There can be no dispute over the proposition stated in the said two authorities. But in the case at hand, the appellants were convicted under section 302 IPC and the trial court could have been impose the sentence of death and that apart, the appeal has been preferred by the State. Thus, the ratio laid down in the said authorities is not applicable to the case at hand.

51. The next submission that is put forth is that the decision in V. Sriharan 2015 Indlaw SC 879 (supra) runs counter to the principles stated in A.R. Antulay 1988 Indlaw SC 467 (supra). Explicating the said stand, it is argued that in the said case the Constitution Bench had directed that the case of the petitioner should be tried by the learned Judge of the High Court as he was tried for the offence under the Prevention of Corruption Act, 1988. The Bench of seven-Judges recalled that order on three counts, namely, a trial under the Prevention of Corruption Act, 1988 has to be held by a special Judge appointed under the said Act and this Court has no jurisdiction to direct the trial to be held by a High Court Judge; that the statutory right of the petitioner for filing an appeal to the High Court could not be taken away by this Court; and that the earlier direction abridged the right of the petitioner therein under Articles 14 and 21 of the Constitution. Drawing an analogy it is contended that V. Sriharan 2015 Indlaw SC 879 (supra) takes away the statutory right of the convict to apply for commutation/remission under Sections 432 and 433 CrPC, and also affects the right under Article 21 of the Constitution. Learned senior counsel for the appellants would contend that the principles stated in A.R. Antulay 1988 Indlaw SC 467 (supra) have not been kept in view in V. Sriharan 2015 Indlaw SC 879 (supra) and, therefore, it is not a binding precedent and a two-Judge Bench should either say that it is per incuriam or refer it to a larger Bench. With regard to declaring a larger Bench judgment per incuriam, learned senior counsel for the appellants have drawn inspiration from the authority in Fibre Boards Private Limited, Bangalore v. Commissioner of Income-Tax, Bangalore (2015) 10 SCC 333 2015 Indlaw SC 552. In that case, the two-Judge Bench referred to Mamleshwar Prasad v. Kanhaiya Lal (1975) 2 SCC 232 1975 Indlaw SC 415 and State of U.P. and another v. Synthetics and Chemicals Ltd. and another (1991) 4 SCC 139 1991 Indlaw SC 702 and took note of the earlier Constitution Bench judgment in State of Orissa v. M.A. Tulloch and Co. (1964) 4 SCR 461 1964 Indlaw SC 325, and held thus:-

"35. The two later Constitution Bench judgments in Rayala Corpn. (P) Ltd. v. Director of Enforcement (1969) 2 SCC 412 1969 Indlaw SC 146 and Kolhapur Canesugar Works Ltd. v. Union of India (2000) 2 SCC 536 2000 Indlaw SC 39 also did not have the benefit of the aforesaid exposition of the law. It is clear that even an implied repeal of a statute would fall within the expression "repeal" in Section 6 of the General Clauses Act. This is for the reason given by the Constitution Bench in M.A. Tulloch & Co. that only the form of repeal differs but there is no difference in intent

or substance. If even an implied repeal is covered by the expression "repeal", it is clear that repeals may take any form and so long as a statute or part of it is obliterated, such obliteration would be covered by the expression "repeal" in Section 6 of the General Clauses Act."

52. Be it noted, the Court followed the principles stated in M.A. Tulloch and Co. 1964 Indlaw SC 325 (supra) and not in Rayala Corpn. (P) Ltd. 1969 Indlaw SC 146 (supra). In State of U.P. v. Synthetics and Chemicals Ltd. (1991) 4 SCC 139 1991 Indlaw SC 702 a two-Judge Bench of this Court held that one particular conclusion of a Bench of seven-Judges in Synthetics and Chemicals Ltd. and others v. State of U.P. and others (1990) 1 SCC 109 1989 Indlaw SC 286 as per incuriam. The two-Judge Bench in Synthetics and Chemicals Ltd. 1991 Indlaw SC 702 (supra) opined thus:-

"36. The High Court, in our view, was clearly in error in striking down the impugned provision which undoubtedly falls within the legislative competence of the State, being referable to Entry 54 of List II. We are firmly of the view that the decision of this Court in Synthetics (1990) 1 SCC 109 1989 Indlaw SC 286 is not an authority for the proposition canvassed by the assessee in challenging the provision. This Court has not, and could not have, intended to say that the Price Control Orders made by the Central Government under the IDR Act imposed a fetter on the legislative power of the State under Entry 54 of List II to levy taxes on the sale or purchase of goods. The reference to sales tax in paragraph 86 of that judgment was merely accidental or per incuriam and has, therefore, no effect on the impugned levy."

53. The observations speak for themselves. We are not inclined to enter into the doctrine of precedents and the principle of per incuriam in the instant case. Suffice it to say that the grounds on which it is urged that the Constitution Bench decision in V. Sriharan 2015 Indlaw SC 879 (supra) runs counter to the larger Bench decision in A.R. Antulay 1988 Indlaw SC 467 (supra) are fallacious. In A.R. Antulay 1988 Indlaw SC 467 (supra), the High Court had no jurisdiction to try the case under the Prevention of Corruption Act, 1988 and consequently, by virtue of a direction the accused was losing the right to appeal. Both could not have been done and that is why, the larger Bench reviewed the Constitution Bench judgment. For better appreciation, we may reproduce what Mukherjee, J. (as His Lordship then was) speaking for three learned Judges had to say:-

".. By reason of giving the directions on February 16, 1984 this Court had also unintentionally caused the appellant the denial of rights under Article 14 of the Constitution by denying him the equal protection of law by being singled out for a special procedure not provided for by law. When these factors are brought to the notice of this Court, even if there are any technicalities this Court should not feel shackled and decline to rectify that injustice or otherwise the injustice noticed will remain forever a blot on justice. It has been said long time ago that "actus curiae neminem gravabit" - an act of the court shall prejudice no man. This maxim is founded upon justice and good sense and affords a safe and certain guide for the administration of the law."

And again:-

"In the aforesaid view of the matter the appeal is allowed; all proceedings in this matter subsequent to the directions of this Court on 16-2-1984 as indicated before are set aside and quashed. The trial shall proceed in accordance with law, that is to say under the Act of 1952 as mentioned hereinbefore."

The majority concurred with the said opinion.

54. In the case at hand, the question of forum of trial does not arise. What is fundamentally argued is that the right of the appellants to submit an application is abrogated. An attempt has been made to elevate the same to a constitutional right. The right of an appeal and abrogation thereof by a direction of this Court is totally different and that is the principle which compelled the larger Bench to recall its order. They applied the principle of ex debito justitiae and passed the order reproduced hereinabove.

55. Having adverted to the factual scenario, we have to understand the obtaining situation. In the present context, a convict is not permitted to submit an application under Section 433-A CrPC because of sentence imposed by a Court. There is no abrogation of any fundamental or statutory right. If the imposition of sentence is justified, as a natural corollary the principle of remission does not arise. The principle for applying remission arises only after expiry of 14 years if the Court imposes sentence of imprisonment for life. When there is exercise of expanded option of sentence between imprisonment for life and death sentence, it comes within the sphere or arena of sentencing, We have already held that the said exercise of expanded option is permissible as has been held in many a judgment of this Court and finally by the Constitution Bench. The said exercise, on a set of facts, has a rationale. It is based on a sound principle.

Series of judgments have been delivered by this Court stating in categorical terms that imprisonment for life means remaining of the whole period of natural life of the convict.

The principle of exercise of expanded expansion has received acceptance because the Court when it does not intend to extinguish the spark of life of the convict by imposing the death sentence. We have already discussed that facet earlier and not accepted the submission to refer the matter to the larger Bench. We have no hesitation in holding that the principles stated in A.R. Antulay 1988 Indlaw SC 467 (supra) do not apply to the application to be preferred under Section 433-A CrPC, and, therefore, the judgment in V. Sriharan 2015 Indlaw SC 879 (supra) is a binding precedent.

56. The next aspect that is required to be deliberated upon is the factual score of the case that would include the genesis of crime, the nature of involvement, the manner in which it has been executed, the antecedents of the appellants, the motive that has moved the appellants to do away with a young life, the gravity and the social impact of the crime, the suffering of the family of the victim, the fear of the collective when such a crime takes place, the category to which the High Court has fitted it, after expressing its disinclination not to impose the death sentence and other connected factors.

57. It is submitted by the learned counsel for the appellants that the imposition of fixed term sentence is highly disproportionate and unjustified in the particular facts of the case, for as the conviction is based on the circumstantial evidence and as per the materials brought on record only a single blow was inflicted not by any lethal weapon but by a hammer. Though the High Court has referred to various aggravating and mitigating circumstances, yet, it has misdirected itself by holding that the motive of crime is "honour killing". That apart, the High Court has taken into consideration the false plea of alibi, intimidation of witnesses, misleading of the police in the matter of recovery, intimidation of the public prosecutor, the factum of abscondence, conviction in another case, the inhuman treatment of the deceased, commission of murder while the appellants had the trust of the deceased, the depravity of the mind, reflection of cold bloodedness in commission of the crime, the brutality that shocks the judicial conscience, absence of probability of reformation of the convicts and such other aspects of which some are not relevant and some have not been duly considered while imposing such harsh punishment.

58. It is urged by them, the approach of the High Court dealing with death penalty and arriving at the conclusion that the case is not a rarest of rare one has completely misdirected itself and, therefore, the imposition of fixed term sentence is wholly unsustainable. They have commended us to the authorities in Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546, Oma alias Omprakash and another v. State of Tamil Nadu (2013) 3 SCC 440, Mohd. Farooq Abdul Gafur and another v. State of Maharashtra (2010) 14 SCC 641, Mohinder Singh v. State of Punjab (2013) 3 SCC 294 and Mangesh v. State of Maharashtra (2011) 2 SCC 123.

59. Learned counsel for the State submits that the crime was premeditated and diabolic in nature and the same is evincible from the discussion of the judgment of conviction of the High Court and the said findings are beyond assail as no leave has been granted in that regard and the Special Leave Petition has been dismissed. According to the learned counsel for the State, the said findings which find place in the judgment of conviction are not subject to criticism and can be relied upon to describe the nature of commission of crime. Mr. Krishnan, would further submit that the sentence imposed is not disproportionate.

60. On a careful scrutiny of the judgment of conviction, it is seen that the High Court has taken note of the facts that the deceased Nitish Katara and Bharti Yadav (sister of Vikas Yadav; first cousin sister of Vishal Yadav and; daughter of Shri D.P. Yadav who was also the employer of Sukhdev @ Pehalwan) were in an intimate relationship aiming towards permanency; that the family members of Bharti Yadav, including Vikas and Vishal Yadav, were opposed to this relationship; that the aversion stemmed from the reason that Nitish Katara did not belong to the same caste as that of Bharti Yadav, that his family belonged to the service class and belonged to economically lower strata; that Vishal Yadav and Sukhdev @ Pehalwan had not been invited to the wedding and had no reason for being there, other than perpetration of the crime; that Nitish Katara was abducted from the wedding venue by the appellants with the common intention to murder him; that in furtherance of their common intention Nitish Katara was thereafter murdered by the appellants; that after murdering Nitish Katara, the appellants removed his clothes, wrist watch and mobile

from his person and set aflame his dead body with the intention of preventing identification of the body and destroying evidence of the commission of the offence; that immediately after the incident, the three appellants absconded; that the dead body of Nitish Katara was found at 9.30 a.m. in the morning of 17th February, 2002 in a completely burnt, naked and unidentifiable condition on the Shikharpur Road which was recovered by the Khurja Police; that the body was having a lacerated wound on the head, a fracture in the skull, laceration and hematoma in the brain immediately below the fracture; that Vikas and Vishal Yadav deliberately misled the police and took them to three places in Alwar (Rajasthan) to search for Tata Safari vehicle which was obviously not there; that Vikas and Vishal Yadav jointly misled the police to the taxi stand behind Shamsan Ghat (cremation ground) in Panipat to search for the Tata Safari which was again not there, and, enroute to Chandigarh for the same purpose, got recovered the Tata Safari Vehicle bearing registration No. PB-07H 0085 recovered from the burnt down factory premises of M/s. A.B. Coltex Limited; that the appellant Sukhdev @ Pehalwan absconded for over three and half years despite extensive searches, raids, issuance of coercive process, attachment even at his native village and that he could be arrested only on the 23rd of February, 2005 after he fired at police patrol party.

61. From the aforesaid findings recorded by the High Court it is vivid that crime was committed in a planned and cold blooded manner with the motive that has emanated due to feeling of some kind uncalled for and unwarranted superiority based on caste feeling that has blinded the thought of "choice available" to a sister - a representative of women as a class. The High Court in its judgment of conviction has unequivocally held that it is a "honour killing" and the said findings apart from being put to rest, also gets support from the evidence brought on record. The circumstantial evidence by which the crime has been established, clearly lead to one singular conclusion that the anger of the brother on the involvement of the sister with the deceased, was the only motive behind crime. While dwelling upon the facet of honour killing the High Court in the judgment of conviction has held:-

"2023. The instant case manifests that even in a household belonging to the highest class in society, (one in which you can make day trips with friends from Ghaziabad to Mumbai just to celebrate a birthday; owns multiple businesses and properties, luxury vehicles etc.) what can happen to even a young, educated, articulate daughter if she attempted to break away from the conventional caste confines and explored a lifetime alliance with a member of another caste. Especially one who was also perceived to be of a lesser economic status.

2024. We have found that immediately after Shivani Gaur's wedding, Bharti was completely segregated and confined by her family. On the 17th of February 2002 itself, she was spirited away from her residence in Ghaziabad to Faridabad. The police could record her statement under Section 161 of the Cr.P.C. only on the 2nd of March 2002 that too under the eagle eye of her father, a seasoned politician. Shortly thereafter, she was sent out of India to U.K. and kept out of court for over three and a half years. Her testimony is evidence of the influence of her brothers and family as she prevaricates over trivial matters and denies established facts borne out by documentary evidence. Finally, when she must have been stretched to the utmost, she succumbs to their pressures when she concedes a deviously put suggestion.

2025. Undoubtedly, the family of Nitish Katara has suffered at his demise and thereafter. Having given our thought to this issue, we are of the view that apart from the deceased and his family, there is one more victim in an "honour killing".

66. Be it stated, though the High Court treated the murder as "honour killing", yet regard being had to other factors did not think appropriate to impose extreme penalty of death sentence. We may hasten to clarify that we have highlighted the factum of "honour killing", as that is a seminal ground for imposing the fixed term sentence of twenty-five years for the offences under section 302/34 IPC on the two accused persons, who though highly educated in good educational institutions, had not cultivated the ability to abandon the depreciable feelings and attitude for centuries. Perhaps, they have harboured the fancy that it is an idea of which time had arrived from time immemorial and ought to stay till eternity.

67. One may feel "My honour is my life" but that does not mean sustaining one's honour at the cost of another. Freedom, independence, constitutional identity, individual choice and thought of a woman be a wife or sister or daughter or mother cannot be allowed to be curtailed definitely not by application of physical force or threat or mental cruelty in the name of his self-assumed honour. That apart, neither the family members nor the members of the collective has any right to assault the boy chosen by the girl. Her individual choice is her self-respect and creating dent in it is destroying her honour. And to impose so

called brotherly or fatherly honor or class honor by eliminating her choice is a crime of extreme brutality, more so, when it is done under a guise. It is a vice, condemnable and deplorable perception of "honour", comparable to medieval obsessive assertions.

68. Apart from the issue of honour killing, the High Court has also adjudicated to the brutal manner in which the crime has been committed. Mr. Lalit, learned senior counsel has highlighted on infliction of a single blow. The High Court appreciating the material brought on record, has given a graphic description.

69. The High Court has also taken note of the impact of post-offence events and observed that the deceased was burnt to such a point that his own mother could only suggest the identification from the small size of one unburnt palm with fingers of the hand that the body appeared to be that of her deceased son. The identification had to be confirmed by DNA testing. While imposing the sentence, the High Court has been compelled to observe that the magnitude of vengeance of the accused and the extent to which they had gone to destroy the body of the deceased after his murder shows the brutality involved in the crime and the maladroit efforts that were made to destroy the evidence. From the evidence brought on record as well as the analysis made by the High Court, it is demonstrable about the criminal proclivity of the accused persons, for they have neither the respect for human life nor did they have any concern for the dignity of a dead person. They had deliberately comatosed the feeling that even in death a person has dignity and when one is dead deserves to be treated with dignity. That is the basic human right. The brutality that has been displayed by the accused persons clearly exposes the depraved state of mind.

70. The conduct during the trial has also been emphasized by the High Court because it is not an effect to protect one-self, but the arrogance and the impunity shown in which they set up false defense and instilled shivering fear in the mind and heard of witnesses with the evil design of defeating the prosecution case. In fact, as has been recorded by the High Court, the public prosecutor was also not spared. The factum of abscondance and non-cooperation with the investigating team and also an maladroit effort to mislead the investigators have been treated as aggravating circumstances on the basis of authorities in *Praveen Kumar v State of Karnataka* (2003) 12 SCC 199 and *Yakub Abdul Razak Memon v State of Maharashtra* (2013) 13 SCC 1.

71. The criminal antecedents of accused Vikas Yadav has been referred to in detail by the High Court. He was prosecuted in "Jesica Lal murder case" and convicted under Section 201/120-B IPC and sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs.2000 and, in default, of payment of fine, to further undergo imprisonment for three months. This Court in *Sidhartha Vashisht alias Manu Sharma v State (NCT of Delhi)* (2010) 6 SCC 1 2010 Indlaw SC 296 affirmed the conviction. The conclusion reached while affirming the decision of the High Court, is as follows:-

"303. (9) The High Court has rightly convicted the other two accused, namely, Amardeep Singh Gill @ Tony Gill and Vikas Yadav after appreciation of the evidence of PWs 30 and 101."

During the period, the said Vikas Yadav was on bail, he committed the present crime.

74. The next contention that is canvassed pertains to non-application of mind by the High Court while imposing the sentence, for two accused persons have been sentenced for twenty-five years and Sukhdev, the other appellant, has been sentenced to twenty years. The High Court, while dealing with Vikas Yadav and Vishal Yadav has opined that they had misused the process of law while in jail and in their conduct there is no sign of any kind of remorse or regret. As far as the Sukhdev is concerned, the High Court has taken his conduct in jail which had been chastened and punishment was imposed once. The High Court has taken note of the fact that Sukhdev was the employee of the father of Vikas Yadav and he is a married man with five children and on account of his incarceration, his family is in dire stress. A finding has been returned that he is not a person of substantial means and has lesser paying capacity. On the basis of these facts and circumstances, the High Court has drawn a distinction and imposed slightly lesser sentence in respect of Sukhdev.

74A. Thus analyzed, we find that the imposition of fixed term sentence on the appellants by the High Court cannot be found fault with. In this regard a reference may be made to a passage from *Guru Basavaraj vs State of Karnataka* (2013) 7 SCC 545, wherein while discussing about the concept of appropriate sentence, the Court has expressed thus:-

"18. Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect - propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors. Needless to emphasise, these are certain illustrative aspects put forth in a condensed manner. We may hasten to add that there can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalized judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crime [incarceration meaning] has been committed and other concomitant factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in conceptual essence of just punishment."

75. Judged on the aforesaid parameters, we reiterate that the imposition of fixed terms sentence is justified.

76. The next submission pertains to the direction by the High Court with regard to the sentence imposed under Section 201 to run consecutively. Learned counsel for the appellants have drawn our attention to the Constitution Bench decision in V. Sriharan 2015 Indlaw SC 879 (supra) . The larger Bench was dealing with the following question:-

"Whether consecutive life sentences can be awarded to a convict on being found guilty of a series of murders for which he has been tried in a single trial?"

77. Learned counsel appearing for the appellants have drawn out attention to the analysis whether a person sentenced to undergo imprisonment for life when visited with the "term sentence" should suffer them consecutively or concurrently. The larger Bench in that context has held thus:-

"We do not, however, think so. The power of the Court to direct the order in which sentences will run is unquestionable in view of the language employed in Section 31 of the Cr.P.C. The Court can, therefore, legitimately direct that the prisoner shall first undergo the term sentence before the commencement of his life sentence. Such a direction shall be perfectly legitimate and in tune with Section 31. The converse however may not be true for if the Court directs the life sentence to start first it would necessarily imply that the term sentence would run concurrently. That is because once the prisoner spends his life in jail, there is no question of his undergoing any further sentence."

78. In the instant case, the trial Court has imposed the life sentence and directed all the sentences to be concurrent. The High Court has declined to enhance the sentence from imprisonment for life to death, but has imposed a fixed term sentence. It curtails the power of remission after fourteen years as envisaged under Section 433-A. In such a situation, we are inclined to think that the principle stated by the aforesaid Constitution Bench would apply on all fours. The High Court has not directed that the sentence under Section 201/34 IPC shall run first and, thereafter, the fixed term sentence will commence. Mr. Dayan Krishnan, learned senior counsel appearing for the State has argued that this Court should modify the sentence and direct that the appellants shall suffer rigorous imprisonment for the offence punishable under Section 201/34 IPC and, thereafter, suffer the fixed term sentences. Similar argument has been made in the written submission by the learned counsel for the informant. As the High Court has not done it, we do not think that it will be appropriate on the part of this Court in the appeal preferred by the appellants to do so. Therefore, on this score we accept the submission of the learned counsel for the appellants and direct that the sentence imposed for the offence punishable under Section 201/34 IPC shall run concurrently with the sentence imposed for other offences by the High Court.

79. The last plank of submission advanced by the learned counsel for the appellant pertains to imposition of fine by the High Court. The High Court has already given the reasons and also adverted to the paying capacities. The concept of victim compensation cannot be marginalized. Adequate compensation is required to be granted. The High Court has considered all the aspects and enhanced the fine, determined the compensation and prescribed the default clause. We are not inclined to interfere with the same.

80. Consequently, the appeals are disposed of with the singular modification in the sentence i.e. the sentence under Section 201/34 IPC shall run concurrently. Needless to say, all other sentences and directions will remain intact. Appeals disposed of

(2019)7SCC1

Accused 'x'
Vs.
State of Maharashtra

Judges/Coram:

N.V. Ramana, Mohan M. Shantanagoudar and Indira Banerjee, JJ.

CaseNote:

Criminal - Death sentence - Mental illness - Mitigating circumstance - Sections 201, 363, 376 and 302 of Indian Penal Code, 1860 (IPC) and Section 235 (2) of Code of Criminal Procedure, 1973 (CrPC) - Present appeal was against confirmation to sentence of punishment with death as confirmed to Accused - How could culpability be assessed for sentencing those with mental illness - Whether sentence of death awarded to Petitioner was commuted to imprisonment for remainder of his life.

Facts:

The instant proceedings pertain to the reopening of Review Petition to review the final judgment passed by this Court in Criminal Appeal dismissing the appeal filed by the Review Petitioner (the Petitioner) and confirming his conviction under Sections 201, 363, 376 and 302 of IPC. Vide the impugned judgment, this Court upheld the sentence of 2 years' rigorous imprisonment each under Sections 201 and 363, 10 years' rigorous imprisonment under Section 376 and the death sentence under Section 302 of IPC imposed upon the Petitioner. This petition raises complex questions concerning the relationship between mental illness and crime. Petitioner raised only two arguments: firstly, that the Trial Court had not given the Petitioner a separate hearing while awarding the sentence, in direct contravention of Section 235(2) of the CrPC, which provides for the right of pre-sentencing hearing as affirmed by this Court in *Bachan Singh v. State of Punjab*, and a plethora of other decisions; and secondly, that the award of the death sentence to the Petitioner is contrary to the ratio of the three-Judge Bench decision of this Court in *Shatrughan Chauhan v. Union of India*, followed in a four-Judge Bench decision of this Court in *Navneet Kaur v. State*, which held that, the execution of persons suffering from mental illness or insanity violates Article 21 of the Indian Constitution and that such mental illness or insanity would be a supervening circumstance meriting commutation of the death sentence to life imprisonment.

Held, while allowing the petition in part

1. At the stage of hearing on sentence, generally, the Accused argues based on the mitigating circumstances in his favour for imposition of lesser sentence. On the other hand, the State/the complainant would argue based on the aggravating circumstances against the Accused to support the contention relating to imposition of higher sentence. The object of Section 235 (2) of CrPC is to provide an opportunity for Accused to adduce mitigating circumstances. This does not mean, however, that the Trial Court can fulfil the requirements of Section 235(2) of CrPC only by adjourning the matter for one or two days to hear the parties on sentence. If the Accused is ready to submit his arguments on this aspect on the very day of pronouncement of the judgment of conviction, it is open for the Trial Court to hear the parties on sentence on the same day after passing the judgment of conviction. In a given case, based on facts and circumstances, the Trial Court may choose to hear the parties on the next day or after two days as well. [33]

2. As long as the spirit and purpose of Section 235(2) is met, as the Accused is afforded a real and effective opportunity to plead his case with respect to sentencing, whether simply by way of oral submissions or by also bringing pertinent material on record, there is no bar on the pre-sentencing hearing taking place on the same day as the pre-conviction hearing. Depending on the facts and circumstances, a separate date may be required for hearing on sentence, but it is equally permissible to argue on the question of sentence on the same day if the parties wish to do so. [34]

3. The Trial Court heard the Petitioner on the aspect of imposition of sentence separately. Trial Court has fully complied with the requirement of Section 235(2) of CrPC, While coming to its conclusion, the Court held that the aggravating circumstances of the crime, i.e. the magnitude and manner of commission of the crime in the form of the kidnapping, rape and murder of two minor girls, outweighed the mitigating circumstances of the Accused, i.e. the dependency of his aged mother on him, and his young age. The Court also gave weightage to the prior convictions of the Accused for the same kind of offence, i.e. for the offence of rape of a nine-year-old girl child under Sections 376 and 506 of IPC and Section 57 of the Bombay Children Act, as well as for the kidnapping and rape of a seven-year-old girl child Under Sections 363 and 366 of IPC. In light of his two prior convictions, the Trial Court also gave him an opportunity to be heard on the question of Section 75 of IPC, which pertains to enhance punishment for certain offences under Chapter XII or XVII of IPC after previous conviction, but the factum of these convictions was also not contested by the Petitioner. [40]

4. Before the High Court as well, further material was brought on record by the Petitioner regarding his discharge in one case related to offences of the same nature, which the Court found to not be in the nature of a mitigating circumstance. The High Court was of the opinion that, the dependency of aged parents could also not be considered as a mitigating circumstance to begin with, and that the Accused was not young enough for his age to be considered as a mitigating circumstance. The High Court noted the absence of any extreme mental or emotional disturbance leading to the commission of the offence, and observed that given the past offending history of the Accused, there was no hope of his reform or rehabilitation. The Court also noted the barbaric nature of the offence, as the Petitioner had cold-bloodedly raped and murdered two innocent and defenceless girls by abusing the faith that they had reposed in him as their neighbour, and concluded that he would pose a threat to society even if released for the smallest period of time, and might commit similar acts in the future. On this basis, the High Court affirmed the death penalty awarded to the Accused. [41]

5. The Supreme Court, in appeal, being Criminal Appeal also determined the case to fall into the category of the rarest of rare cases. [42]

6. The record in the instant matter therefore clearly shows that, the Accused was accorded a real and effective opportunity at the trial stage itself. It may further be stated that, the opportunity granted to the Petitioner by the High Court to adduce further material on this aspect was above and beyond the requirement of Section 235(2). The Courts had taken all the attendant circumstances into account before reaching the conclusion of awarding the death penalty. It is also not the case that, the Accused made a request for hearing on sentencing on a separate date and the same was refused. In such circumstances, contention that the procedure envisaged in Section 235(2) of CrPC was not complied with in the present case is rejected. [43]

7. The Accused has now pleaded an entirely new ground of post-conviction mental illness for the first time herein, which obliges Court to go into the aspect of sentencing afresh. It is also brought to notice that, the Appellant has been a death row convict for almost 17 years, mandating present Court to resolve the issue of sentencing herein. [46]

8. There appear to be no set disorders/disabilities for evaluating the 'severe mental illness', however a 'test of severity' can be a guiding factor for recognizing those mental illness which qualify for an exemption. Therefore, the test envisaged herein predicates that, the offender needs to have a severe mental illness or disability, which simply means that a medical professional would objectively consider the illness to be most serious so that he cannot understand or comprehend the nature and purpose behind the imposition of such punishment. These disorders generally include schizophrenia, other serious psychotic disorders, and dissociative disorders-with schizophrenia. [68]

9. Directions need to be followed in the future cases that, the post-conviction severe mental illness will be a mitigating factor and appellate Court, in appropriate cases, needs to consider while sentencing an Accused to death penalty. The assessment of such disability should be conducted by a multi-disciplinary team of qualified professionals (experienced medical practitioners, criminologists etc), including professional with expertise in Accused's particular mental illness. The burden is on the Accused to prove by a preponderance of clear evidence that, he is suffering with severe mental illness. The Accused has to demonstrate active, residual or prodromal symptoms that the severe mental disability was manifesting. The State may offer evidence to rebut such claim. Court in appropriate cases could setup a panel to submit an expert report. 'Test of severity' envisaged herein predicates that the offender needs to have a severe mental illness or disability, which simply means that objectively the illness needs to be most serious that the Accused cannot understand or comprehend the nature and purpose behind the imposition of such punishment. [69]

10. The Accused has submitted a report of the Class-I Psychiatrist, Yerawada Central Prison, indicating that he was suffering from some sort of mental illness without providing any objective factors for such assessment. [70]

11. Present Accused has been reeling under bouts of some form of mental irritability since 1994, as apparent from the records placed. Moreover, he has suffered long incarceration as well as a death row convict. In the totality of circumstances, it is not appropriate to constitute a panel for re-assessment of his mental condition, in the facts and circumstances of this case. [72]

12. Given the barbaric and brutal manner of commission of the crime, the gravity of the offence itself, the abuse of the victims' trust by the Petitioner, and his tendency to commit such offences as is evident from his past conduct, it is clear that the Petitioner poses such a grave threat to society that he cannot be allowed to roam free. In this view of the matter, it is deemed fit to direct that, the Petitioner shall remain in prison for the remainder of his life. [73]

13. The petition is allowed to the extent that the sentence of death awarded to the Petitioner is commuted to imprisonment for the remainder of his life sans any right to remission. [74]

14. Therefore, the State Government is directed to consider the case of 'Accused x' under the appropriate provisions of the Mental Healthcare Act, 2017 and if found entitled, provide for his rights under that enactment. [77]

78. Review petition partly allowed. [78]

JUDGMENT

N.V. Ramana, J.

1. The instant proceedings pertain to the reopening of Review Petition (Crl.) No. 301 of 2008 to review the final judgment and Order dated 16.05.2008 passed by this Court in Criminal Appeal No. 680 of 2007 dismissing the appeal filed by the Review Petitioner (hereinafter "the Petitioner") and confirming his conviction Under Sections 201, 363, 376 and 302 of the Indian Penal Code (in short, "the IPC"). Vide the impugned judgment, this Court upheld the sentence of 2 years' rigorous imprisonment each Under Sections 201 and 363, 10 years' rigorous imprisonment Under Section 376 and the death sentence Under Section 302, Indian Penal Code imposed upon the Petitioner.

2. This petition raises complex questions concerning the relationship between mental illness and crime. How can culpability be assessed for sentencing those with mental illness? Is treatment better suited than punishment? These are some of the questions we need to reflect upon in this case at hand.

3. In line with Section 23 (1) of the Mental Healthcare Act, 2017, (Act 10 of 2017) and the right to privacy of the Accused herein, while taking further action on this judgment, we direct the Registry to not disclose the actual name of the Accused and other pertinent information which could lead to his identification as it concerns confidential information. In this context we shall address the Accused herein as 'Accused x'.

4. Brief facts giving rise to the present petition are as follows; the two deceased, viz. victim-1 (studying in the 4th standard) and victim-2 (studying in the 1st standard) were cousins staying at Gulumb, Maharashtra, in a locality of homeless people (Beghar Vasti) at the house of Ramdas Jadhav (PW-13, victim-1's father).

The Petitioner lived in the adjacent house with his family. On 13.12.1999, at about 6 p.m., the Petitioner had gone to the grocery shop run by Sunil (PW-6), with his daughter, Reshma (PW-8), where he met the two

deceased girls, and on the pretext of offering sweets, he led the girls to accompany him. Thereafter, he committed the rape and murder of both girls, and threw victim-2's body in a well situated in the field of the father of Sakharam Bhiku Yadav (PW-11), and concealed the body of victim-1 in a "kalkache bet" (place where bamboo trees and shrubs grow together thickly).

5. The Petitioner was apprehended by the villagers on the next day, i.e. 14.12.1999, before whom he made an extra judicial confession about the murder of victim-2. The same day, he also led the police to the recovery of the bodies of the deceased as well as the discovery of the spot of commission of rape, from where bloodstained earth and plants, half-burnt bidis and broken bangles were recovered. The blood-stained clothes worn by the Petitioner at the time of arrest were also seized. The clothes of the deceased were recovered at his instance on 25.12.1999. The FIR came to be lodged by Jaysing Dinkar Jadhav, PW10, the brother of the grandfather of the deceased.

6. The Trial Court in Sessions Case No. 142 of 2000 convicted the Petitioner for the offences stated supra on the basis of the 'last seen' evidence; motive of the Accused; seizure of blood-stained clothes worn by the Accused; the Chemical Analysis Report showing that "A" group blood was found on the shirt and pant of the Petitioner as well as in his nail clippings, which was the blood group of both the deceased; recovery of the bodies of the deceased at the instance of the Accused; discovery of the spot of commission of rape of the two deceased wherefrom blood-stained earth and other incriminating articles were seized; extra-judicial confession of the Petitioner; recovery of frocks at his instance; and the false explanation given by the Petitioner. The Trial Court found that all these circumstances formed a complete chain pointing to the guilt of the Petitioner.

7. The High Court in Criminal Appeal No. 652 of 2001 and Confirmation Case No. 3 of 2001, confirmed the conviction and sentence as awarded by the Trial Court, including the sentence of death, relying upon all the aforementioned circumstances except for the alleged extra-judicial confession. This Court, in appeal, being Criminal Appeal No. 680 of 2007, confirmed the same, holding that the case at hand falls into the category of the rarest of rare cases warranting punishment with death. Review Petition (Crl.) No. 301 of 2008 filed by the Petitioner against the above judgment and Order of this Court was dismissed vide order dated 19.11.2008 by the same three-Judge Bench which had rendered the judgment in appeal, who after considering the matter by way of circulation held that there was no merit in the petition.

8. A criminal miscellaneous petition being Crl. M.P. No. 5584 of 2015 was filed by the Petitioner seeking reopening of this review petition, placing reliance on the decision of this Court dated 02.09.2014 in W.P. (Crl.) No. 77 of 2014 in Mohd. Arif @ Ashfaq v. The Registrar, Supreme Court of India, MANU/SC/0754/2014 : (2014) 9 SCC 737, which held that in light of Article 21 of the Indian Constitution, review petitions in death sentence cases were required to be heard orally by a three-Judge Bench, and specifically permitted the reopening of review petitions in all cases where review petitions had been dismissed by circulation.

9. In light of the above decision, this Court has heard the review petition filed by the Petitioner orally in the open Court.

10. Learned Counsel for the Petitioner, Ms. Nitya Ramakrishnan, did not raise any argument concerning the merits of the case, however raised only the following two arguments: firstly, that the Trial Court had not given the Petitioner a separate hearing while awarding the sentence, in direct contravention of Section 235(2) of the Code of Criminal Procedure (in short, "CrPC"), which provides for the right of pre-

sentencing hearing as affirmed by this Court in *Bachan Singh v. State of Punjab*, MANU/SC/0111/1980 : (1980) 2 SCC 684 and a plethora of other decisions; and secondly, that the award of the death sentence to the Petitioner is contrary to the ratio of the three-Judge Bench decision of this Court in *Shatrughan Chauhan v. Union of India*, MANU/SC/0043/2014 : (2014) 3 SCC 1, followed in a four-Judge Bench decision of this Court in *Navneet Kaur v. State (NCT of Delhi)*, MANU/SC/0253/2014 : (2014) 7 SCC 264, which held that the execution of persons suffering from mental illness or insanity violates Article 21 of the Indian Constitution and that such mental illness or insanity would be a supervening circumstance meriting commutation of the death sentence to life imprisonment.

11. Learned Counsel for the Respondent, i.e. the State of Maharashtra, Mr. Nishant Ramakantrao Katneshwarkar, on the other hand, highlighted that the pre-sentencing hearing as envisaged Under Section 235(2) of the Code of Criminal Procedure need not be conducted on a separate date, and the sentence awarded by the Trial Court does not stand vitiated merely because the sentence with respect to hearing was not conducted on a separate date. To that end, the counsel relied on the three-Judge Bench decision of this Court in *Vasanta Sampat Dupare v. State of Maharashtra*, MANU/SC/0570/2017 : (2017) 6 SCC 631. He also submitted that the Petitioner is not suffering from any mental illness so as to warrant commutation of the death sentence, and to that effect submitted certain medical reports.

12. On hearing this petition, this Court was of the opinion that there was no merit in the Petitioner's submissions against the order of conviction, and it was therefore decided that this Court would hear only on the aspects of sentencing pertaining to two issues.

13. The first relates to the implications of non-compliance of Section 235 (2) of Code of Criminal Procedure during the sentencing

process before the Trial Court. The second issue concerns the mental illness of 'Accused x', which was raised for the first time in this Review Petition, after the judgment of this Court in the earlier round.

14. On the first issue, the learned Counsel on behalf of the Petitioner contended that considering the fact that the procedural right of Pre-Sentence Hearing, as envisaged Under Section 235 (2) of Code of Criminal Procedure, was never provided to the Accused, this mandated a fresh hearing before the trial court on the sentencing aspect. In the instant case before us, the principle argument advanced by the counsel for the Petitioner was that, since the order of conviction and the order of sentence in the present case were passed on the same day, no opportunity was awarded to the Petitioner with regard to the sentence imposed upon him. Therefore, the counsel contended that the order of sentence passed in the present case is in violation of Section 235 (2) of the Code of Criminal Procedure, which is an illegality vitiating the entire sentence. The counsel vehemently argued that a holistic reading of Section 235 (2) of the Code of Criminal Procedure would indicate that the Accused should be given ample opportunity to produce materials in his favour so as to place on record the mitigating circumstances which mandate the imposition of lesser penalty.

15. It is pertinent at this point of time to note that countries following the common law tradition, prosecution historically did not play any part in the sentencing process and that it was mostly left for the judge to decide. In India, under the old Code, no opportunity was provided, post-conviction, for the Accused to place relevant facts before the court. It was only after the introduction of the present Code in 1973 that such a hearing was provided for in accordance with modern penological practices. At this stage it may be necessary to quote Section 235 of Code of Criminal Procedure, which provides for Pre-Sentence Hearing, among other things.

235. Judgment of acquittal or conviction.

...

(2) If the Accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the Accused on the question of sentence, and then pass sentence on him according to law.

Section 235 (2) of Code of Criminal Procedure implies that once the judgment of conviction is pronounced, the Court will hear the Accused on the question of sentence and at that stage, it is open to the Accused to produce such material on record as is available to show the mitigating circumstances in his favor. In other words, the Accused at this stage argues for imposition of lesser sentence based on such mitigating circumstances as brought to the notice of the Court by him.

16. Section 235 (2) of Code of Criminal Procedure mandates Pre-Sentence Hearing for the Accused and imbibes a cardinal principle that the sentence should be based on 'reliable, comprehensive information relevant to what the Court seeks to do'. In the case at hand, the Accused argues that his right to fair trial stands extinguished as he was not provided a separate hearing for sentencing. This issue can be resolved directly by relying on the interpretation of Section 235 (2) of Code of Criminal Procedure and this Court's jurisprudence built around Pre-Sentence Hearing.

17. As also highlighted by the Petitioner, this requirement has also been affirmed by the five-Judge Bench of this Court in *Bachan Singh v. State of Punjab* (supra), wherein it was also held that at the stage of Pre-Sentence Hearing, the Accused can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, may have a bearing on the choice of sentence.

18. The first case on this point is Santa Singh v. The State of Punjab, MANU/SC/0167/1976 : (1976) 4 SCC 190, which was decided by a Division Bench of this Court presided by Justice Bhagwati (as His Lordship then was) and Justice Fazal Ali. This case revolved on the fact that an Accused in a double murder case was sentenced to death without providing an opportunity of 'hearing' Under Section 235 (2) of Code of Criminal Procedure, which was the only ground of appeal before the Supreme Court. This Court, by two concurrent opinions, remanded the matter back to the trial court for fresh consideration on sentencing after giving an opportunity of 'hearing' to the Accused. Justice Bhagwati interpreted Section 235 (2) of Code of Criminal Procedure in the following manner-

This material may be placed before the court by means of affidavits, but if either party disputes the correctness or veracity of the material sought to be produced by the other, an opportunity would have to be given to the party concerned to lead evidence for the purpose of bringing such material on record. **The hearing on the question of sentence, would be rendered devoid of all meaning and content and it would become an idle formality, if it were confined merely to hearing oral submissions without any opportunity being given to the parties** and particularly to the Accused, to produce material in regard to various factors bearing on the question of sentence, and if necessary, to lead evidence for the purpose of placing such material before the court.

...

We are therefore of the view that the hearing contemplated by Section 235 (2) is not confined merely to hearing oral submissions, but it is also intended to give an opportunity to the prosecution and the Accused to place before the court facts and material relating to various factors bearing on the question of sentence and if they are contested by either side, then to produce evidence for the

purpose of establishing the same. **Of course, care would have to be taken by the court to see that this hearing on the question of sentence is not abused and turned into an instrument for unduly protracting the proceedings.**

(Emphasis supplied)

Justice Fazal Ali, agreed with the aforesaid conclusion, and made observations along the same lines.

19. The aforesaid ruling came to be questioned in Dagdu and Ors. v. State of Maharashtra, MANU/SC/0086/1977 : (1977) 3 SCC 68, wherein a similar question came before this Court. This Court, while repelling the submission of the counsel for the Accused therein, who argued that the ratio in Santa Singh Case (supra) mandated compulsory remand of the case to the trial court, held as under-

But we are unable to read the judgment in Santa Singh (supra) as laying down that the failure on the part of the Court, which convicts an Accused, to 'hear him on the question of sentence must necessarily entail a remand to that Court in order to afford to the Accused an opportunity to be heard on the question of sentence. The Court, on convicting an Accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the Accused makes a grievance of it in the higher court, it would be open to that Court to remedy the breach by giving a hearing to the Accused on the question of sentence. That opportunity has to be real and effective, which means that the Accused must be permitted to adduce before the Court all the data which he desires to adduce on the question of sentence. The Accused may exercise that right either by instructing his counsel to make oral submissions to the Court or he may, on affidavit or otherwise, place in writing before the Court whatever he desires to place before it on the question of sentence. **The Court may, in appropriate**

cases, have to adjourn the matter in order to give to the Accused sufficient time to produce the necessary data and to make his contentions on the question of sentence.

That, perhaps, must inevitably happen where the conviction is recorded for the first time by a higher court.

Bhagwati J. has observed in his judgment that care ought to be taken to ensure that the opportunity of a hearing on the question of sentence is not abused and turned into an instrument for unduly protracting the proceedings.

(Emphasis supplied)

20. In *Rajendra Prasad v. State of Uttar Pradesh* MANU/SC/0212/1979 : AIR 1979 SC 916, the Supreme Court expressed its concern that the mandatory Pre-Sentence Hearing had become nothing more than a repetition of the facts of the case. The Bench hoped that "the Bar will assist the Bench in fully using the resources of the new provision to ensure socio-personal justice, instead of ritualising the submissions on sentencing by reference only to materials brought on record for proof or disproof of guilt".

21. In the case of *Muniappan v. State of Tamil Nadu*, MANU/SC/0187/1981 : (1981) 3 SCC 11, the Supreme Court noted that the trial court had sentenced the Accused to death stating that when the Accused was asked to speak on the question of sentence, he did not say anything. In such a case the Supreme Court noted that the requirement of Section 235(2) was not discharged by merely putting a formal question to the Accused, and the court should undertake genuine efforts. The Court observed therein that, "it is the bounden duty of the judge to cast aside the formalities of the court scene and approach the question of sentence from a broad, sociological point of view".

22. The question of providing sufficient time for Pre-Sentence Hearing was dealt with by the Court in *Allauddin Mian v. State of Bihar*,

MANU/SC/0648/1988 : (1989) 3 SCC 5. The Supreme Court observed that the trial court had not provided sufficient time to the Accused for hearing on sentencing. Relevant factors, such as, the antecedents of the Accused, their socio-economic conditions, and the impact of their crime on the community had not come on record, and in the absence of such information deciding on punishment was difficult. The Supreme Court therefore recommended that, "as a general Rule the trial courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender". The aforesaid proposition was also reiterated in *Malkiat Singh v. State of Punjab*, MANU/SC/0622/1991 : (1991) 4 SCC 341.

23. On the other hand, in *Sevaka Perumal v. State of Tamil Nadu* MANU/SC/0338/1991 : AIR 1991 SC 1463, this Court upheld the death sentence even though it was argued that no time had been given to raise grounds on sentencing by the trial court. This Court observed that, during the appeal, the defence counsel had been unable to provide any additional grounds on sentence and therefore no prejudice had been caused to the Accused.

24. In *State of Maharashtra v. Sukhdev Singh*, MANU/SC/0416/1992 : (1992) 3 SCC 700, the Supreme Court clarified that while Section 309 of the Code of Criminal Procedure prescribed no power for adjournment of sentencing hearings, these should be provided where the Accused sought to produce materials in capital cases. In *Jai Kumar v. State of Madhya Pradesh* MANU/SC/0360/1999 : AIR 1999 SC 1860, this Court observed that the trial court had given an opportunity to the defence to produce materials, which they chose not to do, and had considered the mitigating circumstances raised by them. This Court opined that, in such circumstances, it was not a miscarriage of justice that the judge did not adjourn the hearing.

25. In *Anshad v. State of Karnataka*, MANU/SC/0733/1994 : (1994) 4 SCC 381, this Court disapprovingly noted that the trial judge had dealt with sentencing cryptically in one paragraph and this defeated the very object of Section 235(2) of Code of Criminal Procedure, exposing a "lack of sensitiveness on his part while dealing with the question of sentence". Commuting the sentences of the Appellants, the Supreme Court observed that both the lower courts did not appreciate the aggravating and mitigating circumstances and therefore their entire approach to sentencing was incorrect.

26. The aforesaid principle was further elucidated in the case of *B.A. Umesh v. Registrar General, High Court of Karnataka*, MANU/SC/1289/2016 : (2017) 4 SCC 124, wherein it was held that a review petition cannot be allowed merely because no separate date was given for hearing on the sentence. This Court held that Section 235(2) of Code of Criminal Procedure does not mandate separate date for the hearing of the sentence, rather, it is dependent on the facts and circumstances of the case, for instance, if parties insist to be heard on separate dates.

27. As per the order dated 03.02.2017 in *Mukesh v. State (NCT of Delhi)*, MANU/SC/0366/2017 : (2017) 3 SCC 717, this Court, having found that there was no compliance of Section 235 (2) of Code of Criminal Procedure by the court's below, observed as under-

Having considered all the authorities, we find that there are two modes, one is to remand the matter or to direct the Accused persons to produce necessary data and advance the contention on the question of sentence. Regard being had to the nature of the case, we think it appropriate to adopt the second mode. To elaborate, we would like to give opportunity before conclusion of the hearing to the Accused persons to file affidavits along with documents stating about the mitigating circumstances. Needless to say, for the said

purpose, it is necessary that the learned Counsel, Mr. M.L. Sharma and his associate Ms. Suman and Mr. A.P. Singh and his associate Mr. V.P. Singh should be allowed to visit the jail and communicate with the Accused persons and file the requisite affidavits and materials.

(Emphasis supplied)

28. In the final order of *Mukesh v. State (NCT of Delhi)*, MANU/SC/0575/2017 : (2017) 6 SCC 1, this Court held that in the event the procedural requirements Under Section 235 (2) of the Code of Criminal Procedure are not met, the appellate court can either remit the case back to the trial court or adjourn the matter before the appellate forum for hearing on sentence after giving an opportunity to adduce evidence. On the other hand, the court also noted that any deficiency in non-compliance of Section 235 (2) of Code of Criminal Procedure can be cured by providing the opportunity at the appellate stage itself so as to curtail the delay in the proceedings. In that case, this Court had allowed the Accused to file an affidavit listing the mitigating circumstance, noticing that no pre-hearing on sentence was ever carried out.

29. Two recent three-Judge Bench decisions of this Court on this aspect merit our consideration. Firstly, in the decision dated 28.11.2018 in *Chhannu Lal Verma v. State of Chhattisgarh (Criminal Appeal Nos. 1482-1483 of 2018)*, this Court observed that not having a separate hearing at the stage of trial was a procedural impropriety. Noting that a bifurcated hearing for conviction and sentencing was a necessary condition laid down in *Santosh Kumar Satishbhushan Bariyar*, MANU/SC/0801/2009 : (2009) 6 SCC 498, the Court held that by conducting the hearing for sentencing on the same day, the Trial Court failed to provide necessary time to the Appellant therein to furnish evidence relevant to sentencing and mitigation. We find that this cannot be taken to mean that this Court intended to lay down,

as a proposition of law, that hearing the Accused for sentencing on the same day as for conviction would vitiate the trial. On the contrary, in the said case, it was found on facts that the same was a procedural impropriety because the Accused was not given sufficient time to furnish evidence relevant to sentencing and mitigation.

30. Secondly, in the decision dated 12.12.2018 in *Rajendra Prahladrao Wasnik v. State of Maharashtra*, (Review Petition (Crl.) Nos. 306-307 of 2013), this Court made a general observation that in cases where the death penalty may be awarded, the Trial Court should give an opportunity to the Accused after conviction which is adequate for the production of relevant material on the question of the propriety of the death sentence. This is evidently at best directory in nature and cannot be taken to mean that a pre-sentence hearing on a separate date is mandatory.

31. It may also be noted that in the older three-Judge Bench decision of this Court in *Malkiat Singh Case* (supra), the Court observed that keeping in mind the two-Judge Bench decisions in *Allauddin Mian Case* (supra) and *Anguswamy v. State of Tamil Nadu*, MANU/SC/0029/1989 : (1989) 3 SCC 33, wherein it had been laid down that a sentence awarded on the same day as the finding of guilt is not in accordance with law, the normal course of action in case of violation of such procedure would be remand for further evidence. However, on a perusal of these two decisions we find that their import has not been correctly appreciated in *Malkiat Singh Case* (supra), since the observations in *Allauddin Mian Case* (supra), as relied upon in *Anguswamy Case* (supra), regarding conduct of hearings on separate dates, were only directory. Be that as it may, it must be noted that the effect of *Malkiat Singh Case* (supra) has already been considered by this Court in *Vasanta Sampat Dupare Case* (supra), wherein it was already noted that the mere non-conduct of the pre-sentence hearing on a separate date would not per se vitiate the trial if the Accused has been

afforded sufficient time to place relevant material on record.

32. It may not be out of context to note that in case the minimum sentence is proposed to be imposed upon the Accused, the question of providing an opportunity Under Section 235(2) would not arise. (See *Tarlok Singh v. State of Punjab*, MANU/SC/0159/1977 : (1977) 3 SCC 218; *Ramdeo Chauhan v. State of Assam*, MANU/SC/0297/2001 : (2001) 5 SCC 714).

33. There cannot be any doubt that at the stage of hearing on sentence, generally, the Accused argues based on the mitigating circumstances in his favour for imposition of lesser sentence. On the other hand, the State/the complainant would argue based on the aggravating circumstances against the Accused to support the contention relating to imposition of higher sentence. The object of Section 235 (2) of the Code of Criminal Procedure is to provide an opportunity for Accused to adduce mitigating circumstances. This does not mean, however, that the Trial Court can fulfil the requirements of Section 235(2) of the Code of Criminal Procedure only by adjourning the matter for one or two days to hear the parties on sentence. If the Accused is ready to submit his arguments on this aspect on the very day of pronouncement of the judgment of conviction, it is open for the Trial Court to hear the parties on sentence on the same day after passing the judgment of conviction. In a given case, based on facts and circumstances, the Trial Court may choose to hear the parties on the next day or after two days as well.

34. In light of the above discussion, we are of the opinion that as long as the spirit and purpose of Section 235(2) is met, inasmuch as the Accused is afforded a real and effective opportunity to plead his case with respect to sentencing, whether simply by way of oral submissions or by also bringing pertinent material on record, there is no bar on the pre-sentencing hearing taking place on the same day as the pre-conviction hearing. Depending

on the facts and circumstances, a separate date may be required for hearing on sentence, but it is equally permissible to argue on the question of sentence on the same day if the parties wish to do so.

35. Now we need to consider the impact of non-compliance of procedure provided Under Section 235 (2) of Code of Criminal Procedure by the trial court. Even assuming that a procedural irregularity is committed by the trial court to a certain extent on the question of hearing on sentence, the violation can be remedied by the appellate Court by providing sufficient opportunity of being heard on sentence. It must be kept in mind that Section 465 of the Code of Criminal Procedure mandates that no finding, sentence or order passed by the Court of competent jurisdiction shall be reversed or altered by the Court of appeal on account of any error, omission or irregularity in the order, judgment and other proceedings before or during trial unless such error, omission or irregularity results in a failure of justice. Such non-compliance can be remedied by the appellate Court by either remanding the matter in appropriate cases or by itself giving an effective opportunity to the Accused.

36. The narrative provided by numerous cases on this aspect portrays a picture of the appellate Court trying to balance two important rights, viz., right to fair trial and right to speedy trial. On one side, is the procedural right granted to the Accused Under Section 235 (2) of Code of Criminal Procedure, and on the other side is the possibility of misuse to delay the trial. The experienced judges in India have enough expertise to distinguish, between the schemes for protracting trials from that of genuine causes in order to protect rights of the Accused.

37. This brings us to the role of appellate courts under our Criminal Justice System. There is no dispute that under our chosen system, that the highest discretion is provided to trial courts. Sometimes appellate courts, in

order to preserve the competing factors in play, provides discretion for the trial court to operate. However, appellate court must adopt a 'cautionary approach' when providing such indulgence, which must be restricted and balanced against competing interests.¹ The narration of various court dicta, which are cited above, provide for a cautionary tale right from Santa Singh Case onwards, as the choice of solution for remedying non-compliance of Section 235 (2) of Code of Criminal Procedure provides for selection of at least two different modes.

38. As noted above, many cases have grappled with the question as to the choice between the two. The approach of this Court needs to be rationalized and understood in the light of cautionary approach discussed above. From the aforesaid discussion, following dicta emerge-

i. That the term 'hearing' occurring Under Section 235 (2) requires the Accused and prosecution at their option, to be given a meaningful opportunity.

ii. Meaningful hearing Under Section 235 (2) of Code of Criminal Procedure, in the usual course, is not conditional upon time or number of days granted for the same. It is to be measured qualitatively and not quantitatively.

iii. The trial court need to comply with the mandate of Section 235 (2) of Code of Criminal Procedure with best efforts.

iv. Non-compliance can be rectified at the appellate stage as well, by providing meaningful opportunity.

v. If such an opportunity is not provided by the trial court, the appellate court needs to balance various considerations and either afford an opportunity before itself or remand back to trial court, in appropriate case, for fresh consideration.

vi. However, the Accused need to satisfy the appellate courts, inter alia by pleading on the grounds as to existence of mitigating circumstances, for its further consideration.

vii. Being aware of certain harsh realities such as long protracted delays or jail appeals through legal aid etc., wherein the appellate court, in appropriate cases, may take recourse of independent enquiries on relevant facts ordered by the court itself.

viii. If no such grounds are brought by the Accused before the appellate courts, then it is not obligated to take recourse Under Section 235 (2) of Code of Criminal Procedure.

39. Having discussed the law on pre-sentence hearing, it would be appropriate at this juncture to revisit the decisions of the Courts, leading to this review in order to ascertain whether the Petitioner was given an effective opportunity to place material on record relevant to the quantum of sentence, in this instant case.

40. The Trial Court heard the Petitioner on the aspect of imposition of sentence separately, which is amply clear from paragraphs 79-87 of the judgment of the Trial Court. Hence, based on the material on record we are satisfied that the Trial Court has fully complied with the requirement of Section 235(2) of the Code of Criminal Procedure, While coming to its conclusion, the Court held that the aggravating circumstances of the crime, i.e. the magnitude and manner of commission of the crime in the form of the kidnapping, rape and murder of two minor girls, outweighed the mitigating circumstances of the Accused, i.e. the dependency of his aged mother on him, and his young age. The Court also gave weightage to the prior convictions of the Accused for the same kind of offence, i.e. for the offence of rape of a nine-year-old girl child Under Sections 376 and 506 of the Indian Penal Code and Section 57 of the Bombay Children Act, as well as for the kidnapping and rape of a seven-year-old girl

child Under Sections 363 and 366 of the Indian Penal Code. It may be noted here itself that in light of his two prior convictions, the Trial Court also gave him an opportunity to be heard on the question of Section 75 of the Indian Penal Code, which pertains to enhance punishment for certain offences under Chapter XII or XVII of the Indian Penal Code after previous conviction, but the factum of these convictions was also not contested by the Petitioner.

41. Before the High Court as well, further material was brought on record by the Petitioner regarding his discharge in one case related to offences of the same nature, which the Court found to not be in the nature of a mitigating circumstance. The High Court was of the opinion that the dependency of aged parents could also not be considered as a mitigating circumstance to begin with, and that the Accused was not young enough for his age to be considered as a mitigating circumstance. The High Court noted the absence of any extreme mental or emotional disturbance leading to the commission of the offence, and observed that given the past offending history of the Accused, there was no hope of his reform or rehabilitation. The Court also noted the barbaric nature of the offence, inasmuch as the Petitioner had cold-bloodedly raped and murdered two innocent and defenceless girls by abusing the faith that they had reposed in him as their neighbour, and concluded that he would pose a threat to society even if released for the smallest period of time, and might commit similar acts in the future. On this basis, the High Court affirmed the death penalty awarded to the Accused.

42. The Supreme Court, in appeal, being Criminal Appeal No. 680 of 2007, also determined the case to fall into the category of the rarest of rare cases.

43. The record in the instant matter therefore clearly shows that the Accused was accorded a real and effective opportunity at the trial stage itself. It may further be stated that the

opportunity granted to the Petitioner by the High Court to adduce further material on this aspect was above and beyond the requirement of Section 235(2). The Courts had taken all the attendant circumstances into account before reaching the conclusion of awarding the death penalty. It is also not the case that the Accused made a request for hearing on sentencing on a separate date and the same was refused. In such circumstances, we reject the contention that the procedure envisaged in Section 235(2) of the Code of Criminal Procedure was not complied with in the present case.

44. Now we need to consider the second issue concerning post-conviction mental illness as a mitigating factor for converting a death sentence to life imprisonment.

45. It is pertinent for us to understand the phenomenon of post-conviction mental illness. As the phrase itself suggests, it is only after being proven guilty, that the convict has developed such illness. It is well acknowledged fact throughout the world that, prisons are difficult places to be in. The World Health Organisation and the International Red Cross, identify multiple circumstances such as overcrowding, various forms of violence, enforced solitude, lack of privacy, inadequate health care facilities, concerns about family etc, can take a toll on the mental health of the prisoners. Due to the prevailing lack of awareness about such issues, the prisoners have no recourse and their mental health keeps on degrading day by day. The prevailing argument in favour of such prisoners is that; whether the imposition of death penalty upon such prisoners is justified, who have clearly impaired their abilities to even understand the nature and purpose of such punishment and the reasons for such imposition? The aforesaid issues will be dealt at length at the later stage.

46. The Accused has now pleaded an entirely new ground of post-conviction mental illness for the first time herein, which obliges us to go into the aspect of sentencing afresh. It is

also brought to our notice that the Appellant has been a death row convict for almost 17 years, mandating us to resolve the issue of sentencing herein. Before we consider the appropriate punishment for the Accused herein, a reference needs to be made to the background principles concerning sentencing policy considering that the present Petitioner is pleading a mitigating factor which has arisen post-conviction.

47. Sentencing is appropriate allocation of criminal sanctions, which is mostly given by the judicial branch.² This process occurring at the end of a trial still has a large impact on the efficacy of a Criminal Justice System. It is established that sentencing is a socio-legal process, wherein a judge finds an appropriate punishment for the Accused considering factual circumstances and equities. In light of the fact that the legislature provided for discretion to the judges to give punishment, it becomes important to exercise the same in a principled manner. We need to appreciate that a strict fixed punishment approach in sentencing cannot be acceptable, as the judge needs to have sufficient discretion as well.

48. Before analyzing this case, we need to address the issue of the impact of reasoning in the sentencing process. The reasoning of the trial court acts as a link between the general level of sentence for the offence committed and to the facts and circumstances. The trial court is obligated to give reasons for the imposition of sentence, as firstly, it is a fundamental principle of natural justice that the adjudicators must provide reasons for reaching the decision and secondly, the reasons assume more importance as the liberty of the Accused is subject to the aforesaid reasoning. Further, the appellate court is better enabled to assess the correctness of the quantum of punishment challenged, if the trial court has justified the same with reasons. The aforesaid principle is fortified not only by the statute Under Section 235 (2) of Code of Criminal Procedure but also by judicial interpretation. Any increase or decrease in the quantum of punishment than the usual levels need to be reasoned by

the trial court. However, any reasoning dependent on moral and personal opinion/notion of a Judge about an offence needs to be avoided at all costs.

49. Sentencing in India, is a midway between judicial intuition and strict application of Rule of law. As much as we value the Rule of law, the process of sentencing needs to preserve principled discretion for a judge. In India, sentencing is mostly led by 'guideline judgments' in the death penalty context, while many other countries like United Kingdom and United States of America, provide a basic framework in sentencing guidelines.

50. Although at the outset, it is clarified that this Court may not lay down a 'definitive sentencing policy', which is rather a legislative function, however, the Courts in India have addressed this problem in a principled manner having regards to judicial standards and principles. These judicially set-principles not only serve as instructive guidelines, but also preserve the required discretion of the trial judges while sentencing. Such an effort has already been initiated by the Supreme Court, in Sunil Dutt Sharma Case, MANU/SC/1030/2013 : (2014) 4 SCC 375, when the sentencing guidelines evolved in the context of death penalty were applied to a lesser sentence as well. However, achieving sentencing uniformity may not only require judicial efforts, but even the legislature may be required to step in.

51. Moreover, our attention is also drawn to the Malimath Committee Report on Reforms in the Criminal Justice System, which recommended creation of a statutory body for prescribing sentencing guidelines. Before concluding the aforementioned observations highlighting the dangers of sentencing discretion, we are reminded of the words of Justice Krishna Iyer, who held that "Guided missiles with lethal potential, in unguided hands, even judicial, is a grave risk where the peril is mortal though tempered by the appellate process." [refer Rajendra Prasad v.

State of Uttar Pradesh MANU/SC/0212/1979 : (1979) 3 SCC 646]

52. In any case, considering that a large part of the exercise of sentencing discretion is principled, a Judge in India needs to keep in mind broad purposes of punishment, which are deterrence, incapacitation, rehabilitation, retribution and reparation (wherever applicable), unless particularly specified by the legislature as to the choice. The purposes identified above, marks a shift in law from crime-oriented sentencing to a holistic approach wherein the crime, criminal and victim have to be taken into consideration collectively.

53. Having observed some of the general aspects of sentencing, it is necessary to consider the aspect of post-conviction mental illness as mitigating factor in the analysis of 'rarest of the rare' doctrine which has come into force post Bachan Singh Case (supra).

54. As a starting point we need to refer to *Piare Dusadh v. King Emperor* MANU/FE/0011/1943 : AIR 1944 FC 1, has already recognized post-conviction mental illness as a mitigating factor in the following manner-

Case No. 47-The Appellant in this case was convicted by a Special Judge of the offence of murder and was sentenced to death on 30th September 1942. His appeal to the Allahabad High Court was dismissed and the sentence of death was confirmed. The Appellant is a young man of 25 who has been twice widowed. His victim was his aunt, 30 years of age, whose husband (Kanchan) had about six years previously murdered his own brother, Appellant's father. Kanchan was sentenced to death for the murder, but lost his reason while awaiting the execution of the death sentence, and is now detained as a lunatic. The evidence in this case leaves no room for doubt that the Appellant was rightly convicted of murder. There is some confusion as to the exact motive for the undoubtedly brutal assault of which the

Appellant made his aunt the victim. The prosecution alleged that the Appellant being a widower was chagrined by the refusal of his aunt to become his mistress. In his statement before, the Special Judge he said that another uncle (P.W. 7) who according to the Appellant was behind the prosecution was on terms of improper intimacy with the deceased and resented even small acts of kindness on the part of the deceased towards the Appellant. In the appeal preferred by him through the jail authorities to the High Court, the Appellant stated that his aunt was a woman of loose character and was pursuing him with unwelcome attentions. The previous history of this family indicates that the Appellant probably suffers from an unbalanced mind. The nature and ferocity of the assault upon his aunt appear to confirm this.

In committing the offence the Appellant must have been actuated by jealousy or by indignation either of which would tend further to disturb the balance of his mind. He has besides been awaiting the execution of his death sentence for over a year. We think that in this case a sentence of transportation for life would be more appropriate than the sentence of death.

We accordingly reduce the sentence of death to one of transportation for life and subject to this modification dismiss the appeal.

(Emphasis supplied)

However, this case does not provide any guidelines or the threshold for evaluating what kind of mental illness needs to be taken into consideration by the Courts.

55. We note that, usually, mitigating factors are associated with the criminal and aggravating factors are relatable to commission of the crime. These mitigating factors include considerations such as the Accused's age, socio-economic condition etc. We note that the ground claimed by 'Accused

x' is arising after a long-time gap after crime and conviction. Therefore, the justification to include the same as a mitigating factor does not tie in with the equities of the case, rather the normative justification is founded in the Constitution as well as the jurisprudence of the 'rarest of the rare' doctrine. It is now settled that the death penalty can only be imposed in the rarest of the rare case which requires a consideration of the totality of circumstances. In this light, we have to assess the inclusion of post-conviction mental illness as a determining factor to disqualify as a 'rarest of the rare' case.

56. Sentencing generally involves curtailment of liberty and freedom for the Accused. Under Article 21 of the Constitution, right to life and liberty cannot be impaired unless taken by jus laws. In this case we are concerned with the death penalty, which inevitably affects right to life, and is subjected to a various substantive and procedural protections under our criminal justice system. An irreducible core of right to life is 'dignity'. [refer Navtej Singh Johar v. Union of India MANU/SC/0947/2018 : AIR 2018 SC 4321]. Right to human dignity comes in different shades and colours. [refer Common Cause v. Union of India MANU/SC/0232/2018 : AIR 2018 SC 1665]. For our purposes, the dignity of human being inheres a capacity for understanding, rational choice, and free will inherent in human nature, etc. The right to dignity of an Accused does not dry out with the judges' ink, rather, it subsists well beyond the prison gates and operates until his last breath. In the context of mentally ill prisoners it is pertinent to mention that Section 20 (1) of the Mental Health Care Act, 2017, Act No. 10 of 2017, explicitly provides that 'every person with mental illness shall have a right to live with dignity'.

57. All human beings possess the capacities inherent in their nature even though, because of infancy, disability, or senility, they may not yet, not now, or no longer have the ability to exercise them. When such disability occurs, a person may not be in a position to

understand the implications of his actions and the consequence it entails. In this situation, the execution of such a person would lower the majesty of law.

58. Article 20 (1) of the Indian Constitution imbues the idea communication/knowledge for the Accused about the crime and its punishment. It is this communicative element, which is ingrained in the sentence (death penalty), that gives meaning to the punishments in a criminal proceeding. The notion of death penalty and the sufferance it brings along, causes incapacitation and is idealized to invoke a sense of deterrence. If the Accused is not able to understand the impact and purpose of his execution, because of his disability, then the *raison d'être* for the execution itself collapses.

59. It may not be out of context to refer *Atkins v. Virginia*, MANU/USSC/0061/2002 : 536 U.S. 304 (2002), wherein the United States Supreme Court, while dealing with the question 'whether the execution of mentally retarded persons "cruel and unusual punishment" prohibited by the Eighth Amendment?' The Court noted that hanging mentally disabled or retarded neither increases the deterrence effect of death penalty nor does the non-execution of the mentally disabled will measurably impede the goal of deterrence.

60. Moreover, Article 20 of the Constitution guarantees individuals the right not to be subjected to excessive criminal penalty. The right flows from the basic tenet of proportionality. By protecting even those convicted of heinous crimes, this right reaffirm the duty to respect the dignity of all persons. Therefore, our Constitution embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency against which penal measures have to be evaluated. In recognizing these civilized standards, we may refer to the aspirations of India in being a signatory to the Convention on Rights of Persons with Disabilities, which endorse 'prohibition of cruel, inhuman or

degrading punishments' with respect to disabled persons. Additionally, when the death penalty existed in England, there was a common law right barring execution of lunatic prisoners.³ Additionally, there is a strong international consensus against the execution of individuals with mental illness.⁴

61. We may note that various prison Rules in India also recognizes that generally the Government has the duty to pass appropriate orders on execution, if a person is found to be lunatic. Andhra Pradesh Prison Rules, 1979, Rule 796; Gujarat Prisons (Lunatics) Rules, 1983; Delhi Prison Rules, 2018, Rule 824; Tamil Nadu Prison Rules, 1983, Rule 923; Maharashtra Prison Manual, 1979, Chapter XLII (Government Notification, Home department, No. RJM-1058 (XLVI)/12,495-XVI, dated 18.01.1971); Model Prison Manual by Ministry of Home Affairs (2016), Rule 12.36 are some of the examples of legal instruments in India which have already recognized post-conviction mental illness as a relevant factor for Government to consider under its clemency jurisdiction.

62. Having understood the normative basis for recognition of post-conviction mental illness as a mitigating factor in a death penalty case, we must mention that *Shatrughan Chauhan Case* (supra) had identified the same and holds as under:

86. The above materials, particularly, the directions of the United Nations international conventions, of which India is a party, clearly show that insanity/mental illness/schizophrenia is a crucial supervening circumstance, which should be considered by this Court in deciding whether in the facts and circumstances of the case death sentence could be commuted to life imprisonment. To put it clear, "insanity" is a relevant supervening factor for consideration by this Court.

63. Now we need to consider the test for recognizing an Accused eligible for such mitigating factor. It must be recognized that

insanity recognized under Indian Penal Code and the mental illness we are considering in the present case arise at a different stage and time. Under Indian Penal Code, Section 84 recognizes the plea of legal insanity as a defence against criminal prosecution. [refer *Surendra Mishra v. State of Jharkhand*, (2011) 3 SCC (Cri.) 232]. This defence is restricted in its application and is made relatable to the moment when the crime is committed. Therefore, Section 84 of Indian Penal Code relates to the mens rea at the time of commission of the crime, whereas the plea of post-conviction mental illness is based on appreciation of punishment and right to dignity. [refer *Amrit Bhushan Gupta v. Union of India* MANU/SC/0087/1976 : AIR 1977 SC 608] The different normative standards underpinning the above consequently mean different threshold standards as well.

64. On the other hand, considering the fact that the case is at the fag end of the process and the mitigating factors so discussed above were not emergent at the time of commission of the crime, therefore this ground needs to be utilized only in extreme cases of mental illness considering the element of marginal retribution which survives. In any case, considering that India has taken an obligation at an international forum to not punish mental patients with cruel and unusual punishments, it would be necessary for this Court to provide for a test wherein only extreme cases of convicts being mentally ill are not executed. Moreover, this Court cautions against utilization of this dicta as a ruse to escape the gallows by pleading such defense even if such ailment is not of grave severity.

65. Before we analyse this case at hand, a brief survey of classification of mental illness and its impact on death penalty needs to be considered. The Diagnostic and Statistical Manual of Mental Disorders (DSM), is one of the most well-known classification and diagnostic guides for mental disorders in America. Its fifth edition (DSM-5), published in 2013, defines mental disorder as follows: -

A mental disorder is a syndrome characterized by clinically significant disturbance in an individual's cognition, emotion Regulation, or behaviour that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress in social, occupational, or other important activities. An expectable or culturally approved response to a common stressor or loss, such as the death of a loved one, is not a mental disorder. Socially deviant behavior (e.g., political, religious, or sexual) and conflicts that are primarily between the individual and society are not mental disorders unless the deviance or conflict results from a dysfunction in the individual, as described above.

66. 'Severe Mental Illness' under the 'International Classification of Diseases (ICD)', which is accepted Under Section 3 of the Mental Health Care Act, 2017, enerally include-

1. schizophrenic and delusional disorders
2. mood (affective) disorders, including depressive, manic and bipolar forms
3. neuroses, including phobic, panic and obsessive- compulsive disorders
4. behavioural disorders, including eating, sleep and stress disorders
5. personality disorders of different kinds.

67. American Bar Association, by its Resolution 122A passed on August 2006, notes as under-

(a) Grounds for Precluding Execution. A sentence of death should not be carried out if the prisoner has a mental disorder or disability that significantly impairs his or her capacity (i) to make a rational decision to forgo or terminate post-conviction proceedings available to challenge the

validity of the conviction or sentence; (ii) to understand or communicate pertinent information, or otherwise assist counsel, in relation to specific claims bearing on the validity of the conviction or sentence that cannot be fairly resolved without the prisoner's participation; or (iii) to understand the nature and purpose of the punishment, or to appreciate the reason for its imposition in the prisoner's own case.

68. In line with the above discussion, we note that there appear to be no set disorders/disabilities for evaluating the 'severe mental illness', however a 'test of severity' can be a guiding factor for recognizing those mental illness which qualify for an exemption. Therefore, the test envisaged herein predicates that the offender needs to have a severe mental illness or disability, which simply means that a medical professional would objectively consider the illness to be most serious so that he cannot understand or comprehend the nature and purpose behind the imposition of such punishment. These disorders generally include schizophrenia, other serious psychotic disorders, and dissociative disorders-with schizophrenia.

69. Following directions need to be followed in the future cases in light of the above discussion-

a. That the post-conviction severe mental illness will be a mitigating factor that the appellate Court, in appropriate cases, needs to consider while sentencing an Accused to death penalty.

b. The assessment of such disability should be conducted by a multi-disciplinary team of qualified professionals (experienced medical practitioners, criminologists etc), including professional with expertise in Accused's particular mental illness.

c. The burden is on the Accused to prove by a preponderance of clear evidence that he is suffering with severe mental illness. The

Accused has to demonstrate active, residual or prodromal symptoms, that the severe mental disability was manifesting.

d. The State may offer evidence to rebut such claim.

e. Court in appropriate cases could setup a panel to submit an expert report.

f. 'Test of severity' envisaged herein predicates that the offender needs to have a severe mental illness or disability, which simply means that objectively the illness needs to be most serious that the Accused cannot understand or comprehend the nature and purpose behind the imposition of such punishment.

70. Having said so, it needs to be considered that the Accused has submitted a report of the Class-I Psychiatrist, Yerawada Central Prison, indicating that he was suffering from some sort of mental illness without providing any objective factors for such assessment. We may reproduce the aforesaid report dated 25.09.2014, in the following manner-

Clinical impression: no delusions, no hallucinations, sleep and appetite are normal.

Remark: Taking regular medication and maintaining improvement. He is under OPD under Psychiatric treatment since 21.12.1994 and since then taking regular treatment. Currently he is on anti-psychotic drugs...

The doctor further opined that 'he is maintaining good improvement on medication, good diet. He is having psychological disturbance and symptoms like irritability emerges when the dosage is decreased.

71. Moreover, the expert opinion offered by a Psychiatrist registered with the Maharashtra Medical Council working as a coordinator of the Centre for Mental Health Law and Policy, Indian Law Society, Pune, does not provide any further clarity. We may extract the

conclusion reached by the aforesaid report as well-

While no definite opinion can be given relating to the mental health condition of Accused 'X' and the treatment being administered to him, considering that he appears to be under treatment for a severe mental illness such as schizophrenia or some type of psychosis, there appears to be a need to review Accused x's medical records and to clinically examine him to assess his current psychiatric status.

(Emphasis supplied).

72. Even though we are not satisfied with such statements made by the doctors as the assessment seems to be incomplete. However, it is to be noted that the present Accused has been reeling under bouts of some form of mental irritability since 1994, as apparent from the records placed before us. Moreover, he has suffered long incarceration as well as a death row convict. In the totality of circumstances, we do not consider it be appropriate to constitute a panel for re-assessment of his mental condition, in the facts and circumstances of this case.

73. At the same time, we cannot lose sight of the fact that a sentence of life imprisonment simpliciter would be grossly inadequate in the instant case. Given the barbaric and brutal manner of commission of the crime, the gravity of the offence itself, the abuse of the victims' trust by the Petitioner, and his tendency to commit such offences as is evident from his past conduct, it is extremely clear that the Petitioner poses such a grave threat to society that he cannot be allowed to roam free at any point whatsoever. In this view of the matter, we deem it fit to direct that the Petitioner shall remain in prison for the remainder of his life. It need not be stated that this Court has in a plethora of decisions held such an approach to be perfectly within its power to adopt, and that it acts as a useful via media between the imposition of the death penalty and life imprisonment

simpliciter (which usually works out to 14 years in prison upon remission). (See for instance *Swamy Shraddananda v. State of Karnataka*, MANU/SC/3096/2008 : (2008) 13 SCC 767; *Union of India v. V. Sriharan*, MANU/SC/1377/2015 : (2016) 7 SCC 1; *Tattu Lodhi v. State of Madhya Pradesh*, MANU/SC/1015/2016 : (2016) 9 SCC 675).

74. In light of the above discussion, the petition is allowed to the extent that the sentence of death awarded to the Petitioner is commuted to imprisonment for the remainder of his life sans any right to remission.

75. Further, it is this state of 'Accused x' that obliges the State to act as *parens patriae*. In this state 'Accused x' cannot be ignored and left to rot away, rather, he requires care and treatment. Generally, it needs to be understood that prisoners tend to have increased affinity to mental illness.⁵ Moreover, due to legal constraints on the recognition of broad-spectrum mental illness within the Criminal Justice System, prisons inevitably become home for a greater number of mentally-ill prisoners of various degrees. There is no overlooking of the fact that the realities within the prison walls may well compound and complicate these problems.⁶

76. In order to address the same, the Mental Healthcare Act, 2017 was brought into force. The aspiration of the Act was to provide mental health care facility for those who are in need including prisoners. The State Governments are obliged Under Section 103 of the Act to setup a mental health establishment in the medical wing of at least one prison in each State and Union Territory, and prisoners with mental illness may ordinarily be referred to and cared for in the said mental health establishment.

77. Therefore, we direct the State Government to consider the case of 'Accused x' under the appropriate provisions of the Mental Healthcare Act, 2017 and if found entitled, provide for his rights under that enactment.

78. In light of the above discussion, this review petition stands partly allowed in the aforesaid terms and pending applications, if any, shall also stand disposed of.

¹Dame Sian Elias, Fairness in Criminal Justice (golden threads and pragmatic patches), Hamlyn Lectures (2018)

²Nicola Padfield, Rod Morgan and Mike Maguire, 'Out of Court, out of sight? Criminal sanctions and no-judicial decision making', The Oxford Handbook of Criminology (5th Ed.).

³Hale's Pleas of the Crown Vol. I - p. 33; Coke's Institutes, Vol. III, pg. 6; Blackstone's Commentaries on the Laws of England Vol. IV, pages 18 and 19; "An Introduction to Criminal Law", by Rupert Cross, (1959), p. 67.

⁴Commission on Human Rights Resolution 2000/65 The question of the death penalty, UN Commission on Human Rights (Apr. 27, 2000); G.A. Res. 69/186, 5(d) (Feb. 4, 2015);

⁵Although statistics on the same are not available for all of Indian prisons, but we were able to compare sample studies within some Indian prisons and literature on psychiatric morbidity concurs as well.

⁶Liebling, Maruna and McAra et al., The Oxford Handbook of Criminology (6th Ed. (2017)).

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CYBER CRIMES: THE INDIAN LEGAL SCENARIO

*Maneeta**

Crime is an act or omission, which is prohibited by the law. Cyber crime may be said to be an act which violates net etiquettes. Cyber crime is the latest and perhaps the most specialized and dynamic field in cyber laws. One of the greatest lacunae of this field is the absence of a set of comprehensive law anywhere in the world. Further the growth ratio of Internet and cyber law is not proportional, too. The idea of Internet was conceived in the early 60's while a code for its regulation was mooted in late 90's This clearly brings about the reason for the complication of cyber crime. Any crime essentially consists of two elements namely, actus reus and mens rea. In the same way, cyber crime is also caused due to these two underlying factors— I. Actus Reus in cyber crimes; and II. Mens Rea in cyber crimes.

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INTRODUCTION

Since the independence of India, i.e., August 15th, 1947, it has been struggling through to make its stand in the world. Many new technologies were brought and many new are still to be found. One such revolution was brought about by the introduction of the Internet, which is considered as the pool of knowledge. But who could think of the time when this rich source of knowledge will be misused for criminal activities.

There are many such disturbing activities that occurred in past and demanded for some rules and regulations urgently, some set definite patterns that can be put forward while carrying out any business transaction over the net, ranging from simple friendly e-mail to carrying out the whole set of work, without which it may go wild and beyond control and it can be used as a tool for the destruction of mankind. New forms and manifestations of cyber crimes are emerging every day. Therefore, to control cyber crimes new legislative mechanisms are required.

The largest challenge to the law is to keep pace with technology. The march of technology demands the enactment of newer legislation both to regulate the technology and also to facilitate its growth. It was at this point of time that the government of India felt the need to enact the relevant cyber laws which can regulate the Internet in India. Internet and cyberspace need to be regulated and a regulated cyberspace would be the catalyst for the future progress of mankind. Here lay the seeds of origin of cyber law in India.

This research paper is an honest attempt to examine the cyber crimes and their impact on the present legal scenario in India. Part I of this research paper summarizes Actus Reus in cyber crimes, Part II explains mens rea in cyber crimes, Part III investigates classification of various types of cyber crimes, Part IV examines comparative scanning of cases registered and persons arrested under Information Technology Act, Part V deals with changes brought by the Information Technology (Amendment) Act 2008 and Part VI discusses at length suggestions to tackle cyber crimes.

I. ACTUS REUS IN CYBER CRIMES

The element of actus reus in cyber crimes is relatively easy to identify, but it is not always easy to prove. The fact of occurrence of the act that can

be termed as a crime can be said to have taken place when a person is:¹

- (a). trying to make a computer function.
- (b). trying to access data stored on a computer or from a computer, which has access to data stored outside.

II. MENS REA IN CYBER CRIMES

There are two vital ingredients for Mens Rea to be applied to a cyber criminal²:

- (a). The access intended to be secured must have been unauthorized; and
- (b). The offender should have been aware of the same at the time he or she tried to secure access.

Mens Rea does not enquire into the mental attitude of the wrong doer but it simply means that the mens rea is judged from the conduct by applying an objective standard. The act is not judged from the mind of the wrong-doer, but the mind of the wrong-doer is judged from the acts. An act which is unlawful can not be excused in law on the ground, that it was committed with a good motive.

To be guilty of cyber crime in India, a person must act voluntarily and willfully. For example, a person who deliberately sends Virus online is guilty of cyber crime but a person who forwards an e-mail without realizing it contains a virus or spreads a virus when his/her account is hacked is not guilty. This means that to constitute a cyber crime in India mens-rea is an essential element along with actus reus. Section 43 (c) read with S/66 amply clears the above point. S/43 mentions penalty and compensation for damage to computer, computer system, etc. whereas S/66 mentions punishment and fine for computer related offences.

III. CLASSIFICATION OF CYBER CRIMES

Cyber crimes are crime related to information technology, electronic commerce etc. Cyber crimes are increasing in all countries and they are bound to explode new legal issues. There are a variety of crimes committed on the Internet but some of them are:

- (a). Internet fraud and financial crimes

¹ NANDAN KAMATH, LAW RELATING TO COMPUTERS, INTERNET & E-COMMERCE 269 (Universal Law Publishing Co., New Delhi 2009).

² *Ibid.*

- (b). Online sale of illegal articles
- (c). Online gambling
- (d). Digital forgery
- (e). Cyber delamation
- (f). Cyber stalking
- (g). Phishing
- (h). Cyber terrorism
- (i). Cyber conspiracy etc.

These cyber crimes will be discussed one by one. (This list is not exhaustive)

A. *Internet Fraud and Financial Crimes*

Money is the most common motive behind all crime. The same is also true for cyber crime. More and more cyber crimes are being committed for financial motives rather than for "revenge" or for "fun". There are various fraudulent schemes envisaged over the Internet from which the criminals benefit financially. Various Internet frauds include online auctions, Internet access devices, work-at-home plans, information/adult services, travel/vacations, advance fee loan, prizes etc. Payment method varies from credit/debit card to cheque to even sending cash. Financial crimes include cyber cheating, credit card frauds, money laundering, hacking into bank servers, computer manipulation, accounting scams etc. Internet offers certain unique advantages, which no other medium has, like anonymity and speed. The Internet also offers a global marketplace for consumers and business.³ These factors together work up to make up a haven for any fraudulent activities online.

The IT Act deals with the crimes relating to Internet fraud and online investment fraud in Sections 43(d), 65 and 66. Under the Indian Penal Code, Internet fraud would be covered by Sections 415 to 420 which relates to cheating.⁴

B. *Online Sale of Illegal Articles*

Internet is being used now to sell articles which otherwise are not

³ Fraud Section, Criminal Division, U.S. Department of Justice, available at <http://internetfraud.usdoj.gov>.

⁴ Statutory provisions are from relevant acts.

permitted to be sold under the law of a country. This would include sale of narcotics, weapons and wildlife, pirated software or music and distribution of data on private persons and organizations etc. by information on websites, auction websites or simply by using email communication. In December 2004, the CEO of Bazoo.com was arrested in connection with sale of a CD with objectionable material on the website. The CD was also being sold in the markets in Delhi. The Mumbai City Police and the Delhi Police got into action. The CEO was later released on bail by the Delhi High Court.⁵

Online sale of illegal articles are governed by Section 8 of the Narcotic Drugs and Psychotropic Substances Act, 1985 which prohibits sale or purchase of any narcotic drug or psychotropic substance. Section 7 of the Arms Act, 1959 prohibits sale of any prohibited arms and ammunition, whereas Section 9B of the Indian Explosive Act, 1884 makes sale of any explosive an offence. Wild Life (Protection) Act, 1972 prohibits sale of banned animal products.⁶

C. *Online Gambling*

Gambling is illegal in many countries. The problem is that virtual casinos are based offshore making them difficult to regulate.⁷ That means that people offer gambling services on the Internet from countries where gambling is permitted and players from countries where gambling is illegal play and bet. It is in this situation that the Internet helps the gamblers to evade law.⁸

Section 3 of the Public Gambling Act, 1867 prohibits gambling. Relevant provisions of the IPC dealing with cheating, criminal misappropriation or criminal breach of trust could be applied in cases of online gambling. However, there is no direct law on this point.⁹

D. *Digital Forgery*

Forgery is creation of a document which one knows is not genuine and yet projects the same as if it is genuine. Digital forgery implies making use of digital technology to forge a document. Desktop publishing systems, color laser and ink-jet printers, color copiers and image scanners enable

⁵ Suit No. 1279 of 2001, Delhi High Court.

⁶ *Supra* note 4.

⁷ BBC Online Network, available at <http://news.bbc.co.uk>.

⁸ Keith Mench, *Online Gambling*, available at <http://www.wetsafe.org.nz/gambling/gambling-detail.asp>.

⁹ *Supra* note 4.

crooks to make fakes, with relative ease of cheques, currency, passports, visas, with certificates, ID cards etc.¹⁰

Advanced design, copying and publishing technology is enhancing the capability to produce high-quality counterfeit currency and financial instruments such as commercial cheques, traveler's cheques and money-orders. One of the most popular case was that of Abdul Kareem Telgi who along with several others was convicted in India on several counts of counterfeiting stamp papers and postage stamps totaling several billion rupees.¹¹

Section 91 of the IT Act amended the provisions of Section 464 of the IPC in relation to "forgery" to include "electronic records" as well.¹²

E. Cyber Defamation

This occurs when defamation takes place with the help of computers or the Internet. In comparison of offline attempt of defamation, online defamation is more vigorous and effective. Quantitatively, the number of people a comment defaming a person might reach is gigantic and hence would effect the reputation of the defamed person much more than would an ordinary publication. Recently cyber defamation came into highlight, when fraud profiles of several high politicians (L.K. Advani¹³, Miss Mayawati¹⁴, Dr. Manmohan Singh¹⁵) appeared on the social networking site "Orkut".

Cyber defamation is covered under Section 499 of IPC read with Section 4 of the IT Act. While Section 499 of IPC provides provision for defamation, Section 4 of IT Act gives legal recognition to electronic records.¹⁶

F. Cyber Stalking

Cyber stalking is an electronic extension of stalking. Cyber stalking or on-line harassment is a terrifying pursuit of the victim, actions that usually leave no physical cuts or bruises. Cyber stalking involves following a person's movements across the Internet by posting messages (sometimes threatening) on the bulletin boards frequented by the victim, entering the

¹⁰ S.K. VERMA & RAMAN MITTAL, LEGAL DIMENSIONS OF CYBER SPACE 235 (LLI Publications, 2004).

¹¹ S.C. No-4302/012 (Crime No-54500).

¹² *Supra* note 4.

¹³ Amar Ujala dated August 29, 2007, Regional Daily Newspaper.

¹⁴ Amar Ujala dated August 28, 2007, Regional Daily Newspaper.

¹⁵ Amar Ujala dated August 29, 2007, Regional Daily Newspaper.

¹⁶ *Supra* note 4.

chat-rooms frequented by the victim, constantly bombarding the victim with e-mails etc. Cyber bullying is worse than face-to-face bullying because it has no geographical boundaries. Former Miss India and ad film maker Rani Jeyraj says, "Earlier, if a man wanted to get at you, he would spread rumors. Now the damage can be far worse. It's like having your own newspaper and writing bad things about someone and circulating it worldwide".¹⁷ A recent data confirms the truth:¹⁸

Cyber Crime Rate	Yes	No	No awareness
Had bad experience in the social networking sites	61.6%	38.4%	-
Received abusive/dirty mails in inboxes from known/unknown sources	78.1%	21.9%	-
Has experienced cyber stalking	37.0%	49.3%	13.7%
Has experienced phishing attacks	50.7%	42.5%	6.8%
Has been impersonated by email account/social networking profiles/websites etc	28.3%	60.3%	11.4%
Has seen his/her "cloned" profile/email ids	41.1%	46.6%	12.3%
Has been a victim of defamatory statements/activities involving him/herself in the cyber space	68.5%	23.3%	8.2%
Has received hate messages in their inboxes/message boards	42.5%	47.9%	9.6%
Has seen his/her morphed pictures	31.5%	57.5%	11.0%
Has been bullied	39.7%	50.7%	9.6%
Has experienced flaming words from others	43.8%	46.6%	9.6%
Victimized by their own virtual friends	45.2%	53.4%	1.4%
Has reported to authorities	37.8%	47.3%	14.9%
Feels women are prone to cyber attacks	74.0%	26.0%	-

Cyber stalking is covered under Section 503 of IPC that is criminal intimation, cyber stalking in effect is criminal intimidation with the help of computers.¹⁹

G. Phishing

Phishing is a new kind of cybercrime and method of committing online financial fraud. In the cyber world, phishing (also known as carding and spoofing) is a technique that Internet fraudsters lure unsuspecting victims into giving out their personal finance information. It tricks computer users into entering critical and sensitive information in fake websites, which is later used by them for identity theft and swindling user bank accounts. When users respond with the requested information attackers can use it to

¹⁷ Economic Times, Oct. 4, 2007, National Daily Newspaper.

¹⁸ <http://www.cybervictims.org>.

¹⁹ *Supra* note 4.

gain access to the accounts.²⁰ The term "phishing" is derived from "fishing" where bait is offered to fish.²¹

The Delhi High Court in the case of *NASSCOM v Ajay Sood* elaborated upon the concept of "phishing". The defendants were operating a placement agency involved in head-hunting and recruitment. In order to obtain personal data, they could use for purposes of head-hunting, the defendants composed and sent e-mails to third parties in the name of NASSCOM.²² The plaintiff had filed the suit *inter alia* praying for a decree of permanent injunction restraining the defendants from circulating fraudulent e-mails purportedly originating from the plaintiff. The court declared "phishing" on the Internet to be a form of Internet fraud and hence, an illegal act. This case had a unique bend since it was filed not by the one who was cheated but by the organization who was being wrongly represented that is NASSCOM. The court held the act of phishing as passing off and tarnishing the plaintiff's image.

An alternate form of phishing is by installing malicious code on your machine without your knowledge and permission. This code works secretly in the background monitoring all the sites you visit and passwords you type in. It then passes this information to the identity thieves.

Apart from losing peace of mind, a victim of phishing is robbed of his identity. This means the fraudsters have access to all the bank and credit card information and can make purchases or withdraw cash itself from the victim's account.

The increasing use of electronic channels for payments has posed a new security problem for banks. India's largest bank, the State Bank of India, has reported an attempt at phishing to the Indian Computer Emergency Response Team (CERT-In).²³

Other banks like HDFC, IDBI, ICICI Bank Home Loans, HSBC, Standard Chartered, ABN Personal Loans, Bank of India and Kotak Mahindra have their phishing sites. The site called www.hdfcbank.com is very much similar to the URL of the actual HDFC Bank's website www.hdfcbank.com. Similarly, the phishing site for IDBI Bank comes with an extra i-www.idbiibank.com.

Sections of IPC and IT Act which are applicable to Internet fraud and online investment fraud covers phishing as well.²⁴

²⁰ <http://www.us-cert.gov>.

²¹ *Economic Times*, June, 2006, National Daily Newspaper.

²² 119 (2005) DLT 596, 2005 (30) PTC 437 (Del).

²³ <http://infotech.indiatimes.com>

²⁴ *Supra* note 4.

H. *Cyber Terrorism*

Cyber terrorism is the convergence of terrorism and cyberspace. It is generally understood to mean unlawful attacks and threats of attack against computer networks and the information stored therein when done to intimidate or coerce a govt. or its people in the furtherance of political or social objectives.²⁵

The F.B.I. has defined cyber terrorism as²⁶

The unlawful use of force or violence against persons or property to intimidate or coerce a govt. the civilian population, or any segment thereof, in furtherance of political or social objectives through the exploitation of systems deployed by the target.

Another definition of Cyber Terrorism is that "It is the premeditated, politically motivated attack against information, computer systems, computer programmes, and the data which result in violence against non-combatant targets by sub-national groups or clandestine agents".²⁷

Cyber-terrorism is the use of computers and information technology, particularly the Internet, to cause harm or severe disruption with the aim of advancing the attacker's own political or religious goals as the Internet becomes more pervasive in all areas of human endeavor, individuals or groups can use the anonymity afforded by cyberspace to threaten citizens, specific groups²⁸ (i.e. members of an ethnic group or belief), communities and entire countries.

From the above definitions, it can easily concluded that "cyber terrorism" refers to two elements:

- (i) Cyber Space; and
- (ii) Terrorism.

This means that the term necessarily refers to any dangerous, damaging, and destructive activity that takes place in cyber space. There have been reports of Osama Bin Laden and others hiding maps and photographs of terrorist targets and posting instructions for terrorist activities on sports chat rooms, pornographic bulletin boards and other websites.

Recently F.B.I. has warned America of cyber attacks. It has said that the destruction caused by such cyber attacks can be easily compared to disastrous weapons causing mass destruction of life and property. Internet is used not only for spreading message of Jihad but new techniques of making

²⁵ Nagpal, *Defining Cyber Terrorism*, Asian School of Cyber Laws.

²⁶ ICFAL Journal of Cyber Law, Vol. 1, No. 1, at 77 (Nov., 2002).

²⁷ YOGESH BARUA & DENZYL P. DAYAL, 3 CYBER CRIMES 121(11) 6.

²⁸ <http://nl.wikipedia.org/wiki/cyber-terrorism>

bomb, making new members for terrorist activities, raising funds for terrorist attacks and other heinous motives.²⁹ Arizona University's "Dark Web Project" claims that on Internet 50 crore pages, 10 lakh pictures, 15 thousand videos, 300 forums related to terrorist activities and more than 30,000 terrorist members exist.

In India alone, 300 websites are hacked every month. The majority of hacked websites are that of govt. organizations, V.I.P.'s and celebrities.³⁰

Information Technology Act 2000 completely missed any provision regarding prevention of Cyber terrorism but IT (Amendment) Act, 2008 has severely dealt with cyber terrorism under Section 66/F.³¹

I. Cyber Conspiracy

Nowadays, social networking sites besides trudging long distances to revive with old friends have also become new synonym for criminal conspiracy. Communities set up these networking websites that are though said to be successful tool for social and political discussions but behind this rosy picture is a dark under-belly. In August 2007, Mumbai teenager Adnan Patrawala was kidnapped from the suburbs and later found murdered in Nav Mumbai allegedly by friends he made on Orkut.³² The 16-year-old boy was lured with a fake female on-line profile "Angel" to a late night meeting in a shopping mall.³³ He was then kidnapped and strangled to death, before his parents could pay the ransom.

Criminal conspiracy is dealt under Sections 120-A and 120-B of Indian Penal Code (IPC). There is no direct provision on this point in IT Act.³⁴

IV. COMPARATIVE SCANNING OF CASES REGISTERED & PERSONS ARRESTED UNDER INFORMATION TECHNOLOGY ACT

Cyber crimes may be spiralling but the country is grappling with poor conviction rates in courts. Scanning of data of cases registered and persons arrested under Information Technology Act bears testimony to this fact. The following data³⁵ shows that controlling cyber crimes needs immediate attention of the authorities at the helm of affairs.

²⁹ Computers & Law, No. 77 (Maneela, May 2010), at 21

³⁰ *Dainik Jagran*, Regional Daily Newspaper (Jan. 23, 2009).

³¹ *Supra* note 4.

³² *Times of India*, National Daily Newspaper (New Delhi, August 23, 2007).

³³ *Economic Times*, National Daily Newspaper (Oct. 9, 2007).

³⁴ *Supra* note 4.

³⁵ National Crime Records Bureau, Cyber Crimes Statistics 2011.

Table 2 Cyber Crimes/Cases Registered and Person Arrested under Information Technology Act during 2006-2011

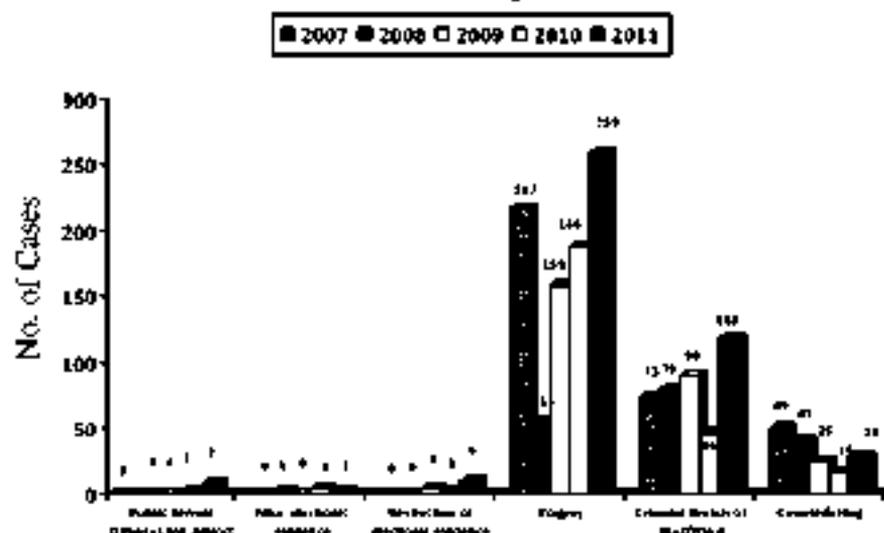
Sl. No.	Crime Heads	Cases Registered				% Variation in 2011 over 2010	Persons Arrested				% Variation in 2011 over 2010
		2008	2009	2010	2011		2008	2009	2010	2011	
1	Tampering computer source documents Hacking with Computer System	26	21	64	94	46.9	26	6	79	66	-16.5
2	i) Loss/Damage to computer resource/utility ii) Hacking	56	115	346	826	138.7	41	63	233	487	109.00
		82	118	164	157	-4.3	15	44	61	65	6.6
3	Obscene Publication / transmission in electronic form	105	139	328	496	51.2	90	225	361	443	22.7
4	i) Of compliance orders of Certifying Authority ii) To assist in decrypting the information intercepted by Govt. Agency	1	3	2	6	200	1	2	6	4	-33.3
		0	0	0	3	-	0	0	0	0	@
5	Un-authorized access/attempt to access to protected computer system	3	7	3	5	66.7	0	1	16	15	+6.3
6	Obtaining licence or Certificate by misrepresentation / suppression of fact	0	1	9	0	33.3	11	0	1	0	-100
7	Publishing false Digital Signature Certificate	0	1	2	3	50.0	0	0	0	1	-
8	Fraud Digital Signature Certificate	3	4	3	12	300.0	3	0	6	8	33.3
9	Breach of confidentiality/privacy	8	10	15	26	73.3	3	3	5	27	400.0
10	Other	4	1	30	157	423.3	0	0	0	68	-
	Total	288	420	966	1791	85.4	154	178	288	1184	311.1

Note: @ denotes infinite percentage variation because of division by zero.

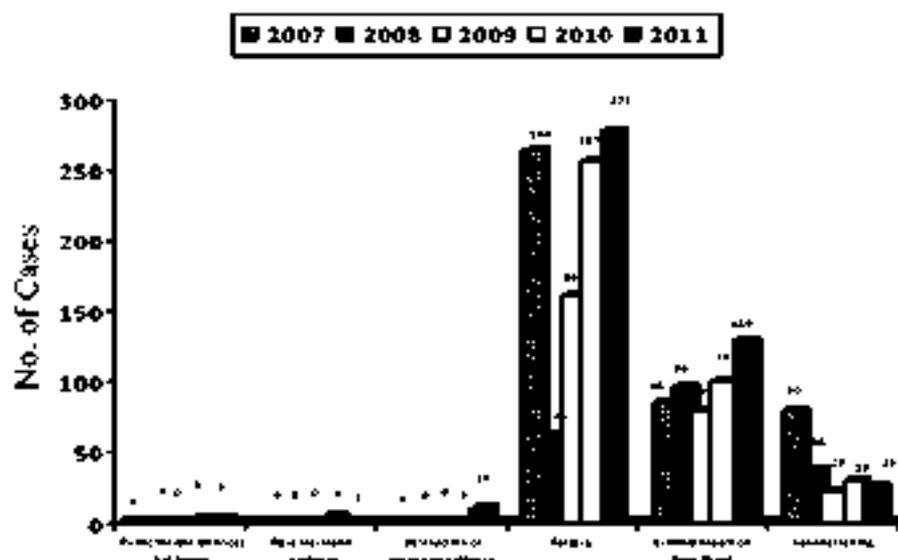
With the legal recognition of electronic records and the amendments made in the several sections of the Indian Penal Code (IPC), 1860 vide the IT Act, 2000 several offences having bearing on cyber-arena are registered under the appropriate sections of the IPC. Besides this law enforcement agencies find easier to handle cybercrime cases under IPC cybercrime cases are not necessarily dealt under the IT Act, 2000. The following graphical

illustration bears testimony to the fact. Offences like Fraud (S/423), Forgery (S/191) and Counterfeiting (S/464) are registered under IPC.

**Cyber Crimes/Cases Registered and Persons Arrested
under Indian Penal Code during 2007-2011
Cases Registered.**



**Cyber Crimes/Cases Registered and Persons Arrested
under Indian Penal Code during 2007-2011
Persons Arrested.**



The National Crime Records Bureau 2011 statistics clearly illustrates that incidence of cyber crimes (IT Act+IPC Sections) has increased by 67.4% in 2011 as compared to 2010 (from 1,322 in 2010 to 2,213 in 2011). Cyber Forgery 61.3% (259 out of total 422) and Cyber Fraud 27.9% (188 out of 422) were the main cases under IPC category for cyber crimes.

V. CHANGES BROUGHT BY THE INFORMATION TECHNOLOGY (AMENDMENT) ACT, 2008

The IT Act, 2000 was promulgated twelve years ago primarily to bolster the e-commerce business and not intended to deal with cyber crime issues. When the law was framed, there were no technology like MMS or sophisticated devices like mobile phones, or mobile phones with cameras or Internet connectivity. The IT Act, 2000 was struggling to cope with the change in modern technology. The act remained static while the rest of the world has changed a lot. To justify the need of the hour on December 23rd, 2008 the Parliament of India passed "The Information Technology Amendment Bill 2008".

A. *Main Amendments*

Compensation limit has been removed from Section 43 (previously it was one crore rupees under IT Act, 2000). Under Section 48 the name of Cyber Regulations Appellate Tribunal has been changed to Cyber Appellate Tribunal. In Section 66, "dishonesty" and "fraudulent" intention has been made necessary.

B. *Some New Sections Have Been Introduced to Combat New Offences*

S/66A—Punishment for sending offensive messages.

S/66B—Punishment for dishonestly receiving stolen computer resource.

S/66C—Punishment for identity theft.

S/66D—Punishment for cheating by personation by using computer resource.

S/66E—Punishment for violation of privacy.

S/66F—Punishment for cyber terrorism.

S/67A—Punishment for publishing or transmitting of material containing sexually explicit act.

S/67B—Punishment for child pornography.

C. *Other Changes*

The definition of intermediary has been modified. As the amendments in various sections now intermediaries are made more responsible and liable towards their acts. New Section 67C asks intermediaries to preserve and retain certain records for a stated period. New Section 69B is also quite stringent to intermediaries. Section 69A has been introduced to enable blocking of websites by the central government. Section 69B provides powers to central government to collect traffic data from any computer resource. It could be either in transit or in storage. This amendment was necessary for security purpose but it may lead to abuse of power by government. Section 72A has been introduced to cover offences regarding disclosure of information in breach of lawful contract. Section 80 empowers inspectors instead of D.S.P's to enter, search, etc.

D. *Loopholes of Information Technology Act, 2008*

ITA-2000 suffer from many loopholes, some of them are removed in ITAA-2008 but some of them prevail even now. The IT Act, 2000 has provided punishment for various cyber offences ranging from three to ten years. These are non-bailable offences where the accused is not entitled to bail as a matter of right.

However, what amazes the lay reader is that the amendments to the IT Act have gone ahead and reduced the quantum of punishment. For example, in Section 67, which relates to offence of online obscenity the quantum of punishment on first conviction for publishing, transmitting or causing to be published any information in the electronic form, which is lascivious and has been reduced from the existing five years to three years. Similarly, the amount of punishment for the offence of failure to comply with the directions of the controller of certifying authorities is reduced from three years to two years. (S/68)

Government has actually relaxed the laws governing some most common cyber offences. Common cyber crimes, such as introducing viruses, cyber stalking, defamation, impersonation and stealing of access codes like passwords and pin numbers are bailable offences under ITAA-2008. Earlier these were non-bailable offences.

Hacking or unauthorized access to a computer system has been deleted from the list of crimes in the ITAA-2008. The original legislation had stipulated jail term up to three years and Rs. 2 lakh fine for hacking, now it has come under the ambit of computer-related offences that are bailable.

The legislation has now stipulated that cyber crimes punishable with

imprisonment of three years shall be bailable offences. Since the majority of cyber crime offences defined under the amended IT Act are punishable with three years, (except-cyber terrorism, child pornography and violation of privacy), the net effect of all amendments is that a majority of these cyber crimes shall be bailable. This means that the moment a cyber criminal will be arrested by the police, barring a few offences, in almost all other cyber crimes, he shall be released on bail as a matter of right by the police, there and then.

It will be but natural to expect that the concerned cyber criminal, once released on bail, will immediately go and evaporate, destroy or delete all electronic traces and trails of his having committed any cyber crime, thus making the job of law enforcement agencies (LEA's) to have cyber crime convictions, near impossibility. This would put the LEA's under extreme pressure.

Section 69 of 2008 Act had given the central government the power to intercept and monitor any information through computer systems in national interest, permitting it to monitor any potentially cognizable offence. This will give government endless power to "intercept or monitor any information through any computer resource". Unauthorized interceptions could soon become common. This is bound to infringe civil liberties like right to privacy or right to anonymous communication with legitimate purposes.

Another major change that ITAA-2008 have done is that cyber crimes in India shall now be investigated not by a Deputy Superintendent of Police, as under ITA-2000 but shall now be done by low level police inspector such an approach is hardly likely to withstand the test of time, given the current non-exposure and lack of training of Inspector level police officers to tackle cyber crimes, their detection, investigation and prosecution.

Having discussed the innumerable negative changes of ITAA-2008, it is also necessary to mention briefly if there are any benefits at all that are envisaged in ITAA-2008.

Certain provisions that have been put in the right frame are as follows: Cyber terrorism and child pornography have been made non-bailable. The law has dealt severely with sections relating to child pornography (S/67B) and cyber terrorism (S/66F). The punishment for child pornography is imprisonment up to 5 years along with a fine up to Rs. 10 Lakhs, while for cyber terrorism, the punishment is imprisonment for life.

Perhaps these provisions can be considered as the silver lining in the otherwise dark cloud.

VI. SUGGESTIONS

Some suggestions to tackle cyber crimes are as follows: There should be clear provisions for handling IPR, domain name issues and related concerns such as cyber squatting certain provisions like electronic payments need urgent and specific attention. Trained officials well trained and equipped police force, investigators with the expert knowledge in computer forensic should be appointed to attend to the grievances of the complainant.

There should be clear briefs on how the act will apply to any offence, and how action will be taken against any person who has committed the crime outside India(S/75). Crimes like cyber theft, cyber stalking, cyber harassment, cyber defamation need to have specific provisions in the act to enable the police to take quick action. To cope with modern cyber crimes (MMS, mobile phones), there is a need for a constant innovation and improvement in the present act. There is a need for incorporating new technologies. There is a further need towards adoption of new technologies.

The IT Act should include special and tighter norms to protect data from theft, frauds, etc. Different provisions concerning privacy need to be appropriately defined specific provisions dealing with problems as spamming need to be incorporated.

Under IT Act, 2000, the authentication technology acceptable was only digital signatures. This is not suffice, so technologies like biometrics which include fingerprints, thumb impression or retina of an eye to prove identity should be recognized. Offences instead of being prosecuted under civil and criminal procedure both, covered under criminal procedure only then the process could be much faster.

To keep a check on cyber terrorism, all cybercafes should be continuously monitored to ensure that they maintain regular and proper records of its users with adequate identity checking procedures being duly adopted as per law, stringent laws should be made regarding cyber terrorism so that terrorists may not use web to commit crimes such as online credit card fraud or using e-mail to plan a crime, a terrorist attack (Taj Hotel Bombay November 26, 2008) or hack into some sites.

If India has to make a quantum jump in law-making, it needs to develop capacities to protect material interests and to avoid exploitation by those who own technology. Government should take note of social networking sites and put in place a proper mechanism to curb the misuse. The IT Act needs to be amended to clarify the rights, obligations and liabilities of bloggers and address blogging as a phenomenon.

The specialized nature of cyber crime requires a specialized response.

It requires cops specially suited and trained to deal with it. Detection of cyber crimes requires Internet research skills, necessary court orders including search warrants of premises and electronic surveillance.

The absolutely poor rate of cyber crime conviction in the country has also not helped the cause of regulating cyber crimes. There have only been few cyber crime convictions in the whole country, which can be counted on fingers. There is a need to ensure specialized procedures associated with expertise manpower for prosecution of cybercrime cases so as to tackle them on a war footing. Investigators and judges should be sensitized to the nuances of the system. It must be ensured that the system provides for stringent punishment of cyber crime and cyber criminals so that the same acts as a deterrent for others. This is necessary so as to win the faith of the people in the ability of the system to tackle cyber crime. Special and fast track courts should be set up to settle cases of cyber crimes expeditiously.

Harmonization of cyber laws across the globe is needed, so that investigating agencies like Central Bureau of investigation (CBI) have more teeth for tackling hi-tech crimes. Although the Department of Information Technology (DIT) has a computer emergency response team (Cert-in) for assisting the combat efforts of law enforcing agencies, it needs to be developed further.

Quick response to the Interpol references and bilateral requests, liberal sharing of forensic technology and more cross-country training exchange programmes besides timely alert could prove a deterrent against the cyber menace. Mobile Hi-tech crime detecting units must be established. Cooperation in investigation from other countries and extradition should be secured for tackling cyber crime.

Internet security does not seem to be a priority with Indian Internet companies. On an average, Indian companies spend less than 1% of their funds on security. This is considerably lower than the worldwide average of 5% and needs to be increased considerably. It requires sincere and effective efforts in this direction.

CONCLUSION

Certainly, revolution was brought about by the introduction of the Internet, but who could think of the time when this rich source of knowledge will be misused for criminal activities. The largest challenge to the law is to keep pace with technology. A combined effort from public, users, technocrats is the dire need of the present time. If the suggestions given above will be followed, cyber crimes will be effectively combated.

Chapter 4

Legal Protection against Cyber Crimes

Cybercrimes are a new class of crimes which are increasing day by day due to extensive use of internet these days. To combat the crimes related to internet the Information Technology Act, 2000 was enacted with prime objective to create an enabling environment for commercial use of I.T. The IT Act specifies the acts which have been made punishable. The Indian Penal Code, 1860 has also been amended to take into its purview cybercrimes. The various offenses related to internet which have been made punishable under the IT Act and the IPC are enumerated below:

4.1 Criminal Liabilities under Information Technology Act, 2000

- Sec.65: Tampering with Computer source documents
- Sec.66: Hacking with Computer systems, Data alteration and other computer related Offences
- Sec. 66A: Punishment for sending offensive messages through communication service etc.
- Sec. 66B: Punishment for dishonestly receiving stolen computer resource or communication device
- Sec. 66C: Punishment for identity theft
- Sec. 66D: Punishment for Cheating by personating by using computer resource
- Sec. 66E: Punishment for Violation of Privacy
- Sec. 66F: Punishment for Cyber Terrorism
- Sec.67: Publishing obscene information
- Sec. 67A: Punishment for publishing or transmitting of material containing sexually explicit act, etc. in electronic form

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- Sec. 67B: Punishment for Child Pornography
 - Sec. 67C: Preservation and Retention of Information by Intermediaries
 - Sec.70: Un-authorized access to protected system
 - Sec. 70A: National Nodal Agency
 - Sec. 70B: CERT-in
 - Sec. 71: Penalty for Misrepresentation
 - Sec.72: Breach of Confidentiality and Privacy
 - Sec.73: Publishing false digital signature certificates
 - Sec. 74: Publication for fraudulent purposes

The criminal provisions of the IT Act and those dealing with cognizable offences and criminal acts follow from Chapter IX titled "Offences"

Section 65 : *Whoever knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy or alter any computer source code used for a computer, computer programme, computer system or computer network, when the computer source code is required to be kept or maintained by law for the time being in force, shall be punishable with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.*

Explanation—For the purposes of this section, "computer source code" means the listing of programmes, computer Commands, design and layout and programme analysis of computer resource in any form.

This section deals with Tampering with computer source code and related documents. Concealing, destroying, and altering any computer source code when the same is required to be kept or maintained by law is an offence punishable with three years imprisonment or two lakh rupees or with both. Fabrication of an electronic record or committing forgery by way of interpolations in CD produced as evidence in a court (*Bhim Sen Garg vs State of Rajasthan and others*¹¹)

attract punishment under this Section. Computer source code under this Section refers to the listing of programmes, computer commands, design and layout etc. in any form.

Case Laws

(i) *Frios vs State of Kerala*¹²

Facts : In this case it was declared that the FRIENDS application software as protected system. The author of the application challenged the notification and the constitutional validity of software under Section 70. The court upheld the validity of both. It included tampering with source code. Computer source code the electronic form, it can be printed on paper.

Held : The court held that tampering with Source code are punishable with three years jail and or two lakh rupees fine of rupees two lakh rupees for altering, concealing and destroying the source code.

(ii) *Syed Asifuddin And Ors. vs The State of Andhra Pradesh*¹³

Facts : In this case the Tata Indicom employees were arrested for manipulation of the electronic 32- bit number (ESN) programmed into cell phones, theft were exclusively franchised to Reliance Infocom.

Held : Court held that Tampering with source code invokes Section 65 of the Information Technology Act.

(iii) *State vs Mohd. Afzal And Others*¹⁴ (*Parliament Attack Case*)

Facts : In this case several terrorist attacked on 13 December, 2001 Parliament House. In this the Digital evidence played an important role during their prosecution. The accused argued that computers and evidence can easily be tampered and hence should not be relied.

In Parliament case several smart device storage disks and devices, a Laptop were recovered from the truck intercepted at Srinagar pursuant to information given by two suspects. The laptop included the evidence of

fake identity cards, video files containing clips of the political leaders with the background of Parliament in the background shot from T.V. news channels. In this case design of Ministry of Home Affairs car sticker, there was game "wolf pack" with user name of "Ashiq". There was the name in one of the fake identity cards used by the terrorist. No backup was taken therefore it was challenged in the Court.

Held: Challenges to the accuracy of computer evidence should be established by the challenger. Mere theoretical and generic doubts cannot be cast on the evidence.

Section 66 : *If any person, dishonestly or fraudulently, does any act referred to in section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.*

Explanation.—For the purpose of this section,—

- (a) *The word "dishonesty" shall have the meaning assigned to it in section 24 of the Indian Penal Code (45 of 1860).*
- (b) *The word "fraudulently" shall have the meaning assigned to it in section 25 of the Indian Penal Code (45 of 1860).*

Computer related offences are dealt with under this Section. Data theft stated in Section 43¹⁵ is referred to in this Section. Whereas it was a plain and simple civil offence with the remedy of compensation and damages only, in that Section, here it is the same act but with a criminal intention thus making it a criminal offence. The act of data theft or the offence stated in Section 43 if done dishonestly or fraudulently becomes a punishable offence under this Section and attracts imprisonment upto three years or a fine of five lakh rupees or both. Earlier hacking was defined in Sec 66 and it was an offence.

Now after the amendment, data theft of Section 43 is

being referred to in Section 66 by making this section more purposeful and the word 'hacking' is not used. The word 'hacking' was earlier called a crime in this Section and at the same time, courses on 'ethical hacking' were also taught academically. This led to an anomalous situation of people asking how an illegal activity be taught academically with a word 'ethical' prefixed to it. Then can there be training programmes, for instance, on "Ethical burglary", "Ethical Assault" etc. say for courses on physical defence? This tricky situation was put an end to, by the ITAA when it re-phrased the Section 66 by mapping it with the civil liability of Section 43 and removing the word 'Hacking'. However the act of hacking is still certainly an offence as per this Section, though some experts interpret 'hacking' as generally for good purposes (obviously to facilitate naming of the courses as ethical hacking) and 'cracking' for illegal purposes. It would be relevant to note that the technology involved in both is the same and the act is the same, whereas in 'hacking' the owner's consent is obtained or assumed and the latter act 'cracking' is perceived to be an offence.

Case Laws

1. *R vs. Gold & Schifreen*¹⁶

In this case it is observed that the accused gained access to the British telecom Prestly Gold computers networks file amount to dishonest trick and not criminal offence.

2. *R vs. Whiteley*¹⁷

In this case the accused gained unauthorized access to the Joint Academic Network (JANET) and deleted, added files and changed the passwords to deny access to the authorized users. Investigations had revealed that Kumar was logging on to the BSNL broadband Internet connection as if he was the authorized genuine user and 'made alteration in the computer database pertaining to broadband Internet user accounts' of the subscribers. The CBI had registered a cyber crime case against Kumar

and carried out investigations on the basis of a complaint by the Press Information Bureau, Chennai, which detected the unauthorised use of broadband Internet. The complaint also stated that the subscribers had incurred a loss of Rs 38,248 due to Kumar's wrongful act. He used to 'hack' sites from Bangalore, Chennai and other cities too, they said.

Verdict: The Additional Chief Metropolitan Magistrate, Egmore, Chennai, sentenced N G Arun Kumar, the techie from Bangalore to undergo a rigorous imprisonment for one year with a fine of Rs 5,000 under section 420 IPC (cheating) and Section 66 of IT Act (Computer related Offense).

Thanks to ITAA, Section 66 is now a widened one with a list of offences as follows:

66A : *Punishment for sending offensive messages through communication service, etc.—Any person who sends, by means of a computer resource or a communication device,— (a) any information that is grossly offensive or has meaning character, or (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such message, shall be punishable with imprisonment for a term which may extend to three years and with fine.*

Explanation.—For the purposes of this section, terms "electronic mail" and "electronic mail message" means a message or information created to transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.

The section covers the offences like sending offensive messages through communication service, causing annoyance etc. through an electronic communication or sending an email to mislead or deceive the recipient about the origin of such messages (commonly known as IP or email spoofing).

Punishment for these acts is imprisonment up to three years or fine.

Case Laws

Fake profile of President posted by imposter

On September 9, 2010, the imposter made a fake profile in the name of the Hon'ble President Smt. Pratibha Devi Singh Patil. A complaint was made from Additional Controller, President Household, President Secretariat regarding the four fake profiles created in the name of Hon'ble President on social networking website, Facebook. The said complaint stated that president house has nothing to do with the facebook and the fake profile is misleading the general public. The First Information Report under Sections 469 IPC and 66A Information Technology Act, 2000 was registered based on the said complaint at the police station, Economic Offences Wing, the elite wing of Delhi Police which specializes in investigating economic crimes including cyber offences.

Bomb Hoax mail

In 2009, a 15-year-old Bangalore teenager was arrested by the cyber crime investigation cell (CCIC) of the city crime branch for allegedly sending a hoax e-mail to a private news channel. In the e-mail, he claimed to have planted five bombs in Mumbai, challenging the police to find them before it was too late. At around 1 p.m. on May 25, the news channel received an e-mail that read: "I have planted five bombs in Mumbai; you have two hours to find it." The police, who were alerted immediately, traced the Internet Protocol (IP) address to Vijay Nagar in Bangalore. The Internet service provider for the account was BSNL, said officials.

66B *Punishment for dishonestly receiving stolen computer resource or communication device.—*

Whoever dishonestly receives or retains any stolen computer resource or communication device knowing or having reason to believe the same to be stolen computer resource or communication device, shall be punished with imprisonment of either description for a term which may extend to three years or with fine which may extend to rupees one lakh or with both.

The section clearly states that dishonestly receiving stolen computer resource or communication device will be leading to the punishment upto three years or one lakh rupees as fine or both.

66C *Punishment for identity theft -*

Whoever, fraudulently or dishonestly makes use of the electronic signature, password or any other unique identification feature of any other person, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to rupees one lakh.

Electronic signature or other identity theft like using others' password or electronic signature etc.

Punishment is three years imprisonment or fine of one lakh rupees or both.

66D : *Punishment for cheating by personation by using computer resource*

Whoever, by means of any communication device or computer resource cheats by personation, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to one lakh rupees.

In accordance with this section, Cheating by personating using computer resource or a communication device shall be punished with imprisonment of either description for a term which extend to three years and shall also be liable to fine which may extend to one lakh rupees.

Case Laws

*Sandeep Vaghese vs. State of Kerala*¹⁸

A complaint filed by the representative of a Company, which was engaged in the business of trading and distribution of petrochemicals in India and overseas, a crime was registered against nine persons, alleging offenses under Sections 65, 66, 66A, C and D of the Information Technology Act along with Sections 419 and 420 of the Indian Penal Code.

The company has a web-site in the name and style 'www.jaypolychem.com' but, another web site 'www.jayplychem.org' was set up in the internet by first accused Samdeep Varghese @ Sam, (who was dismissed from the company) in conspiracy with other accused, including Preeti and Charanjeet Singh, who are the sister and brother-in-law of 'Sam'.

Defamatory and malicious matters about the company and its directors were made available in that website. The accused sister and brother-in-law were based in Cochin and they had been acting in collusion with known and unknown persons, who have collectively cheated the company and committed acts of forgery, impersonation etc.

Two of the accused, Amardeep Singh and Rahul had visited Delhi and Cochin. The first accused and others sent e-mails from fake e-mail accounts of many of the customers, suppliers, Bank etc. to malign the name and image of the Company and its Directors. The defamation campaign run by all the said persons named above has caused immense damage to the name and reputation of the Company.

The Company suffered losses of several crores of Rupees from producers, suppliers and customers and were unable to do business.

66E *Punishment for violation of privacy*

Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which

may extend to three years or with fine not exceeding two lakh rupees, or with both

Explanation.- For the purposes of this section--

- (a) "transmit" means to electronically send a visual image with the intent that it be viewed by a person or persons;*
- (b) "capture", with respect to an image, means to videotape, photograph, film or record by any means;*
- (c) "private area" means the naked or undergarment clad genitals, pubic area, buttocks or female breast;*
- (d) "publishes" means reproduction in the printed or electronic form and making it available for public;*
- (e) "under circumstances violating privacy" means circumstances in which a person can have a reasonable expectation that--*
 - (i) he or she could disrobe in privacy, without being concerned that an image of his private area was being captured; or*
 - (ii) any part of his or her private area would not be visible to the public, regardless of whether that person is in a public or private place.*

Data Protection and Privacy

This section deals with the punishment for Privacy violation—Publishing or transmitting private area of any person without his or her consent etc. Punishment is three years imprisonment or two lakh rupees fine or both. This section needs to be read along with section 43 and Section 43A which creates civil remedies for data theft wherein section 66 E provides criminal liability for the gross violation of one's privacy.

Cases

- (i) Jawaharlal Nehru University MMS scandal*

In a severe shock to the prestigious and renowned institute – Jawaharlal Nehru University, a pornographic

MMS clip was apparently made in the campus and transmitted outside the university. Some media reports claimed that the two accused students initially tried to extort money from the girl in the video but when they failed the culprits put the video out on mobile phones, on the internet and even sold it as a CD in the blue film market.

(ii) *Nagpur Congress leader's son MMS scandal*

On January 05, 2012 Nagpur Police arrested two engineering students, one of them a son of a Congress leader, for harassing a 16-year-old girl by circulating an MMS clip of their sexual acts. According to the Nagpur (rural) police, the girl was in a relationship with Mithilesh Gajbhiye, 19, son of Yashodha Dhanraj Gajbhiye, a zila parishad member and an influential Congress leader of Saoner region in Nagpur district.

66F *Punishment For Cyber Terrorism*

(1) *Whoever -*

(A) *With intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people by –*

- *denying or cause the denial of access to any person authorized to access computer resource; or*
- *attempting to penetrate or access a computer resource without authorisation or exceeding authorized access; or*
- *introducing or causing to introduce any Computer Contaminant and by means of such conduct causes or is likely to cause death or injuries to persons or damage to or destruction of property or disrupts or knowing that it is likely to cause damage or disruption of supplies or services essential to the life of the community or adversely affect the critical information infrastructure specified under section 70, or*

(B) knowingly or intentionally penetrates or accesses a computer resource without authorization or exceeding authorized access, and by means of such conduct obtains access to information, data or computer database that is restricted for reasons of the security of the State or foreign relations; or any restricted information, data or computer database, with reasons to believe that such information, data or computer database so obtained may be used to cause or likely to cause injury to the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence, or to the advantage of any foreign nation, group of individuals or otherwise, commits the offence of cyber terrorism.

(2) Whoever commits or conspires to commit cyber terrorism shall be punishable with imprisonment which may extend to imprisonment for life'.

Critique : We find the terminology in multiple sections too vague to ensure consistent and fair enforcement. The concepts of 'annoyance' and 'insult' are subjective. Clause (d) makes it clear that phishing requests are not permitted, but it is not clear that one cannot ask for information on a class of individuals.

Cyber terrorism – Intent to threaten the unity, integrity, security or sovereignty of the nation and denying access to any person authorized to access the computer resource or attempting to penetrate or access a computer resource without authorization. Acts of causing a computer contaminant (like virus or Trojan Horse or other spyware or malware) likely to cause death or injuries to persons or damage to or destruction of property etc. come under this Section. Punishment is life imprisonment.

It may be observed that all acts under Section 66 are cognizable and non-bailable offences. Intention or the

knowledge to cause wrongful loss to others i.e. the existence of criminal intention and the evil mind, i.e., concept of mens rea, destruction, deletion, alteration or diminishing in value or utility of data are all the major ingredients to bring any act under this Section.

To summarise, what was civil liability with entitlement for compensations and damages in Section 43, has been referred to here, if committed with criminal intent, making it a criminal liability attracting imprisonment and fine or both.

Cases

Threat Mail to BSE and NSE¹⁹

In May 5, 2009, the Mumbai police have registered a case of 'cyber terrorism'—the first in the state since an amendment to the Information Technology Act—where threats email was sent to the BSE and NSE on May 4, 2009. The MRA Marg police and the Cyber Crime Investigation Cell are jointly probing the case. The suspect has been detained in this case. The police said an email challenging the security agencies to prevent a terror attack was sent by one Shahab Md with an ID sh.itaiyeb125@yahoo.in to BSE's administrative email ID corp.relations@bseindia.com at around 10.44 am on Monday. The IP address of the sender has been traced to Patna in Bihar. The ISP is Sify. The email ID was created just four minutes before the email was sent. "The sender had, while creating the new ID, given two mobile numbers in the personal details column. Both the numbers belong to a photo frame-maker in Patna," said an officer.

Status : The MRA Marg police have registered forgery for purpose of cheating, criminal intimidation cases under the IPC and a cyber-terrorism case under the IT Act, 2000.

Section 67 : *Publishing of information which is obscene in electronic form*

Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to

deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to two three years and with fine which may extend to five lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.

This section deals with publishing or transmitting obscene material in electronic form. The earlier Section in ITA, 2000 was later widened as per ITAA, 2008 in which child pornography and retention of records by intermediaries were all included.

Publishing or transmitting obscene material in electronic form is dealt with here. Whoever publishes or transmits any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely to read the matter contained in it, shall be punished with first conviction for a term upto three years and fine of five lakh rupees and in second conviction for a term of five years and fine of ten lakh rupees or both.

This Section is of historical importance since the landmark judgement in what is considered to be the first ever conviction under I.T. Act, 2000 in India, was obtained in this Section in the famous case *State of Tamil Nadu vs. Suhas Katti*²⁰ on 5 November, 2004. The strength of the Section and the reliability of electronic evidences were proved by the prosecution and conviction was brought about in this case, involving sending obscene message in the name of a married women amounting to cyber stalking, email spoofing and the criminal activity stated in this Section.

Case Laws

1. *The State of Tamil Nadu vs. Suhas Katti*²¹

Facts : This case is about posting obscene, defamatory and annoying message about a divorcee woman in the Yahoo message group. E-mails were forwarded to the

victim for information by the accused through a false e-mail account opened by him in the name of the victim. These postings resulted in annoying phone calls to the lady. Based on the complaint police nabbed the accused. He was a known family friend of the victim and was interested in marrying her. She married to another person, but that marriage ended in divorce and the accused started contacting her once again. And her reluctance to marry him he started harassing her through internet.

Held : The accused is found guilty of offences under section 469, 509 IPC and 67 of IT Act, 2000 and the accused is convicted and is sentenced for the offence to undergo Rigorous Imprisonment for 2 years under section 469 IPC and to pay fine of Rs.500/- and for the offence u/s 509 IPC sentenced to undergo 1 year Simple imprisonment and to pay fine of Rs.500/- and for the offence u/s 67 of IT Act 2000 to undergo Rigorous Imprisonment for 2 years and to pay fine of Rs.4000/- All sentences to run concurrently.'

The accused paid fine amount and he was lodged at Central Prison, Chennai. This is considered the first case convicted under section 67 of Information Technology Act 2000 in India.

In a recent case, a groom's family received numerous emails containing defamatory information about the prospective bride. Fortunately, they did not believe the emails and chose to take the matter to the police. The sender of the emails turned out to be the girl's step-father, who did not want the girl to get married, as he would have lost control over her property, of which he was the legal guardian.

2. *Avnish Bajaj vs. State*²²

This is famously known as Avnish Bajaj (CEO of bazzee.com – now a part of the eBay group of companies) case.

Facts: There were three accused first is the Delhi school

boy and IIT Kharagpur Ravi Raj and the service provider Avnish Bajaj.

The law on the subject is very clear. The sections slapped on the three accused were Section 292 (sale, distribution, public exhibition, etc., of an obscene object) and Section 294 (obscene acts, songs, etc., in a public place) of the Indian Penal Code (IPC), and Section 67 (publishing information which is obscene in electronic form) of the Information Technology Act, 2000. In addition, the schoolboy faced a charge under Section 201 of the IPC (destruction of evidence), for there is apprehension that he had destroyed the mobile phone that he used in the episode. These offences invite a stiff penalty, namely, imprisonment ranging from two to five years, in the case of a first time conviction, and/or fines.

Held: In this case the Service provider Avnish Bajaj was later acquitted and the Delhi school boy was granted bail by Juvenile Justice Board and was taken into police charge and detained into Observation Home for two days.

3. *Dakshina Kannada police solved the first case of cyber crime in the district*

Dakshina Kannada Police solved a case where a Father at a Christian institution in the city had approached the Superintendent of Police with a complaint that he was getting offensive and obscene e-mails.

Police said that all the three admitted that they had done this to tarnish the image of the Father. As the three tendered an unconditional apology to the Father and gave a written undertaking that they would not repeat such act in future, the complainant withdrew his complaint. Following this, the police dropped the charges against the culprit.

The release said that sending of offensive and obscene e-mails is an offence under the Indian Information Technology Act 2000.

Section 67-A *Punishment for publishing or transmitting of material containing sexually explicit act, etc. in electronic form:*

Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.

Exception: This section and section 67 does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form-

- *the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art, or learning or other objects of general concern; or*
- *which is kept or used bona fide for religious purposes.*

It deals with publishing or transmitting of material containing sexually explicit act in electronic form. Contents of Section 67 when combined with the material containing sexually explicit material attract penalty under this Section.

Section 67B : *Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc. in electronic form:*

Whoever,-

- (a) *Publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct or*
- (b) *Creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or*

- distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner or*
- (c) *Cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource or*
- (d) *Facilitates abusing children online or*
- (e) *Records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees:*

Provided that the provisions of section 67, section 67A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form-

- (i) *The publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or*
- (ii) *which is kept or used for bonafide heritage or religious purposes*

Explanation: For the purposes of this section, "children" means a person who has not completed the age of 18 years.

Child Pornography has been exclusively dealt with under Section 67B. Depicting children engaged in sexually explicit act, creating text or digital images or advertising or promoting such material depicting children in obscene or indecent manner etc or facilitating abusing children online

or inducing children to online relationship with one or more children etc come under this Section.

'Children' means persons who have not completed 18 years of age, for the purpose of this Section. Punishment for the first conviction is imprisonment for a maximum of five years and fine of ten lakh rupees and in the event of subsequent conviction with imprisonment of seven years and fine of ten lakh rupees.

Bonafide heritage material being printed or distributed for the purpose of education or literature etc. are specifically excluded from the coverage of this Section, to ensure that printing and distribution of ancient epics or heritage material or pure academic books on education and medicine are not unduly affected.

Screening video graphs and photographs of illegal activities through Internet all come under this category, making pornographic video or MMS clippings or distributing such clippings through mobile or other forms of communication through the Internet fall under this category.

Section 67C fixes the responsibility to intermediaries that they shall preserve and retain such information as may be specified for such duration and in such manner as the Central Government may prescribe. Non-compliance is an offence with imprisonment up to three years or fine.

Case Laws

*Janhit Manch & Ors. vs. The Union of India*²³

In this case it was Public Interest Litigation to ban child pornography. The petition sought a blanket ban on pornographic websites. The NGO had argued that websites displaying sexually explicit content had an adverse influence, leading youth on a delinquent path.

Transmission of electronic message and communication:

Section 69: Powers to issue directions for interception or

monitoring or decryption of any information through any computer resource:

- (1) Where the central Government or a State Government or any of its officer specially authorized by the Central Government or the State Government, as the case may be, in this behalf may, if is satisfied that it is necessary or expedient to do in the interest of the sovereignty or integrity of India, defense of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence, it may, subject to the provisions of sub-section (2), for reasons to be recorded in writing, by order, direct any agency of the appropriate Government to intercept, monitor or decrypt or cause to be intercepted or monitored or decrypted any information transmitted received or stored through any computer resource.*
- (2) The Procedure and safeguards subject to which such interception or monitoring or decryption may be carried out, shall be such as may be prescribed.*
- (3) The subscriber or intermediary or any person in charge of the computer resource shall, when called upon by any agency which has been directed under sub section (1), extend all facilities and technical assistance to –*
 - (a) provide access to or secure access to the computer resource generating, transmitting, receiving or storing such information; or*
 - (b) intercept or monitor or decrypt the information, as the case may be; or*
 - (c) provide information stored in computer resource.*
- (4) The subscriber or intermediary or any person who fails to assist the agency referred to in sub-section (3) shall be punished with an imprisonment for a term which may extend to seven years and shall also be liable to fine.*

[Section 69B] Power to authorize to monitor and collect

traffic data or information through any computer resource for Cyber Security:

- (1) The Central Government may, to enhance Cyber Security and for identification, analysis and prevention of any intrusion or spread of computer contaminant in the country, by notification in the official Gazette, authorize any agency of the Government to monitor and collect traffic data or information generated, transmitted, received or stored in any computer resource.*
 - (2) The Intermediary or any person in-charge of the Computer resource shall when called upon by the agency which has been authorized under sub-section (1), provide technical assistance and extend all facilities to such agency to enable online access or to secure and provide online access to the computer resource generating, transmitting, receiving or storing such traffic data or information.*
 - (3) The procedure and safeguards for monitoring and collecting traffic data or information, shall be such as may be prescribed.*
 - (4) Any intermediary who intentionally or knowingly contravenes the provisions of subsection*
- (2) shall be punished with an imprisonment for a term which may extend to three years and shall also be liable to fine.*

Explanation: For the purposes of this section,

- (i) "Computer Contaminant" shall have the meaning assigned to it in section 43*
- (ii) "traffic data" means any data identifying or purporting to identify any person, computer system or computer network or location to or from which the communication is or may be transmitted and includes communications origin, destination, route, time, date, size, duration or type of underlying service or any other information.*

Critique: Though we recognize how important it is for a government to protect its citizens against cyber-terrorism, we are concerned at the friction between these provisions

and the guarantees of free dialog, debate, and free speech that are Fundamental Rights under the Constitution of India.

Specifically:

- (a) There is no clear provision of a link between an intermediary and the information or resource that is to be monitored.
- (b) The penalties laid out in the clause are believed to be too harsh, and when read in conjunction with provision 66, there is no distinction between minor offenses and serious offenses.
- (c) The ITA is too broad in its categorization of acts of cyber terrorism by including information that is likely to cause: injury to decency, injury to morality, injury in relation to contempt of court, and injury in relation to defamation.

This is an interesting section in the sense that it empowers the Government or agencies as stipulated in the Section, to intercept, monitor or decrypt any information generated, transmitted, received or stored in any computer resource, subject to compliance of procedure as laid down here.

This power can be exercised if the Central Government or the State Government, as the case may be, is satisfied that it is necessary or expedient in the interest of sovereignty or integrity of India, defence of India, security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of any cognizable offence relating to above or for investigation of any offence. In any such case too, the necessary procedure as may be prescribed, is to be followed and the reasons for taking such action are to be recorded in writing, by order, directing any agency of the appropriate Government. The subscriber or intermediary shall extend all facilities and technical assistance when called upon to do so.

Cases

Posting Insulting Images of Chhatrapati Shivaji:

In August 2007, Lakshmana Kailash K., a techie from

Bangalore was arrested on the suspicion of having posted insulting images of Chhatrapati Shivaji, a major historical figure in the state of Maharashtra, on the social-networking site Orkut. The police identified him based on IP address details obtained from Google and Airtel -Lakshmana's ISP. He was brought to Pune and detained for 50 days before it was discovered that the IP address provided by Airtel was erroneous. The mistake was evidently due to the fact that while requesting information from Airtel, the police had not properly specified whether the suspect had posted the content at 1:15 p.m.

Verdict : Taking cognizance of his plight from newspaper accounts, the State Human Rights Commission subsequently ordered the company to pay Rs 2 lakh to Lakshmana as damages. The incident highlights how minor privacy violations by ISPs and intermediaries could have impacts that gravely undermine other basic human rights.

Section 69A : *Power to issue directions for blocking for public access of any information through any computer resource*

- (1) *Where the Central Government or any of its officer specially authorized by it in this behalf is satisfied that it is necessary or expedient so to do in the interest of sovereignty and integrity of India, defense of India, security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of any cognizable offence relating to above, it may subject to the provisions of sub-sections (2) for reasons to be recorded in writing, by order direct any agency of the Government or intermediary to block access by the public or cause to be blocked for access by public any information generated, transmitted, received, stored or hosted in any computer resource.*
- (2) *The procedure and safeguards subject to which such blocking for access by the public may be carried out shall be such as may be prescribed.*
- (3) The intermediary who fails to comply with the direction

issued under sub-section (1) shall be punished with an imprisonment for a term which may extend to seven years and also be liable to fine.

The section as inserted in the ITAA, vests with the Central Government or any of its officers with the powers to issue directions for blocking for public access of any information through any computer resource, under the same circumstances as mentioned above.

Section 69B discusses the power to authorise to monitor and collect traffic data or information through any computer resource.

Commentary on the powers to intercept, monitor and block websites

In short, under the conditions laid down in the Section, power to intercept, monitor or decrypt does exist. It would be interesting to trace the history of telephone tapping in India and the legislative provisions (or the lack of it) in our nation and compare it with the powers mentioned here. Until the passage of this Section in the ITAA, phone tapping was governed by Clause 5(2) of the Indian Telegraph Act of 1885, which said that "On the occurrence of any public emergency, or in the interest of the public safety, the Government may, if satisfied that it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order". Other sections of the act mention that the government should formulate "precautions to be taken for preventing the improper interception or disclosure of messages". There have been many attempts, rather many requests, to formulate rules to

govern the operation of Clause 5(2). But ever since 1885, no government has formulated any such precautions, maybe for obvious reasons to retain the spying powers for almost a century.

A writ petition was filed in the Supreme Court in 1991 by the People's Union for Civil Liberties, challenging the constitutional validity of this Clause 5(2). The petition argued that it infringed the constitutional right to freedom of speech and expression and to life and personal liberty.

In December 1996, the Supreme Court delivered its judgment, pointing out that "unless a public emergency has occurred or the interest of public safety demands, the authorities have no jurisdiction to exercise the powers" given to them under Clause 5(2). They went on to define them thus: a public emergency was the "prevailing of a sudden condition or state of affairs affecting the people at large calling for immediate action", and public safety "means the state or condition of freedom from danger or risk for the people at large". Without those two, however "necessary or expedient", it could not do so. Procedures for keeping such records and the layer of authorities etc were also stipulated.

Now, this **Section 69 of ITAA is far more intrusive** and more powerful than the above-cited provision of Indian Telegraph Act 1885. Under this ITAA Section, the nominated Government official will be able to listen in to all phone calls, read the SMSs and emails, and monitor the websites that one visited, subject to adherence to the prescribed procedures and without a warrant from a magistrate's order. In view of the foregoing, this Section was criticised to be draconian vesting the government with much more powers than required.

Having said this, we should not be oblivious to the fact that this power (of intercepting, monitoring and blocking) is something which the Government represented by the **Indian Computer Emergency Response Team**, (the National Nodal Agency, as nominated in Section 70B of ITAA) has very rarely exercised. Perhaps believing in the freedom

of expression and having confidence in the self-regulative nature of the industry, the CERT-In has stated that these powers are very sparingly (and almost never) used by it.

Critical Information Infrastructure and Protected System have been discussed in Section 70.

The Indian Computer Emergency Response Team (CERT-In) coming under the Ministry of

Information and Technology, Government of India, has been designated as the National Nodal Agency for incident response. By virtue of this, CERT-In will perform activities like collection, analysis and dissemination of information on cyber incidents, forecasts and alerts of cyber security incidents, emergency measures for handling cyber security incidents etc.

The role of CERT-In in e-publishing security vulnerabilities and security alerts is remarkable.

The then Minister of State for Communications and IT Mr.Sachin Pilot said in a written reply to the Rajya Sabha said that (as reported in the Press), CERT-In has handled over 13,000 such incidents in 2011 compared to 8,266 incidents in 2009. CERT-In has observed that there is significant increase in the number of cyber security incidents in the country. A total of 8,266, 10,315 and 13,301 security incidents were reported to and handled by CERT-In during 2009, 2010 and 2011, respectively,"

These security incidents include website intrusions, phishing, network probing, spread of malicious code like virus, worms and spam, he added. Hence the role of CERT-In is very crucial and there are much expectations from CERT In not just in giving out the alerts but in combating cyber crime, use the weapon of monitoring the web-traffic, intercepting and blocking the site, whenever so required and with due process of law.

Penalty for breach of confidentiality and privacy is discussed in Section 72 with the punishment being imprisonment for a term upto two years or a fine of one lakh rupees or both.

Section 71: Penalty for misrepresentation

Whoever makes any misrepresentation to, or suppresses any material fact from, the Controller or the Certifying Authority for obtaining any license or Digital Signature Certificate, as the case may be, shall be punished with imprisonment for a term which may extend to two years, or which fine which may extend to one lakh rupees, or with both.

Penalties:

Punishment : imprisonment which may extend to two years

Fine : may extend to one lakh rupees or with both.

Section 72 : Penalty for breach of confidentiality and privacy

Save as otherwise provide in this Act or any other law for the time being in force, any person who, in pursuance of any of the powers conferred under this Act, rules or regulation made there under, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.

Explanation: This section relates to any to any person who in pursuance of any of the powers conferred by the Act or it allied rules and regulations has secured access to any: Electronic record, books, register, correspondence, information, document, or other material.

If such person discloses such information, he will be punished with punished. It would not apply to disclosure of personal information of a person by a website, by his email service provider.

Penalties :

Punishment : term which may extend to two years.

Fine: one lakh rupees or with both.

Section 72A : Punishment for Disclosure of information in breach of lawful contract

Any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person shall be punished with imprisonment for a term which may extend to three years, or with a fine which may extend to five lakh rupees, or with both.

Section 73 : Penalty for publishing electronic Signature Certificate false in certain particulars:

No person shall publish an Electronic Signature Certificate or otherwise make it available to any other person with the knowledge that

- *the Certifying Authority listed in the certificate has not issued it; or*
- *the subscriber listed in the certificate has not accepted it; or*
- *the certificate has been revoked or suspended, unless such publication is for the purpose of verifying a digital signature created prior to such suspension or revocation*

Any person who contravenes the provisions of sub-section (1) shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.

Explanation : The Certifying Authority listed in the certificate has not issued it or,

The subscriber listed in the certificate has not accepted it or the certificate has been revoked or suspended.

The Certifying authority may also suspend the Digital Signature Certificate if it is of the opinion that the digital signature certificate should be suspended in public interest.

A digital signature may not be revoked unless the subscriber has been given opportunity of being heard in the matter. On revocation the Certifying Authority need to communicate the same with the subscriber. Such publication is not an offence it is the purpose of verifying a digital signature created prior to such suspension or revocation.

Penalties:

Punishment: imprisonment of a term of which may extend to two years.

Fine: fine may extend to 1 lakh rupees or with both

Case Laws

Bennett Coleman & Co. v/s Union of India²⁴

In this case the publication has been stated that 'publication means dissemination and circulation. In the context of digital medium, the term publication includes and transmission of information or data in electronic form.

Section 74 – Publication for fraudulent purpose:

Whoever knowingly creates, publishes or otherwise makes available a Electronic Signature Certificate for any fraudulent or unlawful purpose shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.

Section 75 – Act to apply for offence or contraventions committed outside India

Subject to the provisions of sub-section (2), the provisions of this Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality.

For the purposes of sub-section (1), this Act shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.

4.2 Common Cyber Crimes and Applicable Legal Provisions : A Snapshot

<i>S.No.</i>	<i>Cyber Crime</i>	<i>Applicable Provisions</i>
1.	<i>Harassment via fake public profile on social networking site</i> :A fake profile of a person is created on a social networking site with the correct address, residential information or contact details but he/she is labeled as 'prostitute' or a person of 'loose character'. This leads to harassment of the victim	Sections 66A, 67 of IT Act and Section 509 of the Indian Penal Code.
2.	<i>Online Hate Community</i> : Online hate community is created inciting a religious group to act or pass objectionable remarks against a country, national figures etc.	Section 66A of IT Act and 153A & 153B of the Indian Penal Code.
3.	<i>Email Account Hacking</i> :If victim's email account is hacked and obscene emails are sent to people in victim's address book	Sections 43, 66, 66A, 66C, 67, 67A and 67B of Information Technology Act.
4.	<i>Credit Card Fraud</i> : Unsuspecting victims would use infected computers to make online transactions.	Sections 43, 66, 66C, 66D of IT Act and section 420 of the Indian Penal Code.
5.	<i>Web Defacement</i> : The homepage of a website is replaced with a pornographic or defamatory page. Government sites generally face the wrath of hackers on symbolic days	Sections 43 and 66 of IT Act and Sections 66F, 67 and 70 of IT Act also apply in some cases.
6.	<i>Introducing Viruses, Worms, Backdoors, Rootkits, Trojans, Bugs</i> : All of the above are some sort of	Sections 43, 66, 66A of IT Act and Section 426 of Indian Penal Code.

S.No.	Cyber Crime	Applicable Provisions
	malicious programs which are used to destroy or gain access to some electronic information	
7.	<i>Cyber Terrorism</i> : Many terrorists are use virtual (G-Drive, FTP sites) and physical stoarage media (USB's hard drives) for hiding information and records of their illicit business.	Conventional terrorism laws may apply along with Section 69 of IT Act.
8.	<i>Online sale of illegal Articles</i> : Where sale of narcotics, drugs weapons and wildlife is facilitated by the Internet	Generally conventional laws apply in these cases.
9.	<i>Cyber Pornography</i> : Among the largest businesses on Internet. Pornography may not be illegal in many countries, but child pornography is prohibited at large.	Sections 67, 67A and 67B of the IT Act.
10.	<i>Phishing and Email Scams</i> : Phishing involves fraudulently acquiring sensitive information through masquerading a site as a trusted entity. (E.g. Passwords, credit card information)	Section 66, 66A and 66D of IT Act and Section 420 of IPC
11.	<i>Theft of Confidential Information</i> : Many business organizations store their confidential information in computer systems. This information is targeted by rivals, criminals and disgruntled employees.	Sections 43, 66, 66B of IT Act and Section 426 of Indian Penal Code.
12.	<i>Source Code Theft</i> : A Source code generally is the most coveted and important "crown jewel" asset of a company.	Sections 43, 66, 66B of IT Act and Section 63 of Copyright Act.

<i>S.No.</i>	<i>Cyber Crime</i>	<i>Applicable Provisions</i>
13.	<i>Tax Evasion and Money Laundering</i> : Money launderers and people doing illegal business activities hide their information in virtual as well as physical activities.	Income Tax Act and Prevention of Money Laundering Act. IT Act may apply case-wise.
14.	<i>Online Share Trading Fraud</i> : It has become mandatory for investors to have their demat accounts linked with their online banking accounts which are generally accessed unauthorized, thereby leading to share trading frauds.	Sections 43, 66, 66C, 66D of IT Act and Section 420 of Indian Penal Code.

4.3 Civil Liabilities under Information Technology Act, 2000

The concept of accrued liability applies only to substantive laws and not to procedural laws as no one can claim a vested right in the procedure. In India we have both substantive and procedural laws. The Indian Penal Code and Information Technology Act are substantive laws whereas the Indian Evidence Act, Criminal Procedure Code and Civil procedure Code are procedural laws. Thus, by a retrospective law the procedure can be amended, changed or even repealed. Similarly, the protection of Article 20(1) is available for and can be sought against criminal matters only and it does not extend to civil matters'. Thus, a civil liability can be enhanced with retrospective effect.

Data Protection

According to the Section: 43-whoever destroys, deletes, alters and disrupts or causes disruption of any computer with the intention of damaging of the whole data of the computer system without the permission of the owner of the computer, shall be liable to pay fine up to 1crore to the person so affected by way of remedy.

Section 43A which is inserted by 'Information Technology (Amendment) Act, 2008 states that where a body corporate

is maintaining and protecting the data of the persons as provided by the central government, if there is any negligent act or failure in protecting the data/information then a body corporate shall be liable to pay compensation to person so affected. And Section 66 deals with 'hacking with computer system' and provides for imprisonment up to 3 years or fine, which may extend up to 2 years or both.

Section 43A of IT Act deals with the aspect of compensation for failure to protect data. The Central Government has not prescribed the term 'sensitive personal data,' nor has it prescribed a standard and reasonable security practice. Until these prescriptions are made, data is afforded security and protection only as may be specified in an agreement between the parties or as may be specified in any law. However, Explanation (ii) to Section 43A is worded in such a way that there is lack of clarity whether it would be possible for banks, (or anybody corporate) to enter into agreement which stipulate standards lesser than those prescribed by Central Government and in the event of the contradiction (between the standards prescribed by the Central Government and those in the agreement) which would prevail. Whether a negligence or mala fide on the part of the customer would make the financial institution liable for no fault of it or whether by affording too much protection to banks, a customer is made to suffer are the two extremes of the situation. The need is for striking a balance between consumer protection and protection of the banks from liability due to no fault of theirs. Apart from affording protection to personal data (sensitive personal data- 43A), the IT Act, 2000 also prescribes civil and criminal liabilities (Section 43 and Section 66 respectively) to any person who without the permission of the owner or any other person who is in charge of a computer, computer system etc., inter alia, downloads, copies or extracts any data or damages or causes to be damaged any computer data base etc. In this context Section 72 and 72A of the amended IT Act, 2000 are also of relevance. Section 72 of the Act prescribes the punishment if any person who, in pursuance of the powers conferred under the IT Act, 2000, has secured access to any

electronic record, information etc. and without the consent of the person concerned discloses such information to any other person then he shall be punished with imprisonment up to two years or with fine up to one lakh or with both. Section 72A on the other hand provides the punishment for disclosure by any person, including an intermediary, in breach of lawful contract. The purview of Section 72A is wider than section 72 and extends to disclosure of personal information of a person (without consent) while providing services under a lawful contract and not merely disclosure of information obtained by virtue of powers granted under IT Act, 2000.

Critical Analysis: Comparative Jurisdiction

However, the attempt is such a limited one, and so replete with shortcomings that the need for a proper data protection law still stands. Given the proposed initiation of the UID scheme, in particular, there is a compelling need for a robust and intelligent law in this regard. Most other countries regimes clearly do at least the following:

- Define and classify types of data (for example, in most European countries, personal data is any data that identifies an individual, sensitive personal data is data that reveals details of ethnicity, religion, health, sexuality, political opinion, etc.),
- Fine-tune the nature of protection to the categories of data (i.e., greater standards of care around sensitive personal data),
- Apply equally to data stored offline and manually as to data stored on computer systems,
- Distinguish between a data controller (i.e., one who takes decisions as to data) and a data processor (i.e., one who processes data on the instructions of the data controller),
- Impose clear restrictions on the manner of data collection (for example, must be obtained fairly and lawfully),
- Give clear guidelines on the purposes for which that data can be put to and by whom (often involving a consent requirement that gives the individual a great degree of control over their data),

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- Require certain standards and technical measures around the collection, storage, access to, protection, retention and destruction of data,
 - Ensure that the use of data is adequate, relevant and not excessive given the purpose for which it was gathered,
 - Cater for opt-in and opt-out type regimes, again to provide individuals with a measure of control over the use of their data even after the stage of initial collection (which has a huge impact on invasive telemarketing or unsolicited written communication),
 - Impose a knowledge requirement and procedures for allowing individuals to seek information on what data is held on them, and
 - Create safeguards and penalties that are well tailored to breaches of any of the above.

Unfortunately, and perhaps understandably, the ITA barely begins to scratch the surface of what a good data protection regime entails. The provisions that it does introduce (sections 43-A and 72-A) have glaring inadequacies which are as follows:

- The term sensitive personal data or information is used indiscriminately without any definition,
- The provisions only cover electronic data and records, not data stored in non-electronic systems or media,
- They offer no guidance on most of the principles set out above such as in relation to accuracy, adequacy, consent, purpose, etc.,
- In the absence of the controller-processor distinction, liability is imposed on persons, who are not necessarily in a position to control data, even if it is in their possession,
- Civil liability for data breaches only arises where negligence is involved (i.e., failure to have security procedures or failure to implement them correctly will not automatically result in damages unless negligence is proven),

- Similarly, criminal liability only applies to cases of information obtained in the context of a service contract, and requires an element of willfulness, or a disclosure without consent or in breach of a lawful contract – this is a very limited remit aimed largely at preventing disgruntled or unscrupulous employees from dealing in company/customer data.

In addition to the criticisms levelled at the data protection provisions, the other large subset of concerns has been in relation to the civil liberties implications of the ITA. There has been some horror expressed in various forums and media about the ITA contributing to the growth of a police state, to severe curtailment of the freedom of speech and expression, to the invasion of privacy, and to the disproportionate severity of penalization for offences that are placed on crimes committed in cyberspace compared to crimes committed in the here and now. Sadly, this is true to a large extent given the clunky treatment of cyber terrorism, the intolerable pre-censorship that is enabled by the blocking of websites, the broad approach to the monitoring and collection of data, and the demanding obligations of intermediaries to cooperate with interception, monitoring and decryption of data for poorly defined reasons.

While our Constitution's fundamental rights chapter, which enshrines certain basic, democratic, and profound rights, might not have the same vocabulary of due process as we see in the US, it nevertheless requires restrictions to be reasonable. Precedents and the wider jurisprudence in the field have further developed the concepts of checks and balances, procedural safeguards and legitimacy of restraints that a functioning democracy like India must accord to its people. It can be argued that several provisions of the ITA cause significant tension with the right to freedom of speech and expression, the right against self-incrimination, the right to equality before the law, and the right to practice a trade or profession.

Privacy and surveillance

This topic pulls together concerns around the blanket

monitoring and collecting of traffic data or information, the interception and decryption (under duress) by intermediaries (now a large superset of ISPs, search engines, cyber cafes, online auction sites, online market places, etc.) and the wide definition of cyber terrorism (which ludicrously even casts defamation as a terrorist activity).

Some of the broad concerns in relation to interception, monitoring and decryption in (section 69) are that:

- There is no provision for a clear nexus between an intermediary and the information or resource sought to be monitored or intercepted,
- The usual internationally recognised exception to liability where an intermediary operates purely as a conduit and has no control over data flowing through its network is not clearly spelt out,
- The penalties for non-cooperation are extremely harsh, especially given the absence of a) and b) above,
- These onerous penalties can be said to be in violation of Article 14 as they seem entirely disproportionate. Similar offences and remedies in the Code of Criminal Procedure or the Indian Penal Code prescribe less severe penalties, by an order of magnitude in fact. When the only difference between the offences is the medium in which information is contained, it seems arbitrary to impose a much harsher punishment on an online intermediary than on a member of the public who, for example, furnishes false information to the police in connection with a trial or enquiry,
- The rules made in relation to monitoring, interception and decryption, offer some procedural safeguards, in that they impose a time limit on how long a directive for interception or monitoring can remain in force, a ceiling on how long data can be kept before it is required to be destroyed, etc. However, the effect of these is greatly diluted by exceptions for functional requirements, etc. The astonishing irony is that rule 20 requires the intermediary to maintain 'extreme secrecy', 'utmost care

and precaution' in the matter of interception, monitoring or decryption of information as it affects the privacy of citizens.

In a similar vein, there are concerns around the monitoring and collection of traffic data (Section 69B) as the section contains an unreasonably long list of grounds for monitoring. These include such extreme excesses as forecasting of imminent cyber incidents, monitoring network application with traffic data or information on computer resource, identification and determination of viruses/ computer contaminant, and the catch-all any other matter relating to cyber security.

Finally, the main criticism of the ITA approach to cyber terrorism is the very wide net that it seeks to cast, looking for a game that has little or nothing to do with the named offence. Amongst the cast of creatures unwittingly caught during this fishing expedition, we find some unlikely victims. In addition to the usual grounds of offence against sovereignty, national security, defence of India, etc., which we have seen in relation to other sections, the ITA considers the following as acts of cyber terrorism broadly speaking, unauthorized access to information that is likely to cause:

- Injury to decency,
- Injury to morality,
- Injury in relation to contempt of court, and
- Injury in relation to defamation.

This would almost be laughable if these grounds were not enacted into law, posing a threat to civil liberties by their very existence. Other countries have some notion of political ideology, religious case, etc. in their view of terrorism. Indian Law on Information and Communication Technology has been shoehorned into a clause that imposes the stiffest penalty within the entire ITA (life imprisonment) gives even more cause for concern.

4.4 Civil Liability for Corporate:

As mentioned above, anybody corporate who fails to

observe data protection norms may be liable to pay compensation if:

- It is negligent in implementing and maintaining reasonable security practices, and thereby
- Causes wrongful loss or wrongful gain to any person;

Claims for compensation are to be made to the adjudicating officer appointed under section 46 of the IT Act.

4.5 Cyber Crimes under IPC and Special Laws

4.5.1 The Indian Penal Code, 1860

Normally referred to as the IPC, this is a very powerful legislation and probably the most widely used in criminal jurisprudence, serving as the main criminal code of India. Enacted originally in 1860 and amended many a times since, it covers almost all substantive aspects of criminal law and is supplemented by other criminal provisions. In independent India, many special laws have been enacted with criminal and penal provisions which are often referred to and relied upon, as an additional legal provision in cases which refer to the relevant provisions of IPC as well.

The Indian Penal Code was amended by inserting the word 'electronic' thereby treating the electronic records and documents on a par with physical records and documents. The Sections dealing with false entry in a record or false document etc. (e.g. 192, 204, 463, 464, 464, 468 to 470, 471, 474, 476 etc.) have since been amended as 'electronic record and electronic document' thereby bringing within the ambit of IPC. Now, electronic record and electronic documents has been treated just like physical records and documents during commission of acts of forgery or falsification of physical records in a crime. After the above amendment, the investigating agencies file the cases/ charge-sheet quoting the relevant sections from IPC under section 463, 464, 468 and 469 read with the ITA/ITAA under Sections 43 and 66 in like offences to ensure the evidence and/or punishment can be covered and proved under either of these or under both legislation.

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- Sending threatening messages by email - Sec 503 IPC
 - Sending defamatory messages by email - Sec 499 IPC
 - Forgery of electronic records - Sec 463 IPC
 - Bogus websites, cyber frauds - Sec 420 IPC
 - Email spoofing - Sec 463 IPC
 - Web-Jacking - Sec. 383 IPC
 - E-Mail Abuse - Sec.500 IPC

4.5.2 Cyber Crimes under the Special Acts

- Online sale of Drugs - Narcotic Drugs and Psychotropic Substances Act, 1985.
- Online sale of Arms – Arms Act, 1959.

Sharat Babu Digumarti v State Govt. of (NCT of Delhi)

2016 Indlaw SC 892

Bench: Dipak Misra, Prafulla C. Pant, JJ.

The Judgment was delivered by: Dipak Misra, J.

2. The appellant along one Avnish Bajaj and others was arrayed as an accused in FIR No. 645 of 2004. After the investigation was concluded, charge sheet was filed before the learned Metropolitan Magistrate who on 14.02.2006 took cognizance of the offences punishable under Sections 292 and 294 of the Indian Penal Code (IPC) and Section 67 of the Information Technology Act, 2000 ("the IT Act") against all of them. Avnish Bajaj filed Criminal Misc. Case No. 3066 of 2006 for quashment of the proceedings on many a ground before the High Court of Delhi which vide order dated 29.05.2008 came to the conclusion that prima facie case was made out under Section 292 IPC, but it expressed the opinion that Avinish Bajaj, the petitioner in the said case, was not liable to be proceeded under Section 292 IPC and, accordingly, he was discharged of the offence under Sections 292 and 294 IPC. However, he was prima facie found to have committed offence under Section 67 read with Section 85 of the IT Act and the trial court was directed to proceed to the next stage of passing of order of charge uninfluenced by the observations made in the order of the High Court.

3. Being grieved by the aforesaid order, Avnish Bajaj preferred Criminal Appeal No. 1483 of 2009. The said appeal was tagged with Ebay India Pvt. Ltd. v. State and Anr. 2012 Indlaw SC 508 (Criminal Appeal No. 1484 of 2009). The said appeals were heard along with other appeals that arose from the lis relating to interpretation of Sections 138 and 141 of the Negotiable Instruments Act, 1881 (for short, "NI Act") by a three-Judge Bench as there was difference of opinion between the two learned Judges in Aneeta Hada v. Godfather Travels and Tours (P) Ltd. (2008) 13 SCC 703 2008 Indlaw SC 1015.

4. Regard being had to the pleas raised by Avnish Bajaj and also the similarity of issue that arose in the context of NI Act, the three-Judge Bench stated the controversy that emerged for consideration thus:-

"2. In Criminal Appeals Nos. 1483 and 1484 of 2009, the issue involved pertains to the interpretation of Section 85 of the Information Technology Act, 2000 (for short "the 2000 Act") which is in pari materia with Section 141 of the Act. Be it noted, a Director of the appellant Company was prosecuted under Section 292 of the Penal Code, 1860 and Section 67 of the 2000 Act without impleading the Company as an accused. The initiation of prosecution was challenged under Section 482 of the Code of Criminal Procedure before the High Court and the High Court held that offences are made out against the appellant Company along with the Directors under Section 67 read with Section 85 of the 2000 Act and, on the said base, declined to quash the proceeding.

3. The core issue that has emerged in these two appeals is whether the Company could have been made liable for prosecution without being impleaded as an accused and whether the Directors could have been prosecuted for offences punishable under the aforesaid provisions without the Company being arrayed as an accused."

6. As far as the appeal of Avnish Bajaj is concerned, the Court referred to Section 85 of the IT Act which is as follows:-

7. Interpreting the same, the Court opined thus:-

"64. Keeping in view the anatomy of the aforesaid provision, our analysis pertaining to Section 141 of the Act would squarely apply to the 2000 enactment. Thus adjudged, the Director could not have been held liable for the offence under Section 85 of the 2000 Act. Resultantly, Criminal Appeal No. 1483 of 2009 is allowed and the proceeding against the appellant is quashed. As far as the Company is concerned, it was not arraigned as an accused. Ergo, the proceeding as initiated in the existing incarnation is not maintainable either against the company or against the Director. As a logical sequitur, the appeals are allowed and the proceedings initiated against Avnish Bajaj as well as the Company in the present form are quashed."

8. After the judgment was delivered, the present appellant filed an application before the trial court to drop the proceedings against him. The trial court partly allowed the application and dropped the proceedings against the appellant for offences under Section 294 IPC and Section 67 of the IT Act,

however, proceedings under Section 292 IPC were not dropped, and vide order 22.12.2014, the trial court framed the charge under Section 292 IPC.

9. Being aggrieved by the order framing of charge, the appellant moved the High Court in Criminal Revision No. 127 of 2015 and the learned Single Judge by the impugned order declined to interfere on the ground that there is sufficient material showing appellant's involvement to proceed against him for the commission of the offence punishable under Section 292 IPC. It has referred to the allegations made against him and the responsibility of the appellant and thereafter referred to the pronouncements in P. Vijayan v. State of Kerala and Anr., (2010) 2 SCC 398 2010 Indlaw SC 58 and Amit Kapoor v. Ramesh Chander and Anr., (2012) 9 SCC 460 2012 Indlaw SC 309 which pertain to exercise of revisional power of the High Court while dealing with propriety of framing of charge under Section 228 of the Code of Criminal Procedure.

10. The central issue that arises for consideration is whether the appellant who has been discharged under Section 67 of the IT Act could be proceeded under Section 292 IPC.

17. At the outset, we may clarify that though learned counsel for the appellant has commended us to certain authorities with regard to role of the appellant, the concept of possession and how the possession is not covered under Section 292 IPC, we are not disposed to enter into the said arenas. We shall only restrict to the interpretative aspect as already stated. To appreciate the said facet, it is essential to understand certain provisions that find place in the IT Act and how the Court has understood the same. That apart, it is really to be seen whether an activity emanating from electronic form which may be obscene would be punishable under Section 292 IPC or Section 67 of the IT Act or both or any other provision of the IT Act.

18. On a perusal of material on record, it is beyond dispute that the alleged possession of material constitutes the electronic record as defined under Section 2(1)(t) of the IT Act. The dictionary clause reads as follows:

"Section 2(1)(t). electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;"

Thus, the offence in question relates to electronic record.

22. In *Devidas Ramachandra Tuljapurkar v. State of Maharashtra and Ors*, (2015) 6 SCC 1 two-Judge Bench has opined that as far as test of obscenity is concerned, the prevalent test is the contemporary community standards test. It is apt to note here that in the said case the Court was dealing with the issue, what kind of test is to be applied when personalities like Mahatma Gandhi are alluded. The Court held:-

"142. When the name of Mahatma Gandhi is alluded or used as a symbol, speaking or using obscene words, the concept of "degree" comes in. To elaborate, the "contemporary community standards test" becomes applicable with more vigour, in a greater degree and in an accentuated manner. What can otherwise pass of the contemporary community standards test for use of the same language, it would not be so, if the name of Mahatma Gandhi is used as a symbol or allusion or surrealist voice to put words or to show him doing such acts which are obscene. While so concluding, we leave it to the poet to put his defence at the trial explaining the manner in which he has used the words and in what context. We only opine that view of the High Court pertaining to the framing of charge under Section 292 IPC cannot be flawed."

23. Reference to *Shreya Singhal* 2015 Indlaw SC 211 (supra) is only to show that in the said case the Court while dealing with constitutional validity of Section 66-A of the IT Act noticed that the said provision conspicuously did not have the word "obscene". It did not say anything else in that regard. In the case at hand, it is required to be seen in which of the provision or both an accused is required to be tried. We have already reproduced Section 292 IPC in the present incarnation. Section 67 of the IT Act which provides for punishment for publishing or transmitting obscene material in electronic form reads as follows:-

25. Section 69 of the IT Act provides for power to issue directions for interception or monitoring or decryption of any information through any computer resource. It also carries a penal facet inasmuch as it states that the subscriber or intermediary who fails to comply with the directions issued under sub-section (3) shall be punished with imprisonment for a term which may extend to seven years and shall also be

liable to fine.

26. We have referred to all these provisions of the IT Act only to lay stress that the legislature has deliberately used the words "electronic form". Dr. Singhvi has brought to our notice Section 79 of the IT Act that occurs in Chapter XII dealing with intermediaries not to be liable in certain cases. Learned counsel has also relied on Shreya Singhal 2015 Indlaw SC 211 (supra) as to how the Court has dealt with the challenge to Section 79 of the IT Act. The Court has associated the said provision with exemption and Section 69A and in that context, expressed that:-

"121. It must first be appreciated that Section 79 is an exemption provision. Being an exemption provision, it is closely related to provisions which provide for offences including Section 69-A. We have seen how under Section 69-A blocking can take place only by a reasoned order after complying with several procedural safeguards including a hearing to the originator and intermediary. We have also seen how there are only two ways in which a blocking order can be passed-one by the Designated Officer after complying with the 2009 Rules and the other by the Designated Officer when he has to follow an order passed by a competent court. The intermediary applying its own mind to whether information should or should not be blocked is noticeably absent in Section 69-A read with the 2009 Rules.

122. Section 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook, etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not. We have been informed that in other countries worldwide this view has gained acceptance, Argentina being in the forefront. Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject-matters laid down in Article 19(2). Unlawful acts beyond what is laid down in Article 19(2) obviously cannot form any part of Section 79. With these two caveats, we refrain from striking down Section 79(3)(b).

123. The learned Additional Solicitor General informed us that it is a common practice worldwide for intermediaries to have user agreements containing what is stated in Rule 3(2). However, Rule 3(4) needs to be read down in the same manner as Section 79(3)(b). The knowledge spoken of in the said sub-rule must only be through the medium of a court order. Subject to this, the Information Technology (Intermediaries Guidelines) Rules, 2011 are valid."

27. We have referred to the aforesaid aspect as it has been argued by Dr. Singhvi that the appellant is protected under the said provision, even if the entire allegations are accepted. According to him, once the factum of electronic record is admitted, Section 79 of the IT Act must apply ipso facto and ipso jure. Learned senior counsel has urged Section 79, as the language would suggest and keeping in view the paradigm of internet world where service providers of platforms do not control and indeed cannot control the acts/omissions of primary, secondary and tertiary users of such internet platforms, protects the intermediary till he has the actual knowledge. He would contend that Act has created a separate and distinct category called 'originator' in terms of Section 2(1) (z)(a) under the IT Act to which the protection under Section 79 of the IT Act has been consciously not extended. Relying on the decision in Shreya Singhal 2015 Indlaw SC 211 (supra), he has urged that the horizon has been expanded and the effect of Section 79 of the IT Act provides protection to the individual since the provision has been read down emphasizing on the conception of actual knowledge. Relying on the said provision, it is further canvassed by him that Section 79 of the IT Act gets automatically attracted to electronic forms of publication and transmission by intermediaries, since it explicitly uses the non-obstante clauses and has an overriding effect on any other law in force. Thus, the emphasis is on the three provisions, namely, Sections 67, 79 and 81, and the three provisions, according to Dr. Singhvi, constitute a holistic trinity.

28. Having noted the provisions, it has to be recapitulated that Section 67 clearly stipulates punishment for publishing, transmitting obscene materials in electronic form. The said provision read with Section 67A and 67B is a complete code relating to the offences that are covered under the IT Act. Section 79, as has been interpreted, is an exemption provision conferring protection to the individuals. However, the said protection has been expanded in the dictum of Shreya Singhal 2015 Indlaw SC 211 (supra) and we concur with the same. Section 81 also specifically provides that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. All provisions will have their play and significance, if the alleged offence pertains to offence of electronic

record. It has to be borne in mind that IT Act is a special enactment. It has special provisions. Section 292 of the IPC makes offence sale of obscene books, etc. but once the offence has a nexus or connection with the electronic record the protection and effect of Section 79 cannot be ignored and negated. We are inclined to think so as it is a special provision for a specific purpose and the Act has to be given effect to so as to make the protection effective and true to the legislative intent. This is the mandate behind Section 81 of the IT Act. The additional protection granted by the IT Act would apply.

32. If legislative intendment is discernible that a latter enactment shall prevail, the same is to be interpreted in accord with the said intention. We have already referred to the scheme of the IT Act and how obscenity pertaining to electronic record falls under the scheme of the Act. We have also referred to Sections 79 and 81 of the IT Act. Once the special provisions having the overriding effect do cover a criminal act and the offender, he gets out of the net of the IPC and in this case, Section 292. It is apt to note here that electronic forms of transmission is covered by the IT Act, which is a special law. It is settled position in law that a special law shall prevail over the general and prior laws. When the Act in various provisions deals with obscenity in electronic form, it covers the offence under Section 292 IPC.

33. In *Jeewan Kumar Raut v. CBI*, (2009) 7 SCC 526 in the context of Transplantation of Human Organs Act, 1994 (TOHO) treating it as a special law, the Court held:-

"22. TOHO being a special statute, Section 4 of the Code, which ordinarily would be applicable for investigation into a cognizable offence or the other provisions, may not be applicable. Section 4 provides for investigation, inquiry, trial, etc. according to the provisions of the Code. Sub-section (2) of Section 4, however, specifically provides that offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, tried or otherwise dealing with such offences.

23. TOHO being a special Act and the matter relating to dealing with offences thereunder having been regulated by reason of the provisions thereof, there cannot be any manner of doubt whatsoever that the same shall prevail over the provisions of the Code." And again:-

"27. The provisions of the Code, thus, for all intent and purport, would apply only to an extent till conflict arises between the provisions of the Code and TOHO and as soon as the area of conflict reaches, TOHO shall prevail over the Code. Ordinarily, thus, although in terms of the Code, the respondent upon completion of investigation and upon obtaining remand of the accused from time to time, was required to file a police report, it was precluded from doing so by reason of the provisions contained in Section 22 of TOHO."

34. In view of the aforesaid analysis and the authorities referred to hereinabove, we are of the considered opinion that the High Court has fallen into error that though charge has not been made out under Section 67 of the IT Act, yet the appellant could be proceeded under Section 292 IPC.

35. Consequently, the appeal is allowed, the orders passed by the High Court and the trial court are set aside and the criminal prosecution lodged against the appellant stands quashed.

Shreya Singhal v Union of India

2015 Indlaw SC 211

Bench: R. F. Nariman, Jasti Chelameswar, Jasti Chelameswar, JJ.

The Judgment was delivered by: R. F. Nariman, J.

1. This batch of writ petitions filed u/art. 32 of the Constitution of India raises very important and far-reaching questions relatable primarily to the fundamental right of free speech and expression guaranteed by Art. 19(1)(a) of the Constitution of India. The immediate cause for concern in these petitions is Section 66A of the Information Technology Act of 2000.

20. With these prefatory remarks, we will now go to the other aspects of the challenge made in these writ petitions and argued before us.

A. Art. 19(1)(a) -

Section 66A has been challenged on the ground that it casts the net very wide - "all information" that is disseminated over the internet is included within its reach.

Two things will be noticed. The first is that the definition is an inclusive one. Second, the definition does not refer to what the content of information can be. In fact, it refers only to the medium through which such information is disseminated. It is clear, therefore, that the petitioners are correct in saying that the public's right to know is directly affected by Section 66A. Information of all kinds is roped in - such information may have scientific, literary or artistic value, it may refer to current events, it may be obscene or seditious. That such information may cause annoyance or inconvenience to some is how the offence is made out. It is clear that the right of the people to know - the market place of ideas - which the internet provides to persons of all kinds is what attracts Section 66A. That the information sent has to be annoying, inconvenient, grossly offensive etc., also shows that no distinction is made between mere discussion or advocacy of a particular point of view which may be annoying or inconvenient or grossly offensive to some and incitement by which such words lead to an imminent causal connection with public disorder, security of State etc. The petitioners are right in saying that Section 66A in creating an offence against persons who use the internet and annoy or cause inconvenience to others very clearly affects the freedom of speech and expression of the citizenry of India at large in that such speech or expression is directly curbed by the creation of the offence contained in Section 66A.

Art. 19(2)

One challenge to Section 66A made by the petitioners' counsel is that the offence created by the said Section has no proximate relation with any of the eight subject matters contained in Art. 19(2). We may incidentally mention that the State has claimed that the said Section can be supported under the heads of public order, defamation, incitement to an offence and decency or morality.

Reasonable Restrictions:

28. As stated, all the above factors may make a distinction between the print and other media as opposed to the internet and the legislature may well, therefore, provide for separate offences so far as free speech over the internet is concerned. There is, therefore, an intelligible differentia having a rational relation to the object sought to be achieved - that there can be creation of offences which are applied to free speech over the internet alone as opposed to other mediums of communication. Thus, an Art. 14 challenge has been repelled by us on this ground later in this judgment. But we do not find anything in the features outlined by the learned Additional Solicitor General to relax the Court's scrutiny of the curbing of the content of free speech over the internet. While it may be possible to narrowly draw a Section creating a new offence, such as Section 69A for instance, relatable only to speech over the internet, yet the validity of such a law will have to be tested on the touchstone of the tests already indicated above.

Public Order

30. In Art. 19(2) (as it originally stood) this sub-head was conspicuously absent. Because of its absence, challenges made to an order made u/s. 7 of the Punjab Maintenance of Public Order Act and to an order made u/s. 9 (1)(a) of the Madras Maintenance of Public Order Act were allowed in two early judgments

by this Court. Thus in *Romesh Thappar v. State of Madras*, [1950] S.C.R. 594, this Court held that an order made u/s. 9(1)(a) of the Madras Maintenance of Public Order Act (XXIII of 1949) was unconstitutional and void in that it could not be justified as a measure connected with security of the State. While dealing with the expression "public order", this Court held that "public order" is an expression which signifies a state of tranquility which prevails amongst the members of a political society as a result of the internal regulations enforced by the Government which they have established.

35. We have to ask ourselves the question: does a particular act lead to disturbance of the current life of the community or does it merely affect an individual leaving the tranquility of society undisturbed? Going by this test, it is clear that Section 66A is intended to punish any person who uses the internet to disseminate any information that falls within the sub-clauses of Section 66A. It will be immediately noticed that the recipient of the written word that is sent by the person who is accused of the offence is not of any importance so far as this Section is concerned. (Save and except where under sub-cl. (c) the addressee or recipient is deceived or misled about the origin of a particular message.) It is clear, therefore, that the information that is disseminated may be to one individual or several individuals.

The Section makes no distinction between mass dissemination and dissemination to one person. Further, the Section does not require that such message should have a clear tendency to disrupt public order. Such message need not have any potential which could disturb the community at large. The nexus between the message and action that may be taken based on the message is conspicuously absent - there is no ingredient in this offence of inciting anybody to do anything which a reasonable man would then say would have the tendency of being an immediate threat to public safety or tranquility. On all these counts, it is clear that the Section has no proximate relationship to public order whatsoever. The example of a guest at a hotel 'annoying' girls is telling - this Court has held that mere 'annoyance' need not cause disturbance of public order. Under Section 66A, the offence is complete by sending a message for the purpose of causing annoyance, either 'persistently' or otherwise without in any manner impacting public order.

Clear and present danger - tendency to affect.

41. Viewed at either by the standpoint of the clear and present danger test or the tendency to create public disorder, Section 66A would not pass muster as it has no element of any tendency to create public disorder which ought to be an essential ingredient of the offence which it creates.

Defamation

43. It will be noticed that for something to be defamatory, injury to reputation is a basic ingredient. Section 66A does not concern itself with injury to reputation. Something may be grossly offensive and may annoy or be inconvenient to somebody without at all affecting his reputation. It is clear therefore that the Section is not aimed at defamatory statements at all.

Incitement to an offence:

44. Equally, Section 66A has no proximate connection with incitement to commit an offence. Firstly, the information disseminated over the internet need not be information which "incites" anybody at all. Written words may be sent that may be purely in the realm of "discussion" or "advocacy" of a "particular point of view". Further, the mere causing of annoyance, inconvenience, danger etc., or being grossly offensive or having a menacing character are not offences under the Penal Code at all. They may be ingredients of certain offences under the Penal Code but are not offences in themselves. For these reasons, Section 66A has nothing to do with "incitement to an offence". As Section 66A severely curtails information that may be sent on the internet based on whether it is grossly offensive, annoying, inconvenient, etc. and being unrelated to any of the eight subject matters under Art. 19(2) must, therefore, fall foul of Art. 19(1)(a), and not being saved under Art. 19(2), is declared as unconstitutional.

Decency or Morality

47. What has been said with regard to public order and incitement to an offence equally applies here. Section 66A cannot possibly be said to create an offence which falls within the expression 'decency' or 'morality' in that what may be grossly offensive or annoying under the Section need not be obscene at all - in fact the word 'obscene' is conspicuous by its absence in Section 66A.

69. Judged by the standards laid down in the aforesaid judgments, it is quite clear that the expressions used in 66A are completely open-ended and undefined.

70. It will be clear that in all computer related offences that are spoken of by Section 66, mens rea is an ingredient and the expression "dishonestly" and "fraudulently" are defined with some degree of specificity, unlike the expressions used in Section 66A.

71. The provisions contained in Sections 66B up to Section 67B also provide for various punishments for offences that are clearly made out. For example, under Section 66B, whoever dishonestly receives or retains any stolen computer resource or communication device is punished with imprisonment. Under Section 66C, whoever fraudulently or dishonestly makes use of any identification feature of another person is liable to punishment with imprisonment. Under Section 66D, whoever cheats by personating becomes liable to punishment with imprisonment. Section 66F again is a narrowly drawn section which inflicts punishment which may extend to imprisonment for life for persons who threaten the unity, integrity, security or sovereignty of India. Ss. 67 to 67B deal with punishment for offences for publishing or transmitting obscene material including depicting children in sexually explicit acts in electronic form.

Chilling Effect and Overbreadth

83. Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech. A person may discuss or even advocate by means of writing disseminated over the internet information that may be a view or point of view pertaining to governmental, literary, scientific or other matters which may be unpalatable to certain sections of society. It is obvious that an expression of a view on any matter may cause annoyance, inconvenience or may be grossly offensive to some. A few examples will suffice. A certain section of a particular community may be grossly offended or annoyed by communications over the internet by "liberal views" - such as the emancipation of women or the abolition of the caste system or whether certain members of a non proselytizing religion should be allowed to bring persons within their fold who are otherwise outside the fold. Each one of these things may be grossly offensive, annoying, inconvenient, insulting or injurious to large sections of particular communities and would fall within the net cast by Section 66A. In point of fact, Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the Section and if it is to withstand the test of Constitutionality, the chilling effect on free speech would be total.

86. That the content of the right under Art. 19(1)(a) remains the same whatever the means of communication including internet communication is clearly established by Reno's case (supra) and by The Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal & Anr., (1995) SCC 2 161 1995 Indlaw SC 2353 already referred to. **It is thus clear that not only are the expressions used in Section 66A expressions of inexactitude but they are also over broad and would fall foul of the repeated injunctions of this Court that restrictions on the freedom of speech must be couched in the narrowest possible terms.**

Possibility of an act being abused is not a ground to test its validity:

92. If Section 66A is otherwise invalid, it cannot be saved by an assurance from the learned Additional Solicitor General that it will be administered in a reasonable manner. Governments may come and Governments may go but Section 66A goes on forever. An assurance from the present Government even if carried out faithfully would not bind any successor Government. It must, therefore, be held that Section 66A must be judged on its own merits without any reference to how well it may be administered.

Severability:

95. It has been held by us that Section 66A purports to authorize the imposition of restrictions on the fundamental right contained in Art. 19(1) (a) in language wide enough to cover restrictions both within and without the limits of Constitutionally permissible legislative action. We have held following K.A. Abbas' case that the possibility of Section 66A being applied for purposes not sanctioned by the Constitution cannot be ruled out. It must, therefore, be held to be wholly unconstitutional and void.

96. The present being a case of an Art. 19(1)(a) violation, Romesh Thappar's judgment would apply on all fours. In an Art. 19(1)(g) challenge, there is no question of a law being applied for purposes not

sanctioned by the Constitution for the simple reason that the eight subject matters of Art. 19(2) are conspicuous by their absence in Art. 19(6) which only speaks of reasonable restrictions in the interests of the general public. The present is a case where, as has been held above, Section 66A does not fall within any of the subject matters contained in Art. 19(2) and the possibility of its being applied for purposes outside those subject matters is clear. We therefore hold that no part of Section 66A is severable and the provision as a whole must be declared unconstitutional.

Article 14

98. We have already held that Section 66A creates an offence which is vague and overbroad, and, therefore, unconstitutional under Art. 19(1)(a) and not saved by Art. 19(2). We have also held that the wider range of circulation over the internet cannot restrict the content of the right under Art. 19(1)(a) nor can it justify its denial. However, when we come to discrimination under Article 14, we are unable to agree with counsel for the petitioners that there is no intelligible differentia between the medium of print, broadcast and real live speech as opposed to speech on the internet. The intelligible differentia is clear - the internet gives any individual a platform which requires very little or no payment through which to air his views. The learned Additional Solicitor General has correctly said that something posted on a site or website travels like lightning and can reach millions of persons all over the world. If the petitioners were right, this Art. 14 argument would apply equally to all other offences created by the Information Technology Act which are not the subject matter of challenge in these petitions. We make it clear that there is an intelligible differentia between speech on the internet and other mediums of communication for which separate offences can certainly be created by legislation. We find, therefore, that the challenge on the ground of Art. 14 must fail.

Procedural Unreasonableness

99. One other argument must now be considered. According to the petitioners, Section 66A also suffers from the vice of procedural unreasonableness. In that, if, for example, criminal defamation is alleged, the safeguards available u/s. 199 Cr.P.C. would not be available for a like offence committed under Section 66A. Such safeguards are that no court shall take cognizance of such an offence except upon a complaint made by some person aggrieved by the offence and that such complaint will have to be made within six months from the date on which the offence is alleged to have been committed. Further, safeguards that are to be found in Ss. 95 and 96 of the Cr.P.C. are also absent when it comes to Section 66A. For example, where any newspaper book or document wherever printed appears to contain matter which is obscene, hurts the religious feelings of some community, is seditious in nature, causes enmity or hatred to a certain section of the public, or is against national integration, such book, newspaper or document may be seized but u/s. 96 any person having any interest in such newspaper, book or document may within two months from the date of a publication seizing such documents, books or newspapers apply to the High court to set aside such declaration. Such matter is to be heard by a Bench consisting of at least three Judges or in High Courts which consist of less than three Judges, such special Bench as may be composed of all the Judges of that High Court.

100. It is clear that Ss. 95 and 96 of the Criminal Procedure Code reveal a certain degree of sensitivity to the fundamental right to free speech and expression. If matter is to be seized on specific grounds which are relatable to the subject matters contained in Art. 19(2), it would be open for persons affected by such seizure to get a declaration from a High Court consisting of at least three Judges that in fact publication of the so-called offensive matter does not in fact relate to any of the specified subjects contained in Art. 19(2).

101. Again, for offences in the nature of promoting enmity between different groups on grounds of religion etc. or offences relatable to deliberate and malicious acts intending to outrage religious feelings or statements that create or promote enmity, hatred or ill-will between classes can only be taken cognizance of by courts with the previous sanction of the Central Government or the State Government. This procedural safeguard does not apply even when a similar offence may be committed over the internet where a person is booked under Section 66A instead of the aforesaid Sections.

Having struck down Section 66A on substantive grounds, we need not decide the procedural unreasonableness aspect of the Section.

S. 118 of the Kerala Police Act.

102. Learned counsel for the Petitioner in Writ Petition No. 196 of 2014 assailed sub-section (d) of S. 118.

The Kerala Police Act as a whole would necessarily fall under Entry 2 of List II. In addition, S. 118 would also fall within Entry 1 of List II in that as its marginal note tells us it deals with penalties for causing grave violation of public order or danger.

104. It is well settled that a statute cannot be dissected and then examined as to under what field of legislation each part would separately fall.

105. It is, therefore, clear that the Kerala Police Act as a whole and S. 118 as part thereof falls in pith and substance within Entry 2 List II, notwithstanding any incidental encroachment that it may have made on any other Entry in List I. Even otherwise, the penalty created for causing annoyance in an indecent manner in pith and substance would fall within Entry 1 List III which speaks of criminal law and would thus be within the competence of the State Legislature in any case.

106. However, what has been said about Section 66A would apply directly to S. 118(d) of the Kerala Police Act, as causing annoyance in an indecent manner suffers from the same type of vagueness and over breadth, that led to the invalidity of Section 66A, and for the reasons given for striking down Section 66A, S. 118(d) also violates Art. 19(1)(a) and not being a reasonable restriction on the said right and not being saved under any of the subject matters contained in Art. 19(2) is hereby declared to be unconstitutional.

Section 69A and the Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009.

107. Section 69A of the Information Technology Act has already been set out in paragraph 2 of the judgment. Under sub-s. (2) thereof, the 2009 Rules have been framed. Under Rule 3, the Central Government shall designate by notification in the official gazette an officer of the Central Government not below the rank of a Joint Secretary as the Designated Officer for the purpose of issuing direction for blocking for access by the public any information referable to Section 69A of the Act. Under Rule 4, every organization as defined under Rule 2(g), (which refers to the Government of India, State Governments, Union Territories and agencies of the Central Government as may be notified in the Official Gazette by the Central Government)- is to designate one of its officers as the "Nodal Officer". Under Rule 6, any person may send their complaint to the "Nodal Officer" of the concerned Organization for blocking, which complaint will then have to be examined by the concerned Organization regard being had to the parameters laid down in Section 69A(1) and after being so satisfied, shall transmit such complaint through its Nodal Officer to the Designated Officer in a format specified by the Rules. The Designated Officer is not to entertain any complaint or request for blocking directly from any person. Under Rule 5, the Designated Officer may on receiving any such request or complaint from the Nodal Officer of an Organization or from a competent court, by order direct any intermediary or agency of the Government to block any information or part thereof for the reasons specified in 69A(1). Under Rule 7 thereof, the request/complaint shall then be examined by a Committee of Government Personnel who under Rule 8 are first to make all reasonable efforts to identify the originator or intermediary who has hosted the information.

If so identified, a notice shall issue to appear and submit their reply at a specified date and time which shall not be less than 48 hours from the date and time of receipt of notice by such person or intermediary. The Committee then examines the request and is to consider whether the request is covered by 69A(1) and is then to give a specific recommendation in writing to the Nodal Officer of the concerned Organization. It is only thereafter that the Designated Officer is to submit the Committee's recommendation to the Secretary, Department of Information Technology who is to approve such requests or complaints. Upon such approval, the Designated Officer shall then direct any agency of Government or intermediary to block the offending information. Rule 9 provides for blocking of information in cases of emergency where delay caused would be fatal in which case the blocking may take place without any opportunity of hearing. The Designated Officer shall then, not later than 48 hours of the issue of the interim direction, bring the request before the Committee referred to earlier, and only on the recommendation of the Committee, is the Secretary Department of Information Technology to pass the final order. Under Rule 10, in the case of an order of a competent court in India, the Designated Officer shall, on receipt of a certified copy of a court order, submit it to the Secretary, Department of

Information Technology and then initiate action as directed by the Court. In addition to the above safeguards, under Rule 14 a Review Committee shall meet at least once in two months and record its findings as to whether directions issued are in accordance with Section 69A(1) and if it is of the contrary opinion, the Review Committee may set aside such directions and issue orders to unblock the said information. Under Rule 16, strict confidentiality shall be maintained regarding all the requests and complaints received and actions taken thereof.

109. It will be noticed that Section 69A unlike Section 66A is a narrowly drawn provision with several safeguards. First and foremost, blocking can only be resorted to where the Central Government is satisfied that it is necessary so to do. Secondly, such necessity is relatable only to some of the subjects set out in Art. 19(2). Thirdly, reasons have to be recorded in writing in such blocking order so that they may be assailed in a writ petition u/art. 226 of the Constitution.

110. The Rules further provide for a hearing before the Committee set up - which Committee then looks into whether or not it is necessary to block such information. It is only when the Committee finds that there is such a necessity that a blocking order is made. It is also clear from an examination of Rule 8 that it is not merely the intermediary who may be heard. If the "person" i.e. the originator is identified he is also to be heard before a blocking order is passed. Above all, it is only after these procedural safeguards are met that blocking orders are made and in case there is a certified copy of a court order, only then can such blocking order also be made. It is only an intermediary who finally fails to comply with the directions issued who is punishable under sub-s. (3) of Section 69A.

111. Merely because certain additional safeguards such as those found in S. 95 and 96 CrPC are not available does not make the Rules Constitutionally infirm. We are of the view that the Rules are not Constitutionally infirm in any manner.

S. 79 and the Information Technology (Intermediary Guidelines) Rules, 2011.

112. S. 79 belongs to Chapter XII of the Act in which intermediaries are exempt from liability if they fulfill the conditions of the Section.

113. Under the 2011 Rules, by Rule 3 an intermediary has not only to publish the rules and regulations, privacy policy and user agreement for access or usage of the intermediary's computer resource but he has also to inform all users of the various matters set out in Rule 3(2).

116. It must first be appreciated that S. 79 is an exemption provision. Being an exemption provision, it is closely related to provisions which provide for offences including Section 69A. We have seen how under Section 69A blocking can take place only by a reasoned order after complying with several procedural safeguards including a hearing to the originator and intermediary. We have also seen how there are only two ways in which a blocking order can be passed - one by the Designated Officer after complying with the 2009 Rules and the other by the Designated Officer when he has to follow an order passed by a competent court. The intermediary applying its own mind to whether information should or should not be blocked is noticeably absent in Section 69A read with 2009 Rules.

117. S. 79(3)(b) has to be read down to mean that the intermediary upon receiving actual knowledge that a court order has been passed asking it to expeditiously remove or disable access to certain material must then fail to expeditiously remove or disable access to that material. This is for the reason that otherwise it would be very difficult for intermediaries like Google, Facebook etc. to act when millions of requests are made and the intermediary is then to judge as to which of such requests are legitimate and which are not. We have been informed that in other countries worldwide this view has gained acceptance, Argentina being in the forefront. Also, the Court order and/or the notification by the appropriate Government or its agency must strictly conform to the subject matters laid down in Art. 19(2). Unlawful acts beyond what is laid down in Art. 19(2) obviously cannot form any part of S. 79. With these two caveats, we refrain from striking down S. 79(3)(b).

119. In conclusion, we may summarise what has been held by us above:

Section 66A of the Information Technology Act, 2000 is struck down in its entirety being violative of Art. 19(1)(a) and not saved under Art. 19(2).

Section 69A and the Information Technology (Procedure & Safeguards for Blocking for Access of

Information by Public) Rules 2009 are Constitutionally valid.

S. 79 is valid subject to S. 79(3)(b) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Art. 19(2) are going to be committed then fails to expeditiously remove or disable access to such material. Similarly, the Information Technology "Intermediary Guidelines" Rules, 2011 are valid subject to Rule 3 sub-rule (4) being read down in the same manner as indicated in the judgment.

S. 118(d) of the Kerala Police Act is struck down being violative of Art. 19(1)(a) and not saved by Art. 19(2).

Sanjay Kumar Kedia v Narcotics Control Bureau

2007(13) SCALE 631

Bench: H.S. Bedi, S.B. Sinha, JJ.

The Judgment was delivered by: Harjit Singh Bedi, J.

2. The appellant Sanjay Kumar Kedia, a highly qualified individual, set up two companies M/s. Xponse Technologies Limited (XTL) and M/s. Xponse IT Services Pvt. Ltd. (XIT) on 22.4.2002 and 8.9.2004 respectively which were duly incorporated under the Indian Companies Act, 1956. On 1.2.2007 officers of the Narcotics Control Bureau (NCB) conducted a search at the residence and office premises of the appellant but found nothing incriminating. He was also called upon to appear before the NCB on a number of occasions pursuant to a notice issued to him u/s. 67 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the Act") and was ultimately arrested and the bank accounts and premises of the two companies were also seized or sealed. On 13.3.2007 the appellant filed an application for bail in the High Court which was dismissed on the ground that a prima facie case u/ss. 24 and 29 of the Act had been made out and that the investigation was yet not complete.

The appellant thereafter moved a second bail application before the High Court on 16.4.2007 which too was dismissed with the observations that the enquiry was at a critical stage and that the department should be afforded sufficient time to conduct its enquiry and to bring it to its logical conclusion as the alleged offences had widespread ramifications for society. It appears that a bail application was thereafter filed by the appellant before the Special Judge which too was rejected on 28.5.2007 with the observations that the investigation was still in progress. Aggrieved thereby, the appellant preferred yet another application for bail before the High Court on 4.6.2007 which too was dismissed on 7.6.2007. The present appeal has been filed against this order.

3. Notice was issued on the Special Leave Petition on 30.7.2007 by a Division Bench noticing a contention raised by Mr. Tulsi that service providers such as the two companies which were intermediaries were protected from prosecution by S. 79 of the Information Technology Act, 2000. An affidavit in reply has also been filed on behalf of the respondent NCB and a rejoinder affidavit in reply thereto by the appellant.

5. Mr. Tulsi has first and foremost argued that the allegations against the appellant were that he had used the network facilities provided by his companies for arranging the supply of banned psychotropic substances on line but there was no evidence to suggest that the appellant had been involved in dealing with psychotropic substances or engaged in or controlled any trade whereby such a substance obtained outside India had been supplied to persons outside India and as such no case u/s. 24 of the Act had been made out against the appellant. Elaborating this argument, he has submitted that the two drugs which the appellant had allegedly arranged for supply were phentermine and butalbital and as these drugs were not included in Schedule-I of the Narcotic Drugs or Psychotropic Substances Rules 1987 in terms of the notification dated 21.2.2003 and were also recognized by the Control Substances Act, a law applicable in the United States, as having low potential for misuse and it was possible to obtain these drugs either on written or oral prescription of a doctor, the supply of these drugs did not fall within the mischief of S. 24. He has further argued that in the circumstance, the companies were mere network service providers they were protected under S. 79 of the Technology Act from any prosecution.

6. Mr. Vikas Singh, the learned Additional Solicitor General for the respondents has however pointed out that the aforesaid drugs figured in the Schedule appended to the Act pertaining to the list of psychotropic substances (at Srl. Nos. 70 and 93) and as such it was clear that the two drugs were psychotropic substances and therefore subject to the Act. It has also been pointed out that the appellant had been charged for offences u/ss. 24 and 29 of the Act which visualized that a person could be guilty without personally handling a psychotropic substance and the evidence so far collected showed that the appellant was in fact a facilitator between buyers and certain pharmacies either owned or controlled by him or associated with the two companies and that S. 79 of the Technology Act could not by any stretch of imagination guarantee immunity from prosecution under the provisions of the Act.

7. It is clear from the Schedule to the Act that the two drugs phentermine and butalbital are psychotropic substances and therefore fall within the prohibition contained in S. 8 thereof. The appellant has been charged for offences punishable u/ss. 24 and 29 of the Act.

A perusal of S. 24 would show that it deals with the engagement or control of a trade in Narcotic Drugs and Psychotropic Substances controlled and supplied outside India and S. 29 provides for the penalty arising out of an abetment or criminal conspiracy to commit an offence under Chapter IV which includes S. 24. We have accordingly examined the facts of the case in the light of the argument of Mr. Tulsi that the companies only provided third party data and information without any knowledge as to the commission of an offence under the Act. We have gone through the affidavit of Shri A.P. Siddiqui Deputy Director, NCB and reproduce the conclusions drawn on the investigation, in his words.

"(i) The accused and its associates are not intermediary as defined u/s. 79 of the said Act as their acts and deeds was not simply restricted to provision of third party data or information without having knowledge as to commission of offence under the NDPS Act. The company (Xponse Technologies Ltd. And Xpose IT Services Pvt. Ltd. Headed by Sanjay Kedia) has designed, developed, hosted the pharmaceutical websites and was using these websites, huge quantity of psychotropic substances (Phentermine and Butalbital) have been distributed in USA with the help of his associates. Following are the online pharmacy websites which are owned by Xponse or Sanjay Kedia.

(1) Brother Pharmacy.com and LessRx.com: Brothers pharmacy.com, online pharmacy was identified as a marketing website (front end) for pharmaceutical drugs. LessRx.com has been identified as a "back end" site which was being utilized to process orders for pharmaceutical drugs through Brotherspharmacy.com. LessRx.com's registrant and administrative contact was listed True Value Pharmacy located at 29B, Rabindra Sarani, Kolkata, India-700073. Telephone No.033-2335-7621 which is the address of Sanjay Kedia. LessRx.com's IP address is 203.86.100.95. The following websites were also utilizing this IP address:

ALADIESPHARMACY.com, EXPRESSPHENTERMINE.com, FAMILYYONLINEPHARMACY.com ONLINEEXPRESSPHARMACY.com, SHIPPEDLIPITOR.com Domain name Servers for LessRx.com (IP address: 203.86.100.95) were NS.PALCOMONLINE.com and NS2PALCOMLINE.com.

The LessRx.com's website hosting company was identified as Pacom Web Pvt Ltd, C-56/14,1st Floor, Institutional Area, Sector 62, Noida-201301. Sanjay Kedia entrusted the hosting work to Palcom at VSNL, Delhi. These servers have been seized. Voluntary statement of Shri Ashish Chaudhary, Prop. Of Palcom Web Pvt Ltd.indicates that He maintained the websites on behalf of Xponse.

According to the bank records, funds have been wired from Brothers pharmacy, Inc's Washington Mutual Bank Account #0971709674 to Xponse IT services Pvt Ltd, ABN AMRO bank account No.1029985, Kolkata.

(2) Deliveredmedicine.com : A review of the Xponse's website-XPONSEIT.com was conducted and observed and advertisement for XPONSERX. That XPONSERX was described as a software platform developed for the purpose of powering online pharmacies. Xponserx was designed to process internet pharmacy orders by allowing customers to order drugs. Drug Enforcement Administration (DEA), USA conducted a "whois" reverse lookup on domain name XPONSERX.COM was at domaintools.Com and it revealed that XPONSERX.COM was registered to Xponse IT Services Pvt Ltd, Sanjay kedia, 29B,Rabindra Sarani, 12E,3rd floor, Kolkata, WB 70073. Telephone no.+91- 9830252828 was also provided for Xponse. Two websites were featured on the XPONSEIT.COM websites as featured clients. And these were DELIVEREDMEDICINE.COM AND TRUEVALUEPRESCRIPTIONS.COM. Review indicated that these two websites were internet pharmacies.

Consequently a "whois" reverse look-up on domain name DELIVEREDMEDICINE.COM at domainstools.com conducted by DEA revealed that it was registered to Xponse Inc.,2760 Park Ave.,Santa Clara, CA, USA which is the address of Sanjay Kedia.

(3) Truevalueprescriptions.com: Review of this website indicated that this website was a internet pharmacy. In addition TRUEVALUEPRESCRIPTIONS listed Phentermine as a drug available for sale. It appeared that orders for drugs could be made without a prescription from the TRUEVALUE website, it was noted that orders for drugs could be placed without seeing a doctor. According to the website, a customer can complete an online questionnaire when placing the order for a drug in lieu of a physical exam in a physician's office. Toll free telephone number 800-590-5942 was provided on the TRUEVALUE website for customer Service.

DEA, conducted a "whois" reverse look-up on domain name TRUEVALUEPRESCRIPTIONS.COM at

domaintools.com and revealed that IP address was 203.86.100.76 and the server that hosts the website was located at Palcom, Delhi which also belongs to Xponse.

From the above facts it is clear that the Xponse Technologies Ltd and Xponse IT Services Pvt Ltd were not acting merely as a network service provider but were actually running internet pharmacy and dealing with prescription drugs like Phentermine and Butalbital."

8. We thus find that the appellant and his associates were not innocent intermediaries or network service providers as defined u/s. 79 of the Technology Act but the said business was only a facade and camouflage for more sinister activity. In this situation, S. 79 will not grant immunity to an accused who has violated the provisions of the Act as this provision gives immunity from prosecution for an offence only under Technology Act itself.

9. We are therefore of the opinion that in the face of overwhelming inculpatory evidence it is not possible to give the finding envisaged u/s. 37 of the Act for the grant of bail that there were reasonable grounds for believing that the appellant was not guilty of the offence alleged, or that he would not resume his activities should bail be granted.

10. For the reasons recorded above, we find no merit in this appeal, which is accordingly dismissed. We however qualify that the observations made above are in the context of the arguments raised by the learned counsel on the bail matter which obligated us to deal with them, and will not influence the proceedings or decision in the trial in any manner. Appeal dismissed.

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Dr. Rini Johar v State of Madhya Pradesh

AIR 2016 SC 2679

Bench: Dipak Misra, Shiva Kirti Singh, JJ.

The Judgment was delivered by: Dipak Misra, J.

1. The petitioner no.1 is a doctor and she is presently pursuing higher studies in United States of America (USA). Petitioner no.2, a septuagenarian lady, is a practicing Advocate in the District Court at Pune for last 36 years. Petitioner no.1 is associated with M/s. Progen, a US company.

2. As the facts would unveil, the informant, respondent no.8 herein, had sent an email to the company for purchase of machine Aura Cam, 6000, which is an Aura Imaging Equipment, in India and the concerned company sent an email to the respondent making a reference to the petitioner no.1. Thereafter, the said respondent sent an email asking her to send the address where he could meet her and have details for making payment. He also expressed his interest to become a distributor.

3. The informant visited the petitioner no.1 at Pune and received a demo of Aura Cam 6000 and being satisfied decided to purchase a lesser price machine i.e. "Twinaura Pro" for a total sum of Rs.2,54,800/-. He paid a sum of Rs.2,50,000/- for which a hand written receipt was given as the proof of payment. During the course of the said meeting, the 8th respondent expressed his desire to purchase a laptop of M/s. Progen of which the petitioner no. 1 was the representative. In pursuance of the discussion, the laptop was given to him who acknowledged it by stating that he owed a sum of Rs.4,800/- as balance consideration towards the Aura Cam and an amount of USD 350 towards the laptop. An assurance was given for remitting the money within a short time. As averred, the respondent no.8 had never raised any grievance relating either to the machine or the laptop. Certain transactions between the informant and the US company have been mentioned and the allegations have been made against the 8th respondent that he represented himself as the sole distributor in India which was brought to the notice of the concerned police in the State of M.P. by the competent authority of the company. The said facts really do not have much relevance to the lis which we are going to adjudicate in the present writ petition.

4. When the matter stood thus, the respondent no.8 filed a complaint before the Inspector General of Police, Cyber Cell, Bhopal alleging that the petitioner no.1 and Mr. Guy Coggin had committed fraud of US 10,500. On the basis of the complaint made, FIR no. 24/2012 under Section 420 and 34 of the Indian Penal Code (IPC) and Section 66-D of the Information Technology Act, 2000 (for brevity, 'the Act') was registered against the petitioners by Cyber Police Headquarters, Bhopal, M.P. The respondent no.2, I.G. Cyber Cell, issued an order on 20.11.2012 which is to the following effect:-

"Cyber state police having registered FIR 24/2012 under S 420, 34 of Indian Penal Code and 66 D of IT Act search and information the undersigned persons are asked to go to Pune.

1. R.R. Devendra Sisodia
2. R.R. (Lady) Ishrat Praveen Khan
3. RR (Lady) Valari Upadhyay"

5. On 21.11.2012, Dy. S.P. State Cyber Police, Bhopal proceeded to pass the following order:-

"Cyber state police having registered FIR 24/2012 under S 420, 34 Indian Penal Code and S 66 D of IT Act accused Rini Johar and Gulshan Johar should be arrested and for that lady constable Ishrat Khan has been deputed with case diary with address from where they are to be found and arrested and it is ordered that they be brought to Bhopal. In reference to which you have been given possession of the said case diary."

7. As the narration would unfurl, on 27.11.2012, the petitioners were arrested from their residence at Pune. Various assertions have been made as regards the legality of the arrest which cover the spectrum of non-presence of the witnesses at the time of arrest of the petitioners, non-mentioning of date, and arrest by unauthorized officers, etc. It is also asserted after they were arrested, they were taken from Pune to Bhopal in an unreserved railway compartment marked - 'viklang' (handicapped). Despite request, the petitioner no.2, an old lady, was not taken to a doctor, and was compelled to lie on the cold floor of the train compartment without any food and water. Indignified treatment and the humiliation faced by the petitioners have been mentioned in great detail. On 28.11.2012, they were produced before the learned Magistrate at Bhopal and the petitioner no. 2 was enlarged on bail after being in custody for about 17 days

and the petitioner no.1 was released after more than three weeks. There is allegation that they were forced to pay Rs.5 lakhs to respondent no.3, Deepak Thakur, Dy. S.P. Cyber Cell, Bhopal. On 18.12.2012, chargesheet was filed and thereafter a petition under Section 482 CrPC has been filed before the High Court for quashment of the FIR.

8. At this stage, it is pertinent to state that on 19.2.2015 the petitioners filed an application for discharge and the learned Magistrate passed an order discharging the petitioners in respect of the offence punishable under Section 66-D of the Act. However, learned Magistrate has opined that there is prima facie case for the offence punishable under Section 66-A(b) of the Act read with Section 420 and 34 of the IPC.

10. In this writ petition, first we shall address to the challenge relating to the validity and legality of arrest, advert to the aspect whether the petitioners would be entitled to any compensation on the bedrock of public law remedy and thereafter finally to the justifiability of the continuance of the criminal proceedings. Be it stated here that this Court on 7.12.2015, taking note of the submissions of the petitioners that they are not interested to prosecute their petition under Section 482 CrPC directed that the said petition is deemed to have been disposed of. It is also requisite to note here that despite efforts being made by the petitioners as well as the State of M.P, respondent no.8, who belongs to Jabalpur, M.P. could not be served. This Court is inclined to infer that the said respondent is really not interested to appear and contest.

12. We consider it imperative to refer to the enquiry made by the State and the findings arrived at by the enquiry officer. It is asserted in the counter affidavit that the petitioners had made a complaint to the Lokayukta Police (M.P. Special Police Establishment) alleging that Deepak Thakur, respondent no.3 herein, demanded a bribe of Rs.10 lakhs for letting them go and pursuant to the said demand, initially a sum of Rs.2,50,000/- was paid and subsequently a sum of Rs.2,50,000/- was also given. The Lokayukta Police had already registered a preliminary enquiry no. 33/2015 and after enquiry submitted an enquiry report dated 18.6.2015 stating that prima facie case had been made out against Deepak Thakur, Dy. S.P., Cyber Cell, Bhopal, Ishrat Khan, Head Constable, Cyber Cell, Bhopal, Inderpal, Writer, Cyber Cell Bhopal and Saurabh Bhat, Clerk, Cyber Cell, Bhopal under Section 13(1)(d) and Section 13(2) of the Prevention of Corruption Act, 1988 and Section 120B IPC. Based on the said preliminary enquiry report, FIR No. 273/2015 dated 27.3.2015 has been registered against the accused persons in respect of the said offences and further steps under the CrPC are being taken. Be it clarified, we are not at all concerned with the launching of said prosecution and accordingly we shall not advert to the same.

13. It is perceivable that the State in its initial affidavit had stated that the Director General of Police by its order dated 8.7.2015 had appointed Inspector General of Police, CID to enquire into the allegations as regards the violation of the provisions enshrined under Section 41-A to 41-C of CrPC. It needs to be stated here that in pursuance of the order passed by the Director General, an enquiry has been conducted by Inspector General of Police Administration, CID, Bhopal. It has been styled as "preliminary enquiry". The said report dated 19.08.2015 has been brought on record. The Inquiring Authority has recorded the statement of Ms. Ishrat Praveen Khan. The part of her statement reads as follows:-

"... When I received the order, I requested DSP Shri Deepak Thakur that I was not in the District Police Force. I do not have any knowledge about IPC/Cr.P.C./Police Regulation/Police Act and Evidence Act, IT Act as I have not obtained any training in Police Training School, nor do I have any knowledge in this regard, nor do I have any knowledge to fill up the seizure memo and arrest memo. Even after the request, DSP Shri Deepak Thakur asked in strict word that I must follow the order. The duty certificate was granted to me on 26.11.2012, on which Report No.567 time 16.30 was registered, in which there are clear directions. In compliance with this order, we reached Kondwa Police Station in Pune Maharashtra on 27.11.2012 with my team and 2 constables and 1 woman constable were sent to assist us from there. The persons of the police station Kondwa came to know reaching Lulla Nagar that the said area does not fall under their police station area so the police of Kondwa phoning Banwari Police Station got to bring the force for help Banwari Police Station. I had given the written application in PS Banwari. The entire team reached the house of Rini Johar and 01 laptop of Dell Company and 1 data card of Reliance Company were seized. Rini Johar called her mother Gulshan Johar from the Court furnishing information to her about her custody. Thereafter, Shri Rini Johar had called up the Inspector General of Police, State Cyber Police Shri Anil Kumar Gupta. I and my team had taken Miss Rini Johar and Smt. Gulshan in our custody. I and Constable Miss Hemlata Jharbare conducted robe search of Miss Rini

Johar and Smt. Gulshan Johar. Nothing was found on their body."

14. He has also recorded the statement of Devender Sisodia, Ms. Vallari Upadhyay, Ms. Hemlata Jharbare and thereafter recorded his findings. The findings arrived at in the preliminary enquiry read thus:-

"24. Finding of the preliminary inquiry:- It was found during the preliminary enquiry that Crime No.24/12 had been registered after the inquiry of one written complaint of the applicant Shri Vikram Rajput, but this complaint inquiry report during the investigation of the offence has been kept as the relevant evidence. The crime was registered on 27.11.2012 under Section 420, 34 IPC read with Section 66D IT Act, 2000 against the named accused persons. The offence was to the effect that though the alleged accused persons obtained Rs.5.00 lakh, they did not supply the camera etc and they supplied the defective articles. This sale - purchase was conducted through the online correspondence, due to which the section of IT Act was imposed. It was found on the preliminary inquiry that Shri Vikram Rajput gave the payment of Rs.2.50 lakh by the bank draft and the remaining payment by cash. The facts of the payment and supply are now disputed and the trial of Crime No.24/12 is pending in the competent Court. Therefore, to give any inquiry finding on it would not be proper. It is clear from the documents attached to the case diary and the statement of Shri Deepak Thakur that Shri Deepak Thakur sent 2 notices respectively by the post and through the Deputy Commissioner, Economic Crime and Cyber Pune respectively to Miss Rini Johar on 01.06.2012 and 02.07.2012 in the investigation of the offence, but they did not appear before the Investigator. It has not been written above both the notices if the notice has been issued under Section 41A of Cr.P.C. It is also not clear whether or not these both notices were severed to Miss Rini Johar.

25. This case is related to the alleged cheating between two persons in respect of sale and purchase of goods. The maximum sentence in Section 420 is the period upto 7 years and similarly when the reasons mentioned in Section 41 (1)(B) are not found, the suspects of the crime should be made to appear for the interrogation in the investigation issuing notice to them. Justice Late Krishna Ayyer has held in Jolly George Varghese v. Bank of Cochin AIR 1980 SC 470 that "No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation". Section 41(2) of Cr.P.C. grants power to the Investigator that if the suspect does not appear for the investigation despite the notice, he can be arrested, though this reason having been mentioned in the case diary should have been produced before the Magistrate, but no reason for the arrest has been mentioned in the case diary. No notice has been sent to the old woman Smt. Gulshan Johar (aged about 70 years), nor has she played any role in committing any offence. Only the draft of Rs.2.50 lakh had been deposited in her account. No binding ground has been mentioned in respect of her arrest in the case diary."

And again:-

"28. It has not been mentioned anywhere in the arrest memo and case diary that the information of the arrest of both women was furnished to any of their relatives and friends. It has become clear from the statements that when both the women were arrested physically they were brought to PS Banwari Pune, where the arrest memo was prepared. There is the signature of Shri Amol Shetty as the witness of the seizure memo. Shri Deepak Thakur has stated in his statement that the handwriting of the seizure memo is of the constable Shri Indrapal. Shri Indrapal did not go as a member of the arresting persons to Pune. The seizure memo does not have the signature of Amol Shetty as well, which proves prima facie that the seizure memo was not prepared on 27.11.2012 in Pune. The report no.29/12 dated 27.11.2012 of seeking police help in PS Banwari is recorded, but no information is recorded at the police station that MP Police are taking by arresting these citizens with them. As a result, the information of the arrested persons was neither furnished in the District Police Control Room Pune, nor was it published there. It has also been clarified in the preliminary inquiry that the accused persons after they were arrested were not produced before the Local Judge and they were brought to Bhopal by rail. Miss Ishrat Khan stated that she did not obtain the rail warrant of neither the policepersons nor the accused during return due to paucity of time."

And finally:-

"As such, the facts of arresting both the suspected women and making seizure memo searching their houses not fully following the procedure of arrest by the Investigator and police team have come to the fore in the preliminary enquiry prima facie."

15. Keeping the aforesaid facts in view, we may refer to the decisions in the field and the submissions canvassed by Mr. Fernandes, learned Amicus Curiae.

18. In *D.K. Basu v. State of W.B.* (1997) 1 SCC 416 1996 Indlaw SC 1546, after referring to the authorities in *Joginder Kumar* 1994 Indlaw SC 1505 (supra), *Nilabati Behera v. State of Orissa* (1993) 2 SCC 746 1993 Indlaw SC 999 and *State of M.P. v. Shyamsunder Trivedi* (1995) 4 SCC 262 1995 Indlaw SC 1216 the Court laid down certain guidelines to be followed in cases of arrest and detention till legal provisions are made in that behalf as preventive measures.

19. Mr. Fernandes, learned Amicus Curiae, in a tabular chart has pointed that none of the requirements had been complied with. Various reasons have been ascribed for the same. On a scrutiny of enquiry report and the factual assertions made, it is limpid that some of the guidelines have been violated. It is strenuously urged by Mr. Fernandes that Section 66-A(b) of the Information Technology Act, 2000 provides maximum sentence of three years and Section 420 CrPC stipulates sentence of seven years and, therefore, it was absolutely imperative on the part of the arresting authority to comply with the procedure postulated in Section 41-A of the Code of Criminal Procedure.

22. We have referred to the enquiry report and the legal position prevalent in the field. On a studied scrutiny of the report, it is quite vivid that the arrest of the petitioners was not made by following the procedure of arrest. Section 41-A CrPC as has been interpreted by this Court has not been followed. The report clearly shows there have been number of violations in the arrest, and seizure. Circumstances in no case justify the manner in which the petitioners were treated.

23. In such a situation, we are inclined to think that the dignity of the petitioners, a doctor and a practicing Advocate has been seriously jeopardized. Dignity, as has been held in *Charu Khurana v. Union of India* (2015) 1 SCC 192, is the quintessential quality of a personality, for it is a highly cherished value. It is also clear that liberty of the petitioner was curtailed in violation of law. The freedom of an individual has its sanctity. When the individual liberty is curtailed in an unlawful manner, the victim is likely to feel more anguished, agonized, shaken, perturbed, disillusioned and emotionally torn. It is an assault on his/her identity. The said identity is sacrosanct under the Constitution. Therefore, for curtailment of liberty, requisite norms are to be followed. Fidelity to statutory safeguards instil faith of the collective in the system. It does not require wisdom of a seer to visualize that for some invisible reason, an attempt has been made to corrode the procedural safeguards which are meant to sustain the sanguinity of liberty. The investigating agency, as it seems, has put its sense of accountability to law on the ventilator. The two ladies have been arrested without following the procedure and put in the compartment of a train without being produced before the local Magistrate from Pune to Bhopal. One need not be Argus - eyed to perceive the same. Its visibility is as clear as the cloudless noon day.

25. Having held thus, we shall proceed to the facet of grant of compensation. The officers of the State had played with the liberty of the petitioners and, in a way, experimented with it. Law does not countenance such kind of experiments as that causes trauma and pain.

27. In the case at hand, there has been violation of Article 21 and the petitioners were compelled to face humiliation. They have been treated with an attitude of insensibility. Not only there are violation of guidelines issued in the case of *D.K. Basu* 1996 Indlaw SC 1546 (supra), there are also flagrant violation of mandate of law enshrined under Section 41 and Section 41-A of CrPC. The investigating officers in no circumstances can flout the law with brazen proclivity. In such a situation, the public law remedy which has been postulated in *Nilawati Behra* 1993 Indlaw SC 999 (supra), *Sube Singh v. State of Haryana* (2006) 3 SCC 178, *Hardeep Singh v. State of M.P.* (2012) 1 SCC 748, comes into play. The constitutional courts taking note of suffering and humiliation are entitled to grant compensation. That has been regarded as a redeeming feature. In the case at hand, taking into consideration the totality of facts and circumstances, we think it appropriate to grant a sum of Rs.5,00,000/- (rupees five lakhs only) towards compensation to each of the petitioners to be paid by the State of M.P. within three months hence. It will be open to the State to proceed against the erring officials, if so advised.

28. The controversy does not end here. Mr. Fernandes, learned Amicus Curiae would urge that it was a case for discharge but the trial court failed to appreciate the factual matrix in proper perspective. The learned Magistrate by order dated 19.2.2015 has found existence of prima facie case for the offences punishable under Section 420 IPC and Section 66-A(b) of I.T. Act, 2000 read with Section 34 IPC. It is submitted by Mr. Fernandes that Section 66-A of the I.T. Act, 2000 is not applicable. The submission

need not detain us any further, for Section 66-A of the I.T. Act, 2000 has been struck down in its entirety being violative of Article 19(1)(a) and not saved under Article 19(2) in *Shreya Singhal v. Union of India* (2015) 5 SCC 1 2015 Indlaw SC 211. The only offence, therefore, that remains is Section 420 IPC. The learned Magistrate has recorded a finding that there has been no impersonation. However, he has opined that there are some material to show that the petitioners had intention to cheat. On a perusal of the FIR, it is clear to us that the dispute is purely of a civil nature, but a maladroit effort has been made to give it a criminal colour.

29. In the present case, it can be stated with certitude that no ingredient of Section 420 IPC is remotely attracted. Even if it is a wrong, the complainant has to take recourse to civil action. The case in hand does not fall in the categories where cognizance of the offence can be taken by the court and the accused can be asked to face trial. In our considered opinion, the entire case projects a civil dispute and nothing else. Therefore, invoking the principle laid down in *State of Haryana v. Bhajan Lal* 1992 Supp. (1) SCC 335, we quash the proceedings initiated at the instance of the 8th respondent and set aside the order negating the prayer for discharge of the accused persons. The prosecution initiated against the petitioners stands quashed. Consequently, the writ petition is allowed to the extent indicated above. There shall be no order as to costs. Petition allowed

Rajesh S/o Bhaskaran v State of Kerala

2013 Indlaw KER 1097, 2014 CRLJ 204

Bench: K. Harilal, J

The Order of the Court was as follows :

1. This Revision Petition is filed challenging the impugned order passed in CMP.No.147/2012 in CC.No.140/2010 on the files of the Judicial First Class Magistrate Court, Muvattupuzha, dismissing the above petition filed by the Revision Petitioner u/s. 239 of the Code of Criminal Procedure, seeking discharge from prosecution.

The Revision Petitioner is the sole accused in CC.No.140/2010 on the files of the Judicial First Class Magistrate Court, Muvattupuzha as well as Crime No.14/2009 in CCPS/Kerala, Thiruvananthapuram of Cyber Crime Police Station, Kerala, from which the above Calender Case had been arisen.

2. Originally he was the accused in Crime No.1499/2010 of Muvattupuzha Police Station registered for the offence punishable u/s. 66 of the Information Technology Act (for short 'IT Act') and the Crime No.399/2009 of the Vanchiyoor Police Station registered for the offence punishable u/s. 66 of the IT Act and Section 420, 379 r/w.S. 34 of the Indian Penal Code. These two crimes were registered alleging the same act alleged to have been committed by the accused. But, by the order No.D5/76776/2009 issued by the Director General of Police, the above two cases were transferred to Cyber Police Station, SCRB, Thiruvananthapuram. Now, after investigation, a final report has been filed by the Circle Inspector of Police, Cyber Police Station, Thiruvananthapuram before the Judicial First Class Magistrate Court, Muvattupuzha against the Revision Petitioner/accused alleging offence punishable u/s. 469 of the IPC alone, after deleting the offence punishable u/s. 66 of the IT Act and also all other offences alleged against the Revision Petitioner/accused for the offences punishable under the India Penal Code.

3. The prosecution case in brief is as follows: On 3.7.2009, the Revision Petitioner/the accused who is the Assistant Manager of the Zonal Office of the State Bank of Travancore (SBT, Panampilly Nagar), Ernakulam had used the E-mail address of the Muvattupuzha branch of the State Bank of Travancore and sent a message to CW6, who is the Assistant General Manager and also the Head of the Vigilance Department of SBT, Head Office, Thiruvananthapuram, stating as follows:

"Your bank is doing unduly favour to M/s.K C Wood Industries Ltd - Wood manufactures of Muvattupuzha. The project proposal submitted by us is rejected citing various reasons by your regional manager. At the same time the limit enjoyed by K C Wood Industries has enhanced from 25 Lacs to 50 Lacs. We are doing same business and the K C Wood Industries has not doing business for a limit of 50 Lacs. So it's unduly personal favour done by your regional manager. Please enquire about such proposals sanctioned and rejected from Muvattupuzha."

It is alleged that the Revision Petitioner had forged and sent an electronic record in the name of an enterpreneur by name V.K.Ibrahim & Sons, which was not in existence on 3.7.2009, from the internet cafe owned by the Cw4 at Panampilly Nagar, Ernakulam. Thus, the Revision Petitioner/accused had thereby caused a loss of reputation to the Bank and Cw1 by sending the above message using the forged E-mail address and thereby committed the offence punishable u/s. 469 of Cr.PC.

4. The Revision Petitioner has filed CMP.No.147/2012, in the above case seeking discharge from prosecution mainly on the ground that Cyber Police Station, Thiruvananthapuram has no authority or power to file a final report to charge sheet him for the offence punishable under the IPC alone, when there is no police charge under the Information Technology Act in the final report. Similarly, the allegations in the charge even if admitted at its entirety, do not disclose the offence alleged against him. The learned Magistrate after hearing both parties dismissed the petition by the impugned order. This order is under challenge in this Revision Petition.

5. The learned Senior counsel for the Revision Petitioner Sri.C.C.Thomas advanced arguments based on the grounds raised in the Revision Petition. The learned Senior counsel submitted that in investigation no offence punishable under the IT Act was disclosed and the Revision Petitioner is not charge sheeted thereunder. So, the Station House Officer of the Cyber Police Station, Thiruvananthapuram has no authority or power to file final report against the Revision Petitioner for an offence punishable under the

IPC or any statute other than the IT Act. Thus, the prosecution itself against the Revision Petitioner on the basis of the final report filed by the Cyber Police Station is not maintainable. Secondly, even if the case is admitted at its entirety, the allegations against the Revision Petitioner do not disclose any offence u/s. 469 of the IPC. The disputed message which is alleged to have been sent, even if admitted, that does not disclose any kind of harm or injury to the reputation of either Cw1 or the Bank. Therefore, the court below ought to have allowed the petition and thereby discharged the Revision Petitioner from prosecution. Thirdly, the Senior counsel contended that even if the allegations are taken at its face value, the Investigating Officer failed to collect any evidence or material objects so as to prove the case against the Revision Petitioner beyond reasonable doubt. Being an offence alleged to have been committed through an electronic media, in the absence of material object by which the alleged message is said to have been sent, no offence alleging fabrication of electronic record can be proved. In short, the prosecution is only an experimental exercise intended to harass the Revision Petitioner by abusing the process of the court. The complaint was filed vindictively by another Officer of the same Bank to wreck-vengence against the Revision Petitioner without any basis.

6. Per contra, the learned Public Prosecutor advanced the argument to justify the impugned order. He submits that originally a crime was registered under the IT Act and was transferred to the Cyber Police Station for investigation. In such cases even if the investigation does not disclose the offence under IT Act, since the investigation has already been completed, the Station House Officer of the Cyber Police Station has power and authority to charge sheet the accused for the offences punishable under IPC even in the absence of any offence under the IT Act. Similarly, he straneously contended that the act allegedly done by the Revision Petitioner would constitute forgery and the contents of the message allegedly sent by the Revision Petitioner would harm the reputation of the Bank as well as the Cw1 and thereby offence u/s. 369 is attracted.

8. In view of the rival contentions, the first and foremost question that arises for consideration is whether the Cyber Police Station of Kerala having jurisdiction over the entire State of Kerala, constituted to investigate any offence committed under the Information Technology Act, 2000 have power or authority to file final report charging offences under the India Penal Code or under any penal statute other than the Information Technology Act, in the absence of charge for any of the offences under the Information Technology Act, 2000 in the final report.

9. Let us have look at the general law provided under Cr.PC for investigation. S. 156 of the Cr.PC deals with the Police Officer's power to investigate cognizable case. According to this Section, any officer in charge of any Police Station may, without order of a Magistrate, investigate any cognizable case which a court having jurisdiction over a local area within the limits of such Station would have power to enquire into or try under the provisions of Chapter XIII. According to S. 177 of the Cr.PC, every offence ordinarily be enquired into and tried by a court within whose local jurisdiction it was committed. According to S. 4 of the Cr.PC, all offences under IPC shall be investigated and enquired into, tried and otherwise dealt with according to the provisions hereinafter contained in Cr.PC. But, according to sub s. 2 of Section 4, all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions but, subject to any enactment for the time being in force regulating the manner or place of investigating, inquiry into, trying or otherwise dealing with such offences. Thus, according to the general law, the investigation of an offence under IPC is vested with the Police Station having local jurisdiction over the area within which the offence has been committed and special procedure or power or jurisdiction can be prescribed for investigation of an offence under any special enactment for the time being in force. S. 5 saves special or local law for the time being in force or special jurisdiction or power conferred or any special form of procedure prescribed by any other law, for the time being in force.

10. Going by the GO.No.909/2004/Home dated 15.4.2004, it could be seen that the Government of Kerala under sub S. 2(s) of the Cr.PC and S. 78 of the Information Technology Act, 2000, constituted and declared Cyber Police Station known as 'Cyber Police Station Kerala' having jurisdiction over the entire State of Kerala to investigate any offence committed under the Information Technology Act, 2000. An explanatory note is also appended to this notification. Though, the explanatory note does not form a part of the notification it says that the explanatory note is intended to explain the purport of the notification. The explanation clarifies that Cyber Police Station is sanctioned in view of the upsurge in cyber crimes including the criminal intimidation on internet, Hate mail, Cyber stalking, website hacking, theft in internet hours, credit card frauds, child pornography, internet sexual harassment, internet bank frauds and

all other crimes where computers are instrumental to crime. The explanatory note further clarifies that "Cyber Police Station shall investigate any offence committed under the Information Technology Act, 2000 and this notification is intended to achieve the above object." To sum up, by the notification, investigation of the offences falling under the Information Technology Act, has been carved out from the general law applicable for investigation as provided under Cr.PC and given to Cyber Police Station, Kerala.

11. But, on an analysis of the said notification, I am of the opinion that the scope and extent of the jurisdiction and power of the 'Cyber Police Station, Kerala' constituted under the above notification is confined to and regulated by the Rule that emerges from the legal maxim "Expressio unius est exclusio alterius" i.e., the express mention of one thing implies exclusion of another. The Law Lexicon explains the maxim - whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative viz., that the thing shall not be done otherwise. This Rule had been adopted in various judicial precedents from Taylor v. Taylor (1875) 1 Ch. D. 426 to GVK Industries Ltd. and another v. Income Tax Officer and another (2011(4) SCC 36 2011 Indlaw SC 135). This Rule adopted in Taylor v. Taylor is well recognised and is founded on sound principle. The court took the view that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than which has been prescribed. This view has been adopted in Nazir Ahmed v. King Emperor (AIR 1936 PC 253(2)). In GVK Industries Ltd. and another v. Income Tax Officer and another (2011 (4) SCC 36 2011 Indlaw SC 135), the Supreme Court applied the said Rule as shown below:

"In this case it is the territory of India that is specified by the phrase "for the whole or any part of the territory of India". Expressio unius est exclusio alterius - the express mention of one thing implies the exclusion of another. In this case Parliament has been granted powers to make laws "for" a specific territory - and that is India or any part thereof, by implication, one may not read that Parliament has been granted powers to make laws "for" territories beyond India."

12. When we apply the Rule of "Expressio unius est exclusio alterius" in the instant case, it can be held that when a special notification expressly confers power and jurisdiction to investigate offences falling under a Special Statute only to a special investigating agency or to a particular Police Station, the Rule making authority is deemed to have intentionally excluded Power and Jurisdiction to investigate all other offences, falling under any Statute other than that Special Statute. To sum up: An implied exclusion of the investigation of all other offences from the purview or authority of the Cyber Police Station Kerala is inherent in the notification itself.

13. When an act is prescribed to be done in a specific way or when a power or authority is conferred to another with a direction to exercise power or authority for the performance of a specific thing or purpose, such act shall be done or performed in such a way only and such power or authority shall be exercised for the purpose for which the power has been conferred only and nothing more or nothing less than that. Going by the notification, in the light of explanatory note, I am of the opinion that obviously, the Cyber Police Station Kerala having sphere of authority over the entire State of Kerala is constituted for investigating offences coming under the Information Technology Act, 2000 only and nothing more than that. On a combined reading of notification and explanation thereunder, it is very clear that Cyber Police Station has the power to investigate offences coming under the Information Technology Act only and no other offences can be investigated by them. Necessarily, it follows that Cyber Police Station has no power or authority to file final report in the absence of any offence under the Information Technology Act in the final report. When none of the offences under Information Technology Act had been disclosed in investigation, the Station House Officer, Cyber Police Station should have sent back the case to the Police Station under which the offences under the Indian Penal Code had allegedly been committed. Therefore, I find that the final report has been filed without power or authority conferred by the notification and no prosecution can be launched on the basis of that final Report.

14. But here, indisputably no offence has been disclosed in investigation under the Information Technology Act. Consequently, the Revision Petitioner has not been charge sheeted for any of the offences under the Information Technology Act in the final report. The present final report is filed charging offence under the Indian Penal Code alone for which the Cyber Police Station has no power or authority. Whether the Cyber Police Station has power to investigate offences coming under the penal code or any other penal statute other than the Information Technology Act along with offences coming

under the Information Technology Act and to file final report charging such offences under other statutes also along with the offences under the Information Technology Act? Considering the facts of the instant case, this question does not arise for consideration and both parties did not address on that issue as it is not necessary. So, I leave it open there.

15. The decision in *Prakashkumar v. State of Gujarat* [2005 Indlaw SC 17] is not applicable to the instant case. Thereby interpretation of Sec.12(1) and (2) of the TADA, the Apex Court held that once the other offences under other Statutes are connected with the offence under the TADA, if the accused is charged with all the offences, the designated court is empowered to convict the accused for the offence under any law notwithstanding the fact that no offence under the TADA is made out. Here the question is entirely different. There, the S. 12(1) of the TADA empowers the designated court to try the offences under different Statutes other than the TADA along with the TADA. But here the notification does not permit so. The Cyber Police Station cannot file charge sheet under the Indian Penal Code. I have considered the decisions reported in *Bhanuprasad v. State of Gujarat* (AIR 1968 Supreme Court 1323 1968 Indlaw SC 45); *State v. Nalini* [(1999) 5 SCC 253 1999 Indlaw SC 810] and *State of Tamil Nadu v. Nalini* (AIR 1999 SC 2640 1999 Indlaw SC 810). But these decisions do not render any assistance to justify the lack of power involved in this case. The learned Public Prosecutor further points out that the decision in *H.N. Rishbud v. State of Delhi* (AIR 1955 SC 196 1954 Indlaw SC 14) a defect or illegality in investigation, however, serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. I am of the opinion that the said proposition cannot be imported to the case where the Police Officer who has no power or authority, has filed a final report, which is incurable in all respects.

16. The next point for consideration is **whether there is any material documents to prove that the offence had been committed by the revision petitioner.** What is revealed in the investigation is that the message had been sent from the Internet Cafe of Cw4 on 3/7/2009, using the IP address allotted to Cw4. Admittedly on 3/7/2009, 11 persons had visited the Internet Cafe and used the facilities on hire. Since 45 days have already been elapsed, video clippings had been deleted automatically. Besides, Cw4 himself had effected formatting and also wiped off several times through wiping tools. The video clippings of those who visited the Cafe as customers on 3/7/2009 are not available according to Cw4 and it cannot be decoded again as already wiped off by automatic deletion. The statement of Cw4 is supported by the statement of his employees Cw7 and Cw8 also. Thus, the crucial material object is not available in the hands of prosecution. Instead of video clippings of the customers on 3/7/09, the prosecution has seized C.Ds. containing visuals of those who visited the Cafe on 9/10/09 and 16/10/09 merely on the reason that the Revision Petitioner had visited the Cafe on those days ie., after three months. Indisputably, these C.Ds. will not serve the purpose of proving the prosecution case. I am of the opinion that the material evidence to show the person who sent the message is not available with the prosecution.

17. Similarly, the statements of Cw4 and two employees Cw7 and Cw8, show that even in the log book the number and details of each cabin which was used by each customer including the accused on 3/7/09 is not available in the log book as that column is left blank by omission. Therefore, even if the revision petitioner visited the Cafe on 3/7/09, the computer which is said to have been used by the revision petitioner is not identifiable. In the final report, it is also stated that since the video clippings containing the visuals of the persons who visited the Cafe on 3/7/09 are not available, the computer and its hard disc have not been seized and taken into custody by the police as Material Objects.

18. The last point raised by the learned Senior counsel is that the contents of the message do not cause any harm to the reputation of either Cw1 or the Bank. It is pertinent to note that the allegation is that the project proposal of one V.K. Ibrahim was rejected on various reasons. But at the same time, the credit limit enjoyed by K.C. Wood Industries has been increased from Rs.25 lakhs to Rs.50 lakhs. It is also alleged that the same is an undue personal favour done by the Regional Manager. It is to be noted that no kind of undue pecuniary benefit, ill-will, ulterior motive or mala fides had been attributed against the said Regional Manager. In short, the allegation is that the attitude shown by the Regional Manager was discriminatory or, at the most, he has violated the norms or showed some undue favour. The allegation is thus confined to an act done in discharge of the official duty and nothing more than that. More pertinently, the message was intended to make an enquiry on his complaint as obviously the same is the concluding request. I am of the opinion that the message can be depicted as a complaint and if the allegation is not true, it is only a false complaint. It is to be noted that Cw6 Job Abraham, the Asst.Manager, Vigilance Wing as well as the recipient of the message had given a statement that no independent vigilance enquiry had been conducted so far by the Vigilance Department of the State Bank

of Travancore, as he believed the statement of Branch Manager and Zonal Manager, despite the receipt of this message indicating discrimination in granting loan. I am of the opinion that the message does not disclose an intend to harm the reputation of the Bank or Cw1, the essential ingredient constituting the offence under Sec.369 Indian Penal Code; but intended for embarking an enquiry.

19. More interestingly, the Deputy Manager, State Bank of Travancore, Muvattupuzha Branch, has given a statement that K.C. Wood Industries had submitted an application for enhancing their credit limit from Rs.25 lakhs to Rs.50 lakhs and that application is being kept in the office and he is ready to produce it. No independent investigation has been made by the police to find out whether the allegations in the message are true? No such materials are available in the final charge except the statements of complainants.

20. Thus, the crucial Material Objects on which the prosecution case rests are not available, even according to the prosecution. Thus, there is no material to connect the revision petitioner with the alleged offence. So, I am of the opinion that not only the charge in the final report but also the materials produced along with the final report do not disclose the offence said to have been committed by the accused even if the uncontroverted prosecution case is admitted. Thus, there are no sufficient grounds to prosecute the revision petitioner even if the uncontroverted prosecution case is admitted. If the prosecution is allowed to continue with trial, certainly it will be a futile experimental exercise as well as abuse of the process of the Court.

21. Consequently, the impugned order under challenge passed by the court below is set aside and C.M.P.No.147/12 in C.C.No.140/10 on the files of the Judicial First Class Magistrate's Court, Muvattupuzha, will stand allowed. In the result, the revision petitioner is discharged from the prosecution for the offences alleged against him in the above Calendar Case.

Rishi Narula v State (NCT of Delhi) and others

2016 Indlaw DEL 234

The Judgment was delivered by: P. S. Teji, J.

1. The present petition under Section 482 Cr.P.C. has been filed by the petitioner, namely, Mr. Rishi Narula for quashing of FIR No.41/2014 dated 25.01.2014, under Sections 420/419 IPC & Sections 66/66C/66D Information Technology Act registered at Police Station Kirti Nagar on the basis of the compromise deed executed between the petitioner and the respondent no. 2, namely, SBI Cards Payment and Service Pvt. Ltd., Delhi through its authorized signatory-Mr. Mukesh Giri on 22.02.2014.

3. The factual matrix of this present case is that the FIR in question was lodged by the complainant on the allegation of misusing the credit cards facility of SBI Cards for unlawful gains by making unsolicited calls to SBI credit cardholders. The complainant is a registered Company. The Company checked the alleged card accounts and found that mobile number and email id was changed and new ones were updated. Later on, on enquiry it was found that the customers never requested the Company to change their mobile number and email. They also informed that they received some phone calls on behalf of SBI card agents asking for card details. The Company is alleged to have never shared customer details to any third party and never instructed any third party to make such calls. On enquiry, merchant Snapdeal informed them that a product of Sony was booked in the name of Mr. Harjit Singh and two other products are yet to be delivered. It was discovered that the said person has caused wrongful loss to the tune of Rs. 1,62,964/- to the said cardholders. Thereafter the FIR in question was lodged against the petitioner. The petitioner was in judicial custody since 25.01.2014 and was granted bail thereafter. Later on, the matter was compromised between the parties.

4. Respondent No.2 present in the Court, submitted that the dispute between the parties has been amicably resolved. As per the contents of the Compromise Deed, both the parties have settled the dispute and have agreed that the petitioner shall, prior to the filing of the petition for quashing the FIR in question, make a payment of Rs 36,951/- to respondent no.2 towards the loss suffered by the company/its customers due to the act committed by the petitioner. It is agreed that thereafter the said amount of Rs 36,951/- was paid by the uncle of the petitioner vide receipt no. 17489301 of a sum of Rs.29,820/- and receipt no. 1749302 of a sum of Rs. 5,897/- on 31.01.2014. It is further agreed that as per the instructions of respondent no.2 that the remaining amount of Rs. 1,231 has been deposited by the petitioner and duly received and acknowledged by respondent no.2 vide receipt no. 17489303 on 11.02.2014. It has also been agreed that respondent no.2 has received direct credit back from the merchants (Snapdeal/Mega deals) for an amount of Rs. 1,12,910/-. Therefore it is finally agreed between the parties that the respondent no.2 shall not object if the petitioner were to file a quashing petition. The affidavit dated 24.02.2014 of Sh. Mukesh Giri, authorized signatory/authorized representative of respondent no. 2 has been placed on record. Mr. J.P.Sundriyal affirmed the contents of the aforesaid compromise deed and of the said affidavit. In the affidavit, it is stated that respondent no.2 has no objection if the FIR in question is quashed. All the disputes and differences have been resolved through mutual consent. Now no dispute with petitioner survives and so, the proceedings arising out of the FIR in question be brought to an end. Statement of Sh. J.P. Sundriyal, authorized signatory/authorized representative of respondent No.2, has been recorded in this regard in which it is stated that the respondent no.2 has entered into a compromise with the petitioner and has settled all the disputes with him. It is further stated that respondent no.2 shall have no objection if the FIR in question is quashed.

5. In Gian Singh v. State of Punjab (2012) 10 SCC 303 2012 Indlaw SC 314 Apex Court has recognized the need of amicable resolution of disputes in cases like the instant one, by observing as under:-

"61. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceedings or continuation of criminal proceedings would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in the affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceedings."

7. The inherent powers of the High Court ought to be exercised to prevent the abuse of process of law and to secure the ends of justice. The respondent no.2 agreed to the quashing of the FIR in question and has,

vide its authorized representative/ authorized signatory, stated that the matter has been settled out of its own free will. As the matter has been settled and compromised amicably, so, there would be an extraordinary delay in the process of law if the legal proceedings between the parties are carried on. So, this Court is of the considered opinion that this is a fit case to invoke the jurisdiction under Section 482 Cr.P.C. to prevent the abuse of process of law and to secure the ends of justice.

8. The incorporation of inherent power under Section 482 Cr.P.C. is meant to deal with the situation in the absence of express provision of law to secure the ends of justice such as, where the process is abused or misused; where the ends of justice cannot be secured; where the process of law is used for unjust or unlawful object; to avoid the causing of harassment to any person by using the provision of Cr.P.C. or to avoid the delay of the legal process in the delivery of justice. Whereas, the inherent power is not to be exercised to circumvent the express provisions of law.

9. It is settled law that the inherent power of the High Court under Section 482 Cr.P.C. should be used sparingly. The Hon'ble Apex Court in the case of State of Maharashtra through CBI v. Vikram Anatrai Doshi and Ors 2014 Indlaw SC 637. and in the case of Inder Singh Goswami v. State of Uttaranchal has observed that powers under Section 482 Cr.P.C. must be exercised sparingly, carefully and with great caution. Only when the Court comes to the conclusion that there would be manifest injustice or there would be abuse of the process of the Court if such power is not exercised, Court would quash the proceedings.

In the present case, the offence under Section 420 IPC is an offence compoundable with the permission of this Court as per Section 320 (2) Cr.P.C. Keeping in view, the above mentioned facts and circumstances, the offence under the said section is compounded.

11. In the facts and circumstances of this case and in view of statement made by the respondent No.2, the FIR in question warrants to be put to an end and proceedings emanating thereupon need to be quashed.

12. Accordingly, this petition is allowed and FIR No.41/2014 dated 25.01.2014, under Sections 420/419 IPC & Sections 66/66C/66D Information Technology Act registered at Police Station Kirti Nagar and the proceedings emanating therefrom are quashed against the petitioner. This petition is accordingly disposed of.



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2018-19 Supreme Court Cases

1. **CHITRA MATHA D. GURURAJU (U.S.)** vs. **STATE OF WEST BENGAL**, AIR 2018 SC 1015
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3. **CHITRA MATHA D. GURURAJU (U.S.)** vs. **STATE OF WEST BENGAL**, AIR 2018 SC 1015

4. **CHITRA MATHA D. GURURAJU (U.S.)** vs. **STATE OF WEST BENGAL**, AIR 2018 SC 1015
5. **CHITRA MATHA D. GURURAJU (U.S.)** vs. **STATE OF WEST BENGAL**, AIR 2018 SC 1015
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17. **CHITRA MATHA D. GURURAJU (U.S.)** vs. **STATE OF WEST BENGAL**, AIR 2018 SC 1015
18. **CHITRA MATHA D. GURURAJU (U.S.)** vs. **STATE OF WEST BENGAL**, AIR 2018 SC 1015
19. **CHITRA MATHA D. GURURAJU (U.S.)** vs. **STATE OF WEST BENGAL**, AIR 2018 SC 1015
20. **CHITRA MATHA D. GURURAJU (U.S.)** vs. **STATE OF WEST BENGAL**, AIR 2018 SC 1015



CHIEF JUSTICE: STATE OF MICHIGAN vs. JAMES EARL RAY, JR. 481

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CHIEF JUSTICE: STATE OF MICHIGAN vs. JAMES EARL RAY, JR.

Supreme Court of Michigan, No. 13, 2019, decided on April 13, 2019

STATE OF MICHIGAN vs. JAMES EARL RAY, JR., APPELLANT
vs. STATE OF MICHIGAN vs. JAMES EARL RAY, JR., APPELLANT
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vs. STATE OF MICHIGAN vs. JAMES EARL RAY, JR., APPELLANT

2



1. **Information Technology, Internet, Computer and Cyber Laws — Cyber Crimes — Child pornography (CP), rape/gang rape (RCR) videos —** Directions issued and parties impleaded. (Paras 1 to 7)
2. **Information Technology, Internet, Computer and Cyber Laws — Cyber Crimes — Child pornography (CP), rape/gang rape (RCR) videos —** Notice issued. (Paras 8 to 11)
3. **Information Technology, Internet, Computer and Cyber Laws — Cyber Crimes — Child pornography (CP), rape/gang rape (RCR) videos —** Directions issued regarding. (Paras 12 to 14)
4. **Information Technology, Internet, Computer and Cyber Laws — Cyber Crimes — Distribution of videos of child pornography/gang rape through social media like WhatsApp —** Constitution of India — Art. 21 — Distribution of sex crime videos (rape and gang rape) through social media like WhatsApp — Judicial notice taken of steps taken on 13.3.2018 and 20.3.2018 — Directions issued with regard to identification and arrest of culprits, and transfer of RCs to CBI, recording of statements of victims, further investigation by CBI under S. 173 B; CrPC and tracking of sites — CBI directed to ascertain persons who uploaded clips in social media. (Paras 15 to 21)
5. **Information Technology, Internet, Computer and Cyber Laws — Cyber Crimes — Distribution of videos of child pornography/gang rape through social media like WhatsApp —** Notice issued to Central Computer Emergency Response Team (CERT) and steps taken to remove the said clips — Group of registered lawyers being identified for impleading persons. (Paras 22 to 31)
6. **Information Technology, Internet, Computer and Cyber Laws — Cyber Crimes — Distribution of sex crime videos (rape and gang rape) through social media like WhatsApp —** Costs of Rs. 50,000 and Rs. 25,000 imposed on States of Odisha and Telangana for non-appearance in such important matter and not seriously taking steps regarding attack on vehicle respectively — Personal appearance of Chief Secretary, Odisha, directed — Resultantly both States taking official steps. (Paras 32, 39 and 42 to 44)
7. **Information Technology, Internet, Computer and Cyber Laws — Cyber Crimes — Effective tackling of cyber crime —** Suggestions of Committee formed by Central Government — 2 suggested schemes approved by Government — Directions issued to update circular on all such schemes. Matter adjourned. (Paras 45 to 48)
8. **Information Technology, Internet, Computer and Cyber Laws — Cyber Crimes — Child pornography (CP), rape/gang rape (RCR) videos —** Notice issued and parties impleaded. (Paras 49 to 51, 54, 68 and 69)
9. **Information Technology, Internet, Computer and Cyber Laws — Cyber Crimes — Child pornography (CP), rape/gang rape (RCR) videos —** Cyber Crime Prevention against Women and Children (C-PWCC) as Central Institutional Mechanism — Constitution, duties, functions, infrastructure and setting up of — Directions — Needful should be done within two weeks. (Paras 52 to 55)
10. **Information Technology, Internet, Computer and Cyber Laws — Cyber Crimes — Child pornography (CP), rape/gang rape (RCR) videos —** Steps not to make said videos available to general public — Feasibility — Committee to advise on feasibility formed with stated constitution — Meeting of committee for said purpose — Accordingly directed — Directions issued



10-1

Supreme Court Cases

11/18/2019

the United States for the statements usually contained in video
tapes were taken after the end of the interview and before any
statements were reviewed by FBI field offices to identify pertinent issues
and determine if review is warranted. 1

23. With regard to six separate cases reported by CB, investigations are
being ongoing for the purposes of the subjects listed, which were shared being
shared with the Director General of Justice in the States, the National
Crime Records Data Centre, State Police, Revenue, Internal, C.I. (Crime Dept.
Administration and Administration) services. Upon completion, FBI will also
conduct a review of the FBI's field offices to determine if any of the
identifications apprehended are suspect. c

24. FBI will be stated in the status report with regard to RI. All
the suspects involved identified by the State police in an FBI was registered
by the Atlanta office. The suspects were identified and were subsequently placed
in a watch list for FBI's use, including FBI's New York. A registered
investigation will be conducted for the investigation to CI. d

24. As per the State's Attorney General, and as explained by the State
Attorney General, the State's Attorney General will be further
status in the State's Attorney General's office, and will be further
investigation. e

25. This summary by the State of Atlanta, Georgia, is being provided to
the Attorney General's office, and will be further investigated. We
will be further CI is being investigated by the State's Attorney General
and the Department of State, FBI's New York, CI is being investigated. f

26. As regards RI, Atlanta, this is being provided to the possible suspects, and
been identified, and necessary steps are being taken to identify them. With
regard to the preliminary inquiry, this is being provided to the State's Attorney
General, and will be further investigated. g

27. It is submitted by the State of Georgia, and will be further
permanently state, and will be further investigated. The State's Attorney
General, and will be further investigated. This submission will discuss
the matter further with the State's Attorney General, CI is being investigated
by the State's Attorney General, and will be further investigated. h

28. The State of Georgia, and will be further investigated. This submission
will discuss the submission to the State's Attorney General, and will be further
investigation. i

29. It is also being provided to the State's Attorney General, and will be further
investigation. This submission will discuss the submission to the State's Attorney
General, and will be further investigated. j



VIJAYESH SIMLA V. UNION OF INDIA & ANOTHER [AIR 2019 SC 1011]

30. The submission of the State is that the delay in the selection of the Member of the State Welfare Board is attributable to the delay in the selection of the Member of the State Welfare Board. The delay in the selection of the Member of the State Welfare Board is attributable to the delay in the selection of the Member of the State Welfare Board.

31. The delay in the investigation by the Commission is not attributable to the delay in the selection of the Member of the State Welfare Board. The delay in the investigation by the Commission is not attributable to the delay in the selection of the Member of the State Welfare Board.

32. As a result of the delay in the selection of the Member of the State Welfare Board, the delay in the investigation by the Commission is not attributable to the delay in the selection of the Member of the State Welfare Board. The delay in the investigation by the Commission is not attributable to the delay in the selection of the Member of the State Welfare Board.

33. As a result of the delay in the selection of the Member of the State Welfare Board, the delay in the investigation by the Commission is not attributable to the delay in the selection of the Member of the State Welfare Board. The delay in the investigation by the Commission is not attributable to the delay in the selection of the Member of the State Welfare Board.

34. It is pointed out that the delay in the selection of the Member of the State Welfare Board is attributable to the delay in the selection of the Member of the State Welfare Board. The delay in the selection of the Member of the State Welfare Board is attributable to the delay in the selection of the Member of the State Welfare Board.

35. In the matter of 1973 (1) 15, The Registrar should send a copy of this order to the Chief Secretary of the State of Orissa and the Standing Council of the State of Orissa.

(2018) 5 SCC 563

ORDER dated 10/4/2015

Chief Justice, Supreme Court, New Delhi
S.A. Mulla, J. (Concurrence)

36. The Chief Secretary of the State of Orissa is present in the Court today. The Chief Secretary of the State of Orissa is present in the Court today. The Chief Secretary of the State of Orissa is present in the Court today.

37. The Chief Secretary of the State of Orissa is present in the Court today. The Chief Secretary of the State of Orissa is present in the Court today. The Chief Secretary of the State of Orissa is present in the Court today.

38. The Chief Secretary of the State of Orissa is present in the Court today. The Chief Secretary of the State of Orissa is present in the Court today. The Chief Secretary of the State of Orissa is present in the Court today.



38. State of Madhya Pradesh vs. Union of India & Ors. (2018) 15 SCC 56411

38. The State of Madhya Pradesh has filed its petition for directions and writs in this Court in respect of the State Government's taking up the matter of the sericulture under the aegis of the State Government for the purpose of the check in the name of the Government. Some of the petitioners complain that the Government has not taken any steps to improve the condition of the State of Madhya Pradesh and they are aggrieved by the Government's failure to take any steps to improve the condition of the State of Madhya Pradesh.

39. Order dated 11-7-2018

(2018) 15 SCC 56411:

Order dated 24-7-2018

BEFORE: MR. JUSTICE N. S. LINGAPPA (C), MR. JUSTICE D. Y. CHANDRACHUD

MR. JUSTICE P. S. SINGH (C), MR. JUSTICE A. K. GOYAL (C)

40. Mr. N. S. Lingappa, appearing on behalf of the petitioners, says that since the Government has not taken any steps to improve the condition of the State of Madhya Pradesh, the Government is liable to be considered and appropriate orders passed thereon.

41. Order dated 11-7-2018

(2018) 15 SCC 56412:

Order dated 27-1-2016

BEFORE: MR. JUSTICE N. S. LINGAPPA (C), MR. JUSTICE D. Y. CHANDRACHUD

MR. JUSTICE P. S. SINGH (C), MR. JUSTICE A. K. GOYAL (C)

42. The petitioners have prayed for directions and writs in this Court in respect of the Government's failure to take any steps to improve the condition of the State of Madhya Pradesh. The petitioners say that the Government is liable to be considered and appropriate orders passed thereon.

43. The Government has filed its petition in this Court on 17-7-2018. The Government has filed its petition in this Court on 17-7-2018. The Government has filed its petition in this Court on 17-7-2018. The Government has filed its petition in this Court on 17-7-2018.

44. We have perused through the affidavits filed on behalf of the Ministry of Home Affairs and the Government of Madhya Pradesh. We have also perused the affidavits filed on behalf of the Ministry of Home Affairs and the Government of Madhya Pradesh. We have also perused the affidavits filed on behalf of the Ministry of Home Affairs and the Government of Madhya Pradesh.

45. The Government has filed its petition in this Court on 17-7-2018. The Government has filed its petition in this Court on 17-7-2018. The Government has filed its petition in this Court on 17-7-2018. The Government has filed its petition in this Court on 17-7-2018.



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2018(1) 5 SCC

1. Mr. S. Umesh Kumar, former Senior Counsel in Board of Fieldwork
the Board has stated that the following persons will represent the eligible
the Group's members:

(a) Vikram Chugh, Manager, Trust and Safety, South & Central
Asia;

(b) Google India Pvt. Ltd. (Google India) will be represented by Fieldwork
within two days;

(c) Google LLC & Google LLC India Pvt. Ltd. will be represented by following persons:

(i) Mr. Anand Singh Nigam;

(ii) Mr. S. K. Srinivas, Director, Karnataka;

(iii) Google Group, Google, Government of India;

(d) Yama and a member from the following persons:

(i) Mr. S. S. Srinivas, Director, Government of Karnataka;

(e) Members of the Board of Fieldwork persons:

(i) Mr. S. Umesh Kumar, Group Director, Google, Mr. S. Resident
of India;

(ii) Mr. Rajasekhar, Srivastava, Group, Program
Manager, India of India;

(iii) Mr. Rajasekhar, Srivastava, Sr. Program Manager, Resident
of India;

Mr. S. Srinivas, Group Director, Board of Members of the Board
the three participants will be available to every participant via video.

63. The Government will submit a list of all the participants who will
be declared by the Government. Additional Secretary will be notified by
the Government to the participants. We request the participants to
newly discuss the matters and participate in the meeting. We request
the participants to discuss the matters and participate in the meeting. We
participate in the meeting and participate in the meeting. For
some of the matters, it is not possible to explain the details. The matters
which are not possible to explain the details will be submitted to the
the participants. We request the participants to discuss the matters.

64. The learned counsel for the parties have assured us that all the
participants will be available for the discussions and meetings. We
request the participants to discuss the matters and participate in the
meeting. We request the participants to discuss the matters and participate
in the meeting. We request the participants to discuss the matters and
participate in the meeting. We request the participants to discuss the
matters and participate in the meeting. We request the participants to
discuss the matters and participate in the meeting. We request the
participants to discuss the matters and participate in the meeting.

65. In this matter, the Government has submitted a list of all the participants.



CAUTION: SIMILAR LITIGATION IS BEING FOLLOWED UP BY THE COURT

(2018) 15 SCC 569 (1)

ORDER dated 5-4-2017

a

REPLY OF MADAN B. DOKRE IN (C) 1986 OF 2017

S.A. No. WP(C) 17 No. 3 of 2015

e

66. Under the proposed agenda, the matter is listed for discussion on 14.11.2017. It may be apparent to be all of the members of the said Dr. Anil Kumar, Additional Secretary, Ministry of Information and Public Relations, who it was suggested by Dr. Anil Kumar in the meeting of the Committee as mentioned in the order dated 27.3.2017, as liable. It would be ideal, the said committee these cases should be before the appropriate authority as proposed by Dr. Anil Kumar, Secretary, and Dr. Anil Kumar, Additional Secretary, Ministry of Information and Public Relations, Government of India.

e

67. We agree to the request made by the petitioner. Hence, the said Dr. Anil Kumar will not be marked as 'Was the representative of your Client in the said meeting'.

(2018) 15 SCC 569 (2)

ORDER dated 11-4-2017

e

REPLY OF MADAN B. DOKRE IN (C) 1986 OF 2017

S.A. No. WP(C) 17 No. 3 of 2015

e

68. The matter stated in para 66 above, was requested by Dr. Anil Kumar, Additional Secretary, Ministry of Information and Public Relations, who it was suggested by Dr. Anil Kumar in the meeting of the Committee as mentioned in the order dated 27.3.2017, as liable. It would be ideal, the said committee these cases should be before the appropriate authority as proposed by Dr. Anil Kumar, Secretary, and Dr. Anil Kumar, Additional Secretary, Ministry of Information and Public Relations, Government of India.

f

(2018) 15 SCC 569 (3)

ORDER dated 13-4-2017

REPLY OF MADAN B. DOKRE IN (C) 1986 OF 2017

S.A. No. WP(C) 17 No. 3 of 2015

g

70. Mr. Kapil Singh, Senior, Senior Counsel appearing on behalf of WhatsApp Inc. stated WhatsApp Inc. is willing to assist and is represented by all the counsel appearing before the court. He says that the following three details of WhatsApp Inc. are participating in the meeting:

g

- Mr. Jayesh Software Engineer
- Mr. Kalya Magrawal, Law Enforcement Research Manager
- Mr. Christian Bowe, Associate General Counsel

Source: www.sconline.com



ANAND K. SUMAL, M. LINDA SHELTON, GABRIELLA JANSSEN, et al. v. ...

77. The ...

(2018) 15 SCC 571

Order dated 4-9-2017

(Before: Mr. Justice ...
Sanjiv Chhabra, J. ...)

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78. We ...

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81. ...

82. ...

83. ...



84. The respondent was seized of the participating processes, namely, WhatsApp, Facebook, Google+ and India, Microsoft and Whatsapp to place in public domain the number of complaints that they have received from India about offences involving child pornography and child pornography, between calendar year 2017 and 31/12/2017, 2018 and 2017 and the order that has been taken in respect of these complaints. This would be in addition to the order made in the order, as stated above, which may have been issued in respect of confidential having been received by the respondent.

85. We make it clear that the details of the order taken need not be sent in public domain. We are only concerned with the number of complaints received and the number of the complaints on which actions have been taken.

86. The learned counsel for the petitioner submits that the Government of India through the Ministry of Home Affairs may file an affidavit regarding the number of prosecutions launched under Sections 19 and 15 of the Protection of Children from Sexual Offences Act, 2012 for the calendar year 2017 and 2017 and 2017. The affidavit may also be filed within a period of ten days from the date of 18/9/2017 at 10.00 pm.

(2018) 18 SC 72

Order dated 18-9-2017

In Public Domain (2018) 18 SC 72 (2017) 18 SC 72
Sup. Ct. (2018) 18 SC 72 (2017) 18 SC 72

87. We have heard the learned Advocate General and the learned counsel for the petitioner and the Ministry of Home Affairs and the learned counsel appearing for the State. Mr. Adv. Kumar submits that there are no directions in respect of the report submitted to the learned Advocate General. The learned Advocate General of the respondent has submitted that there are no directions in which there is no mention.

88. The learned counsel for the parties say that they would like to make submissions in respect of the facts of the case and the request for a hearing should be held in camera. We have no objection in recording the proceedings in camera.

89. If the proposed arrangement for the proceedings is approved, the following directions are given:

(a) The Advocate General for the parties may obtain a copy of the report before we receive from the respondent.

(b) The Advocate General concerned with the case should file Affidavits of any person or persons representing the parties before us in the case. Mr. Adv. Kumar submits that the affidavit should be filed. We make it clear that the representative of the parties should not be a person whose name has not been mentioned in the affidavit.

(c) Mr. Adv. Kumar submits that the parties should not be permitted to bring any other evidence in respect of the proposed arrangement for the proceedings.



UNION OF INDIA AND ANOTHER vs. STATE OF GUJARAT AND OTHERS

1. The appellants, Union of India and others, challenge the constitutionality of the Gujarat State Road Transport Corporation Act, 1962 (GRTCA) and the Gujarat State Road Transport Corporation (Amendment) Act, 1962 (GRTCA Amendment Act). The respondents, State of Gujarat and others, defend the constitutionality of the said Acts.

2. The GRTCA was enacted to provide for the regulation and control of motor vehicles for transport purposes in the State of Gujarat. The GRTCA Amendment Act was enacted to amend certain provisions of the GRTCA.

3. The appellants contend that the GRTCA and the GRTCA Amendment Act are unconstitutional as they violate the fundamental rights guaranteed by Articles 14, 19(1)(b) and 22(1) of the Constitution of India. They argue that the Acts confer a monopoly on the State of Gujarat in the operation of motor vehicles for transport purposes, which is against the public interest and the freedom of trade and commerce.

4. The respondents contend that the GRTCA and the GRTCA Amendment Act are constitutional as they are in the public interest and are necessary for the regulation and control of motor vehicles for transport purposes in the State of Gujarat. They argue that the Acts are in conformity with the provisions of Articles 14, 19(1)(b) and 22(1) of the Constitution of India.

5. The Court has considered the arguments of both sides and has concluded that the GRTCA and the GRTCA Amendment Act are constitutional. The Court has held that the Acts are in the public interest and are necessary for the regulation and control of motor vehicles for transport purposes in the State of Gujarat. The Court has also held that the Acts are in conformity with the provisions of Articles 14, 19(1)(b) and 22(1) of the Constitution of India.



Page	Syllabus/Headlines	Reference(s)
1	<p>1. The Government of Karnataka has notified the National Education Policy (NEP) 2020. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020.</p>	1
2	<p>2. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020.</p>	2
3	<p>3. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020.</p>	3
4	<p>4. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020.</p>	4
5	<p>5. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020.</p>	5
6	<p>6. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020.</p>	6
7	<p>7. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020.</p>	7
8	<p>8. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020.</p>	8
9	<p>9. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020.</p>	9
10	<p>10. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020.</p>	10
11	<p>11. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020.</p>	11
12	<p>12. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020.</p>	12
13	<p>13. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020.</p>	13
14	<p>14. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020. The Government of Karnataka has notified the NEP 2020.</p>	14



UNION OF INDIA vs. ANIL KUMAR GUPTA & ANS. (2019) 11 SCC 1

1. The appellant, Union of India, has filed a writ petition under Article 32 of the Constitution of India, seeking a writ of certiorari to quash the order of the Central Board of Secondary Education (CBSE) dated 15.03.2018, which directed the schools to follow the CBSE syllabus for the examination of the students of the National Council of Educational Research and Training (NCERT) for the year 2018-19.

2. The facts of the case are as follows: The appellant, Union of India, is the owner and proprietor of the National Council of Educational Research and Training (NCERT), which is a non-profit-making organization established in 1962. The NCERT is a central board of secondary education, which is responsible for the development and improvement of the school education in India. The NCERT is also responsible for the preparation of the syllabus for the schools in India.

3. The respondent, Anil Kumar Gupta & Ans., are the proprietors of the schools in the State of Uttar Pradesh, which are affiliated to the Central Board of Secondary Education (CBSE). The respondent schools have been following the CBSE syllabus for the examination of the students for the year 2018-19.

4. The respondent schools have filed a writ petition under Article 226 of the Constitution of India, seeking a writ of certiorari to quash the order of the CBSE dated 15.03.2018, which directed the schools to follow the CBSE syllabus for the examination of the students for the year 2018-19.

5. The respondent schools have also filed a writ petition under Article 32 of the Constitution of India, seeking a writ of certiorari to quash the order of the CBSE dated 15.03.2018, which directed the schools to follow the CBSE syllabus for the examination of the students for the year 2018-19.

6. The respondent schools have also filed a writ petition under Article 226 of the Constitution of India, seeking a writ of certiorari to quash the order of the CBSE dated 15.03.2018, which directed the schools to follow the CBSE syllabus for the examination of the students for the year 2018-19.

7. The respondent schools have also filed a writ petition under Article 32 of the Constitution of India, seeking a writ of certiorari to quash the order of the CBSE dated 15.03.2018, which directed the schools to follow the CBSE syllabus for the examination of the students for the year 2018-19.

8. The respondent schools have also filed a writ petition under Article 226 of the Constitution of India, seeking a writ of certiorari to quash the order of the CBSE dated 15.03.2018, which directed the schools to follow the CBSE syllabus for the examination of the students for the year 2018-19.

9. The respondent schools have also filed a writ petition under Article 32 of the Constitution of India, seeking a writ of certiorari to quash the order of the CBSE dated 15.03.2018, which directed the schools to follow the CBSE syllabus for the examination of the students for the year 2018-19.

10. The respondent schools have also filed a writ petition under Article 226 of the Constitution of India, seeking a writ of certiorari to quash the order of the CBSE dated 15.03.2018, which directed the schools to follow the CBSE syllabus for the examination of the students for the year 2018-19.



No.	SARVAD Kulkarni vs	THE UNION
1	<p>Union of India vs. State of Karnataka (1977) 1 SCC 747</p>	1
2	<p>Union of India vs. State of Karnataka (1977) 1 SCC 747</p>	2
3	<p>Union of India vs. State of Karnataka (1977) 1 SCC 747</p>	3
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6	<p>Union of India vs. State of Karnataka (1977) 1 SCC 747</p>	6
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9	<p>Union of India vs. State of Karnataka (1977) 1 SCC 747</p>	9
10	<p>Union of India vs. State of Karnataka (1977) 1 SCC 747</p>	10



ANAND K. SUMI V. M. LINDA SRI (COMMERCIAL DISSENT) 387

them. The request was made to call for any information, notices, orders, reports, pursuant to the directions and recommendations that have been made. Each will be kept as a part of the case file to review. The committee will send by mail a copy of the report to the providers.

105. The Government says that with regard to status report of the committee and the report of the committee, the Government has not received before the text of the report. On the text of the report, we will refer to the reports received from the respondents.

106. If the committee is not able to complete its report, the report will be filed on the next date of hearing. The proceedings will be held in camera.

(2018) 15 SCC 581

Announced 11-13-2017

BEFORE MR. JUSTICE N. S. LINGAPPA (C.J.) AND MR. JUSTICE

SRINIVAS VARADACHARI (J.)

107. The learned counsel for the respondents and the Government say that the report of the committee, which is the report of the committee, is not a report of the committee. The committee has not submitted the report. We call for the report of the committee. The report of the committee is not a report of the committee. The report of the committee is not a report of the committee.

108. The learned Attorney General and the learned counsel for the petitioners have submitted the report of the committee. The report of the committee is not a report of the committee. The report of the committee is not a report of the committee. The report of the committee is not a report of the committee.

109. It is stated by the learned counsel for the petitioners that the report of the committee is not a report of the committee. The report of the committee is not a report of the committee. The report of the committee is not a report of the committee.

110. The learned counsel for the petitioners says that the report of the committee is not a report of the committee. The report of the committee is not a report of the committee. The report of the committee is not a report of the committee.

111. The learned counsel for the petitioners says that the report of the committee is not a report of the committee. The report of the committee is not a report of the committee. The report of the committee is not a report of the committee.



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Supreme Court Cases

2018:18 SCJ

2018:18 SCJ 882

Order dated 8-1-2018

REPLY BY MR. ANIL K. K. SHARMA (ADVOCATE GENERAL)

Sup. Ct. W.P.(C) No. 366/2018

112. We have read the learned counsel for the parties and the learned
Advocate General.

113. The learned Advocate General has submitted an affidavit in support of his
report on the number of videos of sexual nature on the internet. It
is stated in the status report that the report of Ministry of Home Affairs
has indicated the keywords concerned pornography, rape and gang rape content
social and adult content was in English language has been compared and
analyzed to create a new set of keywords for better detection. It is not possible to
update the existing keywords. Presently, search engines with the keywords
in the languages will also be taken up to ensure detection of pornography, etc. (1)

114. It is also stated that the internet cyber crime reporting portal has been
developed with a search engine www.cybercrime.gov.in and that this portal is
undergoing security audit and has been approved. It is also stated that
the portal is expected to be launched soon. It is also stated that the
search engines are expected to be updated with the keywords in the
languages to ensure that the reports of all the pornography, rape, gang rape
content, etc. are reported to the concerned agencies where necessary for
the state police action as concerned for appropriate action.

115. It is also stated that certain other measures to take to be taken
operational by 15.1.2018 with regard to providing status update of complaints
to registered complainants, portal access to other stakeholders, willing to
register for providing inputs on cyber pornography, safe purchase of domain
and taking multiple measures, etc. (2)

116. For the final report we adjourn the matter to 15.1.2018 at 11.30 a.m.
so that we are made aware of the progress made by the Government in this
regard. Further orders will be passed after the hearing on 15.1.2018.

117. It is stated by the learned counsel for the petitioner that the petitioner
with True Print is developing an in-house developed new platform for internet
technology, or rather, searching through artificial intelligence. In this regard,
the learned counsel appearing for Facebook may file an affidavit stating
whether any such search engine has been developed and if it has not been
developed, the progress made for developing such technology, if any.

118. The affidavit filed by the petitioner three weeks back in the matter no. 15.1.2018
at 11.30 a.m. It is made clear that in the next date or any subsequent proceedings
will be held in camera.



20180115 SCC 58311

(2018) 15 SCC 58311;

Order dated: 15-2-2018

BEFORE: MR. JUSTICE RANJAN GOGOI, J. (A), J. (B)
Suo Motu W.P.(C) No. 30/2018

119. It is submitted by the learned ASG that in the reference to rule 10 of the 8th (1987) version of the rules, it is required for completion of the exercise that public notices should be placed so that it is fully disseminated and responded. The learned ASG says that it will take one to two months' time for this exercise.

120. A note prepared by the learned counsel for the appellants would appear to be a mere copy of a memo that may be placed on record by the Ministry of Home Affairs submitted to the respondents in how the exercise is progressing. The learned ASG says that the said memo may be prepared and filed within two weeks.

121. It is then the order of 12-3-2018 in 2018. However, the learned counsel for the appellants says that he is unable to identify any other notices.

It is so ordered by the court.

122. We have heard the learned counsel for the appellants and it appears to us that it would be appropriate that the parties should work together in the matter. An order has to be made so as to direct the learned counsel for the respondents to place on record a memo regarding the progress of the exercise within a period of two weeks. A further order directing the respondents to place on record a memo regarding the progress of the exercise will be issued upon receipt of the learned counsel for appellants' submissions to be issued by this court.

123. Needless to say, within two weeks, that the matter on 12-3-2018 of the appellants is settled.

(2018) 15 SCC 58312;

Order dated: 12-3-2018

BEFORE: MR. JUSTICE RANJAN GOGOI, J. (A), J. (B)
Suo Motu W.P.(C) No. 30/2018

124. A note that has been prepared by the learned additional solicitor general for the respondents reports that the learned Ministry of Home Affairs has also placed the submissions and a list of 20 points about which there is some public discussion. The learned additional solicitor general for the Ministry of Home Affairs would have to file this and indicate the total time and the manner in which the exercise is to be done.

125. It is then the order of 16-3-2018 in 2018. As instructed by the court in the order of 12-3-2018, the matter of the appellants will be settled.

(2018) 15 SCC 58313;

Order dated: 16-4-2018

BEFORE: MR. JUSTICE RANJAN GOGOI, J. (A), J. (B)
Suo Motu W.P.(C) No. 30/2018

126. We have heard the learned Additional Solicitor General ASG and learned counsel for the parties.

It is so ordered by the court.



-8-

सुप्रीम कोर्ट के बीच

19/11/2019

127. A copy of the status report has been disseminated to the judicial officers. De-
pending on the date the status report is filed, the Ministry of Home Affairs
has decided to use either the Beta version of the Social Inclusion or APE
code reporting to the public domain of the New version's experiment in the last
week of April 2018.

128. It is also stated that connectivity of the portal has been assured
with M.E. (State) - Kerala, P. and C. (Kerala). The process is underway to
establish connectivity with all other States. Technical efforts have been made to
migrate existing status reports to the new portal.

129. It is also stated that also been drawn to the attention of the matter made by
the Government against the State. The work is in the process of being completed.
The main body of the status reports has been done in other countries particularly in
the United States. Only, we have not been able to make progress in the central
in this regard but this is a very scattered set of submissions made to date as

130. We have also seen the matter by the legal council and the parties that
there is a significant number of the status reports that are in the process of being
submitted to the Government. The Government is also in the process of
the Ministry of Home Affairs. The matter is in the process of being
taken up by the State Government. The matter is in the process of being
taken up by the State Government. The matter is in the process of being

131. It would of course be in accordance with all concerned in the Central
reporting mechanism is in place. Only, we have not been able to make
of systems are in place.

132. We would also like to know from the parties before us before
the Ministry of Home Affairs regarding the status of progress made in the
in view of the fact that there is a report that already filed in the court and
and in the status report. The status report will be filed with the court
with the status report in the court.

133. We would also like to know from the parties before us before
the next date of filing of the status of progress made in the court and
reporting mechanism is in place. Only, we have not been able to make
of systems are in place.

134. In the matter of 19/11/2019, it is a first time. It is made clear
that of the last date of filing and the proceedings will be held in camera.

Chief Justice

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Citation: 2019(16)SCALE752

IN THE SUPREME COURT OF INDIA

**P. Gopalkrishnan
Vs.
State of Kerala and Ors.**

Judges/Coram:

A.M. Khanwilkar and Dinesh Maheshwari, JJ.

Prior History / High Court Status: From the Judgment and Order dated 14.08.2018 of the High Court of Kerala at Ernakulum in Crl. MC No. 1663 of 2018 (MANU/KE/2817/2018)

Case Note:

Criminal - Memory card - Furnishing of copy - Appellant had been arrayed as Accused No. 8 in connection with offence punishable under Sections 342, 366, 376, 506(1), 120B and 34 of Code and Sections 66E and 67A of Act - Investigating officer filed police reports before Judicial First Class Magistrate - All documents noted in said report, were not supplied to the Appellant, namely, electronic record (contents of memory card), Forensic Science Laboratory and findings attached thereto in C.D./D.V.D. - Appellant file application before Magistrate for direction to prosecution to furnish cloned copy of contents of memory card containing video and audio footage/clipping, in same format as obtained in memory card - Magistrate rejected said application - Aggrieved by said decision, Appellant carried matter to High Court - High Court dismissed said petition and confirmed order of Magistrate rejecting stated application filed by Appellant - Hence, present appeal - Whether it was obligatory to furnish cloned copy of contents of such memory card/pen-drive to Accused facing prosecution for alleged offence of rape and related offences.

Facts:

The Appellant had been arrayed as Accused No. 8 in connection with offence registered as First Information Report (FIR) punishable under Sections 342, 366, 37, 506(1), 120B and 34 of the 1860 Code and Sections 66E and 67A of the 2000 Act. The investigating officer filed police reports under Section 173 of the 1973 Code before the Judicial First Class Magistrate. When the Appellant was supplied a copy of the police report, all documents noted in the said report, on which the prosecution proposed to rely, were not supplied to the Appellant, namely, electronic record (contents of memory card), Forensic Science Laboratory reports and the findings attached thereto in C.D./D.V.D. Appellant to file a formal application before the Judicial First Class Magistrate for a direction to the prosecution to furnish a cloned copy of the contents of memory card containing the video and audio footage/clipping, in the same format as obtained in the memory card, alongwith the transcript of the human voices, both male and female recorded in it. The Magistrate rejected the said application, essentially on the ground that acceding to the request of the Appellant would be impinging upon the esteem, decency, chastity, dignity and reputation of the victim and also against public interest. Aggrieved by the said decision, the Appellant carried the matter to the High Court. The single Judge of the High Court dismissed the said petition and confirmed the order of the Magistrate rejecting the stated application filed by the Appellant.

Held, while partly allowing the appeal:

(i) The preliminary objection taken by the Respondent for dismissing the appeal at the threshold because of the disclosure of identity of the victim in the memo of the special leave petition forming the subject matter of the present appeal, it was found that the explanation offered by the Appellant was plausible inasmuch as the prosecution itself had done so by naming the victim in the First Information Report/Crime Case, the statement of the victim under Section 161, as well as under Section 164 of the 1973 Code, and in the charge sheet/police report filed before the Magistrate. Even the objection regarding incorrect factual narration about the Appellant having himself viewed the contents of the memory card/pen-drive does not take the matter any further, once this court recognize the right of the Accused to get the cloned copies of the contents of the memory card/pen-drive as being mandated by Section 207 of the 1973 Code and more so, because of the right of the Accused to a fair trial enshrined in Article 21 of the Constitution of India. [34]

(ii) Instead of allowing the prayer sought by the Appellant in toto, it may be desirable to mould the relief by permitting the Appellant to seek second expert opinion from an independent agency such as the Central Forensic Science Laboratory (CFSL), on all matters which the Appellant may be advised. In that, the Appellant could formulate queries with the help of an expert of his choice, for being posed to the stated agency. That shall be confidential and not allowed to be accessed by any other agency or person not associated with the CFSL. Similarly, the forensic report prepared by the CFSL, after analyzing the cloned copy of the subject memory card/pen-drive, shall be kept confidential and shall not be allowed to be accessed by any other agency or person except the concerned Accused or his authorized representative until the conclusion of the trial. This court were inclined to say so because the State FSL had already submitted its forensic report in relation to the same memory card at the instance of the investigating agency. [37]

(iii) If the Accused or his lawyer himself, additionally, intends to inspect the contents of the memory card/pen-drive in question, he could request the Magistrate to provide him inspection in Court, if necessary, even for more than once along with his lawyer and I.T. expert to enable him to effectively defend himself during the trial. If such an application was filed, the Magistrate must consider the same appropriately and exercise judicious discretion with objectivity while ensuring that it was not an attempt by the Accused to protract the trial. While allowing the Accused and his lawyer or authorized I.T. expert, all care must be taken that they do not carry any devices much less electronic devices, including mobile phone which may have the capability of copying or transferring the electronic record thereof or mutating the contents of the memory card/pen-drive in any manner. Such multipronged approach may sub serve the ends of justice and also effectuate the right of Accused to a fair trial guaranteed under Article 21 of the Constitution. [43]

(iv) The contents of the memory card/pen drive being electronic record must be regarded as a document. If the prosecution was relying on the same, ordinarily, the Accused must be given a cloned copy thereof to enable him/her to present an effective defence during the trial. However, in cases involving issues such as of privacy of the complainant/witness or his/her identity, the Court may be justified in providing only inspection thereof to the Accused and his/her lawyer or expert for presenting effective defence during the trial. The court may issue suitable directions to balance the interests of both sides. [44]

JUDGMENT

A.M. Khanwilkar, J.

1. Leave granted.

2. The conundrum in this appeal is: whether the contents of a memory card/pen-drive being electronic record as predicated in Section 2(1)(t) of the Information and Technology Act, 2000 (for short, 'the 2000 Act') would, thereby qualify as a "document" within the meaning of Section 3 of the Indian Evidence Act, 1872 (for short, 'the 1872 Act') and Section 29 of the Indian Penal Code, 1860 (for short, 'the 1860 Code')? If so, whether it is obligatory to furnish a cloned copy of the contents of such memory card/pen-drive to the Accused facing prosecution for an alleged offence of rape and related offences since the same is appended to the police report submitted to the Magistrate and the prosecution proposes to rely upon it against the Accused, in terms of Section 207 of the Code of Criminal Procedure, 1973 (for short, 'the 1973 Code')? The next question is: whether it is open to the Court to decline the request of the Accused to furnish a cloned copy of the contents of the subject memory card/pen-drive in the form of video footage/clipping concerning the alleged incident/occurrence of rape on the ground that it would impinge upon the privacy, dignity and identity of the victim involved in the stated offence(s) and moreso because of the possibility of misuse of such cloned copy by the Accused (which may attract other independent offences under the 2000 Act and the 1860 Code)?

3. The Appellant has been arrayed as Accused No. 8 in connection with offence registered as First Information Report (FIR)/Crime Case No. 297/2017 dated 18.2.2017 punishable Under Sections 342, 366, 376, 506(1), 120B and 34 of the 1860 Code and Sections 66E and 67A of the 2000 Act, concerning the alleged incident/occurrence at around 2030 hrs. to 2300 hrs. on 17.2.2017, as reported by the victim.

4. For considering the questions arising in this appeal, suffice it to observe that the investigating officer attached to the

Nedumbassery Police Station, Ernakulam, Kerala, after recording statements of the concerned witnesses and collecting the relevant evidence, filed police reports Under Section 173 of the 1973 Code before the Judicial First Class Magistrate, Angamaly. First police report, on 17.4.2017 and the second, on 22.11.2017. When the Appellant was supplied a copy of the second police report on 15.12.2017, all documents noted in the said report, on which the prosecution proposed to rely, were not supplied to the Appellant, namely, (i) electronic record (contents of memory card); (ii) Forensic Science Laboratory (for short, 'the FSL') reports and the findings attached thereto in C.D./D.V.D.; (iii) medical reports; C.C.T.V. footages and (iv) Call data records of Accused and various witnesses etc.

5. It is noted by the concerned Magistrate that the visuals copied and documented by the forensic experts during the forensic examination of the memory card were allowed to be perused by the Appellant's counsel in the presence of the regular cadre Assistant Public Prosecutor of the Court, in the Court itself. After watching the said visuals, some doubts cropped up, which propelled the Appellant to file a formal application before the Judicial First Class Magistrate, Angamaly for a direction to the prosecution to furnish a cloned copy of the contents of memory card containing the video and audio footage/clipping, in the same format as obtained in the memory card, alongwith the transcript of the human voices, both male and female recorded in it. In the said application, the Appellant inter alia asserted as follows:

7. It may be noted that the electronic record in the form of copy of the alleged video footage of the offending act committed by Accused No. 1 on the body and person of the defacto complainant is a crucial and material record relied by the prosecution in this case. It is the definite contention of prosecution that the above electronic record is both the evidence of commission of crime as well as the object of commission of crime and hence indisputably the most material piece of evidence in this case. When the injustice, in not serving such a vital piece of

evidence relied on by the prosecution in the case, was immediately brought to the notice of this Hon'ble Court, without prejudice to the right of Petitioner to obtain copies of the same, the defence side was allowed to watch the alleged video footages by playing the contents of a pen drive in the lap top made available before this Hon'ble Court. Head phones were also provided to the counsel and also to the learned APP who also was throughout present during this proceedings.

8. It is most respectfully submitted that by watching the video footage, although in a restricted environment and with limited facilities in the presence of the Ld. APP and the Presiding Officer, it is shockingly realised that the visuals and audio bytes contained in the video are of such a nature which would completely falsify the prosecution case in the form presently alleged by the prosecution. As a matter of fact the video footage is not at all an evidence of commission of crime as falsely contended by the prosecution but it is rather a clear case of fabricating false evidence with intent to foist a false case. It is submitted that it is after deliberately concealing or withholding the alleged primary evidence viz. the mobile phone stated to have been used by Accused No. 1, by the prosecution in active connivance with Accused No. 1, that the prosecution has produced a memory card which evidently contains only selected audio and video recording.

9. xxx xxx xxx

10.The further Verification and close scrutiny of the images and audio with scientific aid will in all probability provide more significant materials necessary to find out the truth behind the recorded images and the extent of tampering and the same could only be unearthed if the mirror copy of the memory card is furnished to the Petitioner which he is entitled to get without any further delay. As the prosecution is fully aware that the tampering could be detected and further female voice could be retrieved by the defense, the prosecution is trying to prevent the supply of the copy of the memory card in any form to the defense. It is illegal and the same will clearly amount to denial of a just and fair trial.

11. xxx xxx xxx

12. A close scrutiny of the contents of mahazar dated 8.3.2017 would show that on 18.2.2017 Accused No. 1 had entrusted a 8 GB memory card to Adv. E.G. Poullose, who had in turn produced the same before the Court of JFCM Aluva. The investigating agency thereafter obtained custody of the above electronic record and later the 8 GB memory card was sent to FSL, where, upon examination, Dr. Sunil S.P., Assistant director (documents), FSL, Thiruvananthapuram has allegedly prepared a report in that regard. The copy of the report has not been furnished to the Petitioner. The mahazar further shows that the contents of Memory card was transferred to a pen drive for the investigation purpose. The above mahazar further categorically states that the pen drive contained the data transferred from memory card and the same relates to the video footage of 17.2.2017 from 22:30:55 to 22:48:40 hrs and it is in order to check and verify whether the voice contained therein belongs to Suni that the voice sample was allegedly taken. The description in the mahazar proceeds as if there is only male voice in the video footage totally screening the fact that the video footage contains many vital and material utterances in female voice. Those utterances were revealed to the Petitioner and his counsel only on 15.12.2017. Everybody present had the benefit of hearing the said clear female voice. As mentioned earlier the Ld. APP was also present. But the investigation agency which should have definitely seen and heard the same has for obvious reason screened the said material aspects from the records. The investigation, it appears did not venture to take steps to compare the female voice in the video footage with the voice of the female involved in this case, for obvious reasons. On viewing and hearing, it is revealed that clear attempt have been made by somebody to delete major portions from the video footage and from the audio recording.

13. It is respectfully submitted that utterances made by the parties involved and seen in the video footage determines the nature of act recorded in the video footage and a transcript of the utterances and human voices in the video footage is highly just and necessary especially in view

of the shocking revelation, found when the video footage was played on 15.12.2017.

14. Yet another aspect which is to be pointed out is the mysterious disappearance of the mobile phone allegedly used for recording the video footage. The strong feeling of the Petitioner is that the investigating agency has not so far stated the truth regarding the mobile phone allegedly used to shot the video footage. The prosecution records itself would strongly indicate that the mobile phone used to record the occurrence (which now turns out to be a drama) was with the Police or with the persons who are behind the fabrication of the video footage as evidence to launch the criminal prosecution and false implication of the Petitioner. It is revolting to common sense to assume that even after conducting investigation for nearly one year by a team headed by a very Senior Police officer like the Addl. DGP of the Stage, during which Accused No. 1 was in the custody of the investigating team for 14 days at a stretch and thereafter for different spells of time on different occasions the original mobile instrument used for recording the video footage could not be unearthed. It appears that the investigating team was a willing agent to suffer the wrath of such a disgrace in order to suppress the withholding of the mobile instrument.

15. It is interesting to note that even in the second final report dated 22.11.2017 the Police has stated that the investigation to obtain the original mobile phone is even now continuing. It is nothing but an attempt to be fool everybody including the Court.

16. It is most respectfully submitted that in view of the startling revelation in the video footage, the Petitioner intends to make request to conduct proper, just and meaningful investigation into the matter so as to ensure that the real truth is revealed and the real culprits in this case are brought to justice. For enabling the Petitioner to take steps in that regard. It is highly just and essential that the cloned copy of the contents of memory card containing the video and audio content in the same format as obtained in the Memory card and the transcript of the human voices recorded in it are produced before Court and copy of the same furnished forthwith to the Petitioner.

17. As mentioned herein before, the prosecution has chosen to furnish only a small portion of the prosecution records on 15.12.2017. The Petitioner is approaching this Hon'ble Court with a detailed petition stating the details of relevant documents which do not form part of the records already produced before this Hon'ble Court and the details of the other documents which are not furnished to Petitioner.

18. It is submitted that the Petitioner as an Accused is legally entitled to get the copies of all documents including the CDs, Video footage etc., and the prosecution is bound to furnish the same to the Petitioner.

19. In the above premises it is respectfully prayed that this Hon'ble Court may be pleased to direct the prosecution to furnish a cloned copy of the contents of Memory Card containing the video and audio content in the same format as obtained in the memory card and the transcript of human voices, both male and female recorded in it, and furnish the said cloned copy of the memory card and the transcript to the Petitioner.

6. The Magistrate vide order dated 7.2.2018, rejected the said application, essentially on the ground that acceding to the request of the Appellant would be impinging upon the esteem, decency, chastity, dignity and reputation of the victim and also against public interest. The relevant portion of the order dated 7.2.2018 reads thus:

Heard both sides in detail.

The Petitioner has also filed reply statement to the objection and counter statement filed by Special Public Prosecutor in the case. The allegation against the Petitioner is that he engaged the first Accused to sexually assault the victim and videograph the same. On receipt of summons the Petitioner entered appearance and was served with the copies of prosecution records. The learned Senior Counsel appearing for the Petitioner requested for the copies of the contents of memory card. The same could not be allowed & the investigation official has already a petition filed objecting the same, with a prayer to permit them to view the same in the court. Hence they were

permitted to view the video footage and subsequent to the same they had filed this petition seeking a direction to the prosecution to furnish the copies of alleged audio and video footage and its transcript. The prosecution strongly opposed the same stating that the same will add insult to the victim who had suffered a lot at the hands of not only the Accused but also the media. Hence they submitted that the Petitioner may be permitted to view the contents of the video during trial.

Here the offence alleged tantamounts to a serious blow to the supreme honour of a woman. So as to uphold the esteem, decency, chastity, dignity and reputation of the victim, and also in the public interest, I am declining the prayer. But so as to ensure fairness in the proceedings and for just determination of the truth, the Petitioner is permitted to inspect the contents of the video footage at the convenience of court.

7. Aggrieved by the above decision, the Appellant carried the matter to the High Court of Kerala at Ernakulam (for short, 'the High Court') by way of CrI. M.C. No. 1663/2018. The learned single Judge of the High Court dismissed the said petition and confirmed the order of the Magistrate rejecting the stated application filed by the Appellant. The High Court, however, after analyzing the decisions and the relevant provisions cited before it, eventually concluded that the seized memory card was only the medium on which the alleged incident was recorded and hence that itself is the product of the crime. Further, it being a material object and not documentary evidence, is excluded from the purview of Section 207 of the 1973 Code. The relevant discussion can be discerned from paragraph 41 onwards, which reads thus:

41. This leads to the crucial question that is to be answered in this case. Evidently, the crux of the prosecution allegation is that, offence was committed for the purpose of recording it on a medium. Memory card is the medium on which it was recorded. Hence, memory card seized by the police itself is the product of the crime. It is not the contents of the memory card that is proposed to be established by the production of the memory card. The acts of sexual abuse is to be established by the oral testimony of the victim and witnesses. It is

also not the information derived from the memory card that is sought to be established by the prosecution. Prosecution is trying to establish that the alleged sexual abuse was committed and it was recorded. Though, in the course of evidence, contents of it may be sought to be established to prove that, it was the memory card created by the Accused, contemporaneously recorded on the mobile, along with the commission of offence, that does not by itself displace the status of the memory card as a document. Memory card itself is the end product of the crime. It is hence a material object and not a documentary evidence. Hence, it stands out of the ambit of Section 207 Code of Criminal Procedure.

42. The evaluation of the above legal propositions clearly spells out that, the memory card produced in this case is not a document as contemplated Under Section 307 Indian Penal Code [sic 207 Code of Criminal Procedure.]. In fact, it is in the nature of a material object. Hence, copy of it cannot be issued to the Petitioner herein.

43. Prosecution has a case that, though Accused is entitled for his rights, it is not absolute and even outside Section 207 Code of Criminal Procedure, there can be restrictions regarding the right Under Section 207 Code of Criminal Procedure It was contended that, if the above statutory provision infringes the right of privacy of the victim involved, fundamental right will supersede the statutory right of the Accused. Definitely, in case of Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India and Ors. MANU/SC/1044/2017 : (2017) 10 SCC 1 (at page 1), the Constitutional Bench of the Supreme Court had held that the fundamental rights emanate from basic notions of liberty and dignity and the enumeration of some facets of liberty as distinctly protected rights Under Article 19 does not denude Article 21 of its expansive ambit. It was held that, validity of a law which infringes the fundamental rights has to be tested not with reference to the object of state action, but on the basis of its effect on the guarantees of freedom. In Sherin v. John's case (supra), this Court had held that, when there is a conflict between Fundamental Rights of a person and statutory rights of another person, Fundamental Rights will

prevail. The possibility of such contention may also arise. Since that question does not arise in this case in the light of finding Under Section 207 Code of Criminal Procedure I do not venture to enter into that issue.

44. Having considered the entire issue, I am inclined to sustain the order of the court below in Crl. M.P. No. 49 of 2018 in C.P. No. 16 of 2017 dismissing the application, though on different grounds. However, this will not preclude the Court from permitting the Accused to watch the memory card only in Court, subject to restrictions, to prepare defence.

8. The Appellant being dissatisfied, has assailed the reasons which found favour with the trial Court, as well as the High Court. The Appellant broadly contends that the prosecution case is founded on the forensic report which suggests that eight video recordings were retrieved from the memory card and that the video files were found to be recorded on 17.2.2017 between 22:30:55 hrs. and 22:48:40 hrs. The same were transferred to the stated memory card on 18.2.2017 between 09:18 hrs. and 09:20 hrs. Be it noted that the original video recording was allegedly done by Accused No. 1 on his personal mobile phone, which has not been produced by the investigating agency. However, the memory card on which the offending video recording was copied on 18.2.2017 was allegedly handed over by an Advocate claiming that the Accused No. 1 had given it to him. He had presented the memory card before the Court on 20.2.2017, which was sent for forensic examination at State FSL, Thiruvananthapuram. After forensic examination, the same was returned alongwith FSL report DD No. 91/2017 dated 3.3.2017 and DD No. 115/2017 dated 7.4.2017. A pen-drive containing the data/visuals retrieved from the memory card, was also enclosed with the report sent by the State FSL.

9. Be that as it may, the prosecution was obviously relying on the contents of the memory card which have been copied on the pen-drive by the State FSL during the analysis thereof and has been so adverted to in the police report. The contents of the memory card, which are replicated in the pen-drive created by the State FSL would be nothing but a "document" within the

meaning of the 1973 Code and the provisions of the 1872 Act. And since the prosecution was relying on the same and proposes to use it against the Accused/Appellant, it was incumbent to furnish a cloned copy of the contents thereof to the Accused/Appellant, not only in terms of Section 207 read with Section 173(5) of the 1973 Code, but also to uphold the right of the Accused to a fair trial guaranteed Under Article 21 of the Constitution of India. The trial Court rejected the request of the Appellant on the ground that it would affect the privacy and dignity of the victim, whereas, the High Court proceeded on the basis that the memory card is a material object and not a "document". It is well known that a cloned copy is not a photocopy, but is a mirror image of the original, and the Accused has the right to have the same to present his defence effectively. In the alternative, it is submitted, that the Court could have imposed appropriate conditions while issuing direction to the prosecution to furnish a cloned copy of the contents of memory card to the Accused/Appellant.

10. Per contra, the Respondent-State and the intervenor (the victim) have vehemently opposed the present appeal on the argument that the Appellant before this Court is none other than the master-mind of the conspiracy. Although he was not personally present on the spot, but the entire incident has occurred at his behest. It is urged that the appeal deserves to be dismissed as the Appellant has disclosed the identity of the victim in the memo of the special leave petition from which the present appeal has arisen. Further, the Appellant has falsely asserted that he had himself perused the contents of the pen-drive and even for this reason, the appeal should be dismissed at the threshold. As a matter of fact, the contents of the pen-drive were allowed to be viewed by the Appellant's counsel and the regular cadre Assistant Public Prosecutor of the Court. The assertion of the Appellant that after viewing the contents of the pen-drive, he gathered an impression that the contents of the memory card must have been tampered with, is the figment of imagination of the Appellant and contrary to forensic report(s) by the State FSL. The definite case of the Respondent is that the memory card seized in this case containing the visuals of sexual

violence upon the victim is a material object and the pen-drive into which the contents of memory card were documented through the process of copying by the State FSL and sent to the Court for the purpose of aiding the trial Court to know the contents of the memory card and the contents of the said pen-drive is both material object as well as "document". It is also urged that the visual contents of the pen-drive would be physical evidence of the commission of crime and not "document" *per se* to be furnished to the Accused alongwith the police report. The contents of the memory card or the pen-drive cannot be parted to the Accused and doing so itself would be an independent offence. Moreover, if a cloned copy of the contents of the memory card is made available to the Accused/Appellant, there is reason to believe that it would be misused by the Accused/Appellant to execute the conspiracy of undermining the privacy and dignity of the victim. It is urged that the Appellant has relied on certain decisions to contend that the contents of the memory card must be regarded as "electronic record" and, therefore, a "document". The exposition in those decisions are general observations and would be of no avail to the Appellant. The Appellant is facing prosecution for an offence of rape, and the trial thereof would be an in-camera trial before the Special Court. To maintain the sanctity and for upholding the privacy, dignity and identity of the victim, it is urged that the Accused/Appellant in such cases can seek limited relief before the trial Court to permit him and his lawyer or an expert to view the contents of the pen-drive in Court or at best to permit him to take a second opinion of expert to reassure himself in respect of the doubts entertained by him. Such indulgence would obviate the possibility of misuse of the cloned copy of the video/audio footage/clipping and the same would be in the nature of a preventive measure while giving a fair opportunity to the Accused to defend himself. The Respondent and the intervenor would urge that the appeal be dismissed being devoid of merits.

11. As aforesaid, both sides have relied on reported decisions of this Court, as well as the High Courts and on the provisions of the relevant enactments to buttress the submissions. We shall refer thereto as may be required.

12. We have heard Mr. Mukul Rohatgi, learned senior Counsel for the Appellant, Mr. Ranjit Kumar, learned senior Counsel for the Respondent-State and Mr. R. Basant, learned senior Counsel for the intervenor.

13. The central issue is about the obligation of the investigating officer flowing from Section 173 of the 1973 Code and that of the Magistrate while dealing with the police report Under Section 207 of the 1973 Code. Section 173 of the 1973 Code ordains that the investigation under Chapter XII of the said Code should be completed without unnecessary delay and as regards the investigation in relation to offences Under Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E of the 1860 Code, the same is required to be completed within two months from the date on which the information was recorded by the officer in charge of the police station. The investigating officer after completing the investigation, is obliged to forward a copy of the police report to a Magistrate empowered to take cognizance of the offence on such police report. Alongwith the police report, the investigating officer is also duty bound to forward to the Magistrate "all documents" or relevant extracts thereof, on which prosecution proposes to rely other than those sent to the Magistrate during investigation. Similarly, the statements recorded Under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses, are required to be forwarded to the Magistrate alongwith the police report. Indeed, it is open to the police officer, if in his opinion, any part of the "statement" is not relevant to the subject matter of the proceedings or that its disclosure to the Accused is not essential in the interests of justice and is inexpedient in public interest, to indicate that part of the "statement" and append a note requesting the Magistrate to exclude that part from the copies to be granted to the Accused and stating his reasons for making such request. That discretion, however, is not given to him in respect of the "documents" or the relevant extracts thereof on which the prosecution proposes to rely against the Accused concerned. As regards the documents, Sub-section (7) enables the investigating officer, if in his opinion it is convenient so to do, to furnish copies of all or any of the documents referred to in Sub-section (5) to the Accused. Section 173, as

amended and applicable to the case at hand, reads thus:

173. Report of police officer on completion of investigation.--(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(1A) The investigation in relation to an offence Under Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E of the Indian Penal Code (45 of 1860) shall be completed within two months from the date on which the information was recorded by the officer in charge of the police station.

(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating--

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the Accused has been arrested;

(f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody Under Section 170;

(h) whether the report of medical examination of the woman has been attached where investigation relates to an offence Under Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or Section 376E of the Indian Penal Code (45 of 1860).

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the

information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed Under Section 158, the report, shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.

(4) Whenever it appears from a report forwarded under this Section that the Accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which Section 170 applies, the police officer shall forward to the Magistrate along with the report--

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded Under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the Accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the Accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the Accused copies of all or any of the documents referred to in Sub-section (5).

(8) Nothing in this Section shall be deemed to preclude further investigation in respect

of an offence after a report under Sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of Sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under Sub-section (2).

14. Concededly, as regards the "documents" on which the prosecution proposes to rely, the investigating officer has no option but to forward "all documents" to the Magistrate alongwith the police report. There is no provision (unlike in the case of "statements") enabling the investigating officer to append a note requesting the Magistrate, to exclude any part thereof ("document") from the copies to be granted to the Accused. Sub-section (7), however, gives limited discretion to the investigating officer to forward copies of all or some of the documents, which he finds it convenient to be given to the Accused. That does not permit him to withhold the remaining documents, on which the prosecution proposes to rely against the Accused, from being submitted to the Magistrate alongwith the police report. On the other hand, the expression used in Section 173(5)(a) of the 1973 Code makes it amply clear that the investigating officer is obliged to forward "all" documents or relevant extracts on which the prosecution proposes to rely against the Accused concerned alongwith the police report to the Magistrate.

15. On receipt of the police report and the accompanying statements and documents by virtue of Section 207 of the 1973 Code, the Magistrate is then obliged to furnish copies of each of the statements and documents to the Accused. Section 207 reads thus:

207. Supply to the Accused of copy of police report and other documents.--In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the Accused, free of cost, a copy of each of the following:

- (i) the police report;
- (ii) the first information report recorded Under Section 154;
- (iii) the statements recorded under Sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under Sub-section (6) of Section 173;
- (iv) the confessions and statements, if any, recorded Under Section 164;
- (v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under Sub-section (5) of Section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in Clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the Accused:

Provided further that if the Magistrate is satisfied that any document referred to in Clause (v) is voluminous, he shall, instead of furnishing the Accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

As regards the statements, the first proviso enables the Magistrate to withhold any part thereof referred to in Clause (iii), from the Accused on being satisfied with the note and the reasons specified by the investigating officer as predicated in Sub-section (6) of Section 173. However, when it comes to furnishing of documents submitted by the investigating officer alongwith police report, the Magistrate can withhold only such document referred to in Clause (v), which in his opinion, is "voluminous". In that case, the Accused can be permitted to take inspection of the concerned document either personally or through his pleader in Court. In other words, Section 207 of the 1973 Code does not empower the Magistrate to withhold any "document"

submitted by the investigating officer alongwith the police report except when it is voluminous. A fortiori, it necessarily follows that even if the investigating officer appends his note in respect of any particular document, that will be of no avail as his power is limited to do so only in respect of 'statements' referred to in Sub-section (6) of Section 173 of the 1973 Code.

16. Be that as it may, the Magistrate's duty Under Section 207 at this stage is in the nature of administrative work, whereby he is required to ensure full compliance of the Section. We may usefully advert to the dictum in **Hardeep Singh v. State of Punjab** MANU/SC/0025/2014 : (2014) 3 SCC 92 wherein it was held that:

47. Since after the filing of the charge-sheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences, and therefore, the power Under Section 319(1) Code of Criminal Procedure can be exercised at any time after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208 Code of Criminal Procedure, committal, etc. which is only a pre-trial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the true sense for it only requires an application of mind rather than a judicial application of mind. **At this pre-trial stage, the Magistrate is required to perform acts in the nature of administrative work** rather than judicial such as ensuring compliance with Sections 207 and 208 Code of Criminal Procedure, and committing the matter if it is exclusively triable by the Sessions Court

In yet another case of **Tarun Tyagi v. CBI** MANU/SC/0179/2017 : (2017) 4 SCC 490, this Court considered the purport of Section 207 of the 1973 Code and observed as follows:

8. Section 207 puts an obligation on the prosecution to furnish to the Accused, free of cost, copies of the documents mentioned therein, without any delay. It includes, documents or the relevant extracts thereof which are forwarded by the police to the Magistrate with its report Under Section 173(5) of the Code. Such a compliance has to be made on the first date when the

Accused appears or is brought before the Magistrate at the commencement of the trial inasmuch as Section 238 of the Code warrants the Magistrate to satisfy himself that provisions of Section 207 have been complied with. Proviso to Section 207 states that if documents are voluminous, instead of furnishing the Accused with the copy thereof, the Magistrate can allow the Accused to inspect it either personally or through pleader in the Court.

17. It is well established position that when statute is unambiguous, the Court must adopt plain and natural meaning irrespective of the consequences as expounded in **Nelson Motis v. Union of India** MANU/SC/0387/1992 : (1992) 4 SCC 711. On a bare reading of Section 207 of the 1973 Code, no other interpretation is possible.

18. Be that as it may, furnishing of documents to the Accused Under Section 207 of the 1973 Code is a facet of right of the Accused to a fair trial enshrined in Article 21 of the Constitution. In **Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)** MANU/SC/0268/2010 : (2010) 6 SCC 1, this Court expounded thus:

218. The liberty of an Accused cannot be interfered with except under due process of law. The expression "due process of law" shall deem to include fairness in trial. The court (sic Code) gives a right to the Accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the Accused place an implied obligation upon the prosecution (prosecution and the Prosecutor) to make fair disclosure. The concept of fair disclosure would take in its ambit furnishing of a document which the prosecution relies upon whether filed in court or not. That document should essentially be furnished to the Accused and even in the cases where during investigation a document is bona fide obtained by the investigating agency and in the opinion of the Prosecutor is relevant and would help in arriving at the truth, that document should also be disclosed to the Accused.

219. The role and obligation of the Prosecutor particularly in relation to

disclosure cannot be equated under our law to that prevalent under the English system as aforesaid. But at the same time, the demand for a fair trial cannot be ignored. It may be of different consequences where a document which has been obtained suspiciously, fraudulently or by causing undue advantage to the Accused during investigation such document could be denied in the discretion of the Prosecutor to the Accused whether the prosecution relies or not upon such documents, however in other cases the obligation to disclose would be more certain. **As already noticed the provisions of Section 207 have a material bearing on this subject and make an interesting reading. This provision not only require or mandate that the court without delay and free of cost should furnish to the Accused copies of the police report, first information report, statements, confessional statements of the persons recorded Under Section 161 whom the prosecution wishes to examine as witnesses, of course, excluding any part of a statement or document as contemplated Under Section 173(6) of the Code, any other document or relevant extract thereof which has been submitted to the Magistrate by the police under Sub-section (5) of Section 173. In contradistinction to the provisions of Section 173, where the legislature has used the expression "documents on which the prosecution relies" are not used Under Section 207 of the Code. Therefore, the provisions of Section 207 of the Code will have to be given liberal and relevant meaning so as to achieve its object. Not only this, the documents submitted to the Magistrate along with the report Under Section 173(5) would deem to include the documents which have to be sent to the Magistrate during the course of investigation as per the requirement of Section 170(2) of the Code.**

220. The right of the Accused with regard to disclosure of documents is a limited right but is codified and is the very foundation of a fair investigation and trial. On such matters, the Accused cannot claim an indefeasible legal right to claim every document of the police file or even the portions which are permitted to be excluded from the documents annexed to the report

Under Section 173(2) as per orders of the court. But certain rights of the Accused flow both from the codified law as well as from equitable concepts of the constitutional jurisdiction, as substantial variation to such procedure would frustrate the very basis of a fair trial. To claim documents within the purview of scope of Sections 207, 243 read with the provisions of Section 173 in its entirety and power of the court Under Section 91 of the Code to summon documents signifies and provides precepts which will govern the right of the Accused to claim copies of the statement and documents which the prosecution has collected during investigation and upon which they rely.

221. It will be difficult for the Court to say that the Accused has no right to claim copies of the documents or request the Court for production of a document which is part of the general diary subject to satisfying the basic ingredients of law stated therein. A document which has been obtained bona fide and has bearing on the case of the prosecution and in the opinion of the Public Prosecutor, the same should be disclosed to the Accused in the interest of justice and fair investigation and trial should be furnished to the Accused. Then that document should be disclosed to the Accused giving him chance of fair defence, particularly when non-production or disclosure of such a document would affect administration of criminal justice and the defence of the Accused prejudicially.

19. Similarly, in *V.K. Sasikala v. State* MANU/SC/0792/2012 : (2012) 9 SCC 771, this Court held as under:

21. The issue that has emerged before us is, therefore, somewhat larger than what has been projected by the State and what has been dealt with by the High Court. **The question arising would no longer be one of compliance or non-compliance with the provisions of Section 207 Code of Criminal Procedure and would travel beyond the confines of the strict language of the provisions of Code of Criminal Procedure and touch upon the larger doctrine of a free and fair trial that has been painstakingly built up by the courts on a purposive interpretation of Article 21 of the Constitution.** It is not the stage of making

of the request; the efflux of time that has occurred or the prior conduct of the Accused that is material. What is of significance is if in a given situation the Accused comes to the court contending that some papers forwarded to the court by the investigating agency have not been exhibited by the prosecution as the same favours the Accused the court must concede a right to the Accused to have an access to the said documents, if so claimed. This, according to us, is the core issue in the case which must be answered affirmatively. In this regard, we would like to be specific in saying that we find it difficult to agree with the view taken by the High Court that the Accused must be made to await the conclusion of the trial to test the plea of prejudice that he may have raised. Such a plea must be answered at the earliest and certainly before the conclusion of the trial, even though it may be raised by the Accused belatedly. This is how the scales of justice in our criminal jurisprudence have to be balanced.

20. The next seminal question is: whether the contents of the memory card/pen-drive submitted to the Court alongwith the police report can be treated as "document" as such. Indubitably, if the contents of the memory card/pen-drive are not to be treated as "document", the question of furnishing the same to the Accused by virtue of Section 207 read with Section 173 of the 1973 Code would not arise. We say so because it is nobody's case before us that the contents of the memory card/pen-drive be treated as a "statement" ascribable to Section 173(5)(b) of the 1973 Code. Notably, the command Under Section 207 is to furnish "statements" or "documents", as the case may be, to the Accused as submitted by the investigating officer alongwith the police report, where the prosecution proposes to rely upon the same against the Accused.

21. The High Court adverted to certain judgments before concluding that the memory card would be a material object. For arriving at the said conclusion, the High Court relied on the decision of the King's Bench of United Kingdom in **The King v. Daye** [1908] 2 K.B. 333, wherein Darling J., adding to the majority opinion, had held thus:

...But I should myself say that any written thing capable of being evidence is properly described as a document and that it is immaterial on what the writing may be inscribed. It might be inscribed on paper, as is the common case now; but the common case once was that it was not on paper, but on parchment; and long before that it was on stone, marble, or clay, and it might be, and often was, on metal. So I should desire to guard myself against being supposed to assent to the argument that a thing is not a document unless it be a paper writing. I should say it is a document no matter upon what material it be, provided it is writing or printing and capable of being evidence.

The High Court also relied on the decision of the Chancery Court in **Grant and Anr. v. Southwester and County Properties Ltd. and Anr.** [1975] Ch. 185, wherein it was observed as follows:

There are a number of cases in which the meaning of the word "document" has been discussed in varying circumstances. Before briefly referring to such cases, it will, I think, be convenient to bear in mind that the derivation of the word is from the Latin "documentum": it is something which instructs or provides information. Indeed, according to Bullokar's English Expositor (1621), it meant a lesson. The Shorter Oxford English Dictionary has as the fourth meaning for the word the following: "Something written, inscribed, etc., which furnishes evidence or information upon any subject, as a manuscript, title-deed, coin, etc.," and it produces as the relevant quotation: "These frescoes... have become invaluable as documents," the writer being Mrs. Anna Brownell Jameson who lived from 1794 to 1860.

I think that all the authorities to which I am about to refer have consistently stressed the furnishing of information-implicitly otherwise than as to the document itself-as being one of the main functions of a document. Indeed, in *In Re Alderton and Barry's Application* (1941) 59 R.P.C. 56, Morton J. expressly doubted whether blank workmen's time sheets could be classified as documents within Section 11(1)(b) of the Patent and Design Acts 1907-1939 expressly because in their original state

they conveyed no information of any kind to anybody...

It can be safely deduced from the aforementioned expositions that the basis of classifying Article as a "document" depends upon the information which is inscribed and not on where it is inscribed. It may be useful to advert to the exposition of this Court holding that tape records of speeches¹ and audio/video cassettes² including compact disc³ were "documents" Under Section 3 of the 1872 Act, which stand on no different footing than photographs and are held admissible in evidence. It is by now well established that the electronic record produced for the inspection of the Court is documentary evidence Under Section 3 of the 1872 Act⁴.

22. It is apposite to recall the exposition of this Court in ***State of Maharashtra v. Dr. Praful B. Desai*** MANU/SC/0268/2003 : (2003) 4 SCC 601, wherein this Court observed that the Code of Criminal Procedure is an ongoing statute. In case of an ongoing statute, it is presumed that the Parliament intended the Court to apply a construction that continuously updates its wordings to allow for changes and is compatible with the contemporary situation. In paragraph 14 of the said decision, the Court observed thus:

14. It must also be remembered that the Code of Criminal Procedure is an ongoing statute. The principles of interpreting an ongoing statute have been very succinctly set out by the leading jurist Francis Bennion in his commentaries titled *Statutory Interpretation*, 2nd Edn., p. 617:

It is presumed Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, in social conditions, technology, the meaning of words and other matters.... That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will foresee the future and allow for it in the wording.

An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. **The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials.**

23. As aforesaid, the Respondents and intervenor would contend that the memory card is a material object and not a "document" as such. If the prosecution was to rely only on recovery of memory card and not upon its contents, there would be no difficulty in acceding to the argument of the Respondent/intervenor that the memory card/pen-drive is a material object. In this regard, we may refer to ***Phipson on Evidence***⁵, and particularly, the following paragraph(s):

The purpose for which it is produced determines whether a document is to be regarded as documentary evidence. When adduced to prove its physical condition, for example, an alteration, presence of a signature, bloodstain or fingerprint, it is real evidence. So too, if its relevance lies in the simple fact that it exists or did once exist or its disposition or nature. In all these cases the content of the document, if relevant at all, is only indirectly relevant, for

example to establish that the document in question is a lease. When the relevance of a document depends on the meaning of its contents, it is considered documentary evidence.

... ..

Again at page 5 of the same book, the definition of "real evidence⁶" is given as under:

Material objects other than documents, produced for inspection of the court, are commonly called real evidence. This, when available, is probably the most satisfactory kind of all, since, save for identification or explanation, neither testimony nor inference is relied upon. Unless its genuineness is in dispute [See *Belt v. Lawes*, *The Times*, 17 November 1882.], the thing speaks for itself.

Unfortunately, however, the term "real evidence" is itself both indefinite and ambiguous, having been used in three divergent senses:

(1)

(2) *Material objects produced for the inspection of the court.* This is the second and most widely accepted meaning of "real evidence". It must be borne in mind that there is a distinction between a document used as a record of a transaction, such as a conveyance, and a document as a thing. It depends on the circumstances in which classification it falls. On a charge of stealing a document, for example, the document is a thing.

(3)

A priori, we must hold that the video footage/clipping contained in such memory card/pen-drive being an electronic record as envisaged by Section 2(1)(t) of the 2000 Act, is a "document" and cannot be regarded as a material object. Section 2(1)(t) of the 2000 Act reads thus:

(1)(t) "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic

form or micro film or computer-generated micro fiche;

24. As the above definition refers to data or data generated, image or sound stored, received or sent in an electronic form, it would be apposite to advert to the definition of "data" as predicated in Section 2(1)(o) of the same Act. It reads thus:

(1)(o) "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer;

On conjoint reading of the relevant provisions, it would be amply clear that an electronic record is not confined to "data" alone, but it also means the record or data generated, received or sent in electronic form. The expression "data" includes a representation of information, knowledge and facts, which is either intended to be processed, is being processed or has been processed in a computer system or computer network or stored internally in the memory of the computer.

25. Having noticed the above definitions, we may now turn to definitions of expressions "document" and "evidence" in Section 3 of the 1872 Act being the interpretation clause. The same reads thus:

3. Interpretation clause.-

Document.- "Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Illustrations

A writing is a document;

Words printed, lithographed or photographed are documents;

A map or plan is a document;

An inscription on a metal plate or stone is a document;

A caricature is a document.

Evidence.- "Evidence" means and includes-

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence.

On a bare reading of the definition of "evidence", it clearly takes within its fold documentary evidence to mean and include all documents including electronic records produced for the inspection of the Court. Although, we need not dilate on the question of admissibility of the contents of the memory card/pen-drive, the same will have to be answered on the basis of Section 65B of the 1872 Act. The same reads thus:

65B. Admissibility of electronic records.-(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this Section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in Sub-section (1) in respect of a computer output shall be the following, namely:

(a) the computer output containing the information was produced by the computer

during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in Clause (a) of Sub-section (2) was regularly performed by computers, whether--

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this Section as constituting a single computer; and references in this Section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,--

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in Sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this Sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,--

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation.--For the purposes of this Section any reference to information being derived from other information shall be a

reference to its being derived therefrom by calculation, comparison or any other process.

This provision is reiteration of the legal position that any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a "document" and shall be admissible in evidence subject to satisfying other requirements of the said provision.

26. It may be useful to also advert to Section 95(2)(b) of the 1973 Code, which refers to "document" to include any painting, drawing or photograph, or other visible representation. And again, the expression "document" has been defined in Section 29 of the 1860 Code, which reads thus:

29. "Document".--The word "document" denotes any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter.

Explanation 1.--It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice, or not.

Illustrations

A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.

A cheque upon a banker is a document.

A power-of-attorney is a document.

A map or plan which is intended to be used or which may be used as evidence, is a document.

A writing containing directions or instructions is a document.

Explanation 2.--Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage,

shall be deemed to be expressed by such letters, figures or marks within the meaning of this section, although the same may not be actually expressed.

Illustration

A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words "pay to the holder" or words to that effect had been written over the signature.

27. Additionally, it may be apposite to also advert to the definition of "communication devices" given in Section 2(1)(ha) of the 2000 Act. The said provision reads thus:

(1)(ha) "communication device" means cell phones, personal digital assistance or combination of both or any other device used to communicate, send or transmit any text, video, audio or image.

28. We may also advert to the definition of "information" as provided in Section 2(1)(v) of the 2000 Act. The same reads thus:

(1)(v) "information" includes data, message, text, images sound, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche.

29. Even the definition of "document" given in the General Clauses Act would reinforce the position that electronic records ought to be treated as "document". The definition of "document" in Section 3(18) of the General Clauses Act reads thus:

(18) "document" shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter.

30. It may be apposite to refer to the exposition in Halsbury's laws of England⁷ dealing with Chapter - "Documentary and

Real Evidence" containing the meaning of documentary evidence and the relevancy and admissibility thereof including about the audio and video recordings. The relevant exposition reads thus:

(12) DOCUMENTARY AND REAL EVIDENCE

1462. Meaning of documentary evidence. The term 'document' bears different meanings in different contexts. At common law, it has been held that any written thing capable of being evidence is properly described as a document⁸, and this clearly includes printed text, diagrams, maps and plans⁹. Photographs are also regarded as documents at common law¹⁰.

Varying definitions have been adopted in legislation¹¹. **A document may be relied on as real evidence (where its existence, identity or appearance, rather than its content, is in issue¹²), or as documentary evidence. Documentary evidence denotes reliance on a document as proof of its terms or contents¹³.** The question of the authenticity of a document is to be decided by the jury¹⁴.

1463. The primary evidence rule. Under the 'primary evidence rule' at common law¹⁵, it was once thought necessary for the contents of any private document to be proved by production of the original document¹⁶. A copy of an original document, or oral evidence as to the contents of that document, was considered admissible only in specified circumstances, namely: (1) where another party to the proceedings failed to comply with a notice to produce the original which was in his possession (or where the need to produce it was so clear that no such notice was required)¹⁷; (2) where production of the original was shown to be impossible¹⁸; (3) where the original appeared to have been lost or destroyed¹⁹; and (4) where a third party in possession of the original lawfully declined to produce it²⁰....

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1466. Real evidence. Material objects or things (**other than the contents of**

documents) which are produced as exhibits for inspection by a court or jury are classed as real evidence²¹. The court or jury may need to hear oral testimony explaining the background and alleged significance of any such exhibit, and may be assisted by expert evidence in drawing inferences or conclusions from the condition of that exhibit²².

Where a jury wishes to take an exhibit, such as a weapon, into the jury room, this is something which the judge has a discretion to permit²³. Jurors must not however conduct unsupervised experiments²⁴, or be allowed to inspect a thing which has not been produced in evidence²⁵.

Failure to produce an object which might otherwise have been admissible as real evidence does not preclude the admission of oral evidence concerning the existence or condition of that object, although such evidence may carry far less weight²⁶.

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1471. Audio and video recordings. An audio recording is admissible in evidence provided that the accuracy of the recording can be proved, the recorded voices can be properly identified, and the evidence is relevant and otherwise admissible²⁷. However, that evidence should always be regarded with caution and assessed in the light of all the circumstances²⁸.

A video recording of an incident which is in issue is admissible²⁹. **There is no difference in terms of admissibility between a direct view of an incident and a view of it on a visual display unit of a camera or on a recording of what the camera has filmed. A witness who sees an incident on a display or a recording may give evidence of what he saw in the same way as a witness who had a direct view³⁰.**

31. In order to examine the purport of the term "matter" as found in Section 3 of the 1872 Act, Section 29 of the 1860 Code and Section 3(18) of the General Clauses Act, and to ascertain whether the contents of the memory card can be regarded as "document", we deem it appropriate to refer to two Reports of the Law Commission of

India. In the 42nd Law Commission Report³¹, the Commission opined on the amendments to the 1860 Code. Dealing with Section 29 of the 1860 Code, the Commission opined as under:

2.56. The main idea in all the three Acts is the same and the emphasis is on the "matter" which is recorded, and not on the substance on which the matter is recorded. We feel, on the whole, that the Penal Code should contain a definition of "document" for its own purpose, and that Section 29 should be retained.

The said observation is restated in the 156th Report³², wherein the Commission opined thus:

11.08 Therefore, the term 'document' as defined in Section 29, Indian Penal Code may be enlarged so as to specifically include therein any disc, tape, sound track or other device on or in which any matter is recorded or stored by mechanical, electronic or other means The aforesaid proposed amendment in Section 29 would also necessitate consequential amendment of the term "document" Under Section 3 of the Indian Evidence Act, 1872 on the lines indicated above.

Considering the aforementioned Reports, it can be concluded that the contents of the memory card would be a "matter" and the memory card itself would be a "substance" and hence, the contents of the memory card would be a "document".

32. It is crystal clear that all documents including "electronic record" produced for the inspection of the Court alongwith the police report and which prosecution proposes to use against the Accused must be furnished to the Accused as per the mandate of Section 207 of the 1973 Code. The concomitant is that the contents of the memory card/pen-drive must be furnished to the Accused, which can be done in the form of cloned copy of the memory card/pen-drive. It is cardinal that a person tried for such a serious offence should be furnished with all the material and evidence in advance, on which the prosecution proposes to rely against him during the trial. Any other view would not only impinge upon the statutory mandate contained in the

1973 Code, but also the right of an Accused to a fair trial enshrined in Article 21 of the Constitution of India.

33. We do not wish to dilate further nor should we be understood to have examined the question of relevancy of the contents of the memory card/pen-drive or for that matter the proof and admissibility thereof. The only question that we have examined in this appeal is: whether the contents of the memory card/pen-drive referred to in the chargesheet or the police report submitted to Magistrate Under Section 173 of the 1973 Code, need to be furnished to the Accused if the prosecution intends to rely on the same by virtue of Section 207 of the 1973 Code?

34. Reverting to the preliminary objection taken by the Respondent for dismissing the appeal at the threshold because of the disclosure of identity of the victim in the memo of the special leave petition forming the subject matter of the present appeal, we find that the explanation offered by the Appellant is plausible inasmuch as the prosecution itself had done so by naming the victim in the First Information Report/Crime Case, the statement of the victim Under Section 161, as well as Under Section 164 of the 1973 Code, and in the chargesheet/police report filed before the Magistrate. Even the objection regarding incorrect factual narration about the Appellant having himself viewed the contents of the memory card/pen-drive does not take the matter any further, once we recognize the right of the Accused to get the cloned copies of the contents of the memory card/pen-drive as being mandated by Section 207 of the 1973 Code and more so, because of the right of the Accused to a fair trial enshrined in Article 21 of the Constitution of India.

35. The next crucial question is: whether parting of the cloned copy of the contents of the memory card/pen-drive and handing it over to the Accused may be safe or is likely to be misused by the Accused or any other person with or without the permission of the Accused concerned? In the present case, there are eight named Accused as of now. Once relief is granted to the Appellant who is Accused No. 8, the other Accused would follow the same suit. In that event, the cloned copies of the contents of the memory

card/pen-drive would be freely available to all the Accused.

36. Considering the principles laid down by this Court in **Tarun Tyagi** (supra), we are of the opinion that certain conditions need to be imposed in the fact situation of the present case. However, the safeguards/conditions suggested by the Appellant such as to take help of experts, to impose watermarks on the respective cloned copies etc., may not be sufficient measure to completely Rule out the possibility of misuse thereof. In that, with the advancement of technology, it may be possible to breach even the security seals incorporated in the concerned cloned copy. Besides, it will be well-nigh impossible to keep track of the misuse of the cloned copy and its safe and secured custody.

37. Resultantly, instead of allowing the prayer sought by the Appellant in toto, it may be desirable to mould the relief by permitting the Appellant to seek second expert opinion from an independent agency such as the Central Forensic Science Laboratory (CFSL), on all matters which the Appellant may be advised. In that, the Appellant can formulate queries with the help of an expert of his choice, for being posed to the stated agency. That shall be confidential and not allowed to be accessed by any other agency or person not associated with the CFSL. Similarly, the forensic report prepared by the CFSL, after analyzing the cloned copy of the subject memory card/pen-drive, shall be kept confidential and shall not be allowed to be accessed by any other agency or person except the concerned Accused or his authorized representative until the conclusion of the trial. We are inclined to say so because the State FSL has already submitted its forensic report in relation to the same memory card at the instance of the investigating agency.

38. Needless to mention that the Appellant before us or the other Accused cannot and are not claiming any expertise, much less, capability of undertaking forensic analysis of the cloned copy of the contents of the memory card/pen-drive. They may have to eventually depend on some expert agency. In our opinion, the Accused, who are interested in reassuring themselves about the genuineness and credibility of the

contents of the memory card in question or that of the pen-drive produced before the trial Court by the prosecution on which the prosecution would rely during the trial, are free to take opinion of an independent expert agency, such as the CFSL on such matters as they may be advised, which information can be used by them to confront the prosecution witnesses including the forensic report of the State FSL relied upon by the prosecution forming part of the police report.

39. Considering that this is a peculiar case of intra-conflict of fundamental rights flowing from Article 21, that is right to a fair trial of the Accused and right to privacy of the victim, it is imperative to adopt an approach which would balance both the rights. This principle has been enunciated in the case of **Asha Ranjan v. State of Bihar** MANU/SC/0159/2017 : (2017) 4 SCC 397 wherein this Court held thus:

57. The aforesaid decision is an authority for the proposition that there can be a conflict between two individuals qua their right Under Article 21 of the Constitution and in such a situation, to weigh the balance the test that is required to be applied is the test of larger public interest and further that would, in certain circumstances, advance public morality of the day. **To put it differently, the "greater community interest" or "interest of the collective or social order" would be the principle to recognise and accept the right of one which has to be protected.**

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61. Be it stated, circumstances may emerge that may necessitate for balancing between intra-fundamental rights. It has been distinctly understood that the test that has to be applied while balancing the two fundamental rights or inter fundamental rights, the principles applied may be different than the principle to be applied in intra-conflict between the same fundamental right Thus, there can be two individuals both having legitimacy to claim or assert the right. The factum of legitimacy is a primary consideration. It has to be remembered that no fundamental right is absolute and it can have limitations in certain circumstances Therefore, if the collective interest or the public

interest that serves the public cause and further has the legitimacy to claim or assert a fundamental right, then only it can put forth that their right should be protected. There can be no denial of the fact that the rights of the victims for a fair trial is an inseparable aspect of Article 21 of the Constitution and when they assert that right by themselves as well as the part of the collective, the conception of public interest gets galvanised. The accentuated public interest in such circumstances has to be given primacy, for it furthers and promotes "Rule of Law". It may be clarified at once that the test of primacy which is based on legitimacy and the public interest has to be adjudged on the facts of each case and cannot be stated in abstract terms. It will require studied scanning of facts, the competing interests and the ultimate perception of the balancing that would subserve the larger public interest and serve the majesty of Rule of law.

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86.1. The right to fair trial is not singularly absolute, as is perceived, from the perspective of the Accused. It takes in its ambit and sweep the right of the victim(s) and the society at large. These factors would collectively allude and constitute the Rule of Law i.e. free and fair trial.

86.2. The fair trial which is constitutionally protected as a substantial right Under Article 21 and also the statutory protection, does invite for consideration a sense of conflict with the interest of the victim(s) or the collective/interest of the society. **When there is an intra-conflict in respect of the same fundamental right from the true perceptions, it is the obligation of the constitutional courts to weigh the balance in certain circumstances, the interest of the society as a whole, when it would promote and instil Rule of Law.** A fair trial is not what the Accused wants in the name of fair trial. Fair trial must soothe the ultimate justice which is sought individually, but is subservient and would not prevail when fair trial requires transfer of the criminal proceedings.

40. This Court in **Mazdoor Kisan Shakti Sangathan v. Union of India** MANU/SC/0762/2018 : (2018) 17 SCC 324

has restated the legal position in the following terms:

61. Undoubtedly, right of people to hold peaceful protests and demonstrations, etc. is a fundamental right guaranteed Under Articles 19(1)(a) and 19(1)(b) of the Constitution. The question is as to whether disturbances, etc. caused by it to the residents, as mentioned in detail by the NGT, is a larger public interest which outweighs the rights of protestors to hold demonstrations at Jantar Mantar Road and, therefore, amounts to reasonable restriction in curbing such demonstrations. Here, we agree with the detailed reasoning given by the NGT that holding of demonstrations in the way it has been happening is causing serious discomfort and harassment to the residents. At the same time, it is also to be kept in mind that for quite some time Jantar Mantar has been chosen as a place for holding demonstrations and was earmarked by the authorities as well. **Going by the dicta in Asha Ranjan [Asha Ranjan v. State of Bihar, MANU/SC/0159/2017 : (2017) 4 SCC 397 : (2017) 2 SCC (Cri.) 376], principle of primacy cannot be given to one right whereby the right of the other gets totally extinguished. Total extinction is not balancing. Balancing would mean curtailing one right of one class to some extent so that the right of the other class is also protected.**

41. We are conscious of the fact that Section 207 of the 1973 Code permits withholding of document(s) by the Magistrate only if it is voluminous and for no other reason. If it is an "electronic record", certainly the ground predicated in the second proviso in Section 207, of being voluminous, ordinarily, cannot be invoked and will be unavailable. We are also conscious of the dictum in the case of **Superintendent and Remembrancer of Legal Affairs, West Bengal v. Satyen Bhowmick and Ors.** MANU/SC/0263/1981 : (1981) 2 SCC 109, wherein this Court has restated the cardinal principle that Accused is entitled to have copies of the statements and documents accompanying the police report, which the prosecution may use against him during the trial.

42. Nevertheless, the Court cannot be oblivious to the nature of offence and the

principle underlying the amendment to Section 327 of the 1973 Code, in particular Sub-section (2) thereof and insertion of Section 228A of the 1860 Code, for securing the privacy of the victim and her identity. Thus understood, the Court is obliged to evolve a mechanism to enable the Accused to reassure himself about the genuineness and credibility of the contents of the memory card/pen-drive from an independent agency referred to above, so as to effectively defend himself during the trial. Thus, balancing the rights of both parties is imperative, as has been held in **Asha Ranjan** (supra) and **Mazdoor Kisan Shakti Sangathan** (supra). The Court is duty bound to issue suitable directions. Even the High Court, in exercise of inherent power Under Section 482 of the 1973 Code, is competent to issue suitable directions to meet the ends of justice.

43. If the Accused or his lawyer himself, additionally, intends to inspect the contents of the memory card/pen-drive in question, he can request the Magistrate to provide him inspection in Court, if necessary, even for more than once alongwith his lawyer and I.T. expert to enable him to effectively defend himself during the trial. If such an application is filed, the Magistrate must consider the same appropriately and exercise judicious discretion with objectivity while ensuring that it is not an attempt by the Accused to protract the trial. While allowing the Accused and his lawyer or authorized I.T. expert, all care must be taken that they do not carry any devices much less electronic devices, including mobile phone which may have the capability of copying or transferring the electronic record thereof or mutating the contents of the memory card/pen-drive in any manner. Such multipronged approach may subserve the ends of justice and also effectuate the right of Accused to a fair trial guaranteed Under Article 21 of the Constitution.

44. In conclusion, we hold that the contents of the memory card/pen drive being electronic record must be regarded as a document. If the prosecution is relying on the same, ordinarily, the Accused must be given a cloned copy thereof to enable him/her to present an effective defence during the trial. However, in cases involving issues such as of privacy of the complainant/witness or his/her identity, the

Court may be justified in providing only inspection thereof to the Accused and his/her lawyer or expert for presenting effective defence during the trial. The court may issue suitable directions to balance the interests of both sides.

45. In view of the above, this appeal partly succeeds. The impugned judgment and order passed by the trial Court and the High Court respectively stand modified by giving option to the Appellant/Accused to the extent indicated hitherto, in particular paragraphs 37, 38 and 43.

46. Resultantly, the application filed by the Appellant before the trial Court being Crl. M.P. No. 49/2018 in C.P. No. 16/2017 is partly allowed in the aforementioned terms.

47. We direct the trial Court to ensure that the trial in C.P. No. 16/2017 is concluded expeditiously, preferably within six months from the date of this judgment.

¹Tukaram S. Dighole v. Manikrao Shivaji Kokate, MANU/SC/0086/2010 : (2010) 4 SCC 329

²Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdas Mehra and Ors., MANU/SC/0277/1975 : (1976) 2 SCC 17

³Shamsher Singh Verma v. State of Haryana, MANU/SC/1345/2015 : (2016) 15 SCC 485

⁴Anwar P.V. v. P.K. Basheer, MANU/SC/0834/2014 : (2014) 10 SCC 473

⁵Hodge M. Malek, Phipson on Evidence, 19th Edn., 2018, pg. 1450

⁶Hodge M. Malek, Phipson on Evidence, 19th Edn., 2018, pg. 5

⁷Fourth Edition, 2006 reissue, Vol. 11(3) Criminal Law, Evidence and Procedure

⁸R v. Daye [1908] 2 KB 333 at 340, DC, per Darling J.

⁹A tombstone bearing an inscription is in this sense a document (see *Mortimer v. M'Callan* (1840) 6 M & W 58), as is a coffin-plate bearing an inscription (see *R. v. Edge* (1842) Wills, Circumstantial Evidence (6th Edn.) 309).

¹⁰See also *Lyell v. Kennedy* (No. 3) (1884) 27 ChD 1, 50 LT 730, Senior v. Holdsworth, ex p. Independent Television News Ltd. [1976] QB 23, [1975] 2 All ER 1009, *Victor Chandler International Ltd. v. Customs and Excise Comrs.* MANU/UKCH/0030/1999 : [2000] 1 All ER 160, [1999] 1 WLR 2160, ChD.

¹¹For the purposes of the Police and Criminal Evidence Act 1984, 'document' means anything in which information of any description is recorded: Section 118 (amended by the Civil Evidence Act 1995 Section 15(1), Sch 1 para 9(3)). For the purposes of the Criminal Justice

Act 2003 Pt. 11 (Sections 98-141) (as amended) (evidence), the definition is the same (see Section 134(1)), save that for the purposes of Pt. 11 Ch. 3 (Sections 137-141) (which includes the provision relating to refreshing memory (see Section 139; and para 1438 ante)) it excludes any recording of sounds or moving images (see Section 140).

¹²See e.g. *R. v. Elworthy* (1867) LR 1 CCR 103, 32 JP 54, CCR; *Boyle v. Wiseman* (1855) 11 Exch. 360. Documents produced by purely mechanical means may constitute real evidence even where reliance is placed on the content: *The Statute of Liberty, Sapporo Maru (Owners) v. Statue of Liberty (Owners)* [1968] 2 All ER 195, [1968] 1 WLR 739 (film of radar echoes); *R. v. Wood* (1982) 76 Cr. App. Rep. 23, CA (computer used as calculator); *Castel v. Cross* [1985] 1 All ER 87, [1984] 1 WLR 1372, DC (printout of evidential breath-testing device). See also *Garner v. DPP* (1989) Crim. LR 583, DC; *R. v. Skinner* [2005] EWCA Crim. 1439, [2006] Crim. LR 56, [2005] ALL ER (D) 324 (May). As to real evidence generally see para 1466 post.

¹³*R. v. Elworthy* (1867) LR 1 CCR 103, 32 JP 54, CCR.

¹⁴*R. v. Wayte* (1982) 76 Cr. App. Rep. 110 at 118, CA. The admissibility of a document is, following the general rule, a question for the judge: See para 1360 ante. A document which the law requires to be stamped, but which is unstamped, is admissible in criminal proceedings: Stamp Act 1891 Section 14(4) (amended by the Finance Act 1999 Section 109(3), Sch 12 para 3(1), (5)).

¹⁵As to the related 'best evidence rule' see para 1367 ante.

¹⁶As to the admissibility of examined or certified copies of public documents at common law see EVIDENCE vol. 17(1) (Reissue) para 821 et. seq.

¹⁷*A-G v. Le Merchant* (1788) 2 2 Term Rep 201n; *R. v. Hunter* (1829) 4 C & P 128; *R. v. Elworthy* (1867) LR 1 CCR 103, 32 JP 54, CCR.

¹⁸*Owner v. Be Hive Spinning Co. Ltd.* [1914] 1 KB 105, 12 LGR 421; *Alivon v. Furnival* (1834) 1 Cr. M. & Rule 277.

¹⁹*R. v. Haworth* (1830) 4 C & P 254

²⁰*R. v. Nowaz* MANU/UKCR/0020/1976 : (1976) 63 Cr. App. Rep 178, CA. A further possibility was that contents of a document might be proved by an admission or confession: *Slatterie v. Pooley* (1840) 6 M & W 664

²¹This include animals, such as dogs, which may be inspected to see if they are ferocious (*Line v. Taylor* (1862) 3 F & F 731) or whether they appear to have been ill-treated, etc. Note however that statements (such as statements of origin) printed on objects may give rise to issues of hearsay if it is sought to rely on them as true: *Comptroller of Customs v. Western Electric Co. Ltd.* MANU/UKPC/0006/1965 : [1966] AC 367, [1965] 3 All ER 599, PC.

²²Expert evidence may often be essential if the court or jury is to draw any kind of informed conclusions from their examination of the

exhibit. It would be dangerous, for example, for a court or jury to draw its own unaided conclusions concerning the identity of fingerprints or the age and origin of bloodstains: Anderson v. R. MANU/SCCN/0050/1970 : [1972] AC 100, [1971] 3 All ER 768, PC.

²³R. v. Wright [1993] Crim. LR 607, CA; R. v. Devichand [1991] Crim. LR 446, CA.

²⁴R. v. Maggs (1990) 91 Cr. App. Rep 243, CA, per Lord Lane CJ at 247; R. v. Crees [1996] Crim. LR 830, CA; R. v. Stewart MANU/SCCN/0092/1988 : (1989) 89 Cr. App. Rep. 273, [1989] Crim. LR 653, CA.

²⁵R. v. Lawrence [1968] 1 All ER 579, 52 Cr. App. Rep. 163, CCA.

²⁶R. v. Francis (1874) LR 2 CCR 128, 43 LJM 97, CCR; Hocking v. Ahlquist Bros. [1944] KB 120, [1943] 1 All ER 722, DC. See also R. v. Uxbridge Justices, ex. P. Sofaer (1987) 85 Cr. App. Rep. 367, DC. If the object in question is in the possession of the prosecutor or of a third person, its production may generally be compelled by issue of a witness order under the Criminal Procedure (Attendance of Witnesses) Act, 1965 Section 2 (as substituted and amended) or under the Magistrates' Court Act, 1980 Section 97 (as substituted and amended) (see para 1409 ante). The Defendant cannot, however, be served with such an order, lest he be forced to incriminate himself: Trust Houses Ltd. v. Postlethwaite (1944) 109 JP 12.

²⁷R. v. Maqsd Ali, R v. Ashiq Hussain MANU/UKCR/0026/1965 : [1966] 1 QB 688, 49 Cr. App. Rep 230, CCA. For the considerations relevant to the determination of admissibility see R. v. Stevenson, R. v. Hulse, R. v. Whitney [1971] 1 All ER 678, 55 Cr. App. Rep 171; R. v. Robson, R. v. Harris [1972] 2 All ER 699, 56 Cr. App. Rep 450. See also R. v. Senat, R. v. Sin (1968) 52 Cr. App. Rep 282, CA; R. v. Bailey MANU/UKCR/0034/1993 : [1993] 3 All ER 513, 97 Cr. App. Rep 365, CA. Where a video recording of an incident becomes available after the witness has made a statement, the witness may view the video and, if necessary, amend his statement so long as the procedure adopted is fair and the witness does not rehearse his evidence: R. v. Roberts (Michael), R. v. Roberts (Jason) [1998] Crim. LR 682, 162 JP 691, CA.

²⁸R. v. Maqsd Ali, R. v. Ashiq Hussain MANU/UKCR/0026/1965 : [1966] 1 QB 688, 49 Cr. App. Rep 230, CCA. As to the use of tape recordings and transcripts see R. v. Rampling [1987] Crim. LR 823, CA; and see also Buteria v. DPP (1986) 76 ALR 45, Aust. HC. As to the tape recording of police interviews see para 971 et seq ante; and as to the exclusion of a tape recording under the Police and Criminal Evidence Act, 1984 Section 78 (as amended) (see para 1365 ante) as unfair evidence see R. v. H [1987] Crim. LR 47, Cf R. v. Jelen, R. v. Karz (1989) 90 Cr. App. Rep 456, CA (tape recording admitted despite element of entrapment).

²⁹Taylor v. Chief Constable of Cheshire MANU/UKWQ/0046/1986 : [1987] 1 All ER 225, 84 Cr. App. Rep 191, DC.

³⁰Taylor v. Chief Constable of Cheshire MANU/UKWQ/0046/1986 : [1987] 1 All ER 225, 84 Cr. App. Rep 191, DC. As to the admissibility of video recordings as evidence identifying the Defendant see also R. v. Fowden and White [1982] Crim. LR 588, CA; R. v. Grimer [1982] Crim. LR 674, CA; R. v. Blenkinsop [1995] 1 Cr. App. Rep 7, CA. A recording showing a road on which an incident had occurred was admitted in R. v. Thomas [1986] Crim. LR 682. As to the identification of the Defendant by still photographs taken by an automatic security camera see R. v. Dodson, R. v. Williams [1984] 1 WLR 971, 79 Cr. App. Rep 220, CA; as to identification generally see para 1455 ante; and as to the admissibility of a copy of a video recording of an incident see Kajala v. Noble (1982) 75 Cr. App. Rep 149, CA.

³¹Forty-Second Report, Law Commission India, Indian Penal Code, June, 1971, 32-35

³²One Hundred Fifty-Sixth Report on the Indian Penal Code (Volume I), August, 1997, Law Commission of India, Chapter-XI

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Citation: MANU /SC /0807 /2019

IN THE SUPREME COURT OF INDIA

**State
Vs.
M.R. Hiremath**

Judges/Coram:

Dr. D.Y. Chandrachud and Hemant Gupta, JJ.

Case Note:

Criminal - Quashing of proceedings - Challenge thereto - Section 65B of Evidence Act, 1872 and Sections 482 and 239 of Code of Criminal Procedure 1973 (CrPC) - Present appeal arose from a judgment of a learned Single Judge of High Court by which a petition under Section 482 of CrPC was allowed - While doing so, High Court set aside an order of Special Judge, rejecting application of Respondent for discharge under Section 239 of CrPC - Whether a cognizable offence had been made out on basis of which a first information report could be lodged.

Facts:

The case of the prosecution is that, charges were framed for offences punishable under Sections 7, 8, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988. The Respondent instituted three successive petitions under Section 482 of CrPC before the High Court for quashing of the criminal proceedings. The first two petitions were dismissed as withdrawn, leaving it open to the Respondent to pursue his remedies for seeking a discharge from the proceedings. The High Court dismissed the third petition. The first Respondent then filed a discharge application under Section 239 of the CrPC before the Special Judge. The trial judge dismissed the application by an order. This order was questioned in revision before the High Court. The revision was rejected on the ground of maintainability. The Respondent instituted a petition under Section 482 of the CrPC which has resulted in the impugned order of the learned Single Judge. The learned Single Judge has quashed the proceedings against the Respondent on the ground that (i) in the absence of a certificate under Section 65B of the Evidence Act, secondary evidence of the electronic record based on the spy camera is inadmissible in evidence; (ii) the prosecution is precluded from supplying any certification "at this point of time" since that would be an afterthought; and (iii) the case of the prosecution that apart from the electronic evidence, other evidence is available, is on its face unconvincing. The learned judge then held that, the second Accused who was the subject of the trap proceedings was not shown to have named the Respondent as being instrumental in the episode. On this finding the proceedings have been quashed.

Held, while allowing the appeal

1. The fundamental basis on which the High Court proceeded to quash the proceedings is its hypothesis that Section 65B, which requires the production of a certificate for leading secondary evidence of an electronic record mandate the production of such a certificate at this stage in the absence of which, the case of the prosecution is liable to fail. [13]

2. The provisions of Section 65B came up for interpretation before a three judge Bench of this Court in Anvar P.V. v. P.K. Basheer. Interpreting the provision, this Court held that, any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65-B. Section 65-B deals with the admissibility of the electronic record. The purpose

of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. Section 65B(4) is attracted in any proceedings "where it is desired to give a statement in evidence by virtue of this section". Emphasising this facet of Sub-section (4), the decision in Anvar holds that, the requirement of producing a certificate arises, when the electronic record is sought to be used as evidence. Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc., without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice. [14]

3. The same view has been reiterated by a two judge Bench of this Court in Union of India and Ors. v. CDR Ravindra V. Desai. The Court emphasised that, non-production of a certificate under Section 65B on an earlier occasion is a curable defect. The Court relied upon the earlier decision in Sonu alias Amar v. State of Haryana in which it was held that, the crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency. [15]

4. High Court erred in coming to the conclusion that, the failure to produce a certificate under Section 65B(4) of the Evidence Act at the stage when the charge-sheet was filed was fatal to the prosecution. The need for production of such a certificate would arise, when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise. [16]

5. Independent of the electronic record, the prosecution is relying on other material. The existence of such material has been adverted to in the charge-sheet. Details of the documents on which the prosecution sought to place reliance find specific mention in the charge-sheet. [17]

6. P. Sirajuddin emphasized the requirement of a preliminary inquiry, where a public servant is alleged to have committed an act of dishonesty involving a serious misdemeanour. The purpose of a preliminary inquiry is to ascertain whether a cognizable offence has been made out on the basis of which a first information report can be lodged. In view of various counter claims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately. Perhaps, the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR. [20]

7. In the present case, on 15 November 2016, the complainant is alleged to have met the Respondent. During the course of the meeting, a conversation was recorded on a spy camera. Prior thereto, the investigating officer had handed over the spy camera to the complainant. This stage does not represent the commencement of the investigation. At that stage, the purpose was to ascertain, in the course of a preliminary inquiry, whether the information which was furnished by the complainant would form the basis of lodging a first information

report. The purpose of the exercise which was carried out on 15 November 2012 was a preliminary enquiry to ascertain whether the information reveals a cognizable offence. [21]

8. The High Court has erred in coming to the conclusion that, in the absence of a certificate under Section 65B when the charge sheet was submitted, the prosecution was liable to fail and that the proceeding was required to be quashed at that stage. The High Court has evidently lost sight of the other material on which the prosecution sought to place reliance. Finally, no investigation as such commenced before the lodging of the first information report. The investigating officer had taken recourse to a preliminary inquiry. This was consistent with the decision in Lalita Kumari. [22]

9. The High Court ought to have been cognizant of the fact that, the trial court was dealing with an application for discharge under the provisions of Section 239 of the CrPC. The parameters which govern the exercise of this jurisdiction have found expression in several decisions of this Court. It is a settled principle of law that, at the stage of considering an application for discharge, the court must proceed on the assumption that the material which has been brought on the record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary to constitute the offence. [23]

10. Judgment and order of the High Court is set aside. Appeal allowed. [24]

Ratio Decidendi:

Requirement of producing a certificate arises, when the electronic record is sought to be used as evidence

JUDGMENT

Dr. D.Y. Chandrachud, J.

1. Leave granted.

2. This appeal arises from a judgment of a learned Single Judge of the High Court of Karnataka dated 27 April 2017 by which a petition Under Section 482 of the Code of Criminal Procedure 1973¹ was allowed. While doing so, the High Court set aside an order dated 5 December 2016 of the Special Judge, Bengaluru rejecting the application of the Respondent for discharge Under Section 239 of the Code of Criminal Procedure.

3. The Respondent was at the material time serving as Deputy Commissioner in the Land Acquisition Section of Bangalore Development Authority². BDA had acquired certain lands for the formation of a layout on the outskirts of Bengaluru. The complainant moved the court for denotification of the lands following which, a direction had been issued. Accordingly, the complainant made an application to BDA for denotification of the lands.

4. The case of the prosecution is that on 6 November 2012, the complainant attempted to meet the Respondent (accused No. 1) by whom the file was to be placed before the Denotification Committee. It is alleged that though the complainant was not allowed to meet the Respondent, he met his driver through whom he got to know that such cases were being 'mediated' by the second accused, an advocate purporting to act as the agent of the Respondent. A complaint was lodged with the Lokayukta Police on 8 November 2012 apprehending that a bribe would be asked for by the second accused. The police handed over a spy camera together with the instructions to be followed. It is alleged that a meeting of the second Accused was arranged with a representative of the complainant. On 12 and 13 November 2012, a meeting took place with the second Accused who is stated to have informed the representatives of the complainant of the amount which will be charged for the settlement of the deal. The prosecution alleges that on 15 November 2012 the complainant met the Respondent at about 7.30 pm near the BDA office. The conversation between the

complainant and the Respondent was recorded on the spy camera in the course of which, it has been alleged, there was some discussion in regard to the amount to be exchanged for the completion of the work.

5. On 16 November 2012, a complaint was lodged before the Lokayukta and a first information report was registered. Subsequently, it is alleged that a trap was set up and the second Accused was apprehended while receiving an amount of Rupees five lakhs on behalf of the Respondent towards an initial payment of the alleged bribe. A charge sheet was filed after investigation.

6. Charges were framed for offences punishable Under Sections 7, 8, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988.

7. The Respondent instituted three successive petitions Under Section 482 of Code of Criminal Procedure before the High Court of Karnataka³ for quashing of the criminal proceedings. The first two petitions were dismissed as withdrawn on 26 February 2013, leaving it open to the Respondent to pursue his remedies for seeking a discharge from the proceedings. The High Court dismissed the third petition.

8. The first Respondent then filed a discharge application Under Section 239 of the Code of Criminal Procedure before the Special Judge, Bengaluru. The trial judge dismissed the application by an order dated 5 December, 2016. This order was questioned in revision before the High Court. The revision was rejected on the ground of maintainability. The Respondent instituted a petition Under Section 482 of the Code of Criminal Procedure which has resulted in the impugned order of the learned Single Judge dated 27 April 2017.

9. The learned Single Judge has quashed the proceedings against the Respondent on the ground that (i) in the absence of a certificate Under Section 65B of the Evidence Act, secondary evidence of the electronic record based on the spy camera is inadmissible in evidence; (ii) the prosecution is precluded from supplying any certification "at this point of time" since that would be an afterthought; and (iii) the case of the prosecution that apart from the electronic evidence, other evidence is available, is on its face unconvincing. The learned judge then held that the second Accused who was the subject of the trap proceedings was not shown

to have named the Respondent as being instrumental in the episode. On this finding the proceedings have been quashed.

10. Assailing the correctness of the judgment of the High Court, Mr. Joseph Aristotle S., learned Counsel appearing for the Appellant, submits that (i) the High Court was manifestly in error in holding that a certificate Under Section 65B was warranted at this stage; (ii) a certificate Under Section 65B would be required to be produced at the stage when electronic evidence is produced in the course of evidence at the trial and hence the stage at which the High Court sought to apply the provision was premature; (iii) the prosecution is relying, apart from electronic evidence pertaining to the spy camera, on other material which prima facie shows the involvement of the first and the second accused; (iv) without considering the nature of that evidence, the High Court prevented the prosecution from placing reliance on such material on the basis of a bald averment that it did not appear to be convincing; (v) in handing over the spy camera to the complainant and the process which followed by recording what transpired at the meeting with the Respondent on 15 November 2012, the investigating officer was only conducting a preliminary inquiry of the nature that is contemplated by the decision of this Court in *Lalita Kumari v. Government of Uttar Pradesh* MANU/SC/1166/2013 : (2014) 2 SCC 1; and (vi) the purpose of the preliminary inquiry was only to enable the prosecution to ascertain whether a cognizable offence was made out. In other words, the utilization of the spy camera during the course of the preliminary inquiry was in the nature of a pre-trap mahazar which fell within the exceptions which have been carved out in the decision in *Lalita Kumari*. The investigation, it has been urged, would commence only thereafter having due regard to the provisions contained in Section 154 of the Code of Criminal Procedure.

11. On the other hand, while supporting the view which has been taken by the learned Single Judge of the High Court, Mr. Basava Prabhu Patil, learned Senior Counsel appearing for the Respondent, submits that (i) in the present case the investigation had commenced before the registration of an FIR Under Section 154 of the Code of Criminal Procedure. The events which transpired before 16 November 2012 before the FIR was registered and the collection of material would be inadmissible in evidence; (ii) while the decision of the Constitution Bench in *Lalita Kumari* allows a preliminary inquiry particularly

in a case involving corruption under the Prevention of Corruption Act, the Trial Court erred in inferring from the decision of this Court that the investigating officer is entitled to collect evidence even before the FIR is lodged; (iii) there is nothing to indicate, even the existence of an entry in the Station Diary; (iv) in consequence, the decision of the trial court was inconsistent with the principle enunciated in Lalita Kumari, which warranted interference by the High Court in exercise of its jurisdiction Under Section 482 of the Code of Criminal Procedure; (v) as a matter of fact the trial against the second Accused has proceeded and despite a lapse of seven years the prosecution has failed to produce a copy of the certificate Under Section 65B of the Evidence Act; and (vi) in the absence of a certificate Under Section 65B, there is an absence of material hence a discharge is warranted Under Section 231 of the Code of Criminal Procedure.

12. These submissions fall for consideration.

13. The fundamental basis on which the High Court proceeded to quash the proceedings is its hypothesis that Section 65B, which requires the production of a certificate for leading secondary evidence of an electronic record mandate the production of such a certificate at this stage in the absence of which, the case of the prosecution is liable to fail. Section 65B reads as follows:

Section 65(B). Admissibility of Electronic Records-

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this Section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in the Sub-section (1) in respect to the computer output shall be following, namely:

(a) the computer output containing the information was produced by computer during the period over which computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of computer.

(b) during the said period the information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities.

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation for that part of the period, was not such to affect the electronic record or the accuracy of its contents.

(d) The information contained in the electronic record reproduces or is derived from such information fed into computer in ordinary course of said activities.

(3) Where over any period, the function of storing and processing information for the purposes of any activities regularly carried on over that period as mentioned in Clause (a) of Sub-section (2) was regularly performed by the computers, whether-

(a) by a combination of computer operating over that period, or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period of time; or

(d) in any other manner involving successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purpose of this Section as constituting a single computer and any reference in the Section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section,

a certificate doing any of the following things, that is to say,--

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in Sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this Sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,--

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation.--For the purposes of this Section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.

14. The provisions of Section 65B came up for interpretation before a three judge Bench of this

Court in Anvar P.V. v. P.K. Basheer MANU/SC/0834/2014 : (2014) 10 SCC 473. Interpreting the provision, this Court held:

Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed Under Section 65-B. Section 65-B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer.

Section 65B(4) is attracted in any proceedings "where it is desired to give a statement in evidence by virtue of this section". Emphasising this facet of Sub-section (4) the decision in Anvar holds that the requirement of producing a certificate arises when the electronic record is sought to be used as evidence. This is clarified in the following extract from the judgment:

Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., **pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence.** All these safeguards are taken **to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence.** Electronic records being more susceptible to tampering, alteration, transposition, excision, etc., without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

(Emphasis supplied)

15. The same view has been reiterated by a two judge Bench of this Court in Union of India and Ors. v. CDR Ravindra V. Desai MANU/SC/0404/2018 : (2018) 16 SCC 272. The Court emphasised that non-production of a certificate Under Section 65B on an earlier occasion is a curable defect. The Court relied upon the earlier decision in Sonu alias Amar v. State of Haryana MANU/SC/0835/2017 : (2017) 8 SCC 570, in which it was held:

The crucial test, as affirmed by this Court, is **whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being**

marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency.

(Emphasis supplied)

16. Having regard to the above principle of law, the High Court erred in coming to the conclusion that the failure to produce a certificate Under Section 65B(4) of the Evidence Act at the stage when the charge-sheet was filed was fatal to the prosecution. The need for production of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise.

17. Apart from the above feature of the case, on which it is abundantly clear that the High Court has erred, we must also notice the submission of the Appellants that independent of the electronic record, the prosecution is relying on other material. The existence of such material has been adverted to in the charge-sheet. Details of the documents on which the prosecution sought to place reliance find specific mention in the charge-sheet particularly at items 15, 25 and 28 to 31. The High Court rejected this submission of the Appellant on the specious assertion that "it is found that, on the face of it, it is not convincing".

18. That leads us to the next limb of a significant submission which has been made on behalf of the Respondent by Mr. Basava Prabu Patil, learned senior Counsel, which merits close consideration. It was urged on behalf of the Respondent that the exercise of the investigating officer handing over a spy camera to the complainant on 15 November 2012 would indicate that the investigation had commenced even before an FIR was lodged and registered on 16 November 2012. This, it has been submitted, is a breach of the parameters which have been prescribed by the judgment of the Constitution Bench of this Court in Lalita Kumari.

19. Before we advert to the decision of the Constitution Bench, it is necessary to note that in the earlier decision of this Court in P. Sirajuddin v. State of Madras MANU/SC/0158/1970 : (1970) 1 SCC 595, the importance of a preliminary inquiry before the lodging of a first information report in a matter involving alleged corruption by a public servant was emphasized. This Court observed:

17. ... Before a public servant, whatever be his status, is publicly charged with acts, of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against a person, specially one who like the Appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general. If the Government had set up a Vigilance and Anti-Corruption Department as was done in the State of Madras and the said department was entrusted with enquiries of this kind, no exception can be taken to an enquiry by officers of this department but any such enquiry must proceed in a fair and reasonable manner. The enquiring officer must not act under any preconceived idea of guilt of the person whose conduct was being enquired into or pursue the enquiry in such a manner as to lead to an inference that he was bent upon securing the conviction of the said person by adopting measures which are of doubtful validity or sanction. The means adopted no less than the end to be achieved must be impeccable. In ordinary departmental proceedings against a Government servant charged with delinquency, the normal practice before the issue of a charge sheet is for someone in authority to take down statements of persons involved in the matter and to examine documents which have a bearing on the issue involved. It is only thereafter that a charged sheet is submitted and a full-scale enquiry is launched. When the enquiry is to be held for the purpose of finding out whether criminal proceedings are to be resorted to the scope thereof must be limited to the examination of persons who have knowledge of the affairs of the delinquent officer and documents bearing on the same to find out whether there is prima facie evidence of guilt of the officer. Thereafter the ordinary law of the land must take its course and further inquiry be proceeded with in terms of the Code of Criminal Procedure by lodging a first information report.

20. P. Sirajuddin (supra) emphasized the requirement of a preliminary inquiry, where a public servant is alleged to have committed an act of dishonesty involving a serious misdemeanour. The purpose of a preliminary inquiry is to ascertain whether a cognizable offence has been made out on the basis of which a first information report can be lodged. The

basis of a first information report Under Section 154 of the Code of Criminal Procedure⁴ is information relating to the commission of a cognizable offence which is furnished to an officer-in-charge of the police station. It is with a view to ascertain whether a cognizable offence seems to have been implicated in a case involving an alleged act of corruption by a public servant that a preliminary inquiry came to be directed in the judgment of this Court in P Sirajuddin. The decision in P. Sirajuddin was recognized and followed by the Constitution Bench in Lalita Kumari. The Constitution Bench held that while Section 154 of the Code of Criminal Procedure postulates mandatory registration of a first information report on the receipt of information indicating the commission of a cognizable offence yet there could be situations where a preliminary inquiry may be required. Indicating the cases where a preliminary inquiry may be warranted, this Court held:

120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

- a) Matrimonial disputes/family disputes
- b) Commercial offences
- c) Medical negligence cases
- d) Corruption cases
- e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The purpose of conducting a preliminary inquiry has been elaborated in the following extract:

Therefore, in view of various counter claims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a

cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR.

21. In the present case, on 15 November 2016, the complainant is alleged to have met the Respondent. During the course of the meeting, a conversation was recorded on a spy camera. Prior thereto, the investigating officer had handed over the spy camera to the complainant. This stage does not represent the commencement of the investigation. At that stage, the purpose was to ascertain, in the course of a preliminary inquiry, whether the information which was furnished by the complainant would form the basis of lodging a first information report. In other words, the purpose of the exercise which was carried out on 15 November 2012 was a preliminary enquiry to ascertain whether the information reveals a cognizable offence.

22. The High Court has in the present case erred on all the above counts. The High Court has erred in coming to the conclusion that in the absence of a certificate Under Section 65B when the charge sheet was submitted, the prosecution was liable to fail and that the proceeding was required to be quashed at that stage. The High Court has evidently lost sight of the other material on which the prosecution sought to place reliance. Finally, no investigation as such commenced before the lodging of the first information report. The investigating officer had taken recourse to a preliminary inquiry. This was consistent with the decision in Lalita Kumari.

23. The High Court ought to have been cognizant of the fact that the trial court was dealing with an application for discharge under the provisions of Section 239 of the Code of Criminal Procedure. The parameters which govern the exercise of this jurisdiction have found expression in several decisions of this Court. It is a settled principle of law that at the stage of considering an application for discharge the court must proceed on the assumption that the material which has been brought on the record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary to constitute the offence. In the State of Tamil Nadu v. N. Suresh Rajan MANU/SC/0011/2014 : (2014) 11 SCC 709, advertent to the earlier decisions on the subject; this Court held:

29. ...At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the Accused has been made out. To put it differently, if the court thinks that the Accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the Accused has committed the offence. The law does not permit a mini trial at this stage.

24. For the above reasons we are of the view that the appeal would have to be allowed. We accordingly allow the appeal and set aside the judgment and order of the High Court dated 24 April 2017 in Criminal Writ Petition No. 3202 of 2017. We accordingly maintain the order passed by the learned trial judge on 5 December 2016 dismissing the discharge application filed by the Respondent.

20394/2013

⁴ 154 Information in cognizable cases.-(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf;

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1 'CrPC'

2 'BDA'

³ Criminal Petition No. 7562/2012, Writ Petition No. 11252/2013 and Writ Petition No.

Citation: (2018)2SCC 801

IN THE SUPREME COURT OF INDIA

**Shafhi Mohammad
Vs.
The State of Himachal Pradesh**

Judges/Coram:
A.K. Goel and U.U. Lalit, JJ.

Prior History / High Court Status:

From the Judgment and Order dated 26.06.2014 of the High Court of Himachal Pradesh, Shimla in Criminal Appeal No. 404 of 2009 (MANU/HP/1540/2014)

Case Note:

Law of Evidence - Applicability - Section 63 and 65B(4) of Indian Evidence Act, 1872 - Present appeal filed wherein question of admissibility of videography during investigation was raised - Whether videography of scene of crime or scene of recovery during investigation necessary inspiring confidence in evidence collected - Whether Section 65B(4) of Evidence Act be applicable or not

Facts:

Present appeal filed wherein question of admissibility of videography of scene of crime or scene of recovery during investigation necessary to inspire confidence in evidence collected was raised.

Held, while adjourning the appeal:

(i) The applicability of procedural requirement under Section 65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who was not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act could not be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this was not so permitted, it will be denial of justice to the person who was in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in absence of certificate under Section 65B(4) of the Evidence Act, which party producing could not possibly secure. Thus, requirement of certificate Under Section 65B(4) is not always mandatory. Such party could not be required to produce certificate under Section 65B(4) of the Evidence Act. The applicability of requirement of certificate being procedural could be relaxed by the Court wherever interest of justice so justifies. [14] and[15]

ORDER

SLP (Crl.) No. 2302 of 2017:

1. One of the questions which arose in the course of consideration of the matter was whether videography of the scene of crime or scene of recovery during investigation should be necessary to inspire confidence in the evidence collected.

2. In Order dated 25th April, 2017 statement of Mr. A.N.S. Nadkarni, learned Additional Solicitor General is recorded to the effect that videography will help the investigation and was being successfully used in other countries. He referred to the perceived benefits of "Body-Worn Cameras" in the United States of America and the United Kingdom. Body-worn cameras act as deterrent against anti-social behaviour and is also a tool to collect the evidence. It was submitted that new technological device for collection of evidence are order of the day. He also referred to the Field Officers' Handbook by the Narcotics Control Bureau, Ministry of Home Affairs, Government of India. Reference was also made to Section 54-A of the Code of Criminal Procedure providing for videography of the identification process and proviso to Section 164(1) Code of Criminal Procedure providing for audio video recording of confession or statement under the said provision.

3. Thereafter, it was noted in the Order dated 12th October, 2017, that the matter was discussed by the Union Home Secretary with the Chief Secretaries of the States in which a decision was taken to constitute a Committee of Experts (COE) to facilitate and prepare a road-map for use of videography in the crime scene and to propose a Standard Operating Procedure (SOP). However, an apprehension was expressed about its implementation on account of scarcity of funds, issues of securing and storage of data and admissibility of evidence. We noted the suggestion that still-photography may be useful on account of higher resolution for forensic analysis. Digital cameras can be placed on a mount on a tripod which may enable rotation and tilting. Secured portals may be established by which the Investigation Officer can e-mail photograph(s) taken at the crime scene. Digital Images can be retained on State's server as permanent record.

SLP(Crl.) No. 9431 of 2011:

4. Since identical question arose for consideration in this special leave petition as noted in Order dated 12th October, 2017, we have heard learned amicus, Mr. Jayant Bhushan, senior advocate, Ms. Meenakshi Arora, senior advocate, assisted by Ms. Ananya Ghosh, Advocate, on the question of admissibility of electronic record. We have also heard Mr. Yashank Adhyaru, learned senior Counsel, and Ms. Shirin Khajuria, learned Counsel, appearing for Union of India.

5. An apprehension was expressed on the question of applicability of conditions Under Section 65B(4) of the Evidence Act to the effect that if a statement was given in evidence, a certificate was required in terms of the said provision from a person occupying a responsible position in relation to operation of the relevant device or the management of relevant activities. It was submitted that if the electronic evidence was relevant and produced by a person who was not in custody of the device from which the electronic document was generated, requirement of such certificate could not be mandatory. It was submitted that Section 65B of the Evidence Act was a procedural provision to prove relevant admissible evidence and was intended to supplement the law on the point by declaring that any information in an electronic record, covered by the said provision, was to be deemed to be a document and admissible in any proceedings without further proof of the original. This provision could not be read in derogation of the existing law on admissibility of electronic evidence.

6. We have been taken through certain decisions which may be referred to. In Ram Singh and Ors. v. Col. Ram Singh, MANU/SC/0176/1985 : 1985 (Supp) SCC 611, a Three-Judge Bench considered the said issue. English Judgments in R. v. Magsud Ali, (1965) 2 All ER 464, and R. v. Robson, (1972) 2 ALL ER 699, and American Law as noted in American Jurisprudence 2d (Vol. 29) page 494, were cited with approval to the effect that it will be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. Electronic evidence was held to be admissible subject to safeguards adopted by the Court about the authenticity of the same. In the case of tape-recording it was

observed that voice of the speaker must be duly identified, accuracy of the statement was required to be proved by the maker of the record, possibility of tampering was required to be ruled out. Reliability of the piece of evidence is certainly a matter to be determined in the facts and circumstances of a fact situation. However, threshold admissibility of an electronic evidence cannot be ruled out on any technicality if the same was relevant.

7. In Tukaram S. Dighole v. Manikrao Shivaji Kokate, MANU/SC/0086/2010 : (2010) 4 SCC 329, the same principle was reiterated. This Court observed that new techniques and devices are order of the day. Though such devices are susceptible to tampering, no exhaustive Rule could be laid down by which the admission of such evidence may be judged. Standard of proof of its authenticity and accuracy has to be more stringent than other documentary evidence.

8. In Tomaso Bruno and Anr. v. State of Uttar Pradesh, MANU/SC/0057/2015 : (2015) 7 SCC 178, a Three-Judge Bench observed that advancement of information technology and scientific temper must pervade the method of investigation. Electronic evidence was relevant to establish facts. Scientific and electronic evidence can be a great help to an investigating agency. Reference was made to the decisions of this Court in Mohd. Ajmal Amir Kasab v. State of Maharashtra, MANU/SC/0681/2012 : (2012) 9 SCC 1 and State (NCT of Delhi) v. Navjot Sandhu, MANU/SC/0465/2005 : (2005) 11 SCC 600.

9. We may, however, also refer to judgment of this Court in Anvar P.V. v. P.K. Basheer and Ors. MANU/SC/0834/2014 : (2014) 10 SCC 473, delivered by a Three-Judge Bench. In the said judgment in para 24 it was observed that electronic evidence by way of primary evidence was covered by Section 62 of the Evidence Act to which procedure of Section 65B of the Evidence Act was not admissible. However, for the secondary evidence, procedure of Section 65B of the Evidence Act was required to be followed and a contrary view taken in Navjot Sandhu (supra) that secondary evidence of electronic record could be covered Under Sections 63 and 65 of the Evidence Act, was not correct. There are, however, observations in para 14 to the effect that electronic record can be proved only as per Section 65B of the Evidence Act.

10. Though in view of Three-Judge Bench judgments in Tomaso Bruno and Ram Singh

(supra), it can be safely held that electronic evidence is admissible and provisions Under Sections 65A and 65B of the Evidence Act are by way of a clarification and are procedural provisions. If the electronic evidence is authentic and relevant the same can certainly be admitted subject to the Court being satisfied about its authenticity and procedure for its admissibility may depend on fact situation such as whether the person producing such evidence is in a position to furnish certificate Under Section 65B(h).

11. Sections 65A and 65B of the Evidence Act, 1872 cannot be held to be a complete code on the subject. In Anvar P.V. (supra), this Court in para 24 clarified that primary evidence of electronic record was not covered Under Sections 65A and 65B of the Evidence Act. Primary evidence is the document produced before Court and the expression "document" is defined in Section 3 of the Evidence Act to mean any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

12. The term "electronic record" is defined in Section 2(t) of the Information Technology Act, 2000 as follows:

"Electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.

13. Expression "data" is defined in Section 2(o) of the Information Technology Act as follows.

"Data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer.

14. The applicability of procedural requirement Under Section 65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the

opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in absence of certificate Under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate Under Section 65B(h) is not always mandatory.

15. Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate Under Section 65B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies.

16. To consider the remaining aspects, including finalisation of the road-map for use of the videography in the crime scene and the Standard Operating Procedure (SOP), we adjourn the matter to 13th February, 2018.

17. We place on record our deep appreciation for the valuable assistance rendered by learned amicus, Mr. Jayant Bhushan, senior advocate, Ms. Meenakshi Arora, senior advocate, who was assisted by Ms. Ananya Ghosh, Advocate, as well as by Mr. Yashank Adhyaru, learned senior Counsel, and Ms. Shirin Khajuria, learned Counsel, appearing for Union of India.

Citation: 2018 (3) KHC 725

IN THE HIGH COURT OF KERALA AT ERNAKULAM

**Sherin V. John
Vs.
State of Kerala**

Judges/Coram:
K. Abraham Mathew, J.

ORDER

K. Abraham Mathew, J.

1. (i) Is an accused entitled to get copy of an electronic record produced in the court by the prosecution as a material object?

(ii) Is the right of an accused to get copies of the documents produced by the prosecution absolute?

The court is called upon to answer these two questions.

2. The petitioner is the accused in a sessions case. He is alleged to have committed the offences under Sections 201 and 302 IPC. The investigating officer produced a 'tablet' (computer), two hard discs of computer, a pen drive and a compact disc, all of which allegedly contain visuals. The petitioner applied for their copies. By the impugned order the learned Sessions Judge dismissed the application. This is challenged.

3. Heard Sri Ravikrishnan, learned counsel for the petitioner and Sri Suman Chakravarthy, learned Senior Public Prosecutor.

4. The articles of which copies were applied for were produced by the investigating officer as material objects. The Sessions Judge took the view that if the petition is allowed and copy of the 'hard disc' is taken, there is every chance of the hash value being changed and it becomes easy for the accused to allege their contents being tampered. Fair trial can well be ensured "by allowing the petitioner and his pleader to inspect and verify the said items at the time of taking evidence", the trial court held.

5. The contention of Sri Revikrishnan, learned counsel for the petitioner, is that the articles produced in the case are not material objects, but electronic records and the petitioner is entitled to their copies as provided in Section 207 of Cr.P.C. Sri Suman Chakravarthy, learned Senior Public Prosecutor, on the other hand, maintains that the things produced in the court are not electronic records, but material objects and there is no statutory provision to issue copies of material objects.

6. Sub section 5 of section 173 of Cr.P.C. provides that the police officer shall forward to the Magistrate along with his report the following documents:

(a) all documents or relevant extracts thereof on which the prosecution propose to rely other than those already sent to the Magistrate during investigation.

(b) the statements recorded under section 161 of all the persons whom the prosecution propose to examine as its witnesses.

7. Section 207 of the Code makes it mandatory for the court to furnish to the accused the following documents:

(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under subsection (3) of section 161 of all persons whom the prosecution proposes to examine as its

witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under subsection (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173.

8. The purpose behind Section 207 of the Code is to ensure fair trial. In *Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)* [MANU/SC/0268/2010 : 2010 (6) SCC (1)], the Supreme Court has observed: "The liberty of an accused cannot be interfered with except under due process of law. The expression "due process of law" shall deem to include fairness in trial. The court (read Code) gives a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused place an implied obligation upon the prosecution (prosecution and the Prosecutor) to make fair disclosure."

9. In *V.K. Sasikala v. State* [MANU/SC/0792/2012 : 2012 (9) SCC 771] it has been held in paragraph 17:

"Though it is only such reports which support the prosecution case that required to be forwarded to the court under Section 173(5) in every situation where some of the seized papers and documents do not support the prosecution case and, on the contrary, supports the accused, a duty is cast on the investigating officer to evaluate the two sets of documents and materials collected and, if required, to exonerate the accused at that stage itself. However, it is not impossible to visualise a situation whether the investigating officer ignores the part of the seized documents which favour the accused and forwards to the court only those documents which support the prosecution. If such a situation is pointed by the accused and such documents have, in fact, been forwarded to the court would it not be the duty of the court to make available such documents to the accused regardless of the fact whether the same may not have been marked and exhibited by the prosecution".

10. Adv. Sri Revikrishnan submits that electronic records have been declared documents, by Section 3 of the Indian Evidence Act and the prosecution cannot label them material objects.

11. For a better understanding, the definition of 'evidence' in the Evidence Act may be looked into:

"Evidence" means and includes -

(1) all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;

(2) [all documents including electronic records produced for the inspection of the court], such documents are called documentary evidence."

12. It may appear that the law recognises only two categories of evidence, viz; oral evidence and documentary evidence. If it were correct, how could be material objects like weapons or properties in respect of which offences like theft are committed made part of the evidence. The law recognizes a category of evidence other than oral evidence and documentary evidence. This third category is known as real or physical evidence and it consists of material objects other than documents produced before the inspection of the court. This is the most widely accepted meaning of 'real evidence'. (Phipson on Evidence, 16th Edition South Asian Edition of 2007, Page 5). The meaning of real evidence has been given in the Black's Law Dictionary as follows:

"Physical evidence (such as clothing or a knife wound) that itself plays a direct part in the incident in question."

The terms real evidence and demonstrative evidence are sometimes interchangeably used. The meaning of demonstrative evidence is given in Black's Law Dictionary as physical evidence that one can see and inspect. The Dictionary says that this term sometimes overlaps with and is used as a synonym of real evidence.

13. Existence of the third category of evidence has been recognised by the courts in India also, for which the eleven Judge bench decision of the Supreme Court in *State of Bombay v. Kathi Kalu Oghad* [MANU/SC/0134/1961 : AIR 1961 SC 1808] is the authority. The court has said: "Evidence has been classified by text writers into three categories, namely (1) oral testimony (2) evidence furnished by documents, and (3)

material evidence." Referring to materials like fingerprint, specimen signature and handwriting, the Apex Court has declared: "they are neither oral, nor documentary evidence, but belong to the third category of material evidence." The court has called it material evidence instead of real evidence. No evidence is required to prove their genuineness since they are taken before the court or pursuant to the orders passed by it. Material things have been referred to in the second proviso to Section 60 of the Evidence Act.

14. Material evidence is not covered by Section 207 Cr.P.C. There is no law providing for issuance of copy of material objects to accused. A copy of a material object can be only its replica. When a material object cannot be produced before the court, there is no provision to produce secondary evidence. But the second proviso to Section 60 of the Evidence Act enables the party concerned to adduce oral evidence in respect of the object.

15. A document has been defined under Section 3 of the Indian Evidence Act as follows:

"'Document' means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter."

16. What is the distinction between a document and a material object. A document cannot exist without a substance like paper, clay, stone, rock, tree, animal. In the case of a document its contents always appear on a material object (substance). A document cannot be divorced from a material object.

17. To accept the submission of the learned counsel Sri Revikrishnan that since the Evidence Act declares electronic records also documents, they can be only documents and not material objects, cannot be accepted. There are certain things which have the characteristics of a document, but are considered material objects. The following illustrations will make it abundantly clear.

(a) A sword upon which name of a person is inscribed.

(b) A gold ring upon which name of a person is inscribed.

(c) A counterfeit currency.

(d) An obscene writing.

(e) An obscene picture.

(f) a photograph in which a male is seen in a compromising position with the wife of his neighbour.

(g) a cheque.

In respect of each of the above things, two situations may arise.

In illustration (a)

(i) The question is whether the accused forged the inscription on the sword. The prosecution has to adduce evidence to prove that he did so.

(ii) The question is whether the accused assaulted the victim with the sword. The prosecution need not prove who made the inscription on it.

In illustration (b)

(i) The question is whether the plaintiff or the defendant is the owner of the gold ring, their names being the same. The parties may have to adduce evidence to prove the person who made the inscription, the circumstances in which he made it etc.

(ii) The question is whether the accused, who does not claim the ownership of the gold ring, committed theft of it. The inscription on it is immaterial.

In illustration (c)

(i) The question is whether the accused made the counterfeit currency. The prosecution has to adduce evidence to prove that he made it.

(ii) The question is whether the accused was found in possession of the counterfeit currency. The prosecution has only to prove that fact, the identity of the person who made it being irrelevant.

In illustration (d)

(i) The question is whether the accused wrote the obscene writing. The prosecution has to prove the fact that it is in his handwriting or that he has signed it.

(ii) The question is whether the accused was in possession of the obscene writing. The prosecution need not establish that he wrote it, the identity of the author being irrelevant. It is required only to prove that the accused was in possession of it.

In illustration (e)

(i) The question is whether the accused drew the obscene picture. The prosecution has to adduce evidence to establish that he did so.

(ii) The question is whether he was in possession of the obscene picture. The prosecution is required only to prove that he was in possession of it, the identity of the person who drew it being irrelevant.

In illustration (f)

(i) The question is whether the photo is genuine. The prosecution has to prove that it is genuine by examining the person who took it.

(ii) The investigating officer seized the photo from the custody of the accused. It is required only to prove the seizure from his custody, the identity of the person who took the photo being irrelevant.

In illustration (g)

(i) The question is whether the accused executed the cheque. The prosecution has to adduce evidence to prove its execution by him.

(ii) The question is whether the accused committed theft of the cheque. The prosecution is required only to prove that he stole it, its genuineness being irrelevant.

In all of the above illustrations, the thing is a document in the first situation. But it cannot be so in the second situation, where it is a material object.

18. In *Emperor v. Krishtappa Khandappa* [MANU/MH/0030/1925 : AIR 1925 Bom 327] the accused were charged with "having conspired and abetted each other in the felling and removal of twenty sandalwood trees from a Government reserved forest, and further with intending to commit forgery in respect of the trees by impressing thereon certain marks". Accused No. 4 was charged with possession of a counterfeit

stamp for the purpose of impressing those marks. The court considered the question whether the letter appeared on the trees constituted a document, for which it interpreted the phrase "any matter expressed or described upon any substance" appearing in Section 29 of the Indian Penal Code, which is identical to the definition of document in the Evidence Act. The court held that the letters imprinted on the trees would be a document within the meaning of Section 29 of the Indian Penal Code. Suppose, there were no letters imprinted on the trees, then the cut down trees would have been only material objects.

19. What is the test to decide whether a thing is a document or a material object when a matter has been expressed or described upon it. In *Phipson on Evidence* (supra) it is observed that "it must be borne in mind that there is a distinction between a document used as a record of a transaction, such as a conveyance, and a document as a thing. It depends on the circumstances in which classification it falls. On a charge of stealing a document, for example, the document is a thing."

20. The facts to be proved in the case of a document and a material object are different. Section 67 of the Evidence Act says that the contents of a document can be proved by proving the handwriting or signature of the person who allegedly signed it or wrote it. The section applies only when it is necessary to prove the authenticity of the document, which is clear from the clause "if a document is alleged to be signed or to have been written wholly or in part by any person." This is actually meant by the phrase 'used as a record of a transaction' (see *Phipson on Evidence - supra*). It follows that only if the thing produced is one the contents of which has to be proved in the manner laid down in Section 67, it is a document. (In the case of photograph the person who took it has to be examined). If that is not necessary, it is only a material object though some matter has been expressed or described upon it. If the identity of the author of the contents, which is necessary to establish its genuineness, is not relevant, it is not a document. In short, the test is the purpose for which the thing upon which a matter has been expressed or described, is produced. That is why in *State of Bombay v. Kathi Kalu Oghad* [MANU/SC/0134/1961 : AIR 1961 SC 1808] the Supreme Court held that a specimen handwriting or signature or finger impressions taken before a court or by an authority holding investigation are material evidence.

21. In a case where the prosecution only wants to prove possession by the accused of the thing produced in the court like obscene articles, it need not prove the authorship or the truth of the matter expressed or described upon it. Then, it is only a material object. The prosecution only wants the court to draw the inference the court may take from the possession of the accused of the said thing, and nothing more. It becomes the duty of the accused to explain how he happened to be in its possession since it is a matter within his special knowledge as provided in Section 106 of the Evidence Act.

22. To buttress his argument that an electronic record can be considered only a document and the prosecution has to establish its genuineness and it is not sufficient for it to prove its possession by the accused Sri Revikrishnan relies on the decision of a learned Single Judge of this Court in Santhosh Madhavan @ Swami Amritha Chaithanya v. State [2014 KHC 31]. Santhosh Madhavan was charged with having committed the offence of rape as well as some other offences under the Indian Penal Code. Two video cassettes and a multimedia card were seized from the bank locker which was in the exclusive possession of Santhosh Madhavan.

23. The learned Single Judge held:

(i) the video cassettes produced in the case were documents

(ii) the prosecution failed to prove the authenticity of the cassettes

(iii) the prosecution also failed to prove the identity of the persons who appeared in the visuals in the cassettes by examining witnesses, and

(iv) the trial judge committed illegality in viewing the cassettes and taking a decision on the basis of what he saw.

24. In Santhosh Madhavan's case the Chief Judicial Magistrate sent the video cassettes to an executive magistrate (Tahsildar), who was asked to view them and file a report. At the trial the executive magistrate was not examined. The learned Single Judge commented adversely upon the failure of the prosecution to examine the executive magistrate as a witness at the trial. Apparently, the Chief Judicial Magistrate sent the cassettes to the executive magistrate in the light of a circular issued by the Government, K.Dis.

17699/9 LRE dated 9.8.1991. This circular is applicable only to cases registered under the Cinematograph Act. It is not applicable to the cases like Santhosh Madhavan's case, which went unnoticed.

25. In Santhosh Madhavan's case the learned Judge examined the definition of document in the Indian Evidence Act and General Clauses Act, and the views expressed in the Halsbury's Laws of India, Law of Evidence by C.D. Field and in certain decisions of English Courts and of our Supreme Court and held that video cassettes are documents and "it should be established that they are authenticated copies and accurate copies." The learned Judge rejected the argument of the learned Public Prosecutor that since the cassettes were recovered from the exclusive possession of the accused unless he explained how he happened to be in their possession, the court had to draw an inference against him in view of Section 106 of the Evidence Act.

26. The trial judge in Santhosh Madhavan's case held that the persons seen in the visuals in the video cassettes were the accused and the victim after viewing them. The learned Single Judge of this court was of the opinion that though the trial judge had the power to view the cassettes, he should not have relied on them as if they were evidence since they were not made part of the evidence in the case by examining someone to prove their contents. His Lordship observed: "..... it becomes clear that the act of the learned Judge in substituting himself in the place of a witness and entering a conclusive finding on that basis has no sanction of law. If he acts as a witness he has necessarily to offer himself for cross-examination and that has not been done in the case on hand. In fact, the only substantive evidence is the impression formed by the learned Judge by viewing the cassettes."

27. Reliance was placed on the decision of the Supreme Court in Pritam Singh v. State of Punjab [MANU/SC/0119/1955 : AIR 1956 SC 415], from which the following sentences were extracted:

"A Magistrate is certainly not entitled to allow his view or observation to take the place of evidence because such view or observation of his cannot be tested by cross-examination and the accused would certainly not be in a position to furnish any explanation in regard to the same. In the absence of such test having been applied and an explanation sought for from the accused in regard to the same under Section 342, it is not open to the judge to incorporate these observations of his

in the judgment and base his conclusion on the same."

28. In Pritam Singh's case a pair of shoes were recovered from the house allegedly belonging to him. In the course of his examination under Section 313 Cr.P.C. the learned trial judge directed him to try them on his feet. The accused did so and the court found that they fitted his feet. "Realising however that the result of this demonstration would be adverse to his defence, he complained that the shoes were too tight for his feet." It was in this context, the question whether the trial judge was right in doing so arose.

29. From the judgment in Pritam Singh's case it is not clear whether the sentences extracted by the learned Judge who decided in Santhosh Madhavan's case were part of the argument of the learned counsel or the decision of the court. The former appears to be correct because later the court has observed: "This was ocular demonstration and the result of such ocular demonstration could certainly be taken into account by the learned Additional Sessions Judge and the assessors and they were entitled to come to their own conclusions taking into account the further fact that the accused did complain at the time that the shoes were too tight for his feet."

30. Where the prosecution case is that the book produced by it was seized from the accused and it is obscene, it is the duty of the court to read it and decide whether the contents is obscene or not. It cannot delegate it to someone else. It is, in fact, illegal for it to ask someone else to read it and tell the court whether the contents is obscene or not. Same is the case with an obscene film. The prosecution needs only to prove its possession by the accused.

31. When a material object is produced before the court, the prosecution need not examine anyone to prove its nature or effect unless its nature is such that the court cannot take a decision without expert opinion. It is for the court to take a decision after its examination. The opinion of a police officer or a person other than an expert cannot be admitted in evidence. The court cannot abdicate its power to examine the material object produced before it and delegate it to someone else.

32. In Phipson on Evidence it is stated that material objects when available are "probably the most satisfactory kind of all, since, save for

identification or explanation neither testimony nor inference is relied upon. Unless its genuineness is in dispute, the thing speaks for itself."

33. In Raj Kapoor & others v. State (Delhi Administration) & others [MANU/SC/0210/1979 : AIR 1980 SC 258] the Supreme Court observed: "The court will examine the film and judge whether its display, in the given time and clime, so breaches public morals or depraves basic decency as to offend the penal provisions." (emphasis supplied)

34. In Kathi Kalu's case (supra), the eleven judge Bench held that material evidence is "outside the limit of testimony".

35. What is the evidentiary value or probative value of the material objects which have been made part of the evidence in a case? In this context, the definition of 'proved' in the Indian Evidence Act, becomes relevant. It runs as follows:

"Proved". - A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

36. The section makes it clear that the court has to reach a conclusion not on the basis of evidence alone. But on the basis of matters before the court. Of course, these matters include evidence. There can be other matters also before the court. The facts like identity of the person who is present before the court or presence or absence of a party before the court are matters before the court. The court need not examine anyone with regard to his identity or presence or absence. It has the authority to ascertain whether the person who is present before it is the one seen in the visuals in the material objects like cassette, compact disc, pen drive.

37. A material object made part of the evidence in the case is a matter before the court. The court has the authority to examine it. The identity of the accused and the victim who are present before the court is also a matter before it. The question whether those persons and the persons seen in the visuals in the cassette marked in evidence in the case are the same persons is one to be answered on the basis of the matters before the court.

38. In Phipson on Evidence it is stated: "material objects when available are probably the most satisfactory kind of all, since, save for identification or explanation neither testimony nor inference is related upon. Unless its genuineness is in dispute, the thing speaks for itself."

39. In Kathi Kalu's case (supra) the eleven Judge Bench held that material evidence is "outside the limit of testimony".

40. The distinction between a document and a material object was not taken into account, the probative value of a material was not taken into consideration and the observations of learned authors and the Supreme Court were not noticed in Santhosh Madhavan's case. The view taken in Santhosh Madhavan's case runs contrary to the one expressed by learned authors and by the Supreme Court.

41. From the foregoing discussion the following conclusions may be reached:

(i) Apart from oral and documentary evidence, there is a third category of evidence called material evidence, which consists of materials other than documents.

(ii) Only copies of documents can be given, but not of material objects.

(iii) When nothing is expressed or described upon a substance, it is only a material object.

(iv) When a matter is expressed or described upon a substance, it may be a document or a material object depending upon the purpose for which it is produced.

(v) If the identity of the author of the matter expressed or described upon a substance is relevant, it is a document; otherwise it is only a material object.

(vi) Where the only purpose for which a material object upon which a matter has been expressed or described is produced is to prove its seizure from the possession of the accused, and it is made part of the evidence by proving its seizure from his possession, the court does not want the testimony of anyone to prove the matter since it has become a 'matter before the court'.

42. The 'tablet' which has been produced before the court below was seized from the petitioner. The prosecution only wants the court to view it and draw the inference that may be taken from its possession by the petitioner.

43. Learned counsel Sri Revikrishnan submits that the 'tablet' seized from the petitioner has been produced by the prosecution not as a material object, but as a document which is clear from the fact that it has cited some witnesses to prove its contents. Immediately after the seizure, the investigating officer apparently viewed its contents in the presence of witnesses and prepared a mahazar. In the Final Report some witnesses have been cited to prove it. That does not make the contents of the 'tablet' a document. The investigating officer prepared the mahazar in the presence of witnesses only to ensure that the seizure was fool-proof and the 'tablet' has been produced before the court as it was. That apart, what is relevant is only the purpose for which it is produced, and not the form. Even where the investigating officer mistakes a material object for a document, the court can hold it as a material object.

44. In the light of the above discussion I hold that the 'tablet' produced before the court is a material object and the petitioner is not entitled to a copy of it. But his counsel shall be allowed to examine it in his presence and take notes in the presence of the prosecutor under the direct supervision of the Chief Ministerial Officer of the court, for which he shall file an application and obtain orders of the court below. The hard discs and the compact disc were not seized from him. So the prosecution has to prove their genuineness and authenticity. They can be only considered documents.

45. Sri Suman Chakkravarthy, learned Senior Public Prosecutor, submits that if copies of the above documents are given, there is every chance of their being circulated or published and tampered with. He relies on the decision of the Delhi High Court in Jasvinder Kalra v. C.B.I [MANU/DE/3629/2010 : 2011 Cr.LJ 1416]. In that case that the contention was that if a copy is issued to the accused of the documents produced in the case, it will affect the security of the state and would put some person's life in danger. The Delhi High Court accepted it and refused to give a copy of it.

46. The Supreme Court had occasion to consider whether the court can refuse to issue copies of documents to the accused for the reason that its contents is likely to be published and it would

affect the security of the nation. In Superintendent and Remembrancer of Legal Affairs, West Bengal v. Satyen Bhowmick and ors. [MANU/SC/0263/1981 : AIR 1981 SC 917] the argument before the Supreme Court was that if an accused is not supplied with copies, it is impossible for him to defend himself properly and instruct his lawyer to cross-examine the witnesses effectively. This was upheld by the court. But in that case the documents copies of which were applied for were statements of the witnesses recorded under Section 161 Cr.P.C. The documents copies of which have been applied for by the petitioner in this case are not such statements.

47. Sri Suman Chakravarthy submits that there may be cases in which the court has to refuse to furnish copies of documents to the accused. According to him, the right under Section 207 of Cr.P.C is not absolute, which is clear from the 2nd proviso to the section. He also has brought to my notice sub section 6 of Section 173 Cr.P.C. On the other hand, learned counsel Sri Revikrishnan submits that the court cannot add to the items that may be excluded. He relies on the decision of the Supreme Court in Tarun Tyagi v. Central Bureau of Investigation [MANU/SC/0179/2017 : 2017 (4) SCC 490].

48. Sub Section 6 of Section 173 of Cr.P.C. Is extracted below:

"(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceeding or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request."

49. This provision gives power to the investigating officer to request to the court to refuse to give copies of certain portions of the statements recorded under Section 161 Cr.P.C. though they are irrelevant. The two grounds for refusal are (1) interests of justice and (2) public interest. When such a request is made it is for the court to take a decision. Sri Ravikrishnan submits that this sub section is applicable to statements recorded under Section 161 Cr.P.C. and not to other documents, which is clear from the words 'any part of any such statement.' 'Such statement relates' to statements referred to in clause (b) in

sub-section 5. This statement is recorded under Section 161 Cr.P.C. only.

50. The two provisos to Section 207 Cr.P.C which are relevant for the present purpose are as follows:

"Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

51. The statement referred to in clause (iii) in Section 207 is the one recorded under Section 161 of the Code. The first proviso to Section 207 goes with sub section 6 of Section 173. The restriction that may be imposed by the court under the second proviso relates to documents and not statements under Section 161, in which case, the court may allow the accused only to inspect the documents.

52. If a literal interpretation is placed on the words 'such statement' in sub section 6 of section 173 of the Code, no doubt, the court has to hold that the sub section empowers it to refuse to give copies only of the statement recorded under Section 161 of the Code. It is well settled that if literal interpretation leads to absurdity, it should be avoided.

53. It may be examined what would happen if literal interpretation is placed on the words 'such documents'. Take a case where a doctor has issued a certificate for examination of a victim of rape and also has given a statement under Section 161 of the Code giving details of his examination. The court can refuse to give copies of the statement of the doctor recorded under Section 161, but cannot refuse to give copy of his certificate though both are identical statements.

54. It has already been seen that a gold ring or a sword or a counterfeit currency or a tree may be treated as a document in certain circumstances. Is it possible to give copies of these documents. A copy of them can be only their replica. Can the

court make replica of them and deliver to the accused. In such cases it is impossible to comply with Section 207 Cr.P.C. Can the court issue copy of a morphed photo of a girl which is obscene produced before it in a case.

55. If publication of the contents of a document infringes the right to privacy of a person other than the accused in a case, request to issue a copy of it shall be refused, Sri Suman Chakravarthy submits. In my opinion he is right. When there is a conflict between the fundamental right of a person and the statutory right of another, the former shall prevail. In this context the prohibition of disclosure of the identity of the victim contained in Section 228 A of the Indian Penal Code also is relevant.

56. The second proviso to Section 207 of the Code empowers the court to refuse to give copy of a document if it is voluminous. Interests of justice and public interest are better grounds to refuse to give copy of a document to accused.

57. What can be understood from the provisions in the Cr.P.C discussed above is that no prejudice shall be caused to the accused and once that is done, the court can refuse to supply copies of documents and statements on the grounds of interests of justice and public interest.

58. In Satyen Bhowmick's case (supra) the court ordered to supply copies to the accused though it was objected to on the ground of national security because there were safeguards in the statute against the misuse of the copies. In the absence of such safeguards in the statute, in my opinion, the court can refuse to supply to the accused copies of any document on the ground of 'interests of justice' or on 'public interest'.

59. The request of the petitioner to furnish to him copies of the contents of the hard discs, compact disc and pen drive cannot be refused on the ground of interests of justice or public interest.

60. In Tarun Tyagi v. Central Bureau of Investigation [MANU/SC/0179/2017 : 2017 (4) SCC 490] the question how to give a copy of an electronic record came up for consideration. The Supreme Court ordered to supply copy of the electronic records to the accused subject to two conditions. The petitioner also will be issued copies of the electronic records (except the contents of the 'tablet') subject to the said conditions.

61. It will be proper for the legislature to bring in an amendment to Section 207 of the Code of Criminal Procedure to insert a provision that the court can refuse to give the accused copy of any document on the grounds of interests of justice or public interest, which will be clarificatory in nature.

In the result, this CrI.M.C is disposed of

(1) directing the court below to supply copies of the electronic records the petitioner applied for except the contents of the 'tablet' subject to the following conditions:

(a) before supplying the copies, the contents of the records shall be recorded in the court in the presence of the petitioner's counsel as well as the public prosecutor or their representatives and both of them shall attest the veracity thereof so that there is no dispute about the contents later thereby removing the possibility of tampering thereof by the petitioner.

(b) the petitioner shall not make use of the source code contained in the said electronic records or misuse it in any manner and shall give an affidavit of undertaking to this effect in the trial court.

(2) and allowing the counsel for the petitioner to view the contents of the 'tablet' in the presence of the public prosecutor and the petitioner and take notes under the direct supervision of the Chief Ministerial Officer of the court in a closed room in the court building, for which the petitioner shall file an application and obtain orders of the court below.

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Citation: 2019 (4) KHC 928

**Jisal Rasak
Vs.
The State of Kerala**

ORDER

Raja Vijayaraghavan V., J.

1. The petitioner herein is the 2nd accused in C.P. No. 9 of 2019 on the file of the Judicial Magistrate of the First Class-II, Ernakulam. He has been charged for having committed offences punishable under Sections 302, 307, 120B, 143, 148, 341, 506(ii), 323, 326, 201 and 212 of the IPC.

2. In the course of investigation, the investigating officer chanced upon information that the congregation of some of the accused in and around the scene of crime immediately prior to the murder and also of the injured witness being carried away from the location had been captured in three security cams installed at nearby places. The footage was retrieved by following the procedure and the same was forwarded to the Cyber Forensic Lab for analysis and a report was obtained. The footage was produced before Court along with the final report by categorizing the same as a material object.

3. The petitioner approached the learned Magistrate and filed an application seeking to obtain copies of

(a) the CCTV footage relied on by the prosecution,

(b) the FSL report obtained from the Forensic Science Laboratory relating to the CCTV footage and

(c) the report submitted by the investigating agency seeking further investigation.

4. The prosecution vehemently opposed the handing over of the CCTV footage and it was argued that the footage having been produced as a material object, the digital copies of the same cannot be furnished. The learned Magistrate ordered for the issuance of the records, which were requested for, but refused to issue digital copies of the camera footage.

5. The above order is under challenge.

6. Sri. John S. Ralf, the learned counsel appearing for the petitioner, submitted that the learned Magistrate has egregiously erred in concluding that the electronic evidence relied on by the prosecution is a material object and in refusing to furnish copies of the same to the petitioner. He would contend that Section 3 of the Indian Evidence Act, 1872 defines "evidence" as all documents, including electronic records produced for the inspection of the Court. Referring to the relevant provisions of the Information Technology Act, 2000, it was argued that a document under Section 3 of the Indian Evidence Act would definitely include electronic records as defined under Section 2(t) of the Information Technology Act.

7. The learned counsel contended that the video footage produced before Court would clearly show that the petitioner was not there at the scene of crime and that he was roped in later on the basis of cooked up versions given by planted witnesses. Realizing fully well that the footage would destroy the very edifice of the prosecution case insofar as the petitioner is concerned, digital copies of the same is denied to him.

According to the learned counsel, one of the edifices on which the Criminal Justice System in this country is built upon is "fairness in trial". The Code provides an unbridled right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused place an implied obligation upon the prosecution to make fair disclosure and to supply the documents demanded. He would contend that the concept of fair disclosure would take within its ambit furnishing of a document, which the prosecution relies upon, whether filed in Court or not. Relying on the decision of the Apex Court in Sidhartha Vashisht v. State (NCT of Delhi) MANU/SC/0268/2010 : (2010) 6 SCC 1, it is vehemently urged that even in cases where during investigation, a document is bona fide obtained by the investigating agency, and in the opinion of the Prosecutor concerned is relevant and would help in arriving at the truth, that document should be disclosed to the accused. The learned counsel has filed a detailed statement narrating the evolution of the Information Technology Act, 2000 and the consequential amendments made in the various enactments, including the Indian Penal Code, 1860 and the Indian Evidence Act, 1872, to bolster his submissions.

8. Sri. Suman Chakravarthy, the learned Senior Public Prosecutor, has resisted the submissions advanced by the learned counsel appearing for the petitioner. Relying on a decision of this Court in Sherin V. John v. State of Kerala MANU/KE/0980/2018 : 2018 (3) KHC 725, it was argued that the law recognises a third category of evidence in addition to oral evidence as well as documentary evidence, which is 'real evidence' or 'physical evidence' and it consists of material objects other than documents produced for inspection of the Court. It is urged that material evidence is not covered under Section 207 of the Cr.P.C. and there is no law, which provides for the issuance of a copy of a material object. Alternatively, it is argued that the electronic record having been produced as a material object, it is a piece of real evidence and will not fall in the category of an electronic record or document. If that be the case, the prosecution is not obliged to serve

a copy of the same to the accused and for the self-same reason, the accused cannot clamor of prejudice and claim it as a matter of right. He submitted that CCTV footage, videos, photographs etc. may fall into the category of 'documents', but may in certain cases, become a 'material object'. Taking the analogy of an obscene book seized by the police, it is submitted that in the ordinary parlance, though the book may fall into the category of 'document', it is actually a material object and the possession of the same being an offence, the accused is not entitled to a copy. Same is the case with counterfeit currency etc. He would take much pains to point out that an information in an electronic device is a material object as long as it has a direct nexus with the offence committed. The question of privacy is also a consideration to be borne in mind by the Court, contends the learned Senior Public Prosecutor.

9. In view of the questions posed by rival sides, Sri. D. Prem Kamath, a promising young advocate, well versed in cyber law, was requested to assist the Court as Amicus Curiae.

10. Sri. D. Prem Kamath, the learned Amicus Curiae, elucidated on the reasons, which persuaded the legislature to bring in amendments to the Indian Evidence Act, 1872, and to incorporate necessary provisions regarding appreciation of digital evidence. The learned counsel very painstakingly took this Court through the relevant provisions of various enactments and it is persuasively argued that a combined reading of the definitions of "document" and "evidence" together with the provisions of the Information Technology Act unambiguously would lead to the conclusion that CCTV footage is definitely "data", which is an "electronic record" that comes within the definition of "document" and is evidence, as it has been produced for inspection before Court. According to Sri. Prem Kamath, the digital evidence produced before court would fall into the category of 'documentary evidence'.

11. I have considered the submissions advanced and have perused the records.

12. One of the basic principles of a fair hearing in a grave crime is that the

individual charged with a criminal offence be informed of the evidence that supports the allegations that have been formally lodged against him in a Court of law. The provisions of the Code of Criminal Procedure recognize the said right and the accused has a right under Section 173 to obtain the documents made mention of in the said provision. Sub-section (5) of Section 173 is particularly relevant, which reads as under:

"(1) xxxxx xxxxxx

(2) (i) xxxxx xxxxxx

xxxxx xxxxxx

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report-

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements- recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses."

13. Thus, it is imperative on the part of the Investigating Officer to forward all documents and relevant extracts, which the prosecution proposes to rely, so as to enable the learned Magistrate to hand over the same to the accused.

14. Section 207 of the Code makes it mandatory for the Court to furnish to the accused the following documents:

"(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of Section 173."

15. In Sidhartha Vashisht (supra), the Apex Court held that the Code provides a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case. This constitutional mandate and statutory rights given to the accused place an implied obligation upon the prosecution to make fair disclosure. The same view was taken in V.K. Sasikala v. State MANU/SC/0792/2012 : (2012) 9 SCC 771, wherein it was held that though it is only such reports which support the prosecution case that required to be forwarded to the Court under Section 173 (5) of the Cr.P.C., in every situation where some of the seized papers and documents do not support the prosecution case and, on the contrary, supports the accused, a duty is cast on the Investigating Officer to evaluate the two sets of documents and materials collected and, if required, to exonerate the accused at that stage itself. The Apex Court also had occasion to visualize a situation where the investigating officer ignores a part of the seized documents which favour the accused and forwards to the Court only those documents which support the prosecution. In such an event, the Court may have a duty to make available such documents to the accused regardless of the fact whether the same may not have been marked and exhibited by the prosecution. In other words, it will be the duty of the prosecution to disclose evidence to the accused persons, especially that, which might be potentially exculpatory or otherwise, which may have a negative impact on the weight of the evidence led by the prosecution or such evidence, which may support a proposed defence theory. The same view was taken in Tarun Tyagi v. CBI MANU/SC/0179/2017 : (2017) 4 SCC 490, wherein it was held that every document relied upon by the prosecution has to be supplied to the defence/accused at the time of supply of the charge sheet to enable such an accused to demonstrate that no case is made out against him and also to

enable him to prepare his cross-examination and defence strategy.

16. The contention of the learned Senior Public Prosecutor is based on the decision of this Court in *Sherin V. John* (supra), wherein it was held that material evidence is not covered under Section 207 of the Cr.P.C. It was also held in that case that there is no law providing for issuance of a copy of the material objects to the accused. The following conclusions were arrived at by the learned Single Judge in paragraph No. 41 of the judgment.

"41. From the foregoing discussion the following conclusions may be reached:

(i) Apart from oral and documentary evidence, there is a third category of evidence called material evidence, which consists of materials other than documents.

(ii) Only copies of documents can be given, but not of material objects.

(iii) When nothing is expressed or described upon a substance, it is only a material object.

(iv) When a matter is expressed or described upon a substance, it may be a document or a material object depending upon the purpose for which it is produced.

(v) If the identity of the author of the matter expressed or described upon a substance is relevant, it is a document; otherwise it is only a material object.

(vi) Where the only purpose for which a material object upon which a matter has been expressed or described is produced is to prove its seizure from the possession of the accused, and it is made part of the evidence by proving its seizure from his possession, the Court does not want the testimony of anyone to prove the matter since it has become a 'matter before the Court'."

17. I am of the view that *Sherin V. John* (supra) was rendered in a different fact situation and the learned Judge, who had decided the petition, had no occasion to consider the provisions of the Information

Technology Act, 2000 and the sweeping changes it brought to the provisions of the Indian Evidence Act, 1872.

18. Before delving into those aspects, it would be profitable to have a look at the definition of "real evidence". In *Phipson on Evidence*, Sixteenth Edition (South Asian), in page No. 5, the learned Author has defined 'real evidence', in the following words:

"Material objects other than documents, produced for inspection of the court are commonly called real evidence. This, when available, is probably the most satisfactory kind of all, since, save for identification or explanation, neither testimony or inference is relied upon. Unless its genuineness is in dispute, the things speaks for itself. "

Unfortunately, however, the term 'real evidence' is itself both indefinite and ambiguous having been used in three divergent senses.

(1) EVIDENCE FROM THINGS AS DISTINCT FROM PERSONS

(2) MATERIAL OBJECTS PRODUCED FOR INSPECTION OF THE COURT. This is the second and most widely accepted meaning of 'real evidence'. It must be borne in mind that there is a distinction between a document used as a record of a transaction, such as a conveyance, and a document as a thing. It depends on the circumstances in which classification it falls. On a charge of stealing a document, for example, the document is a thing.

(3) PERCEPTION BY THE COURT (OR ITS RESULT) AS DISTINCT FROM THE FACTS PERCEIVED.

Although the physical production of objects is a valuable factor in juridical proof and of use in terms of technical classification, it is questionable whether the term 'real evidence' is a very helpful one by which to express it. The phrases hardly ever used in practice, material objects being referred to either by name, or, more loosely, as circumstantial evidence. In textbooks, especially when dealing with classification the phrase is occasionally convenient. Which of its meaning then should be

retained? It seems advisable to adhere to the more usual definition, "material objects, other than documents, produced for the inspection of the Court".

19. Thus, essentially, material objects, other than documents produced for the inspection of the court are commonly called real evidence. If the electronic record produced for inspection before the court is a document, the question is whether the accused can be denied a copy of the same.

20. Before proceeding to decide the question raised, it would be apposite to bear in mind that major shifts in the Information Technology landscape from the mid 90's have made the collection and analysis of electronic evidence an increasingly important tool for solving crimes and to bring culprits to justice. Though digital evidence is conceptually the same as any other evidence, it has a much larger scope and the information can be used to pin people and events within the confines of a specific time and space and establish a causality in criminal cases. Great many sensational cases, wherein there is total absence of direct evidence have been solved and the culprits have been brought to book with the aid of electronic evidence. It has to be borne in mind that electronic evidence is volatile, easily altered, damaged or destroyed, time sensitive and not bound by territorial jurisdictions. In almost all cases, call data records, chat messages, security cam videos, whatsapp profiles and facebook status messages provide valuable clues to zero in on the offender and the law enforcement agencies extensively rely on such forms of electronic evidence before court in aid of the prosecution.

21. The importance of production of scientific and electronic evidence in court after complying with the procedural formalities was highlighted by the Apex Court in Tomaso Bruno and Other v. State of U.P. MANU/SC/0057/2015 : 2015 (7) SCC 178, wherein it was held as follows:

"25. With the advancement of information technology, scientific temper in the individual and at the institutional level is to pervade the methods of investigation. With the increasing impact of technology in everyday life and as a result, the production of electronic evidence in cases has become

relevant to establish the guilt of the accused or the liability of the defendant. Electronic documents *stricto sensu* are admitted as material evidence. With the amendment to the Indian Evidence Act in 2000, Sections 65A and 65B were introduced into Chapter V relating to documentary evidence. Section 65A provides that contents of electronic records may be admitted as evidence if the criteria provided in Section 65B is complied with. The computer generated electronic records in evidence are admissible at a trial if proved in the manner specified by Section 65B of the Evidence Act. Sub-section (1) of Section 65B makes admissible as a document, paper print out of electronic records stored in optical or magnetic media produced by a computer, subject to the fulfillment of the conditions specified in sub-section (2) of Section 65B. Secondary evidence of contents of document can also be led under Section 65 of the Evidence Act. PW-13 stated that he saw the full video recording of the fateful night in the CCTV camera, but he has not recorded the same in the case diary as nothing substantial to be adduced as evidence was present in it.

26. Production of scientific and electronic evidence in court as contemplated under Section 65B of the Evidence Act is of great help to the investigating agency and also to the prosecution. The relevance of electronic evidence is also evident in the light of Mohd. Ajmal Mohammad Amir Kasab vs. State of Maharashtra, MANU/SC/0681/2012 : (2012) 9 SCC 1, wherein production of transcripts of internet transactions helped the prosecution case a great deal in proving the guilt of the accused. Similarly, in the case of State (NCT of Delhi) vs. Navjot Sandhu @ Afsan Guru, MANU/SC/0465/2005 : (2005) 11 SCC 600, the links between the slain terrorists and the masterminds of the attack were established only through phone call transcripts obtained from the mobile service providers.

27. The trial court in its judgment held that non-collection of CCTV footage, incomplete site plan, non-inclusion of all records and sim details of mobile phones seized from the accused are instances of faulty investigation and the same would not affect the prosecution case. Non-production of CCTV footage, non-collection of call records (details) and sim details of mobile phones

seized from the accused cannot be said to be mere instances of faulty investigation but amount to withholding of best evidence. It is not the case of the prosecution that CCTV footage could not be lifted or a CD copy could not be made."

22. In *Tomaso Bruno (supra)*, the Apex Court deprecated the prosecution for not producing the CCTV footage and call records which would have been invaluable to establish the prosecution case. In landmark cases such as in *Mohd. Ajmal Mohammad Amir Kasab v. State of Maharashtra* MANU/SC/0681/2012 : (2012) 9 SCC 1, and in *State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru* MANU/SC/0465/2005 : (2005) 11 SCC 600, electronic evidence was called in aid to pin point the guilt of the accused. It has to be recognized, therefore, that electronic records are created with every day actions of individuals and in criminal offences, it is extensively used to establish the guilt of the accused.

23. In *State v. S.J. Choudhury* MANU/SC/2199/1996 : (1996) 2 SCC 428, the Apex Court had occasion to observe that the Indian Evidence Act, 1872 by its very nature is an "ongoing Act". In view of the rapid advances in technology, the extant statutes will have to be interpreted in such a manner so as to increase its acceptability. The courts will not be justified in placing unnecessary roadblocks in the acceptability of evidence, particularly of the digital variety. Keeping in mind these aspects, the legislature enacted the Information Technology Act, 2000 and later harmonized the Evidence Act to seamlessly accept electronic evidence to advance the cause of justice. Conventional means of records and data processing have become outdated and the rules relating to admissibility of electronic evidence and its proof were incorporated into Indian Laws. The legislature, it appears, was cognizant of the fact that if the procedural and substantive laws do not keep pace with the speed of change in the society, the casualty would be the interest of justice.

24. In the above background, we may have a glance at the relevant provisions of the Information Technology Act, 2000.

"Sections 2(t), defines "electronic record" to mean data, record or data generated, image

or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche. (Micro fiche is nothing but a flat piece of film containing micro-photographs of the pages of a newspaper, catalogue, or other document). In other words, any data, record or data generated, image or sound stored, received or sent in electronic form is an electronic record.

Section 2(r) defines "electronic form" to mean any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device. Thus, any relevant information, if retained in the above media, then it can very well be said to be kept in electronic form.

"Information" has been defined under Section 2(v) to include data, message, text, images, sound, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche.

"Data" has been defined under Section 2(o) to mean a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts, magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer."

25. The Information Technology Act also defines computer resource, computer network, computer system and computer device. Thus, data, information or any other content generated kept stored, sent, received, and communicated through electronic, magnetic, optical and digital media has to be dealt with as per the provisions of the Information Technology Act, 2000 and such electronic evidence can be admitted and proved in courts in accordance with the special provisions as to evidence relating to electronic record as provided under Section 65B of the Indian Evidence Act, 1872.

26. In this context, it would be relevant to take note of the fact that electronic records are not limited to mere computer outputs such as scanned documents or printouts, which are ordinarily used in the course of business. It includes any data, information or other record stored in electronic medium irrespective of when, how or by whom such record was created. It may include sound recordings of intercepted communications or video footage of crimes. It may also comprise of voluminous data stored on cloud services wherein the device and storage infrastructure are indeterminable. It may also be stored in third party storage platforms, or in social media platforms like Facebook, Twitter, Whatsapp etc. or in e-mails and Camera Footage or photographs. Thus the wide scope of obtaining digital evidence yields a commensurate potential for recoverable evidence.

27. Section 4 of the Information Technology Act provides for legal recognition of electronic records. It states that where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is--

(a) rendered or made available in an electronic form; and

(b) accessible so as to be usable for a subsequent reference.

28. Now, let us have a glance at the relevant provisions of the Indian Evidence Act, 1872.

"Evidence" has been defined to mean and include.-

) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;

) all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence."

29. Thus, after the amendment which was brought into effect from 17.10.2010,

electronic records have been placed in the category of documentary evidence.

30. Section 22A of the Indian Evidence Act states that oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question. Section 59 of the Indian Evidence Act speaks about proof of facts by oral evidence. It states that all facts, except the contents of documents or electronic records, may be proved by oral evidence.

31. A combined reading of Sections 22A and 59 of the Indian Evidence Act would unmistakably show that the contents of electronic records are not expected to be proved by oral evidence. The provisions also say that oral admissions of the contents of electronic records are not relevant, unless its genuineness is in question.

32. The provision in the Indian Evidence Act which enables the Court to require for the production of material thing for its inspection is Section 60. The principle underlying Section 60 is that all facts except the contents of documents may be proved by oral evidence, which must in all cases, be direct. That is, it must consist of a declaration by the witness that he perceived by his own senses the fact to which he testifies. The effect of the section is, subject to the proviso, to exclude opinions given at second hand, which is otherwise called hearsay. The second proviso to Section 60 reads as follows:

"Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection."

33. In other words, if the oral evidence refers to the existence or condition of a material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection. Thus, when material objects such as weapon of offence, clothes or other personal items of the victim or any other thing which is referred by the witnesses are produced in Court, it is regarded as a thing and it can be relied on as it is. It is next to impossible to supply copies of the same to

the accused. However, after the advent of technology, the line between categorizing a thing as a 'material thing' or a document has become more or less obliterated. If a hard disk or a magnetic disk containing data is stolen and the same is seized and produced in court, it may sometimes be difficult to categorize it as 'a thing' produced for inspection of the court or a 'document'. One way of distinguishing it is by asking a question as to whether the item is relevant in itself or whether the item is relevant because of the information that can be retrieved from it. In other words, if a material thing is produced in court to rely on the data that it contains, it is probably a document and it has to be regarded as such. On the other hand, if the material thing is brought to court in order to rely on it as it is, it is a thing and may be exhibited as a material object.

34. In Tarun Tyagi (supra) on the allegation that the accused had stolen source codes of a software, a search was conducted in his house and hard disks were seized. At the stage of Section 207 of the Code of Criminal Procedure, all other records except for the cloned copies of the Hard Disk were supplied to the accused. The accused approached the Apex Court and contended that the copies of the hard disks are to be supplied to demonstrate during trial that no case is made out against him. He also contended that the cloned copies are required for enabling him to prepare his cross examination and a proper defense strategy. The CBI opposed the prayer and it was urged that the accused would misuse the same. The Apex Court repelled the contention and the cloned copies of the hard disk were ordered to be supplied to the accused.

35. In view of the above discussion and on a proper understanding of the provisions of the Information Technology Act, 2000 and the Indian Evidence Act, 1872, it can be deduced that the CCTV footage in the instant case is "data" as defined under Section 2(o) of the Information Technology Act, 2000 and it is an electronic record as defined under Section 2(t) of the I.T. Act. If that be the case, the electronic record produced for the inspection of the Court has to be regarded as documentary evidence. In that view of the matter, I am unable to accept the logic of the prosecution in

producing the CCTV footage as a material object and in refusing to supply a copy of the same to the accused. I hold that cloned Digital copies of the footage relied on by the prosecution have to be made available to the accused, unless it is impracticable or unjustifiable. For instance, in a case of brutal sexual abuse, if the incident has been videotaped, in view of the element of privacy or to prevent misuse, copy may be refused. In a case in which the accused is being prosecuted for possessing pedophilic material, copies of the same can be refused. In such cases, the Court may grant permission to the counsel or the accused to have a private screening to have a proper defense. Same is the case in a terrorism prosecution, wherein national security interests demands non-disclosure of the digital evidence, which has been collected. These are merely illustrative and not exhaustive. As an adversarial system is followed in our country, the accused is entitled to a copy of the records so that he can bring to the notice of the courts exculpatory material or such other aspects in the prosecution case, which may be to his advantage.

36. At this stage, the question of certification under Section 65B of the Indian Evidence Act was raised by the learned counsel appearing for the petitioner.

37. Any documentary evidence by way of an "electronic record" under the Indian Evidence Act can be proved only in accordance with the procedure prescribed under Section 65B of the Indian Evidence Act, 1872. This is what is provided under Sections 59 and 65A of the Indian Evidence Act. Section 59 provides that all facts except the contents of document or "electronic evidence", may be proved by oral evidence. Section 65A provides that the contents of electronic records may be proved in accordance with the provisions of Section 65B of the Act. Section 65B deals with the admissibility of "electronic records". Section 65A and Section 65B were introduced into the Evidence Act in 2000 providing special processes for proving copies of extracts of electronic records. It provided a method of certifying the authenticity of the copy and the integrity of the content of such copy. In other words, any electronic record, which is printed, stored, recorded or copies made on to an optical or magnetic media and

produced by a computer will be deemed to be a document only if the conditions set out in Section 65B(1) of the Evidence Act are satisfied and it was held so in Anwar P.V. v P.K. Basheer MANU/SC/0834/2014 : (2014)10 SCC 473. However, in Shafhi Mohammed v. State of H.P. MANU/SC/0331/2018 : (2018) 5 SCC 311 the Apex Court revisited the principles laid down in Anwar P.V. (supra) and it was held that the applicability of procedural requirement under Section 65B(4) of the Evidence Act for furnishing certificate is not always mandatory. Later, in the case of Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal (Civil Appeal No(s). 2407 of 2018 and connected cases) by interim order dated 26.7.2019, their Lordships of the Apex Court had ordered that in view of Anwar P.V. (supra), the pronouncement of this Court in Shafhi Mohammad (supra) needs reconsideration and the matter was referred to be considered by a larger Bench. However, in the instant case, the said question is merely academic as Sri. Suman Chakravarthy, the learned Senior Public Prosecutor, submitted that the requisite certification under Section 65B of the Indian Evidence Act has been obtained for the electronic evidence. In that view of the matter, there is no embargo in providing to the accused a copy of the CCTV Footage, which is relied on by the prosecution in the subject case.

38. In the case on hand, I have no doubt in my mind that the investigating agency has committed a grave error by producing the CCTV footage as a material object and also in refusing to give a copy of the same to the accused. The accused is entitled to a digital copy of the CCTV footage, which is relied on by the prosecution to prove the charge. That being the case, the order passed by the learned Magistrate will stand set aside.

39. This petition will stand allowed. The digital copies of the electronic record relied on by the prosecution and sought for by the petitioner shall be issued to him by imposing appropriate safeguards that the jurisdictional court may deem fit and proper.

Before parting, I place on record my deep sense of appreciation to Sri. John S. Ralph, the learned counsel appearing for the petitioner, Sri. Suman Chakravarthi, the

learned Senior Public Prosecutor and Sri. D. Prem Kamath, the learned Amicus curiae, for their invaluable assistance.

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Citation: AIR 2017 SC 3441

IN THE SUPREME COURT OF INDIA

**Sonu
vs.
State of Haryana**

Judges/Coram:

S.A. Bobde and L. Nageswara Rao, JJ.

CaseNote:

Criminal - Conviction - Appreciation of evidence - Sections 120B, 201, 302, 328A and 364A of Indian Penal Code, 1860 and Section 65B of Indian Evidence Act, 1872 - Trial convicted Appellants/Accused under Sections 120B, 364A, 302, 328A and 201 read with 120B of Code - High Court confirmed conviction order - Present appeal filed against confirmation of conviction order - Whether order of conviction was justified.

Facts:

The Additional Sessions Judge by his order convicted Accused under Sections 120B, 364A, 302, 328A and 201 read with 120B of Code. All the convicted Accused filed appeals before the High Court. The High Court dismissed all the appeals after a detailed re-appreciation of the material on record. Accused have approached present Court by filing appeals against the confirmation of their conviction and sentence.

Held, while dismissing the appeal:

(i) The dead body was that of deceased as identified by his relatives. The medical evidence shows that the skin was peeled off at several places but the features of the body could easily be made out. There was sufficient evidence on record to suggest that 4th Accused was in constant touch with the other Accused. His mobile phone and the recoveries that were made pursuant to the disclosure statement would clearly prove his involvement in the crime. [20] and [21]

(ii) Call Detail Records (CDRs) did not fall in the said category of documents. An objection that CDRs were unreliable due to violation of the procedure prescribed in Section 65B(4) of Act could not be permitted to be raised at this stage as the objection relates to the mode or method of proof. All the criminal Courts in this country are bound to follow the law as interpreted by present Court. Because of the interpretation of Section 65B of Act in Navjot Sandhu case, there was no necessity of a certificate for proving electronic records. Electronic records without a certificate might have been adduced in evidence. There was no doubt that the judgment of present Court in Anvar's case has to be retrospective in operation unless the judicial tool of prospective overruling was applied. However, retrospective application of the judgment was not in the interests of administration of justice as it would necessitate the reopening of a large number of criminal cases. Criminal cases decided on the basis of electronic records adduced in evidence without certification have to be revisited as and when objections were taken by the Accused at the appellate stage. Attempts would be made to reopen cases which have become final. [27] and [32]

JUDGMENT

L. Nageswara Rao, J.

1. The Appellants in the above appeals along with Dharmender @ Bunty were found guilty of abduction and murder of Ramesh Jain. They were convicted and sentenced for life imprisonment. Their conviction and sentence was confirmed by the High Court. Accused Dharmender @ Bunty did not file an appeal before this Court. Accused Rampal was convicted Under Section 328 read with 201 Indian Penal Code and was sentenced to 7 years imprisonment. His conviction was also confirmed by the High Court which is not assailed before us.

2. Dinesh Jain (PW-1) approached the SHO, Ganaur Police Station (PW 31) at 01:30 pm on 26.12.2005 with a complaint that his father was missing on the basis of which FIR was registered by PW 31. As per the FIR, Dinesh Jain left the rice mill at 7:00 pm on 25.12.2005 and went home while his father stayed back. As his father did not reach home even at 10:00 pm, he called his father's mobile number and found it to be switched of. He went to the rice mill and enquired about the whereabouts of his father from Radhey, the Chowkidar and was informed that his father left the rice mill at 9:30 pm on his motor cycle bearing Registration No. DL-8-SY-4510. He along with his family members searched for his father but could not trace him. He apprehended that his father might have been kidnapped.

3. After registration of the FIR, PW 31 started investigation by visiting the rice mill and making inquiries. On 28.12.2005 one motor cycle was recovered from a pit near Bai crossing. As the number plate of the vehicle was blurred, PW31 verified the engine number, compared it with the registration certificate to find that the seized motor cycle belonged to Ramesh Jain.

4. On 09.01.2006, Dinesh Jain (PW 1) and Ashok Jain (PW 3) informed PW 31 that a call was received on the mobile phone of PW 1 from a person who identified himself as Bunty and who was speaking in Bihari dialect. He informed them that Ramesh Jain was in his custody and demanded a ransom of Rs. 1 crore for his release. They were also asked to purchase another mobile phone having Delhi network to which future calls would be made. The Investigating Officer (PW31) visited the rice mill belonging to deceased Ramesh Jain on 17.01.2006 and met PW 1, PW3

and Dhir Singh (PW 7). They handed over four threatening letters (Exh. P 1 to P 4), one key ring (Exh. P 9), one silver ring having a precious stone (Exh. P 10) and a piece of cloth of a shirt worn by the deceased on 25.12.2005 when he was kidnapped (Exh. P11). PW 1 and PW 3 informed the Investigating Officer that Bunty called them and told them that they would find the key ring, silver ring, a piece of cloth and cuttings of newspaper near Bai crossing. They collected the said articles from Bai crossing.

5. The Investigating Officer along with SHO Special Cell, Rohini, Delhi constituted three raiding parties on 20.01.2006 on the basis of information that the Accused would visit Tibetan Market. Pawan (A1), Surender (A2) and Dharmender @ Bunty (A3) were arrested at 11:45 pm when they visited the Tibetan Market, Delhi in a Maruti car. Their mobile phones and some cash were recovered from them.

6. On 22.01.2006, Amar @ Sonu (A5) and Parveen (A4) were arrested near the bus stand at Ganaur Chowk, GT Road, Ganaur. Two mobile phones were seized from Sonu (A5). Parveen @ Titu (A4) suffered a disclosure statement during the course of investigation that Ramesh Jain was abducted and a demand of Rs. 1 crore was made from his family members for his release. Parveen (A4) stated that Ramesh Jain was murdered and his dead body was buried at Baba Rude Nath temple in village Kheri Khusnam. In his disclosure statement, Surender (A2) further disclosed that Dr. Rampal administered injections to keep Ramesh Jain unconscious. He further disclosed that Ramesh Jain was murdered on 29.12.2005 and his dead body was buried in a pit at Baba Rude Nath temple. Dharmender @ Bunty (A3) and Surender (A2) also suffered disclosure statements in which they stated that they can identify the place where Ramesh Jain was murdered and buried.

7. The Investigating Officer was led by Parveen (A4), Dharmender (A3) and Surender (A2) to Baba Rude Nath temple in village Kheri Khusnam on 22.01.2006. The room in which Ramesh Jain was confined and murdered was pointed out by A2 to A4. The dead body of Ramesh Jain was exhumed from the place identified by A2 and A4. PW1, PW3, PW6 along with PW11 Jai Chand, SDM

were present at the spot from where the dead body of Ramesh Jain was taken out from the pit.

8. On 24.01.2006, a disclosure statement was made by Parveen (A4) pursuant to which he identified the place where the key ring of the motor cycle, threatening letters and a ring of deceased Ramesh Jain were placed near a sign board at the crossing of village Bai. He further disclosed that he concealed another ring of Ramesh Jain at his house in village Ghasoli at a place which he can only identify. Parveen led the police party to the place where he concealed the golden ring of the deceased which was identified by PW1 and recovered through memo Exh. PT/5. Dharmender @ Bunt (A3) led the police party to a rented room situated at Shashtri Park, Delhi from where the SIM card of mobile No. 9896351091 belonging to deceased Ramesh Jain was recovered from a concealed place. Pursuant to a disclosure statement, he also identified the place where the motor cycle of deceased was thrown after he was abducted. On 30.01.2006, Sonu @ Amar suffered a disclosure statement to the effect that he had concealed the wallet of Ramesh Jain and certain documents like PAN card, diary, three electricity bills, two water bills and his photographs underneath the seat of his shop which were exclusively in his knowledge. The said documents were seized by the Investigating Officer from the shop belonging to Sonu @ Amar (A5). The registration certificate of the motor cycle of deceased Ramesh Jain was recovered from a drawer of the table in the house situated at Begha Road, Ganaur which was occupied by Pawan (A1) pursuant to a disclosure statement by him. A country made pistol with two live cartridges were recovered from the same room situated at Begha Road on the basis of disclosure statement made by Surender (A2).

9. Dr. Ram Pal (A6) surrendered in the Court of Sub Divisional Judicial Magistrate (SDJM), Ganaur on 01.02.2006. He suffered a disclosure statement on the basis of which a syringe which was used for giving injections to keep the deceased unconscious was seized from the roof of Baba Rude Nath temple, village Kheri Khusnam. A spade was also recovered from underneath a cot in his house on the basis of his disclosure statement.

10. The Investigating Officer collected the Call Detail Records (CDRs) of all the mobile phones that were recovered from the accused, mobile phones of the deceased and Dinesh Jain (PW 1) from the Nodal officers of the mobile companies.

11. Accused Manish (A7) who is a cousin of Sonu (A5) surrendered on 12.04.2006 in the Court of SDJM, Ganaur. He is alleged to have assisted A5 in the abduction. He was acquitted by the Trial Court which was confirmed by the High Court which remains unchallenged. The Accused were tried for offences punishable Under Section 120B, 364A, 302, 328A and 201 read with 120B of the Indian Penal Code. In addition, A2 was also charged for committing an offence Under Section 25 of the Arms Act. The Additional Sessions Judge, Sonapat by his judgment dated 11.10.2010 convicted A1 to A5 for the aforesaid offences and sentenced them to life imprisonment. A6 was convicted Under Section 328 and 201 of Indian Penal Code and sentenced to seven years. All the convicted Accused filed appeals before the High Court. Dinesh Jain (PW 1) filed an appeal for enhancement of the sentence of the convicted Appellants. He also challenged the acquittal of Accused Manish (A7). The High Court dismissed all the appeals after a detailed re-appreciation of the material on record. A1, A2, A4 and A5 have approached this Court by filing appeals against the confirmation of their conviction and sentence.

12. We have carefully examined the entire material on record and the judgments of the Trial Court and the High Court. The Trial Court relied on the testimonies of PW1 and PW3, the recoveries made pursuant to the disclosure statements of the Accused and the CDRs of the mobile phones of the accused, the deceased and PW 1 to conclude that the prosecution established that the Accused are guilty beyond reasonable doubt. The Trial Court also discussed the complicity of each of the Accused threadbare. The High Court re-appreciated the evidence and placed reliance on the disclosure statements, the consequential recoveries and the CDRs of the mobile phones to confirm the findings of the Trial Court.

13. Ramesh Jain left his rice mill at 9:30 pm on 25.12.2005. His dead body was exhumed from the premises of the temple in village Kheri Khusnam on the intervening night of 22/23.01.2006. The post mortem examination was conducted by Dr. Pankaj Jain (PW16) on 23.01.2006. He deposed that the process of decomposition was in progress. The skin was peeled off at most places. A muffler was present around the neck of the dead body. Both wrists and ankles were tied by a piece of cloth. The hyoid bone was found fractured. In the opinion of PW 16, Ramesh Jain died of asphyxia. The probable time of death, according to him, was 3/4

weeks prior to 23.01.2006. He also deposed that the process of decomposition would be slower during winter. Dinesh Jain (PW1) deposed that there was a demand of ransom of Rs. 1 crore for the release of his father which was made through a telephone call on 06.01.2006 from a person who identified himself as Bunty and who was speaking in Bihari dialect. He also spoke of the calls that were made from the mobile phone bearing No. 9896351091 belonging to his father on 08.01.2006 and 09.01.2006 by which the ransom demands were repeated. He further stated about the threatening letters received by him at his shop address. He also deposed that he collected a piece of shirt worn by his father on the day of his abduction along with one silver ring and a key ring of the motor cycle of his father at a place specified in a call received by him on 16.01.2006. He was present when the dead body of his father was being taken out and he video-graphed the exhumation. Ashok Jain (PW3) who is the brother of deceased Ramesh Jain, corroborated the evidence of PW1 regarding the demands that were made for payment of ransom for the release of Ramesh Jain.

14. The arrest of A1 to A3 from Tibetan Market, Delhi at 11:45 pm on 20.01.2006 led to several disclosure statements made by the Accused pursuant to which relevant material was recovered. The details of recoveries made from each of the Accused will be discussed later. The dead body of the deceased Ramesh Jain was also recovered pursuant to a disclosure statement made by A2 to A4. The CDRs that were obtained from the Nodal officers of the telephone companies which were exhibited in the Court without objection clearly prove the complicity of all the accused. A detailed and thorough examination of the number of calls that were made between the Accused during the period 25.12.2005 to 20.01.2006 was made by the Courts below to hold the Accused guilty of committing the offences. We do not see any reason to differ from the conclusions of the Courts below on the basis of the evidence available on record. Neither do we see any perversity in the reasons and the conclusion of the Courts below. The jurisdiction of this Court in criminal appeals filed against concurrent findings is circumscribed by principles summarised by this Court in **Dalbir Kaur v. State of Punjab** MANU/SC/0144/1976 : (1976) 4 SCC 158, as follows:

8. Thus the principles governing interference by this Court in a criminal appeal by special leave may be summarised as follows:

(1) that this Court would not interfere with the concurrent finding of fact based on pure appreciation of evidence even if it were to take a different view on the evidence;

(2) that the Court will not normally enter into a re-appraisal or review of the evidence, unless the assessment of the High Court is vitiated by an error of law or procedure or is based on error of record, misreading of evidence or is inconsistent with the evidence, for instance, where the ocular evidence is totally inconsistent with the medical evidence and so on;

(3) that the Court would not enter into credibility of the evidence with a view to substitute its own opinion for that of the High Court;

(4) that the Court would interfere where the High Court has arrived at a finding of fact in disregard of a judicial process, principles of natural justice or a fair hearing or has acted in violation of a mandatory provision of law or procedure resulting in serious prejudice or injustice to the accused;

(5) this Court might also interfere where on the proved facts wrong inferences of law have been drawn or where the conclusions of the High Court are manifestly perverse and based on no evidence.

15. Admittedly, there is no direct evidence of kidnapping or the murder of Ramesh Jain. This is a case of circumstantial evidence. In a catena of cases, this Court has laid down certain principles to be followed in cases of circumstantial evidence. They are as under:

1. The circumstances from which an inference of guilt is sought to be proved must be cogently or firmly established.

2. The circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

3. The circumstances taken cumulatively must form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the Accused and none else.

4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the Accused and such evidence should

not only be consistent with the guilt of the Accused but should be inconsistent with his innocence.

(See: Shanti Devi v. State of Rajasthan, MANU/SC/0872/2012 : (2012) 12 SCC 158); (See also: Hanumant v. State of Madhya Pradesh MANU/SC/0037/1952 : (1952) SCR 1091 (P.1097) Sharad Birdhichand Sarda v. State of Maharashtra MANU/SC/0111/1984 : (1984) 4 SCC 116).

16. Applying the above principles to the facts of this case, we find that the following circumstances would lead to the conclusion of guilt against the accused:

A. The deceased was missing from 23.12.2005 and his dead body was dug out from the premises of a temple on 23.01.2006.

B. Demand of ransom for the release of the deceased is proved by the oral testimonies of PW1 and PW3.

C. Disclosure statements of A2 to A4 and the recovery of the dead body from the premises of the temple.

D. Disclosure statements made by the Accused pursuant to which there was recovery of several articles belonging to the deceased including the SIM card of his mobile number, wallet containing his personal belongings, etc.

E. The CDRs of the mobile which clearly show the interaction of the Accused during the period from 25.12.2005 to 20.01.2006 as well as the calls made to PW1 including the calls made from the mobile phone of the deceased.

F. The silver ring, key ring of the motor cycle and a piece of cloth worn by the deceased on 25.12.2005 which were sent to PW1 by the accused.

17. We deem it proper to consider the submissions made by the learned Counsel for the accused.

A1-Pawan (Criminal Appeal No. 1416 of 2013)

18. The registration certificate of motor cycle No. DL-8-SY-4510 of the deceased was recovered from A1 pursuant to the disclosure statement

Exh. PDD. The registration certificate was recovered from the drawer of a table lying in the room of his house situated at Begha Road, Ganaur.

19. Mr. D.B. Goswami, learned Counsel appearing for A1 submitted that A1 and A4 are brothers. A4 and A2 were partners in transport business. He submitted that A1 was arrested from his house in his village Ghasoli, District Sonapat. He relied upon the evidence of DW 2 and DW 5 in support thereof. DW2 and DW 5 who are residents of village Ghasoli deposed that police personnel visited the village around 9 am in search of Parveen (A4) on 20.01.2006. They stated that A1 accompanied the police to the police station. He travelled in his own car and the police went in the Govt. Jeep. On the other hand, the case of the prosecution is that A1 was arrested along with A2 and A3 at 11:45 PM on 20.01.2006 at Tibetan Market, Delhi. The police from Rohini Police Station, Delhi were also involved in the raid pursuant to which A1 was arrested. The interested testimonies of DW2 and DW5 do not merit acceptance, especially when the prosecution has proved the arrest and the subsequent recoveries made pursuant to the disclosure statement of A1. The learned Counsel submitted that the application filed by A1 to take his voice sample was rejected by the Trial Court and so he cannot be found fault with for not giving his voice sample. A1 refused to give his voice sample when the prosecution moved the Court. Thereafter, A1 filed an application to take his voice sample and the said application was disposed of by the Trial Court giving liberty to A1 to file again after the prosecution evidence was completed. Therefore, the learned Counsel for A1 is wrong in contending that his application for giving voice samples was rejected by the Court. The learned Counsel further submitted that the CDRs of the mobile phone of A1 would suggest that he was making calls only to A2, A3 and A4. He made an attempt to justify the calls on the ground that A4 was his brother and A2 was his brother's partner. No justification has been given for the 28 calls between him and A3 who is from Bihar and who was making the calls demanding a ransom of Rs. 1 crore from PW 1.

A2-Surender (Criminal Appeal No. 1652 of 2014)

20. A2 was arrested on 20.01.2006 in Tibetan Market, Delhi along with A1 and A3 and was found to be in possession of a mobile phone bearing No. 9813091701 which was used by him for conversing with A1, A3 and A4 between

25.12.2005 to 20.01.2006. Three STD booth receipts Exh. P41, P42 and P43 were recovered from A2. These receipts showed calls being made to mobile No. 9896001906 which belongs to A5 Sonu. He was a resident of Jhinhana village and the calls made from the STD booth with telephone No. 01398257974 pertain to Jhinhana. An amount of Rs. 20,000/- was also recovered from him at the time of his arrest. The said amount was supposed to have been given to him by A5 Sonu. Pursuant to his disclosure statement Exh. PCC A2 led the police party to his rented accommodation at Begha Road, Ganaur and a country made pistol with two live cartridges. 315 bore were recovered in the presence of PW5 Mohan Lal. He also identified the place of abduction of Ramesh Jain at Ganaur and the place where the dead body was buried at Baba Rude Nath temple in village Kheri Khusnam. Mr. Ram Lal Roy, learned Counsel for A2 doubted the recovery of the country made pistol and cartridges. He submitted that the dead body recovered on 22.01.2006 is that of a priest and not of Ramesh Jain. There is no foundation laid by the defence in support of this contention. There is nothing on record to prove that the dead body is that of a priest. We are of the opinion that the dead body is that of Ramesh Jain as identified by his relatives. The medical evidence shows that the skin was peeled off at several places but the features of the body could easily be made out. PW 16 also deposed that decomposition is slow in winter months. We have perused the photograph of Ramesh Jain and compared it with a photograph of the dead body recovered. We are convinced that the body recovered is that of the deceased Ramesh Jain.

A4-Parveen @ Titu (Criminal Appeal No. 1653 of 2014)

21. The STD booth receipt Exh. P44 showing a call made from STD booth having No. 01398257974 from Shamli village in Uttar Pradesh was recovered from A4 at the time of his arrest on 22.01.2006. As per the receipt, a call was made to mobile No. 9896001906 which belongs to Sonu (A5). Pursuant to the disclosure statement made by him, he identified the place at village Bai crossing on GT Road where he kept the key ring of motor cycle, silver ring belonging to deceased Ramesh Jain and the threatening letters. A golden ring of the deceased was also recovered from his residential house at village Ghasoli. He also made a disclosure statement which led the police to the place where the deceased was wrongfully confined. His SIM card with mobile No. 9812016269 was seized from his

residential house. There is sufficient evidence on record to suggest that he was in constant touch with the other accused. His mobile phone and the recoveries that were made pursuant to the disclosure statement would clearly prove his involvement in the crime.

A5-Sonu (Criminal Appeal No. 1418 of 2013)

22. Mr. Sidharth Luthra, learned Senior Counsel appearing for A5 submitted that it is highly improbable that A5 was arrested at a bus stop at Ganaur Chowk, GT Road, Ganaur. According to him, A5 was arrested on 20.01.2006 at 10:15(30) pm from his house. He relied upon the evidence of DW5 and DW8. We do not find any substance in the submission that A5 was arrested on 20.01.2006 itself as it is clear from the testimony of DW8 that no complaint was made regarding the forcible arrest of A5 on 20.01.2006. A disclosure statement was made by A5 which was marked as Exh. PBB pursuant to which there was a recovery of the wallet belonging to the deceased from the shop of A5. A laminated PAN card, one passport size photograph of the deceased, three electricity bills, two water bills and a small diary of Jain Mantras bearing title 'Aanu Purvi' were recovered from underneath the seat of his Aarat shop at Ganaur Mandi. The STD booth receipts which were recovered from A2 Surender and A4 Parveen at the time of their arrest show that they made calls on the mobile No. 9896001906 belonging to A5 on 29th and 30th December, 2005. A5 also received a call from an STD booth in Patna on 06.01.2006. Pursuant to a disclosure statement made by him an Indica car bearing No. DL-3CW-2447 which was used in the abduction was seized. The recoveries made pursuant to the disclosure statements of A5 cannot be relied upon, according to Mr. Luthra. He referred to the six disclosure statements made by A5 between 22.01.2006 and 04.02.2006. He commented upon the improbability of recovery of the wallet from underneath his seat at his shop. He also submitted that the recovery is from a public place accessible to everybody and so the recoveries made cannot be relied upon. We disagree with Mr. Luthra as the recovery of the wallet from underneath his seat is something which is to his exclusive knowledge though other people might have access to his shop.

23. Mr. Luthra contended that the CDRs are not admissible Under Section 65B of the Indian Evidence Act, 1872 as admittedly they were not certified in accordance with Sub-section (4) thereof. He placed reliance upon the judgment of this Court in **Anvar P.V. v. P.K. Basheer**

MANU/SC/0834/2014 : (2014) 10 SCC 473 by which the judgment of this Court in **State (NCT of Delhi) v. Navjot Sandhu** MANU/SC/0465/2005 : (2005) 11 SCC 600 was overruled. In **Navjot Sandhu** (supra) this Court held as follows:

Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in Sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65.

In **Anvar's** case, this Court held as under:

22. The evidence relating to electronic record, as noted hereinbefore, being a special provision, the general law on secondary evidence Under Section 63 read with Section 65 of the Evidence Act shall yield to the same. *Generalia specialibus non derogant*, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65-A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in **Navjot Sandhu**, does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements Under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

23. The Appellant admittedly has not produced any certificate in terms of Section 65-B in respect of the CDs, Exts. P-4, P-8, P-9, P-10, P-12, P-13, P-15, P-20 and P-22. Therefore, the same cannot be admitted in evidence. Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground.

In view of the law laid down in the case of **Anvar**, Mr. Luthra submitted that the CDRs are liable to be eschewed from consideration.

24. Mr. Vivek Sood, learned Senior Counsel appearing for the State of Haryana submitted that the CDRs were adduced in evidence without any objection from the defence. He submitted that the Accused cannot be permitted to raise the point of admissibility of the CDRs at the appellate stage. He placed reliance on **Padman v. Hanwanta** MANU/PR/0104/1915 : AIR 1915 PC 1 in which the Privy Council held that objections regarding admissibility of a document must be raised in the Trial Court. Mr. Sood contended that there can be two classes of objections regarding admissibility of documents. The first class is that a document is per se inadmissible in evidence. The second is where the objection is regarding the method or mode of the proof of the document. He submitted that the objection of the Accused in this case is regarding the mode or method of proof as it cannot be said that the CDRs are per se inadmissible in evidence.

25. Refuting the contentions of the learned senior Counsel for the State, Mr. Luthra submitted that the objection raised by him pertains to inadmissibility of the document and not the mode of proof. He urged that the CDRs are inadmissible without the certificate which is clear from the judgment of this Court in **Anvar's case**. He refers to the judgment of **RVE Venkatachala Gounder v. Arulmigu Visweswaraswami** MANU/SC/0798/2003 : (2003) 8 SCC 752 relied upon by the prosecution to contend that an objection relating to admissibility can be raised even at the appellate stage. Mr. Luthra also argued that proof required in a criminal case cannot be waived by the accused. He relied upon a judgment of the Privy Council in **Chainchal Singh v. King Emperor** MANU/PR/0034/1945 : AIR 1946 PC 1 in which it was held as under:

In a civil case, a party can, if he chooses, waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence

He further relied upon the judgment of a Full Bench of the Bombay High Court in **Shaikh Farid v. State of Maharashtra** MANU/MH/0030/1981 : 1983 CrLJ 487. He also submitted that Section 294 Code of Criminal Procedure which is an exception to the Rule as to mode of proof has no application to the facts of the present case.

26. That an electronic record is not admissible unless it is accompanied by a certificate as contemplated Under Section 65B(4) of the Indian Evidence Act is no more *res integra*. The question that falls for our consideration in this case is the permissibility of an objection regarding inadmissibility at this stage. Admittedly, no objection was taken when the CDRs were adduced in evidence before the Trial Court. It does not appear from the record that any such objection was taken even at the appellate stage before the High Court. In **Gopal Das v. Sri Thakurji** MANU/PR/0002/1943 : AIR 1943 PC 83, it was held that:

Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof.

In **RVE Venkatachala Gounder**, this Court held as follows:

Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is *itself inadmissible* in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a Rule of fair play. **The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure**

the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court.

It would be relevant to refer to another case decided by this Court in **PC Purshothama Reddiar v. S. Perumal** MANU/SC/0454/1971 : (1972) 1 SCC 9. The earlier cases referred to are civil cases while this case pertains to police reports being admitted in evidence without objection during the trial. This Court did not permit such an objection to be taken at the appellate stage by holding that:

Before leaving this case it is necessary to refer to one of the contentions taken by Mr. Ramamurthi, learned Counsel for the Respondent. He contended that the police reports referred to earlier are inadmissible in evidence as the Head-constables who covered those meetings have not been examined in the case. Those reports were marked without any objection. Hence it is not open to the Respondent now to object to their admissibility.

27. It is nobody's case that CDRs which are a form of electronic record are not inherently admissible in evidence. The objection is that they were marked before the Trial Court without a certificate as required by Section 65B(4). It is clear from the judgments referred to *supra* that an objection relating to the mode or method of proof has to be raised at the time of marking of the document as an exhibit and not later.

The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency.

It is also clear from the above judgments that objections regarding admissibility of documents which are per se inadmissible can be taken even at the appellate stage.

Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. The learned Senior Counsel for the State referred to statements Under Section 161 of the Code of Criminal Procedure 1973 as an example of documents falling under the said category of inherently inadmissible evidence. CDRs do not fall in the said category of documents. We are satisfied that an objection that CDRs are unreliable due to violation of the procedure prescribed in Section 65B(4) cannot be permitted to be raised at this stage as the objection relates to the mode or method of proof.

28. Another point which remains to be considered is whether the Accused is competent to waive his right to mode of proof. Mr. Luthra's submission is that such a waiver is permissible in civil cases and not in criminal cases. He relies upon a judgment of the Privy Council in **Chainchal Singh's case** in support of the proposition. The Privy Council held that the Accused was not competent to waive his right. **Chainchal Singh's case** may have no application to the case in hand at all. In that case, the issue was Under Section 33 of the Evidence Act, and was whether evidence recorded in an earlier judicial proceeding could be read into, or not. The question was whether the statements made by a witness in an earlier

judicial proceeding can be considered relevant for proving the truth or facts stated in a subsequent judicial proceeding. Section 33 of the Evidence Act allows for this inter alia where the witness is incapable of getting evidence in the subsequent proceeding. In **Chainchal Singh**, the Accused had not objected to the evidence being read into in the subsequent proceeding. In this context, the Privy Council held that in a civil case, a party can waive proof but in a criminal case, strict proof ought to be given that the witness is incapable of giving evidence. Moreover, the judge must be satisfied that the witness cannot give evidence. **Chainchal Singh** also held that:

In a civil case a party can, if he chooses, waive the proof, but in a criminal case strict proof ought to be given that the witness is incapable of giving evidence.

The witness, who had deposed earlier, did not appear in the subsequent proceeding on the ground that he was unable to move from his house because of tuberculosis, as deposed by the process server. There was no medical evidence in this regard. The Court observed that the question of whether or not he was incapable of giving evidence must be proved in this context, and in the proof of such a fact it was a condition that statements given in an earlier proceeding can be taken as proved in a subsequent proceeding. **Chainchal Singh's case** therefore, does not lay down a general proposition that an Accused cannot waive an objection of mode of proof in a criminal case. In the present case, there is a clear failure to object to the mode of proof of the CDRs and the case is therefore covered by the test in **R.V.E. Venkatachala Gounder**.

29. We proceed to deal with the submission of Mr. Luthra that the ratio of the judgment of the Bombay High Court in **Shaikh Farid's case** is not applicable to the facts of this case. It was held in **Shaikh Farid's case** as under:

6. In civil cases mode of proof can be waived by the person against whom it is sought to be used. Admission thereof or failure to raise objection to their tendering in evidence amount to such waiver. No such waiver from the Accused was permissible in criminal cases till the enactment of the present Code of Criminal Procedure in 1973. The Accused was supposed to be a silent spectator at the trial, being under no obligation to open his mouth till the occasion to record his statement Under Section 342 (present Section 313) of the Code arose. Even then he was not bound to answer and explain the circumstances

put to him as being appearing against him. In the case of *Chainchal Singh v. Emperor* MANU/PR/0034/1945 : AIR 1946 PC 1 it was held by the Privy Council that the Accused was not competent to waive his right and the obligation of the prosecution to prove the documents on which the prosecution relied. Resultantly, the prosecution was driven to examine witnesses even when the Accused was not interested in challenging the facts sought to be proved though them. The inconvenience and the delay was avoidable.

7. Section 294 of the Code is introduced to dispense with this avoidable waste of time and facilitate removal of such obstruction in the speedy trial. The Accused is now enabled to waive the said right and save the time. This is a new provision having no corresponding provision in the repealed Code of Criminal Procedure. It requires the prosecutor or the accused, as the case may be, to admit or deny the genuineness of the document sought to be relied against him at the outset in writing. On his admitting or indicating no dispute as to the genuineness, the Court is authorised to dispense with its formal proof thereof. In fact after indication of no dispute as to the genuineness, proof of documents is reduced to a sheer empty formality. The Section is obviously aimed at undoing the judicial view by legislative process.

8. The preceding Section 293 of the Code also dispenses with the proof of certain documents. It corresponds with Section 510 of the repealed Code of Criminal Procedure. It enumerates the category of documents, proof of which is not necessary unless the Court itself thinks it necessary. Section 294 makes dispensation of formal proof dependent on the Accused or the prosecutor, not disputing the genuineness of the documents sought to be used against them. Such contemplated dispensation is not restricted to any class or category of documents as Under Section 293, in which ordinarily authenticity is dependent more on the mechanical process involved than on the knowledge, observation or the skill of the author rendering oral evidence just formal. Nor it is made dependent on the relative importance of the document or probative value thereof. The documents being primary or secondary or substantive or corroborative, is not relevant for attracting Section 294 of the Code. Not disputing its genuineness is the only solitary test therefor.

9. Now the post-mortem report is also a document as any other document. Primary evidence of such a document is the report itself.

It is a contemporaneous record, prepared in the prescribed form, of what the doctor has noticed in the course of post-mortem of the dead body, while investigation the cause of the death. It being relevant, it can be proved by producing the same. But production is only a step towards proof of it. It can be received in evidence only on the establishment of its authenticity by the mode of its proof as provided Under Sections 67 to 71 of the Evidence Act. Section 294(1) of the Code enables the Accused also, to waive this mode of proof, by admitting it or raising no dispute as to its genuineness when called upon to do so under Sub-section (1). Sub-section (3) enables the Court to read it in evidence without requiring the same to be proved in accordance with the Evidence Act. There is nothing in Section 294 to justify exclusion of it, from the purview of "documents" covered thereby. The mode of proof of it also is liable to be waived as of any other document.

30. Section 294 of the Code of Criminal Procedure 1973 provides a procedure for filing documents in a Court by the prosecution or the accused. The documents have to be included in a list and the other side shall be given an opportunity to admit or deny the genuineness of each document. In case the genuineness is not disputed, such document shall be read in evidence without formal proof in accordance with the Evidence Act. The judgment in **Shaikh Farid's case** is not applicable to the facts of this case and so, is not relevant.

The Effect of Overrule

31. Electronic records play a crucial role in criminal investigations and prosecutions. The contents of electronic records may be proved in accordance with the provisions contained in Section 65B of the Indian Evidence Act. Interpreting Section 65B(4), this Court in **Anvar's case** held that an electronic record is inadmissible in evidence without the certification as provided therein. **Navjot Sandhu's case** which took the opposite view was overruled.

32. The interpretation of Section 65B(4) by this Court by a judgment dated 04.08.2005 in **Navjot Sandhu** held the field till it was overruled on 18.09.2014 in **Anvar's case**. All the criminal courts in this country are bound to follow the law as interpreted by this Court. Because of the interpretation of Section 65B in **Navjot Sandhu**, there was no necessity of a certificate for proving electronic records.

A large number of trials have been held during the period between 04.08.2005 and 18.09.2014. Electronic records without a certificate might have been adduced in evidence. There is no doubt that the judgment of this Court in **Anvar's** case has to be retrospective in operation unless the judicial tool of 'prospective overruling' is applied. However, retrospective application of the judgment is not in the interests of administration of justice as it would necessitate the reopening of a large number of criminal cases. Criminal cases decided on the basis of electronic records adduced in evidence without certification have to be revisited as and when objections are taken by the Accused at the appellate stage. Attempts will be made to reopen cases which have become final.

33. This Court in **IC Golak Nath v. State of Punjab** MANU/SC/0029/1967 : (1967) 2 SCR 762 held that there is no acceptable reason why it could not restrict the operation of the law declared by it to the future and save transactions that were effected on the basis of earlier law. While referring to the doctrine of prospective overruling as expounded by jurists George F. Canfield, Robert Hill Freeman, John Henry Wigmore and Cardozo, this Court held that when a subsequent decision changes an earlier one, the latter decision does not make law but rather discovers the correct principle of law and the result is that it is necessarily retrospective in operation. As the law declared by this Court is the law of land, it was held that there is no reason why this Court declaring the law in supersession of the law declared by it earlier cannot restrict the operation of the law as declared to the future and save transactions that were affected on the basis of earlier law. While so holding, this Court in **Golak Nath** laid down the following propositions:

(1) The power of the Parliament to amend the Constitution is derived from Articles 245, 246 and 248 of the Constitution and not from Article 368 thereof which only deals with procedure. Amendment is a legislative process.

(2) Amendment is 'law' within the meaning of Article 13 of the Constitution and, therefore, if it takes away or abridges the rights conferred by Part III thereof, it is void.

(3) The Constitution (First Amendment) Act, 1951, Constitution (Fourth Amendment) Act, 1955, and, the Constitution (Seventeenth Amendment) Act, 1964, abridge the scope of the fundamental rights. But, on the basis of earlier decisions of this Court, they were valid.

While taking note of the doctrine of 'prospective overruling' in the United States, this Court referred to the decisions concerning the admissibility of evidence obtained by unreasonable search and seizure. In **Weeks v. United States** 232 U.S. 383 (1914), the US Supreme Court held that evidence obtained by an unreasonable search and seizure has to be excluded in criminal trials. In 1949, the US Supreme Court in **Wolf v. Colorado**, 338 U.S. 25 (1949) held that the Rule of exclusion laid down in **Weeks** did not apply to proceedings in State Courts. The judgment in **Wolf** was overruled in **Mapp v. Ohio**, MANU/USSC/0108/1961 : 367 U.S. 643 (1961). Subsequently, the US Supreme Court applied the doctrine of prospective overruling in **Linkletter v. Walker** MANU/USSC/0207/1965 : 381 U.S. 618 (1965) as it was of the opinion that if **Mapp** was applied retrospectively it would affect the interest of the administration of justice and the integrity of the judicial process.

34. The effect of overrule of a judgment on past transactions has been the subject matter of discussion in England as well. In **R. v. Governor of H.M. Prison Brockhill, ex p. Evans (No. 2)**, [2000] 4 All ER 15, Lord Slynn dealing with the principle of prospective over ruling observed as under:

The judgment of the Divisional Court in this case follows the traditional route of declaring not only what was the meaning of the Section at the date of the judgment but what was always the correct meaning of the section. The court did not seek to limit the effect of its judgment to the future. I consider that there may be situations in which it would be desirable, and in no way unjust, that the effect of judicial rulings should be prospective or limited to certain claimants. The European Court of Justice, though cautiously and infrequently, has restricted the effect of its ruling to the particular claimant in the case before it and to those who had begun proceedings before the date of its judgment. **Those who had not sought to challenge the legality of acts perhaps done years before could only rely on the ruling prospectively. Such a course avoided unscrambling transactions perhaps long**

since over and doing injustice to Defendants.

35. This Court did not apply the principle of prospective overruling in **Anvar's** case. The dilemma is whether we should. This Court in **K. Madhav Reddy v. State of Andhra Pradesh**, MANU/SC/0394/2014 : (2014) 6 SCC 537 held that an earlier judgment would be prospective taking note of the ramifications of its retrospective operation. If the judgment in the case of **Anvar** is applied retrospectively, it would result in unscrambling past transactions and adversely affecting the administration of justice. As **Anvar's** case was decided by a Three Judge Bench, propriety demands that we refrain from declaring that the judgment would be prospective in operation. We leave it open to be decided in an appropriate case by a Three Judge Bench. In any event, this question is not germane for adjudication of the present dispute in view of the adjudication of the other issues against the accused.

36. For the aforementioned reasons, the judgment of the High Court confirming the Trial Court is upheld. The appeals are dismissed.

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Citation : (2017)4SCC 490

IN THE SUPREME COURT OF INDIA

Tarun Tyagi
Vs.
Central Bureau of Investigation

Judges/Coram:
A.K. Sikri and R.K. Agrawal, JJ.

CaseNote:

Criminal - Deficient copies of documents - Supply thereof - Section 207 and 238 of Code of Criminal Procedure, 1973 - Appellant preferred application under Section 207/238 of Code, 1976 seeking supply of deficient copies of documents - Magistrate rejected application - Order was challenged by Appellant before High Court - High Court dismissed petition - Whether approach of Courts below was correct in refusing to supply hard disk and compact disk to Appellant

Facts:

On the basis of a complaint lodged by Director/complainant, a First Information Report (FIR) was registered by the Central Bureau of Investigation (CBI) wherein the Appellant was made an accused. In the said FIR, the complainant had alleged that the Appellant had stolen the 'source code' of a software known as 'Quick Recovery' developed by the complainant's company and thereafter put it for sale on the website of the Appellant company under the name 'Prodatadoctor'. Case was registered Under Section 66 of the Information Technology Act, 2000 and Sections 63 and 63B read with Section 14(b)(ii) of the Copyright Act, 1957. The CBI took up the investigation and seized certain documents and material from the office/residential premises of the Appellant. The Appellant moved an application seeking release of the seized property. This application was rejected by the Court of Chief Metropolitan Magistrate. The High Court of Delhi set aside that order and restored the application for release with direction to the concerned Magistrate to deal with the application afresh. In the meantime, the CBI had filed the charge sheet after completing the investigation. The trial court took cognizance of offence Under Section 381 of the Indian Penal Code, 1860, Section 66 of the Information Technology Act, 2000 and Sections 63 and 63B of the Copyright Act, 1957. Insofar as the application of the Appellant for release of the seized property was concerned, the trial court passed the orders thereupon, directing the Investigating Officer to find out as to whether copies of the hard disk in question can be prepared with Unite Protect Software so that the Appellant/accused is unable to use it till the pendency of the case. The Government Examiner of Questioned Documents (GEQD), vide letter addressed to the Investigating officer, opined that cloned copy of the hard disk can be prepared. The Appellant preferred another application Under Section 207/238 of the Code of Criminal Procedure, 1973 (Code) seeking supply of deficient copies of documents, such as hard disk relied upon by the prosecution. The Magistrate rejected this application. This order was challenged by the Appellant before the High Court which, vide impugned judgment, dismissed the petition.

Held, while allowing the appeal:

(i) Section 207 puts an obligation on the prosecution to furnish to the accused, free of cost, copies of the documents mentioned therein, without any delay. It includes, documents or the relevant extracts thereof which are forwarded by the police to the Magistrate with its report Under Section 173(5) of the Code. Such a compliance has to be made on the first date when

the Accused appears or is brought before the Magistrate at the commencement of the trial inasmuch as Section 238 of the Code warrants the Magistrate to satisfy himself that provisions of Section 207 have been complied with. Proviso to Section 207 states that if documents are voluminous, instead of furnishing the Accused with the copy thereof, the Magistrate can allow the Accused to inspect it either personally or through pleader in the Court. [8]

(ii) The CBI had seized some hard disks marked Q-2, 9 and 20 from the premises of the Appellant which contained the source code of the data recovery software. Defence of the Appellant was that this source code was exclusively prepared by him and was his property. On the other hand, case of the prosecution was that the recovered CDs are in fact same or similar to the software stolen in 2005. In a case like this, at the time of trial, the attempt on the part of the prosecution would be to show that the seized material, which contains the source code, was the property of the complainant. On the other hand, the Appellant will try to demonstrate otherwise and his attempt would be to show that the source code contained in those CDs is different from the source code of the complainant and the seized material contained the source code developed by the Appellant. It was but obvious that in order to prove his defence, the copies of the seized CDs need to be supplied to the Appellant. The right to get these copies is statutorily recognised Under Section 207 of the Code, which is the hallmark of a fair trial that every document relied upon by the prosecution has to be supplied to the defence/accused at the time of supply of the chargesheet to enable such an Accused to demonstrate that no case is made out against him and also to enable him to prepare his cross-examination and defence strategy. The only apprehension of the prosecution was that if the documents were supplied at this stage, the Appellant may misuse the same. [10]

(iii) It needed to be ensured that the Appellant, when given the cloned copy of the hard disk, was not able to erase or change or remove the same. If that can be achieved by putting some safeguards, it would be the ideal situation inasmuch as provisions of Section 207 of the Code which ensure fair trial by giving due opportunity to the Accused to defend himself shall be fulfilled and the apprehension of the prosecution would also be taken care of. In order to comply with the provision of Section 207 of the Code, the hard disks marked Q-2, 9 and 20 be supplied to the Appellant subject to the conditions. Before supplying the said CDs, the contents thereof shall be recorded in the Court, in the presence of complainant as well as the Appellant and both of them shall attest the veracity thereof by putting their signatures so that there is no dispute about these contents later thereby removing the possibility of tempering thereof by the Appellant. The Appellant shall not make use of the source code contained in the said CDs or misuse the same in any manner and give an affidavit of undertaking to this effect in the trial court. [11] and [12]

Disposition:
Appeal Allowed

JUDGMENT

A.K. Sikri, J.

1. On the basis of a complaint lodged by one Mr. Alok Gupta, Director of M/s. Unistal Systems Private Limited (hereinafter referred to as the complainant), a First Information Report (FIR) was registered by the Central Bureau of Investigation (CBI) on July 23, 2007 wherein the Appellant was made an accused. In the said FIR, the complainant had alleged that on or around March 11, 2005, the Appellant had stolen

the '*source code*' of a software known as '*Quick Recovery*' developed by the complainant's company and thereafter put it for sale on the website of the Appellant company under the name '*Prodatadoctor*'. Case was registered Under Section 66 of the Information Technology Act, 2000 and Sections 63 and 63B read with Section 14(b)(ii) of the Copyright Act, 1957. The CBI took up the investigation and seized certain documents and material from the office/residential premises of the Appellant

after conducting search and seizure on August 03, 2007. The Appellant moved, sometime in January 2008, an application seeking release of the seized property. This application was rejected by the Court of Chief Metropolitan Magistrate, Patiala House Courts, New Delhi on March 03, 2008. The High Court of Delhi set aside this order in Criminal Misc. Case No. 1518 of 2008, which was preferred by the Appellant against the order of the trial court rejecting this application. The order of the High Court is dated May 18, 2009. By this order, the High Court restored the application for release with direction to the concerned Magistrate to deal with the application afresh. Operative portion of the order reads as under:

2. The submission of learned Counsel for the Petitioner is that the entire business of the Petitioner is affected because of the seizure of all the electronic hardware equipments although incriminating the evidence, if any, may be only on some of them. He further submits that although the chargesheet was filed in June, 2008, no cognizance has yet been taken of the offence, if any, by the learned ACMM.

3. Learned Counsel for the parties were unable to inform the Court whether the opinion of GEQD on the seized electronic hardware equipment has been received by the trial court.

4. In view of the facts as noticed hereinabove, it is directed that the learned ACMM will first and foremost if not done already, consider whether cognizance should be taken of the offence, if any, on the basis of the charge sheet filed. This will be done within ten days of the receipt by the learned ACMM of the certified copy of this order."

2. In the meantime, on June 28, 2006, the CBI had filed the charge sheet after completing the investigation. On May 27, 2009, the trial court took cognizance of offence Under Section 381 of the Indian Penal Code, 1860, Section 66 of the Information Technology Act, 2000 and Sections 63 and 63B of the Copyright Act, 1957. Insofar as the application of the Appellant for release of the seized property is concerned, the trial court passed the orders dated September 03, 2009

thereupon, directing the Investigating Officer to find out as to whether copies of the hard disk in question can be prepared with Unite Protect Software so that the Appellant/accused is unable to use it till the pendency of the case. The Government Examiner of Questioned Documents (GEQD), Directorate of Forensic Science, Hyderabad, vide letter dated January 01, 2009, addressed to the Investigating officer, opined that cloned copy of the hard disk can be prepared.

3. After receipt of this report, the Appellant preferred another application on July 20, 2010 Under Section 207/238 of the Code of Criminal Procedure, 1976 (hereinafter referred to as the 'Code') seeking supply of deficient copies of documents, such as hard disk relied upon by the prosecution, i.e. Q-2, 9 and 20. The learned Magistrate rejected this application vide orders dated November 06, 2013. This order was challenged by the Appellant by filing Criminal Misc. Case Under Section 482 of the Code. The High Court has, vide impugned judgment dated June 13, 2016, dismissed the said petition. It is this order which is the subject matter of challenge in the instant appeal. To put it in nutshell, along with the chargesheet filed by the CBI, various documents are enclosed which include hard disk as well that was seized from the office of the Appellant. These are Q-2, 9 and 20. Though, copies of all other are supplied to the Petitioner, he is not given the aforesaid three disks. The Appellant wants copies of these disks as well. His submission is that as per the report of GEQD, cloned copies of these hard disks can be prepared and, therefore, there is no problem in supplying the same to the Appellant.

4. Before dealing with the aspect in detail, we may take note of the case put up by the CBI in the charge sheet submitted before the trial court after completing the investigation into the matter:

5. The prosecution case is that M/s. Unistel Systems Private Limited (hereinafter referred to as the 'company') is a company established in the year 1995 and the business of the company was to buy, sell, import-export and distribute all types of computer software and related works. The computer software manufactured by the company were all Data Recovery software

related to recovery of lost data in crashed hard disks of the computer with various types of operating systems. The Data Recovery software developed by the company is under the brand name of '*Quick Recovery*'. This software was developed and launched in the year 1999 and later got renamed as '*Quick Recovery Windows*'. The software was a DOS based software and used to work for File Allocation Table (FAT). Subsequently, the software was got upgraded to FAT and New Technology File System (NTFS). This software was developed by a team headed by one Manu Bhardwaj and others in the office premises of the complainant's company and all these persons were employed in the company in the capacity of Programmers. The source code of the software programme '*Quick Recovery for FAT & NTFS*' was stored in the programming room that was networked for the purpose of convenience and was not password protected and easily accessible by the other employees in the office of the company.

6. The Appellant was an employee of the company initially for a brief period of two months, i.e. in October and November 2003. He rejoined the company in June 2004 and worked till end of April 2005. The Appellant had his own website, which he started while working in the complainant's company. The Appellant, with dishonest intention of selling data recovery software, made out with the stolen source code. The website developed by the Appellant was registered with Direct Internet Service of Mumbai. The Appellant, during the period of his employment with the company, had access to the source code of '*Quick Recovery for FAT & NTFS*' and unauthorisedly misappropriated the same from the programming room of the company. After leaving the services of the company, the Appellant formed his own company by the name M/s. Prodata Doctor Private Limited. The Appellant secured the services of one Mr. Vikas Yadav as the Programmer, who was given the stolen source code of '*Quick Recovery for FAT & NTFS*' and was directed to make a recovery software by modifying the stolen code. During investigation, Vikas Yadav made a statement as to how he had prospered the software '*Data Doctor Recovery for FAT & NTFS*' based on the source code of the complainant's company. He further stated

that how the Appellant instructed him to remove the name of the company from the Graphical User Interface of the source code while adopting it for the new software '*Data Doctor Recovery for FAT & NTFS*'. He further disclosed that he had developed variant of the software like Data Doctor Recovery for iPod, Pendrive, Memory Card, Digital Camera, SIM Card, etc. with the help of the stolen source code of the company. During investigation, the stolen source code was recovered from his mail which was sent by the Appellant. The Appellant, after developing the '*Data Doctor Recovery for FAT & NTFS*' out of the stolen source code of the company, put it for sale on his website and remittance was received by him from abroad, through various payment gateways, and the variant software developed by Vikas Yadav was sold through these gateways. As per the CBI, it is also found that the Appellant obtained a total amount of more than ` 5 crores between 2004-2008 due to online sale of the software under the name '*Data Doctor Recovery for FAT & NTFS*'.

7. It is on the basis of the aforesaid allegations in the chargesheet, that the cognizance is taken by the trial court of the offence under various provisions of the Indian Penal Code, Information Technology Act as well as the Copyright Act. Keeping in mind the aforesaid case put up against the Appellant, we now advert to the moot question, namely, whether the approach of the courts below is correct in refusing to supply the hard disk and compact disk to the Appellant herein. Request was made by the Appellant invoking the provisions of Section 207 of the Code. Other relevant provision, aid whereof is taken by the Appellant, is Section 238 of the Code. We would, therefore, like to reproduce these two provisions herein:

207. Supply to the Accused of copy of police report and other documents.

-In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:

- (i) the police report,
- (ii) the first information report recorded Under Section 154;

(iii) the statements recorded Under Sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer Under Sub-section (6) of Section 173;

(iv) the confessions and statements, if any, recorded Under Section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report Under Sub-section (5) of Section 173;

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in Clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in Clause (v) is voluminous, he shall, instead of furnishing the Accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

xx xxxx

238. Compliance with Section 207.-

When, in any warrant-case instituted on a police report, the Accused appears or is brought before a Magistrate at the commencement of the trial, the Magistrate shall satisfy himself that he has complied with the provisions of Section 207.

8. Section 207 puts an obligation on the prosecution to furnish to the accused, free of cost, copies of the documents mentioned therein, without any delay. It includes, documents or the relevant extracts thereof which are forwarded by the police to the Magistrate with its report Under Section 173(5) of the Code. Such a compliance has to be made on the first date when the Accused appears or is brought before the Magistrate at the commencement of the trial inasmuch as Section 238 of the Code warrants the Magistrate to satisfy himself

that provisions of Section 207 have been complied with. Proviso to Section 207 states that if documents are voluminous, instead of furnishing the Accused with the copy thereof, the Magistrate can allow the Accused to inspect it either personally or through pleader in the Court.

9. Learned Counsel for the Appellant referred to the aforesaid provisions and argued that it was his right to receive the documents in question relied upon by the prosecution, in the absence of which the Appellant would not be able to put up his defence effectively. He also submitted that the complainant had filed a suit bearing CS (OS) No. 792 of 2008 against the Appellant seeking to restrain him from using/selling the said/similar software or its versions. The Division Bench of the High Court declined to attach the bank account of the Appellant in which monies were generated from the sale of the disputed software. The said suit came to be dismissed for non-prosecution on October 15, 2014, thus, demolishing the argument of the CBI that the Appellant can misuse the same to the detriment of anyone much less the complainant who claimed to have a copyright in the same. It was pointed out that the CBI, in the second FIR against one Accused Rupesh Kumar, has conceded to supply the mirror image/copies of the CDs, i.e. the questioned documents, and accepted the finding of the courts below wherein it has been held that '*there is no answer from the CBI whether the software is unique and there is no other software in the market for the recovery of lost data*'.

10. It is clear from the above that the CBI had seized some hard disks marked Q-2, 9 and 20 from the premises of the Appellant which contained the source code of the data recovery software. Defence of the Appellant is that this source code was exclusively prepared by him and was his property. On the other hand, case of the prosecution is that the recovered CDs are in fact same or similar to the software stolen in 2005. In a case like this, at the time of trial, the attempt on the part of the prosecution would be to show that the seized material, which contains the source code, is the property of the complainant. On the other hand, the Appellant will try to demonstrate otherwise and his attempt would be to show that the source code contained in those CDs is different from the source code of the

complainant and the seized material contained the source code developed by the Appellant. It is but obvious that in order to prove his defence, the copies of the seized CDs need to be supplied to the Appellant. The right to get these copies is statutorily recognised Under Section 207 of the Code, which is the hallmark of a fair trial that every document relied upon by the prosecution has to be supplied to the defence/accused at the time of supply of the chargesheet to enable such an Accused to demonstrate that no case is made out against him and also to enable him to prepare his cross-examination and defence strategy. There is no quarrel up to this point even by the prosecution. The only apprehension of the prosecution is that if the documents are supplied at this stage, the Appellant may misuse the same.

11. The aforesaid apprehension of the prosecution is based on the opinion of Government Examiner (Expert) who has opined that if the cloned copy of the hard disk was required, then the same could be prepared by the laboratory on supply of new hard disk of 500 GB but such cloned copy could not be write protected. Cambridge Dictionary defines "write protect" in the following manner:

to protect the data on a computer disk so that it cannot be changed or removed by a user.

Likewise, Collins Dictionary defines the term "write protected" as under:

(of a computer disk) having been protected from accidental writing or erasure

In view of this opinion of the Expert, it needs to be ensured that the Appellant, when given the cloned copy of the hard disk, is not able to erase or change or remove the same. If that can be achieved by putting some safeguards, it would be the ideal situation inasmuch as provisions of Section 207 of the Code which ensure fair trial by giving due opportunity to the Accused to defend himself shall be fulfilled and the apprehension of the prosecution would also be taken care of.

12. We find that CBI, under similar circumstances in the case of Rupesh Kumar,

accepted the order of the trial court whereby directions were given to the CBI to supply the hard disk. In the said case, the trial court found that there was no answer from the CBI whether the software in question was unique and there was no other software in the market for the recovery of lost data from the logical cracked hard disk. Number of softwares are available in the market which negated the arguments of CBI that by supplying the mirror image of the documents, the complainant will lose its money and it will be in violation of the Copyright Act, 1957. In that case, the Court took undertaking from the Appellant that he would not misuse the copy of cloned CD. We, thus, are of the opinion that in order to comply with the provision of Section 207 of the Code, the hard disks marked Q-2, 9 and 20 be supplied to the Appellant subject to the following conditions:

(a) Before supplying the said CDs, the contents thereof shall be recorded in the Court, in the presence of complainant as well as the Appellant and both of them shall attest the veracity thereof by putting their signatures so that there is no dispute about these contents later thereby removing the possibility of tempering thereof by the Appellant.

(b) The Appellant shall not make use of the source code contained in the said CDs or misuse the same in any manner and give an affidavit of undertaking to this effect in the trial court.

13. The appeal stands allowed in the aforesaid terms.

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Chapter 3

Leading Electronic Evidence in the Court: Critical Analysis and the Stepwise Process

It is widely believed amongst the legal community that electronic evidence is a new breed of evidence, requiring a specialised law governing and regulating the same. There is an apprehension that our law of evidence encapsulated in the Indian Evidence Act of 1872 will not hold good for electronic evidence. Are these beliefs and apprehensions justified?

There are also doubts and apprehensions amongst lawyers as to the process of leading electronic evidence in the Courts. Due to the fast pace of information technology and the general belief that electronic evidence is highly technical, doubts lurk in legal minds. Leading electronic evidence is as simple or complex as any other evidence. It needs to be assimilated that the basic process and legal principles of leading evidence apply to electronic evidence as well. The traditional principles of leading evidence along with certain newly added provisions in the Indian Evidence Act, 1872 through the Information Technology Act, 2000 can be said to constitute the body of law applicable to electronic evidence.

■ CLASSIFICATION & NATURE OF ELECTRONIC EVIDENCE AND SHORTCOMINGS IN THE AMENDMENTS TO THE INDIAN EVIDENCE ACT, 1872

For clearly understanding the process of leading electronic evidence in the Courts, it is necessary to classify and understand the nature of electronic evidence. Electronic evidence can be broadly classified into the following categories:-

- Computer and electronic hardware;
- Computer software;
- Processing in the computer system;
- Electronic communication through E-mail, online chat and Internet telephony;
- Blogs;
- Web-sites;
- Electronic content such as text, images and sound.

Prior to the amendment made therein by the I.T. Act, 2000, the term "evidence" in section 3 of the Indian Evidence Act, 1872 was defined as follows:-

"Evidence" means and includes -

- (I) all statements which the Courts permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;
- (II) all documents produced for the inspection of the Court; such documents are called documentary evidence."

The following interesting questions arise:

- Is computer and electronic hardware oral or documentary evidence?
- Where would processing in the computer system and computer software be categorized?
- Are web-sites documentary evidence?
- Where would electronic content (text, images and sound) fall?

The legal status of the aforesaid categories in the Indian Evidence Act, 1872 prior to the amendments made therein

by the Information Technology Act, 2000, is worth noting. In section 3 of the Indian Evidence Act, 1872, a "fact" means and includes any thing, state of things or relation of things, capable of being perceived by the senses; as well as any mental condition of which any person is conscious. The term "document" has been defined as any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of these means, intended to be used, or which may be used, for the purpose of recording that matter.¹ The illustrations of documents appended to the definition throw light on its broad ambit:

- A writing is a document;
- Words printed, lithographed or photographed are documents;
- A map or plan is a document;
- An inscription on a metal plate or stone is a document;
- A signature is a document.

The aforesaid definitions of 'fact' and 'document' show that our law of evidence covers the entire spectrum of things / objects including expression of any matter upon any substance, their state of being and existence, their perception by everyone who is capable of perceiving, as well as any mental condition, or state of mind of a person.

The wide ambit of our law of evidence is further confirmed by the definition of the term "proved" according to which, a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.² The words "matters before it" show the wide amplitude of the definition. These words go even beyond the definition of "evidence" in section 3 of the Indian Evidence Act, 1872 which prior to the amendment by the I.T. Act, 2000 covered oral evidence and documentary evidence.

1. Section 3 of the Indian Evidence Act, 1872.

2. Definition of "proved" or Section 3 of the Indian Evidence Act, 1872.

In the light of the aforesaid definitions, each of the aforesaid categories of computer / electronic devices, processes, inputs and outputs clearly constitute evidence under the Indian Evidence Act, 1972 even prior to the amendments therein carried out by the Information Technology Act, 2008.

Computer & electronic hardware are as good evidence as the weapon used in a crime or the clothes of the promiscuity in a rape case, that have been exhibited as evidence since time immemorial. Firstly, the definition of 'evidence' is inclusive and not exhaustive. Moreover, the words "matters before it" in the definition of the term "proved" are wide enough to encompass a broader spectrum than oral and documentary evidence. There is thus no reason to distinguish computer and electronic hardware as new breeds of evidence.

The processing in the computer system / hardware is done by computer software which as a piece of evidence has three dimensions. The working of the software is equivalent to the working of any machine. The other dimension of computer software is that of an object / thing. The encapsulation of computer software in a storage medium such as floppy, CD, hard-disk or pen-drive etc. makes it a thing / object. Yet another dimension of computer software is the written program i.e. the source code and the object code. The written program would clearly fall within the definition of 'document' which implies expression of any matter upon any substance.

Electronic communication, whether through email, online chat or Internet telephony is like any other communication. Whether the electronic communication is instantaneous or non-instantaneous, there should be no difficulty in accepting it from the evidentiary perspective. Blogs are web pages on the Internet on which individuals and communities post their views and other content. In effect, they are publications on the Internet. A web-site is

a web-page on the Internet on which information and data (text, images, audio-visual content) is posted. From the evidentiary perspective, blogs and web-sites have different dimensions. They can be said to be a bundle of software and expression of matter, in the form of text, images and sound. They are documents and processes at different levels, from the evidentiary perspective.

In the Information Technology Act, 2000, an "electronic record" is defined as data, record or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer generated microfiche.² The word "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts, magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer.³ The expression "electronic form" with reference to information means any information generated, sent, received or stored in media, magnetic, optical, computer memory, microfilm, computer generated microfiche or similar device.⁴

Reading the aforesaid definitions of 'electronic record', 'data' and 'electronic form' in the I.T. Act, 2000 along with the definition of 'document' in the Indian Evidence Act, 1872, it becomes *ex-facie* clear that computer images, text and sound stored, whether on a computer file, blog, web-site or email, are all documents. Even though computers use binary language i.e. consisting of zeros and ones, nevertheless, it constitutes expression of matter. As pieces of evidence, blogs, web-sites and computer files consisting of text, images and sound, may have different dimensions. For instance, the exchange of words through sound would be in the nature of oral evidence, the working of the

2. Section 2 (L) (i) of the Information Technology Act, 2000.

3. Section 2 (D) (ii) of the Information Technology Act, 2000.

4. Section 2 (D) (v) of the Information Technology Act, 2000.

software enabling the exchange of sounds would be an act as that of a machine, the written software program and storage of content (text, images or sound) would be documents, and the floppy, CD or pen-drive in which the content is stored is a document and an object / thing. From the evidentiary perspective, electronic evidence is like a chameleon that changes colours. In other words, it has numerous dimensions.

In spite of the technology-neutral law of evidence, our lawmakers have redefined the word "evidence"¹⁰ by including 'electronic records' as documentary evidence. The new definition of "evidence" in section 3 reads as follows:

"Evidence" means and includes -

- (1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;
- (2) all documents including electronic records produced for the inspection of the Court; such documents are called documentary evidence.

The words "including electronic records" have been inserted in clause (2) above. Electronic records have thus been classified as documentary evidence. Was the amendment really necessary? The definition of the term "document" is not paper-based. Any expression of matter upon any substance is a document. Whether the content is intelligible or not, it does not matter. For instance, if in a murder case, one of the facts in issue is whether a small child of two was present at the spot where his mother was killed. Some pieces of paper are found nearby with the child's scribbles on them. These would be documents under section 3 of the Indian Evidence Act, 1972 even though the contents make no sense. Similarly, if a piece of paper with scribbles is sealed in an envelope, it would still be a

10 Section 3 of the Indian Evidence Act, 1972 as amended by the 11 V. Act, 2011

document. If the child had scribbled on the blackboard, it would be still a document. On a parity of reasoning, a floppy, CD, hard-disk, flash cards, pen-drive and all other storage media containing electronic records have always been documents and hence had evidentiary status under the law. The above amendment to the law was thus not necessary and is only cosmetic in nature. Electronic records were always documents under the Indian Evidence Act, 1872. The Supreme Court in the case of *Ziyuddin Borhanuddin Bukhari v. Brjmojan Ramdas Mehra & Ors*⁷ has also held that tape records of speeches are documents. On a parity of reasoning, electronic records, whether in the form of text, images or sound stored, are also documents, irrespective of the storage media (floppy, CD, pen-drive, hard-disk etc).

From the above analysis it emerges that the amendment to the definition of the term "evidence" can be said to be merely clarifying the pre-existing legal position. However, certain other amendments to the Indian Evidence Act, 1872 by the I.T. Act, 2000 create confusion and open the doors to unnecessary litigation. If only the definition of "evidence" had been amended, it would not have caused any problems as the entire set of provisions applicable to documents or documentary evidence would have *ipso-facto* applied to electronic records as well. But our lawmakers have also amended certain other provisions of the Indian Evidence Act, 1872 thereby adding electronic records alongside documents. Sections 34, 35, 39, 59 and 101 of the Indian Evidence Act, 1872 can be cited as examples in this regard. However, several important provisions applicable to documents have not been amended. For instance, sections 32, 36, 74, 75 and 91 have not been amended thus creating an impression as if the said provisions are not intended to apply to electronic records. To cite an example, section 91 incorporates an important legal principle that if the terms of a contract are reduced in a document, oral evidence cannot be led with respect to the terms of such contract etc.

7. AIR 1985 SC 2198

An impression is created as if the bar of section 91 would apply only if the contract is in a written document but will not apply if the same contract is in the form of an electronic record. This does not appear to be logical. This would create unnecessary confusion amongst the legal community and could also breed unproductive litigation on the interpretation of these provisions that have been left unamended.

■ LEADING ELECTRONIC EVIDENCE: THE STEP-BY-STEP PROCESS

➤ Admissibility and Relevancy

Before leading any piece of evidence in a case, the first question that arises is: Whether the evidence sought to be led is admissible? Admissibility of evidence implies the legal permissibility to adduce the same. Even though the word 'admissibility' is nowhere defined in the Indian Evidence Act, 1872, it is a well-developed legal concept. Evidence that is barred under the Indian Evidence Act can be said to be inadmissible. Examples of inadmissible evidence include confession made to a police officer, hearsay evidence and secondary evidence (unless falling within the exceptions provided in section 65 of the Act).

The concept of relevancy of a fact implies the bearing it has on the case. A fact is said to be relevant to another when it is so connected with the other in any of the ways referred to in the provisions relating to relevancy of facts⁵. Facts that are relevant are exhaustively provided in the Indian Evidence Act, 1872 from sections 6 to 55 in Chapter-II. Section 5 of the Indian Evidence Act, 1872 stipulates that evidence may be given in any suit or proceedings, of the existence or non-existence of every fact in issue and of such other facts declared to be relevant, and of no others. The expression "facts in issue" means and includes any facts

5. Section 7 of the Indian Evidence Act, 1872.

from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.⁸ In other words, the law bars the reception of evidence of any fact that is not relevant. Hence, whether the fact under consideration, of which evidence is sought to be led, is relevant or not is the second question that requires to be dealt with in a case.

Admissibility and relevancy are distinct legal requirements though in certain situations they exclude one another. Though the relevancy of facts implies the bearing/connection to the case, there are a few exceptions whereby even irrelevant facts or facts that are not relevant have been declared admissible in our law of evidence and hence permitted to be adduced in evidence. For example, section 155 permits the credit of a witness to be impeached. Even though this has no bearing/connection with the facts in issue arising in a case but is declared admissible. Section 165 of the Indian Evidence Act, 1872 empowers the Judge to ask any question, in any form, at any time, from any witness or the parties, about any fact that is relevant or irrelevant. On the other hand, confession made to a police officer may have a direct bearing/connection to the case but on principles of public policy, it is declared inadmissible in evidence.

➤ **Proof of Electronic Records:**

Electronic records have been granted legal status by section 4 of the IT Act, 2000 that states as follows:-

***4. Legal recognition of electronic records:** Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is-

8. Section 3 of the Indian Evidence Act, 1972

- (ii) rendered or made available in an electronic form; and
- (iii) accessible so as to be usable for a subsequent reference.*

As discussed earlier, electronic records were documentary evidence even prior to the IT Act, 2000. Section 4 merely recognizes electronic records as part of the legal system but they always had evidentiary status. Since electronic records are generated in the computer system, for proving the same by primary evidence as stipulated by section 64 of the Indian Evidence Act, 1872, the computer system would be required to be produced in the Court. Even though the original/primary electronic record would be practically indistinguishable from a copy thereof, the legal distinction between the primary electronic record and its copy remains. A photocopy of a hand-written document is usually distinct from the original thereof. However, even though the original electronic record and its copy (called 'computer output') are practically indistinguishable, the legal distinction cannot be overlooked.

For avoiding inconvenience to litigants, of having to bring the computer system to the Court as proof of the primary electronic record, section 65B has been introduced into the Indian Evidence Act, 1872 vide the IT Act, 2000. Section 65B is an exception to the rule of primary evidence in as far as electronic records are concerned. Sub-section (1) of section 65B grants admissibility to the secondary evidence of an electronic record (called 'computer output'), as evidence of the original electronic record, without proof or production of the original. Section 65B(1) stipulates as follows: -

65B. Admissibility of electronic records. - (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in

question and shall be admissible in any proceedings without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein if such direct evidence would be unavailable.”

The computer outputs permitted to be in a written or an electronic record, are printouts, CD, floppys, pen-drive, flash cards, hard disk and so stored, recorded or copied in other optical or magnetic media. However, certain strict conditions have been laid down in sub-section (2) of section 65 B for the grant of legal admissibility to the computer output which is otherwise secondary evidence. These conditions seek to ensure the credibility of the secondary evidence / computer output of an electronic record. These conditions are as follows: -

- (a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;
- (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
- (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and
- (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities”

Sub-section (1) contemplates certain typical situations in this digital age. Most medium and large business enterprises use a combination of computers forming a network of computer systems. This sub-section treats the combination of computers as constituting a single computer thereby implying that the conditions stipulated in sub-

section (2) must be fulfilled with respect to all the computers acting in a combination. As proof of the compliance of the aforesaid conditions, sub-section (4) of section 65B permits a person occupying a responsible official position in relation to the operation of the relevant device (including the computer system) or the management of the relevant activities, to give a statement in evidence through a certificate thereby identifying the electronic record and dealing with the compliance of the aforesaid conditions.

Section 65B on first look is clear and straightforward. However, the practical application of section 65B poses difficulties in numerous case situations, especially in criminal cases. For instance, if during the course of a criminal investigation, certain printouts of e-mails are seized and are sought to be proved against the accused, compliance of section 65B would not be possible in the absence of the computer system from which such computer outputs were generated. Section 65B has been legislated with only e-commerce and business enterprises in mind but made applicable to all cases including criminal cases.

Rather than laying down mandatory conditions in sub-section (2) of section 65B, the provision should have been simpler. The admissibility to computer outputs (secondary evidence of the original electronic record) should have been granted subject to the simple condition of satisfying the Court as to the authenticity of the computer output. The conditions of sub-section (2) should have been stated as some of the guidelines to determine the authenticity of the computer outputs. Instead of keeping in view the larger picture of our digital society that includes not only e-commerce but also cyber crimes, section 65B has just been bodily lifted from the Customs Act, 1962 which is purely an economic statute.

Even the conditions stipulated in sub-section (2) especially clauses (a), (b) and (d) may not be satisfied though the computer output is an authentic copy of the original

electronic record. For instance, it is not necessary in every case situation that the computer would be used regularly to store or process information for the purposes of any activities regularly carried on, or information of the kind contained in the electronic record, was regularly fed into the computer. If the electronic record from which the computer output is generated, is a solitary electronic record in the computer, can it be said that due to non-compliance of sub-section (3), the computer output would be inadmissible in evidence.

Section 65B in its present form is relevant only to determine the existence of a course of activities on the computer system and may apply to prove entries or correspondence in the ordinary course of business. Such is the limited practical applicability and utility of section 65B. Even for such determination, sections 15 (existence of course of business), 32 (2) (statement made in course of business) and 34 (entries in books of account) of the Indian Evidence Act, 1872 would have sufficed.

In the existing state of affairs, the rule of best evidence can be usefully applied to tide over the shortcomings in section 65B. In the case situation where certain printouts of e-mails (computer outputs) are seized from the accused during a criminal investigation, the recovery and other circumstantial evidence would be proof of the electronic records thereof (i.e. the e-mails in original even though section 65B cannot be complied with. Another way to save the electronic evidence collected in criminal investigation from being declared inadmissible due to non-compliance of section 65B, is to read down and interpret the provision in a manner that it would be applicable only when the party leading the relevant piece of evidence, has obtained the computer output from the computer.

➤ Authorship of electronic records

Compliance with the conditions stipulated in section 65B merely grants admissibility to the secondary evidence

i.e. the computer output of an electronic record. However, before the computer output is exhibited as a piece of evidence in the Court, its authorship needs to be proved. Authorship of a document can be proved by numerous methods acceptable to law, depending upon the case situation. In the event the author of the electronic record, for instance an e-mail or an electronic accounting entry, is the same person who gives the certificate under section 65B (i.e. a person occupying a responsible official position in relation to the operation of the computer, then the same person would prove the authorship of the electronic record from which the computer output has been generated.

The usual method accepted by law to prove authorship of a document is by examining as a witness, the person who has executed the document, or saw it being executed, or has signed it, or is otherwise qualified and competent to express his opinion about the document in question.²³ Evidence of authorship of a document, proves the presence of the contents therein. The facts and events stated in the document that is proven, must however be independently proved. The contents of a document, other than containing the terms of a contract, by themselves do not *ipso facto* prove the facts and events that are part of the contents. For instance, if 'A' writes a letter to 'B' stating that 'B' has murdered 'X', the murder is not proved merely because it is part of the contents of the proved letter.

■ PROOF OF ELECTRONIC SIGNATURES

Information Technology has made a profound impact on our lives. Apart from completely altering the way we communicate, interact and transact, information technology also has the effect of changing some of our basic acts. Who could imagine two decades back that the act of signing a document would be converted into an external process through the concept of electronic signatures? Initially, the

²³ V. K. Singh, *Banking & State of Andhra Pradesh* (1988) 4 (SC 106)

IT Act, 2008 legally recognized only the "asymmetric crypto system" as the mode of affixing (digital) signatures. The asymmetric crypto system has been explained in some detail in Chapter 2 while dealing with forgery of digital signatures.

The pace of innovation and invention, in the present world that we live in, cannot be stated better than Alvin Toffler in "Future Shock" that was first published in the year 1970:

"Indeed, a growing body of reputable opinion asserts that the present movement represents nothing less than the second great divide in human history, comparable in magnitude only with that first great break in historic continuity, the shift from barbarism to civilization."

"It had been observed, for example, that if the last 50,000 years of man's existence were divided into lifetimes of approximately sixty-two years each, there have been about 800 such lifetimes. Of these 800, fully 650 were spent in caves."

Only during the last seventy lifetimes has it been possible to communicate effectively from one lifetime to another - as writing made it possible to do. Only during the last six lifetimes did humans of any ever see a printed word. Only during the last four has it been possible to measure time with any precision. Only in the last two has anyone anywhere used an electric motor. And the overwhelming majority of all the material goods we use in daily life today have been developed within the present, the 800th lifetime."

Since information technology is also continuously evolving to new levels due to inventions and innovation, new forms of electronic signatures have been developed since the IT Act, 2008 was conceived. The concept of "asymmetric crypto system"¹¹ that was legally recognized as "digital signature"¹² by the IT Act, 2008, may be replaced in future by better technology modes that are faster and more secure. For instance, the "Elliptic Curve Cryptography" (ECC) is gaining much popularity over the "RSA Algorithm" being applied in the country as a "digital

11 Sec. 3(24) of IT Act, 2008.

12 Sec. 2(1)(g) of IT Act, 2008.

signature" that has been legally recognised under the I.T. Act, 2000. Certain new techniques / methods of electronic authentication and electronic signatures, such as, digital fingerprinting, facial matching and retinal scans, are also being developed as part of the science of biometrics.

With a view to make the law technology-neutral, rather than a slave to a particular technological mode of signatures, the expressions "electronic signature"¹² and "electronic authentication technique"¹³ have been added to the I.T. Act, 2000 alongside "digital signature", by the I.T. (Amendment) Act, 2008. Recognizing the fact that the technology with respect to electronic signatures may evolve with inventions of new techniques, the law has been amended to assimilate any e-signature technology that is in vogue at a given point of time. Section 3A has been added to the I.T. Act, 2000 by the I.T. (Amendment) Act, 2008 which *inter alia* empowers the Central Government to add or omit any electronic signature or electronic authentication technique through a notification in the official gazette.

Consequent to the aforesaid amendments in the I.T. Act, 2000, the words "digital signature" and "digital signature certificate" have been replaced by "electronic signature" and "electronic signature certificate" respectively, in sections 3, 47A, 67A, 85A, 85B, 85C and 90A of the Indian Evidence Act, 1872. Section 3 of the Indian Evidence Act, 1872 is the interpretation clause; section 47A makes the opinion of the Certifying Authority with respect to electronic signature relevant; section 67A mandates proof of electronic signature of a subscriber; section 85A raises a presumption in favour of electronic signature on an electronic record purporting to be an agreement containing electronic signature; section 85B raises a presumption in favour of secure electronic signature; section 85C raises a presumption in favour of certain information listed in an Electronic Signature Certificate; and section 90A draws a

12. Sec. 3(1)(a) of I.T. Act, 2000.

13. Sec. 3A of I.T. Act, 2000.

presumptions in favour of an electronic signature on an electronic record that is five years old. However, since "electronic signature" is defined as authentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes digital signature¹⁵, the said provisions of the Indian Evidence Act, 1872 will *ipso facto* apply to "digital signature" as well.

Proof of "digital signature" is governed by section 73A of the Indian Evidence Act, which reads as follows:-

Proof as to verification of digital signature. In order to ascertain whether a digital signature is that of the person by whom it purports to have been affixed, the Court may direct-

- (a) that person or the Controller or the Certifying Authority to produce the Digital Signature Certificate;
- (b) any other person to apply the public key listed in the Digital Signature Certificate and verify the digital signature purported to have been affixed by that person.

Explanation - For the purposes of this section, "Controller" means the Controller appointed under sub-section (1) of section 77 of the Information Technology Act, 2000.

Since "digital signature" is a technical process that is applied to an electronic record, as against the traditional handwritten signatures which is a physical performance of the human hand, proof of the technical process of "digital signature" by application of the process in the Court, has been provided for in the law. However, section 73A is inapplicable to "electronic signature" and "electronic authentication technique" as these cover techniques of the future that may be legally accepted. Hence, it is not possible to lay down the mode of proof of such future techniques that may be legally accepted as "electronic signature" and "electronic authentication technique".

15. Sec. 2(30) of I.T. Act, 2000 inserted by I.T. Amendment Act, 2008.

■ PROOF OF ELECTRONIC MAIL

Electronic mail/e-mail has revolutionized communication. In this age, communication of low to high stake business communication, are all done through e-mail. Post boxes will be expensive antiques in the times to come! An e-mail travels at an unimaginable speed to the destination computer, is cost-free and luxuriously simple to send and receive. With the growing use of e-mail, it is becoming a relevant piece of evidence in innumerable cases ranging from criminal conspiracies through e-mail, criminal intimidation, defamation etc. to business/commercial disputes.

Apart from the importance of the mode of proving an e-mail in the Court, its evidentiary value is also a significant legal question. Article 9(2) of the UNCITRAL Model Law recognizes electronic messages as evidence but lays down certain factors to assess their evidentiary value: -

"Information in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor."

The vulnerability of manipulation and fabrication of electronic messages, has led to a cautious approach before accepting the veracity of the same as a piece of evidence. For example, it is luxuriously easy to open an e-mail account in the name of another person and correspond through such an account, impersonating as the other person.

The affixation of electronic or digital signature (as the case may be) on an electronic message, identifies the signatory and also makes it impossible to tamper with the contents of the electronic record constituting the electronic message. Digital and electronic signatures go a long way in

enhancing the veracity of the electronic message as to its contents as well as the author of the same.

Section 88 A of the Indian Evidence Act as introduced therein by the I.T. Act, 2000 grants discretion to the Court to presume that an electronic message forwarded by the originator through an electronic mail server to the addressee, corresponds with the message as fed into his computer for transmission. The presumption is based upon the acceptance as to the reliability of the e-mail service provider as well as the electronic process of forwarding the electronic message, as fed into the computer by the originator. However, it is a rebuttable presumption. It is clarified in section 88A itself that the Court shall not make any presumption as to the person by whom such electronic message is sent. The law thus accepts the vulnerability of fabrication of electronic messages.

Recognizing the fact that temporary computer breakdowns or bugs are frequent and electronic communication requires credibility to promote e-commerce and prevent unnecessary legal disputes, section 12 of the I.T. Act, 2000 provides for a mechanism of acknowledgement of receipt of an electronic record. Section 12 *inter alia* provides that where the originator has stipulated that the electronic record shall be binding only on the receipt of an acknowledgement of such electronic record by him (originator), then, unless acknowledgement has been so received, the electronic record shall be deemed to have never been sent by the originator.

Proof of digital or electronic signature (as the case may be) and the acknowledgement process, if made part of an electronic message, enhances its evidentiary value. However, electronic messages on which electronic or digital signatures are not affixed nor is the acknowledgement process applied, evidence as to the identity of the originator, the receipt of the electronic message and the identity of the electronic message would

require proof through circumstantial and/or direct evidence, depending upon the nature of the case and the best evidence available. It is not possible to exhaustively state the pieces of evidence for proving an electronic message in every case. Each case has its own peculiar nature, facts and circumstances. However, the following are broadly some of the pieces of evidence to prove an electronic message in the Court :-

- Evidence of the author of the electronic message;
- Evidence of the sender of the electronic message, if different from the author;
- Proof showing that the electronic message was sent by the originator to the e-mail address of the addressee;
- Evidence to prove the e-mail address of the addressee (earlier correspondence from the said address, letter-head showing the address etc.);
- The acknowledgement, if any, of the receipt of the electronic message by the addressee;
- Proof of the receipt of the electronic message, generated from the computer;
- Proof of e-mail address of the originator through documents, such as previous correspondence etc. in which the originator has stated his e-mail address;
- User logs maintained by the network service providers;
- Other corroborative evidence, direct and/or circumstantial.

Electronic messages on which no digital signatures are affixed nor is the acknowledgement process followed, are like unsigned letters. Circumstantial evidence was accepted by the Supreme Court in the case of *Moharick Ali Ahmed v. State of Bombay*¹⁰ as proof of certain unsigned letters and telegrams having been sent by the accused who had denied sending the same. In this case, the appellant was a Pakistani National having his business in Karachi. He

was convicted for the offence of cheating under section 420 IPC. The allegations against him were, he had made false inducements to the complainant at Bombay through letters, telegrams and telephone calls to the effect that he had a ready stock of rice and on receipt of money, he would be in a position to ship the consignment. The complainant believed the representations of the accused. However, the consignment of rice was not supplied. The prosecution relied upon certain letters and telegrams, alleging the same to have been sent by the accused. Many of these letters purportedly bore the signatures of the accused and some of these letters were also undisputed. However, some of the letters were without signatures and it was submitted on behalf of the accused that since neither the complainant nor his witness had seen the accused write any of the letters nor were they acquainted with his handwriting, their deposition did not prove that the letters were attributable to him.

The Supreme Court rejected the submission of the accused and *inter alia* held that proof of authorship of a document can be by direct or circumstantial evidence, depending upon the nature of the case and its peculiar facts and circumstances. It may comprise of direct evidence of a person who saw the document being executed or the signatures being affixed thereon. This may also be proved by proof of handwriting or the signatures, through the evidence of an expert.

The Supreme Court went ahead and stated that a document can also be proved by infernal evidence that is afforded by the contents of the document itself. Where the document in dispute is part of a link in the chain of correspondence some of which has been proved to the satisfaction of the Court, this would furnish proof of the other part of the correspondence as well. The recipient of a letter or telegram that is part of the correspondence between the parties, some of which is admitted or accepted by the Court, would be in a reasonably good position to

speak of the authorship of the remaining correspondences that is disputed. His knowledge of the writing or the signatures of the sender would be credible.

The Supreme Court also stated that the judge would also be in a position to determine the authorship of a document that is part of a chain of correspondence, part of which is undisputed or clearly proven. On the basis of circumstantial evidence, the Supreme Court upheld the proof of letters that were without the signatures of the accused, as being part of the chain of correspondence between the parties. Similarly, several telegrams were also attributed to the accused.

Even though electronic messages are vulnerable to fabrication and manipulation, they are admissible pieces of evidence. The evidentiary weight of electronic messages would depend upon the satisfaction and belief of the Court. The test for proving a fact is the belief of the Court that it exists or the Court considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.¹⁷

Information technology has invaded our lives and is fast replacing traditional modes of communication and documentation. The virtual world is taking over the real world. E-mail has replaced letters sent by post, land-line phones are being replaced by mobile phones and PDAs which are computers too, video conferencing is getting more and more economical and accessible by the day, file-covers containing documents are being replaced by the pen-drive that has the capacity to encapsulate data of an unimaginable size. Lawyers and judges would not require book shelves in the times to come! A laptop computer accompanied with a mobile phone is an office that can move along the golf course with the CRO!

With the exponential growth and pervasiveness of information technology across society, the legal

17. Definition of 'Proof' in Section 3 of the Indian Evidence Act, 1973.

community, especially consisting of trial court lawyers and judges, who are likely to face a deluge of electronic evidence, may need expertise with respect to admissibility, relevancy, appreciation and proof of electronic evidence. Moreover, information technology is complex and has so many dimensions and components that are interconnected. With the convergence of technologies, complexities will get more and more complex. Lines between different technologies are getting blurred due to convergence. For instance, many mobile phones are also computers and when connected to the Internet, they become part of the global network. A mobile also assumes the function of an audiodisplayer while playing music or the FM channels, it becomes a cinema screen while playing a film, it becomes a camera while clicking photographs, and it also becomes a folder to take notes. These electronic products can be said to be 'digital channels'. The increasing convergence of technologies also increase the complexities from the evidentiary perspective. Responding to the imperative necessity of expert opinion on electronic evidence, section 45A has been introduced into the Indian Evidence Act, 1872 by the I.T. (Amendment) Act, 2008, which reads as follows:-

45A. When in a proceeding, the court has to form an opinion on any matter relating to any information transmitted or stored in any computer resource or any other electronic or digital form, the opinion of the Examiner of Electronic Evidence referred to in section 79A of the Information Technology Act, 2000, is a relevant fact.

Explanation.—For the purposes of this section, an Examiner of Electronic Evidence shall be an expert.²⁸

The 'Examiner of Electronic Evidence' would be an agency appointed by the Central or State Government.²⁹ In the opinion of the author, introduction of Section 45A into the law is amongst the most significant amendments to the law, by the I.T. (Amendment) Act, 2008. Opinions of experts upon a point of foreign law or of science or art, or as to identity of handwriting or finger impression, have been

28. Sec. 79A of I.T. Act, 2000 added by I.T. (Amendment) Act, 2008.

relevant facts since the inception of the law of evidence and well settled principles have developed with respect to expert opinion from the evidentiary perspective.¹⁶ These well settled principles would be substantially applicable to evidence adduced by the "Examiner of Electronic Evidence".

● PROOF OF COMPUTER PROCESSES AND VALUE OF ELECTRONIC EVIDENCE

Traditionally, our legal system from the evidentiary perspective has been mainly concerned with oral evidence, documentary evidence, things/objects, and human acts that are perceived by the senses. However, in this digital age, computer processes also assume significant importance from the evidentiary perspective. In this context, computer evidence has been broadly classified by certain legal experts and authors between real, hearsay and derived evidence:

- *Real evidence* refers to computer processes, programs and software. The computations and processes that are done by the computer fall in this category.
- *Hearsay evidence* refers to the information that is supplied to a computer. The inputs applied to a computer are covered in this category.
- *Derived evidence* refers to the output/result that arises out of real and hearsay evidence. It is the output of data that results from the process by computer software.

In the U.K., computer generated evidence is treated as a different class of evidence. The law requires a certificate of authenticity of electronic evidence. Under the U.K. Civil Evidence Act, 1968 as well as the U.K. Police & Criminal Evidence Act, 1984, computer evidence can be admitted provided there is no reasonable ground to believe that the statement in the certificate is inaccurate due to mislay of the computer. Also, the computer must have been operating

16. Sec. 45 of Indian Evidence Act, 1972.

properly at all material times or even if it was not operating properly, it would not have affected the production or the accuracy of the contents. Section 69 of the U.K. Police & Criminal Evidence Act, 1984 contains a negative covenant i.e. unless the evidence sought to be adduced meets the legal requirements, it is not admissible. In the U.S., computer generated evidence has been accepted as an exception to the rule of hearsay. The law in the U.S. contains certain exceptions to the hearsay rule, under which computer generated evidence is covered. However, the Courts in the U.S. have always required satisfaction as to the reliability of such evidence.

However, in our law of evidence, the rule against hearsay evidence is implicitly stated in section 60. Oral evidence must, in all cases whatever, be direct. Documentary evidence has been classified between primary and secondary evidence. The rule against hearsay evidence in documentary evidence, is also implicit in the law. For example, the Supreme Court in the case of *Lokeshmi Raj Sheety v. State of Tamil Nadu*²⁹ has held that newspaper reports are in the nature of hearsay evidence.

Depending upon the nature of the case, the computer processes that are applied, may also need to be proved to the satisfaction of the Court. The computer processes that are well established and accepted as based upon proven scientific principles need not be proved, as the Court is empowered to take judicial notice of the same without formal proof. However, computer processes that are unconventional and yet to be proven and generally acceptable as scientific, should be proved in the Court. For instance, the entire journey of an electronic message through innumerable computer systems from the originator to the destination, need not be proved for the reason that the transmission of an electronic message by the service provider is generally accepted as credible. On the other hand, a computer process to track hacking to its

source from the target/destination, if used during the criminal investigation, should also be proved in the Court till such a process reaches the requisite level of general acceptability. Before computer evidence can be believed, the Court must be satisfied as to the reliability of the inputs, processes and the output, apart from the attendant circumstances relevant to ascertain the veracity of the evidence. The veracity of the computer processes and their proof enhances the evidentiary value of the output. The manner in which electronic records are maintained, security procedures that are adopted and the credibility of the software used, determine the probative value of electronic evidence, apart from the facts and circumstances surrounding the case before the Court.

RELEVANT PROVISIONS OF INDIAN EVIDENCE ACT, 1872

- Justice Raja Vijayaraghavan*

'Document' as defined under **S. 3** of the Indian Evidence Act means -any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

'Evidence' as defined under **S. 3** of the Indian evidence act means and includes-

1. all statements which court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;
2. all documents **including electronic records** produced for the inspection of the court, such documents are called documentary evidence.

S.17 of the Indian Evidence Act which defines the term 'admission' has been substituted as, a statement, oral or documentary or contained in **electronic form**.

S.22A has been introduced to the Evidence Act stating that oral admissions as to the contents of electronic records are not relevant, unless the genuineness of the electronic record produced is in question. i.e:- **There is no relevancy of oral evidence as to the contents of electronic records**, unless the genuineness of the electronic record produced is in question.

Section 59 of the Evidence Act dealing with proof of facts by oral evidence states that, all facts except the [contents of documents or electronic records] maybe proved by oral evidence.

Section 61 Evidence Act provides that contents of documents maybe proved either by primary or secondary evidence.

Sections 62 and 63 of Evidence Act state what primary and secondary evidence respectively is.

The intention of the legislature is explicitly clear i.e. not to extend the applicability of **Ss. 61 to 65** Evidence Act to the electronic record.

Whereas, a newly introduced **S. 65A** categorically states that the contents of electronic records maybe proved in accordance with the provisions of **S.65B**, requires special procedure for presenting electronic records as admissible in evidence, in a Court of law. It provides for technical and non-technical conditions and the method for presenting electronic records as admissible in evidence, in a Court of law.

65B. Admissibility of electronic records.—

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:—

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether—

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,—

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment. Explanation.—For the purposes of this section any reference to information being derived from other information shall

be a reference to its being derived therefrom by calculation, comparison or any other process.

Section 85A of the Evidence Act provides that the court shall presume that every electronic record purporting to be an agreement containing the electronic signature of the parties was so concluded by a fixing the electronic signature of the parties. **Section 85B** of the Evidence Act enshrines presumption as to electronic records and electronic signature wherein court shall presume, unless the contrary is proved that the secure electronic record has not been altered since the specific point of time to which the secured status relates.

Section 85C of the Evidence Act states the presumption unless contrary is proved that the information listed in an electronic signature certificate is correct.

Section 88A of the Evidence Act states that the court may presume that the electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission, with a rider that the court shall not make any presumption as to the person by whom such message was sent.

It is also pertinent to note that the definitions of terms- 'electronic form', 'electronic record', and 'information' have been accorded the same meaning respectively assigned to them in the Information Technology Act, 2000.

RELEVANT PROVISIONS OF THE INFORMATION TECHNOLOGY

ACT,2000

'**Electronic Form**' has been defined under **S. 2(r)** of the Information Technology Act as, with reference to information, means any information generated, sent, received or stored in media, magnetic, optical, computer memory, microfilm, computer-generated micro fiche or similar device.

'**Electronic record**' has been defined under **S. 2 (t)** of the Information Technology Act, 2000 meaning, data, record or data generated, image or sound stored, received or sent in an electronic form or microfilm or computer-generated micro fiche.

'**Data**' has been defined under **S. 2(o)** of the Information Technology Act, 2000 meaning, a representation of **information, knowledge, facts**, concepts or instructions which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed or has been processed in a computer system a computer network, and **may be in any form**, (including computer printout is magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer.

'**Computer**' has been defined under **S. 2(i)** of the Information Technology Act, 2000 meaning any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, **storage**, computer software or communication facilities which are connected or related to the computer in a computer system or a computer network.

*'Computer network' has been defined under **S. 2(j)** of the Information Technology Act, 2000 meaning, the inter-collection of one or more computers or computer systems or communication device through-

(i) the use of satellite, microwave, terrestrial line, wired, wireless or other communication media; and

(ii) terminals or a complex consisting of 2 or more inter-connected computers or communication device whether or not the interconnection is continuously maintained

*was substituted by Act 10 of 2009, S. 4(B) for clause (j)

'Computer system' has been defined under **S. 2(I)** of the Information Technology Act, 2000 meaning, a divisor collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files which contain computer programs, electronic instructions, input data and output data that perform logic, arithmetic, data storage and retrieval, communication control and other functions.

'Information' as defined under **S.2(v)** of the Information Technology Act,2000 , includes [**data**, message, text], image, sound, voice, codes, computer programs, software and data bases or micro film or computer generated micro fiche.

Section 4 of the IT Act provides for legal recognition of electronic records.

To condense it to gain the essence, spirit and applicability - any **data** is **a representation of information, knowledge, facts etc.**, is an **electronic record**; it is considered a **document** and is **evidence**

when produced for the inspection of the court. **Such documents are called documentary evidence.** Hence **data, which** forms part of **electronic record** which is a **document** and is **evidence** when produced for the inspection of the court and such documents are called **documentary evidence.**

WHAT IS ELECTRONIC EVIDENCE?

In the **explanation** provided for **S. 79A** of the Information Technology Act, '**electronic form of evidence**' means any information of probative value that is either stored or transmitted in electronic form and includes computer evidence, digital audio, digital video, cellphones, digital fax machines.

ADMISSIBILITY OF ELECTRONIC RECORDS IN EVIDENCE BEFORE COURTS

So, electronic records are documents as defined in the Evidence act (S.3) and do not require any oral evidence unless the genuineness of the electronic record produced is in question (S.22A). All facts except the contents of electronic records may be proved by oral evidence. Ss. 61 & 62 regarding what amounts to primary and secondary evidence are silent about electronic records and it is only by S. 65A that the procedure for proving electronic records by virtue of S.65B is laid down. Section 65A of the Evidence Act creates special procedure laid down in S.65B by which electronic records may be admissible in evidence. **On a deeper scrutiny, section S. 65A performs the same function for electronic records that section 61 does for documentary evidence.**

S.65B is a complete code in itself detailing conditions by fulfilling which alone, can an electronic record shall be deemed to be also a document admissible in evidence in any proceedings without further proof or production of the original.

Section 65B Evidence Act states that any electronic record produced by a computer (the electronic storage device which stores the CCTV footage in the case at hand) also includes a storage device in which information was stored or was earlier stored or continues to be stored.

'SILENT WITNESS' THEORY

The "silent witness theory" has also developed as an alternative approach to authenticating traditional photographs. This theory allows "photographs to substantively 'speak for themselves' after being authenticated by evidence that supports the reliability of the process or system that produced the photographs." The silent witness theory originated in an early twentieth century case from Iowa [State v. Matheson, 103 N.W. 137 (Iowa 1905)]. Wherein the prosecution sought to admit an "x-ray photograph" to demonstrate the location of a bullet lodged near the victim's spine. The defendant objected and argued that the x-ray was not admissible because no witness had personally seen the bullet and could testify that the picture was accurate. The court took note of the skill level of the individual who took the x-ray and then, by judicial notice, recognized that photographs had independent value apart from the testimony of the witnesses. The court allowed the x-ray photograph to enter as direct evidence. Thus by this theory photographic evidence produced by a process whose

reliability is established **may be admitted as substantive evidence** of what it depicts without the need for an eyewitness of what it depicts and without the need for an eyewitness to verify the accuracy of its depiction. Since then American Courts have applied this theory in various cases.

RELEVANT CASE LAWS IN BRIEF

In Santosh Madhavan Vs. State of Kerala 2014 KHC 31, question whether multimedia cards were admissible in evidence and if so, the criterion to be applied was considered and a single Judge of the High Court of Kerala concluded that photographs, audio, video cassette, all can be treated as falling within the ambit of the term 'document'.

In Tukaram S. Dighole vs. Manikrao Shivaji Kokate, (2010) 4 SCC 329, the Apex Court observed that new techniques and devices are order of the day and though such devices are susceptible to tampering, no exhaustive rule could be laid down by which the admission of such evidence may be judged.

In Tomaso Bruno and Another vs. State of Uttar Pradesh, (2015) 7 SCC 178, the Apex Court observed that advancement of information technology and scientific temper must pervade the method of investigation and scientific and electronic evidence can be a great help to an investigating agency.

In V.K. Sasikala Vs. State (2012) 9 SCC 771, wherein the scope of handing over documents produced by prosecution and access to the documents in the custody of the Court at the stage of S.313

Cr.P.C. the Apex Court held that the question which arises herein is no longer one of compliance or non-compliance with the provisions of S. 207 Cr.P.C. and travels beyond the confines of the strict language of the provisions of the Cr.P.C. and touches upon the larger doctrine of a free and fair trial that has been painstakingly built up by the courts on a purposive interpretation of Art. 21 of the Constitution.

In **Tarun Tyagi Vs. Central Bureau of Investigation (2017) 4 SCC 490**, where the accused was charged with unauthorized misappropriation of a source code which he had access to, it was held by the Apex Court that, it is a hallmark of a fair trial that every document relied on by the prosecution has to be supplied to the accused at the time of supply of charge sheet to enable such accused to prepare his cross examination and defense strategy and directed to furnish a cloned copy of the hard disc to ensure that it was not interpolated by the accused in the course of time.

In **Sherin V. John Vs. State of Kerala 2018 (3) KHC 725**, while considering the questions whether an accused entitled to get copy of an electronic record produced in the court by the prosecution as a material object and is the right of an accused to get copies of the documents produced by the prosecution absolute, this Court proceeded to conclude that the distinction between document and material object is that the document cannot exist without a substance like paper, clay, stone, rock, tree or animal and that in the case of document, its contents always appear on a material object and ultimately held that the tablet

produced before the court was a material object and petitioner was not entitled to get a copy of it.

In **Adv. T.G. Ajith Kumar T.S. Vs. State of Kerala & Anr., Crl.M.C. 4480 /2018**, wherein the Investigation Officer produced a CD allegedly containing some visuals, as material object. Petitioner applied for a certified copy of it but was turned down by Magistrate. This Court held that CD not a material object, but an electronic record, directing to issue copy of the CD as per the directions in Shrein's case and Tarun Tyagi's case.

In **P. Gopalakrishnan Vs. State of Kerala 2018 (4) KHC 437** the Kerala High court held that the memory card seized was the end product of the crime; that it was not the contents or the information derived from the memory card that was proposed to be established by the production of the memory card and hence the memory card produced is not a document as contemplated under S.207 Cr.P.C.

In **ARK Shipping Co. Ltd. Vs. CRT Ship Management Pvt. Ltd., 2007 SCC Online Bombay 663**, an affidavit was filed in compliance of Sec.65B, Hon'ble High Court said, 'The affidavit, therefore, in the facts and circumstances of the case, is sufficient compliance of Sec.65B of the Evidence Act'.

In **Kundan Singh Vs. The State, Crl. Appeal No. 711/2014**, the Delhi High Court held that section 60 5B is a specific provision relating to the admissible 80 of attorney record(s) and therefore, production of a certificate under section 65B(4) is mandatory.

In **Nyati Builders Pvt. Ltd. Vs. Mr. Rajat Dinesh Chauhan & Ors. 2015 SCC Online Bombay 7578**, the Bombay High Court justified the trial court's order allowing the filing of S. 65B certificate at a later stage in a civil suit.

In **State of Rajasthan through the Special P.P. Vs. Sri Ram Sharma and Others**, S.B. CrI. Misc. Petition No. 4383/2016 dt. 02.09.2016, the Hon'ble High Court of Rajasthan allowed prosecution application filed under Sec. 311 Cr.P.C. for submitting certificate under Sec.65B, prepared by investigation officer after closing of defence evidence, regarding electronic evidence of conversation between complainant and accused, relating to illegal gratification.

Similar view was expressed by Hon'ble High Court of Rajasthan in **Paras Jain Vs. State of Rajasthan**, S.B. CrI. Revision Petition No. 1329/2014 dt. 04.07.2016, as well as in in **Avadut Waman Kushe Vs. The State of Maharashtra**, CrI., Writ Petition No. 54/2016 dt. 03.03.2016, before Hon'ble High Court of Bombay. It was argued before Hon'ble Court that considering the provision of Section 65B and the purpose of the certificate, it was necessary for the prosecution to submit the same along with the CD and subsequent filing of the certificate cannot be treated as compliance with the mandatory provision. The Hon'ble High Court of Bombay considered **Anvar P.V. Vs P.K. Basheer** (supra) and **Faim@Lala Ibrahim Khan Vs. The State of Maharashtra** that were cited in support of the above argument and held that both these cases simply hold that certificate under Sec.65B is mandatory and no electronic evidence in absence of this certificate can be admitted in evidence. It was also held by the Hon'ble Court that, a perusal

of the provision of Section 65B(4) showed that, there is nothing in the provision that specified the stage of production of the certificate. It further held that the provision of Section 65B is about admissibility of electronic record and not production of it. While discussing the words the opening words of Section 65B(4) are '**In any proceedings where it is desired to give statement in evidence**', the Honourable Court held that this can only be the stage at which the record is tendered in evidence for being considered its admissibility. Therefore held that the certificate need not be filed at the time of production of the electronic record and that it could be filed at the time, the record is tendered in evidence. The subsequent filing of the certificate cannot reduce its effectiveness as a safeguard against tampering etc.

In **Ignatius Topy Pereira Vs. Travel Corporation (India) Pvt. Ltd. And Another**, 2016 SCC online Bom 97, It was held by Hon'ble Bombay High Court that if the certificate under Sec.65B, which was produced, was rejected as not in compliance with the provision, a fresh certificate may be produced in the Court. It has been categorically ruled by all the Hon'ble Courts, that the certificate under Sec.65B can be filed at a later stage during the trial when electronic record is tendered in evidence. It can also be filed invoking discretionary powers of the trial court under Sec.91 and Sec.311 Cr.P.C read with Sec. 165 Evidence Act. The requisite certificate under Sec.65B can also be allowed to be filed at appellate stage under Sec.391 Cr.P.C.

In **STATE (NCT OF DELHI) Vs. NAVJOT SANDHU (AIR 2005 SC 3820)** more famously known as the Parliament Blast Case, wherein, the proof and admissibility of mobile telephone call records was dealt

with by the Apex Court while considering the appeal. It was submitted on behalf of the appellant/accused that no reliance could be placed on the mobile telephone call records due to the lack of relevant certificate under S.65B(4) of the Evidence Act. The Apex Court held that a cross examination of the competent witness acquainted with the functioning of the computer during the relevant time and the manner in which the printouts of the call records were taken, was sufficient to prove the call records. In other words, the Apex Court heavily relied on sections 63 and 65 of the Evidence Act and held –

“150. It may be that the certificate containing the details in Sub-section(4) of section 65B is not filed in the instance case, but that does not mean that secondary evidence can't be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, sections 63 & 65 of the Evidence Act”.

In **ANVAR P.V. Vs., P.K. BASHEER (2014)10SCC 473**, while dealing with production of electronic records in evidence the Apex Court stated that only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be **taken** to Section 45A - opinion of examiner of electronic evidence.

The Apex Court further held the Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements Under Section 65B of the Evidence Act are not complied with, as the law now stands in India. The Apex

Court further held that the law laid down under S. 65B of the Evidence Act being a special provision, the general law on secondary evidence under S. 63 r/w S. 65 of the Evidence Act shall yield to the same based on the Maxim 'Generalia specialibus non derogant' meaning a special law will always prevail over the general law. The apex court further held as follows:-

“ 22.To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this Court in Navjot Sandhu case (supra), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements Under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.”

By this landmark judgment the Apex Court cleared the air with regard to the law relating to admissibility of electronic evidence in courts in India.

In **Shafiq Mohammad v. The State of Himachal Pradesh, (2018) 2 SCC 801**, wherein one of the questions which arose in the course of consideration was, the apprehension whether videography of the scene of crime or scene of recovery during investigation should be necessary to inspire confidence in the evidence collected. The Apex Court held –

“(7) Though in view of Three-Judge Bench judgments in Tomaso Bruno and Ram Singh (supra), it can be safely held

that electronic evidence is admissible and provisions under Sections 65A and 65B of the Evidence Act are by way of a clarification and are procedural provisions. If the electronic evidence is authentic and relevant the same can certainly be admitted subject to the Court being satisfied about its authenticity and procedure for its admissibility may depend on fact situation such as whether the person producing such evidence is in a position to furnish certificate under Section 65B(4).

(8) Sections 65A and 65B of the Evidence Act, 1872 cannot be held to be a complete code on the subject. In Anvar P.V. (supra), this Court in para 24 clarified that primary evidence of electronic record was not covered under Sections 65A and 65B of the Evidence Act. Primary evidence is the document produced before Court and the expression "document" is defined in Section 3 of the Evidence Act to mean any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter."

In Anvar PV's case the Full Bench clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), pen drive, removable hard disc etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. **All these safeguards are taken to ensure the source and authenticity, which are the two**

hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records could lead to travesty of justice. The Full Bench had clarified that Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B of the Evidence Act.

In **Arjun Panditrao Khotkar vs. Kailash Kushanrao Gorantyal**, the bench comprising Justice Ashok Bhushan and Justice Navin Sinha on 26th July, 2019 observed: "we are of the considered opinion that in view of Anvar P.V. the pronouncement of this court in Shafi Mohammad need reconsideration. With the passage of time, reliance on electronic records during investigation is bound to increase. The Law therefore needs to be laid down in this regard with certainty. We, therefore, consider it appropriate to refer this matter to a larger Bench. Needless to say that there is an element of urgency in the matter."

.....



conduct is required to be read with a few years of its receipt. Such provisions, both in the Act and in the rules, are part of the special provisions under the Evidence Act. Section 65 A and Section 65 B lay the complete test for the admissibility of such evidence.

Electronic records are now created with everyday activities from the moment we wake up to the very end when we go to bed with hundreds of various computer records such as mobile phones, mail, tablets, blog, blogs, computers, devices, digital data, name tags, faces at the mall, etc. "Electronic" is a broad term which covers all such digital records with their excessively small, microscopic, and digital bits stored on crystals, recording and storing electronic records. Digital records are no longer a by-product of other paper records. From the moment we enter the digital world, our entire lives are being recorded by devices that are not even visible to us.

This article traces the formulation of Section 65 A and Section 65 B of the Evidence Act from *Verghese v. State of Kerala* to the reversal in *Prakash v. P.K. Babu*.¹ The article analyses the failure of the judgment of the Supreme Court in *Prakash v. P.K. Babu*.² It also examines the formulation of Section 65 B of the Evidence Act and its role in the field of forensic evidence and the impact of the evolution of information technology on Section 65 B of the Evidence Act. The article also includes the recent judgment of the Supreme Court in *State of Karnataka v. N. Gopal*.³ It also traces the evolution of forensic evidence and digital records in the context of the Evidence Act. Section 65 B of the Evidence Act is the judgment of the Supreme Court. Finally, the article also includes the field of forensic evidence and digital records in Section 65 A and Section 65 B in case the traces of moving electronic evidence.

SPECIAL PROVISIONS AND EVIDENCE ACT, 1973

Electronic records are now created by us in these days. We create computer files and outputs in the course of our lives on our computer files which are stored in computers or networks with the removal of the paper copy of the records. It contains any data, information or details stored in electronic form and irrespective of when, how or by whom such documents are created.

Significantly, the computer files are stored on cloud services, where the evidence and storage facilities are not under the control of the entity storing the information, such as email providers, which under the custody of multiple institutions. Most e-mails are sent to a few of the email providers and

¹ *Prakash v. P.K. Babu*, (2001) 10 SCC 613, 614 (SC). (2001) 10 SCC 613, 614 (SC).

² *Prakash v. P.K. Babu*, (2001) 10 SCC 613, 614 (SC). (2001) 10 SCC 613, 614 (SC).

³ *State of Karnataka v. N. Gopal*, (2019) 10 SCC 613, 614 (SC).

⁴ *State of Karnataka v. N. Gopal*, (2019) 10 SCC 613, 614 (SC).

⁵ *State of Karnataka v. N. Gopal*, (2019) 10 SCC 613, 614 (SC).

⁶ *State of Karnataka v. N. Gopal*, (2019) 10 SCC 613, 614 (SC).



THE EVIDENCE ACT, 1973 AND THE EVIDENCE (AMENDMENT) ACT, 2008 33

imagery to his part of evidence submitted in civil and criminal cases. Evidence may be given even in child cases which may be in quite sessions conducted voluntarily by child witnesses, although even in such cases, assistants like Ayesha I. You – Technological agencies like Techline and Knight bridge have provided the programs of our country USA to amend existing legislations to give authority to child claimants and to give to the judges, via this way, by means of an exchange of

Computing processes and its peripheral devices, e.g. in compliance of the need of policy processes for child sexual abuse cases, as was noted by the Supreme Court in *Harshada v. State of Maharashtra*.¹¹

The present legal provisions on formal electronic evidence may be comparative to have simple material (e.g. on proving the same). There is a need to find a way in the way of evidence as per the need of the claim and to give a better way of giving claimant as observed in *Harshada*.¹²

The legislature has also amended the Evidence Act to include two special provisions on electronic evidence, namely, Section 17 A and Section 17 B of the Evidence Act. These provisions have the simplicity and efficiency of the legal provisions, as seen in Section 17 of the Evidence Act and Section 18 of the Bengal Evidence Act, 1907. These provisions have withstood the test of time for a variety of reasons, and demands that electronic evidence in digital form and other digital forms should have their own documents. Similarly, existing provisions under Section 63 and Section 64 which related to making copies of documents had also been applied for proving copies of electronic documents. Section 63 of the Evidence Act, 1973, specifically Section 63 of the Evidence Act, 1973, and Section 64 of the Evidence Act, 1973, were replaced in April 2008 by Section 17 of the Evidence Act, 2008, and Section 17 B of the Evidence Act, 2008. The changes in the law, especially Section 17 of the Evidence Act, 2008, and Section 17 B of the Evidence Act, 2008, were replaced in April 2008 by Section 17 of the Evidence Act, 2008, and Section 17 B of the Evidence Act, 2008. The changes in the law, especially Section 17 of the Evidence Act, 2008, and Section 17 B of the Evidence Act, 2008, were replaced in April 2008 by Section 17 of the Evidence Act, 2008, and Section 17 B of the Evidence Act, 2008.

Restriction on the rationale and the complexities involved, as was rightly pointed out in *Harshada v. State of Maharashtra*,¹³ and the special provisions under Section 17 A and Section 17 B take priority over the general provisions. The problem is, however, as with the Sections 63 and 64 of the Evidence Act.

¹¹ (2003) 10 SCC 682.
¹² *Harshada v. State of Maharashtra*, (2003) 10 SCC 682, paras 10-11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.



ANALYSIS OF SECTION 65 AND SECTION 65B

Section 65 A and Section 65 B were introduced into the Evidence Act of 1973 providing special processes for proving copies or extracts of electronic records. The introduction of the said provisions appear to be the same and in addition some processes under Section 64 and Section 65 of the Evidence Act, 1973 providing a method of authenticating the integrity of the copy and the integrity of the contents of such copy.

Originals & Section 65 A

Section 65 A makes it mandatory that the original copy or copies or extracts produced after the procedure specified in Section 65 B only to be followed. It also states that original or electronic records are produced the same must not require the mandatory compliance with the above mentioned processes under Section 64 and Section 65 B including the authentication process mentioned in Section 65 B.

Justice Jadhav in *State of Andhra Pradesh v. Special Provisions for Section 65 A & Section 65 B* pointed out that copies or extracts and not when the original is submitted in court is what is produced. Many judgments including *State of Andhra Pradesh v. Special Provisions* have held that procedure laid out in the said section regarding copies under Section 65 B of the Evidence Act is then mandatory and not optional. It is not an alternative procedure to be followed.¹

"Degree document" under Section 65-B

Section 65 A stipulates that copies or extracts of electronic records have to be proven through the procedure set out in Section 65 B. Any electronic record which is produced in a trial or is produced in evidence is made to be authentic and reliable under procedure specified in the said section. If the conditions mentioned in the said section of Section 65 B of the Evidence Act are satisfied, this will have to be treated as the Section 65 B of the Evidence Act. The said definition provision therefore does clearly require special provisions under Section 3 of the Evidence Act and section 29 (2).

Section 65 B A provides definitions of computers and computer systems and Section 65 B, 3 sets out definitions of computer inputs and outputs. The actual process for admission of copies or extracts or contents of evidence is provided under section 65 B and Section 65 B, 4.

Section 65 B, 1 sets out the parameters to be proved with respect to computer inputs or outputs and covers those cases where an electronic

¹ *State of Andhra Pradesh v. Special Provisions for Section 65 A & Section 65 B*, (2011) 11 SCC 618.

² *State of Andhra Pradesh v. Special Provisions for Section 65 A & Section 65 B*, (2011) 11 SCC 618; *State of Andhra Pradesh v. Special Provisions for Section 65 A & Section 65 B*, (2011) 11 SCC 618; *State of Andhra Pradesh v. Special Provisions for Section 65 A & Section 65 B*, (2011) 11 SCC 618; *State of Andhra Pradesh v. Special Provisions for Section 65 A & Section 65 B*, (2011) 11 SCC 618; *State of Andhra Pradesh v. Special Provisions for Section 65 A & Section 65 B*, (2011) 11 SCC 618.



record is produced from a computer, which is used regularly in the normal course of business.”

The said material sites under Section 95(B)(2) as contained in the Supreme Court in the *P. V. N. K. Bhatnagar* case.

(1) The electronic record pertains to the retention of e-mail files. It is not a document as contemplated in the general context which has come to mean a document in a process of information technology. It is not a document as contemplated by the law so far as the law of evidence is concerned.

(2) The information of the same is not an electronic record as defined by law. It is not a document as contemplated by law. It is not a document as contemplated by law in the ordinary sense of the word.

(3) During the material part of the said period, the system was operating properly and that even if it was not operating properly for some time, the breakdowns had not affected the record of the agency as to contents.

(4) The information contained in the system can be a reproduction or a copy of the information contained in the computer in the ordinary course of the business.

Section 95(3)(B) therefore clearly applies to such computer inputs or outputs, which are input into, pass through, and are output from a computer system, which are used by a computer to create or receive such electronic documents.

Processes mentioned under Section 95(B)(2) do not allow for tracing or third party documents. For a certificate stating that a particular computer resource was functioning without disruption to the knowledge of the person using such certificate, namely, the help service and, as the *P. V. N. K. Bhatnagar* case is related with respect to the fact of the station, it serves as a pointer.

The present case in Section 95(3)(B) makes the tracing documents within a company difficult. The fact that under Section 95(B)(2) all are to be read together. It is not a document as contemplated by law for the purpose of a certificate under Section 95(3)(B). The legislative intention is to provide that the computer inputs or outputs which were required to be produced in the course of the business of the company, which indicates that the system of the company is not a document as contemplated by law.

The said cases, as compared with the earlier judgments under Section 95(B)(2) of the Evidence Act, are to be read together. The effect of the interpretation of Section 95(B)(2) in the *P. V. N. K. Bhatnagar* case has been explained in the subsequent decisions of the Supreme Court including through the *State of Karnataka* case, which is a valid precedent.



THE ANARREST ACT, 1988 AND THE ANARREST ACT, 1988

which was alleged to be the result of a process of the Special Branch of the Security Forces Section by the State Executive Act.

THE ANARREST ACT

The Act and the other provisions for providing a framework for the arrest of persons below the stage of the sentencing of a person most commonly the person was not a suspect or a defendant. The presence of a person in the government's custody was the requirement of the State as per the Act. The Act also provided for the arrest of a person who was a suspect or a defendant in a criminal case. The Act also provided for the arrest of a person who was a suspect or a defendant in a criminal case. The Act also provided for the arrest of a person who was a suspect or a defendant in a criminal case.

THE ANARREST ACT

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Significantly, the Supreme Court in the case of *State v. Anarrest* (1988) 1 SCR 1000, the Act and the other provisions were held to be validly enacted. The Act and the other provisions were held to be validly enacted. The Act and the other provisions were held to be validly enacted. The Act and the other provisions were held to be validly enacted. The Act and the other provisions were held to be validly enacted.

Original provisions under the Prevention of Corruption Act, 1988 were also struck down by the court. The court held that the provisions of the Act were unconstitutional. The court held that the provisions of the Act were unconstitutional. The court held that the provisions of the Act were unconstitutional. The court held that the provisions of the Act were unconstitutional. The court held that the provisions of the Act were unconstitutional.

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THE ANARREST ACT

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THE ANARREST ACT

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THE ANARREST ACT

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MANU/SCOR/21793/2019
IN THE SUPREME COURT OF INDIA
CIVIL APPEAL NO(s). 20825-20826 OF 2017

Date of Order: 26.07.2019

Appellants: Arjun Panditrao Khotkar

Vs.

Respondent: Kailash Kushanrao Gorantyal and Others

ORDER

In Anvar P.V. vs. P.K. Basheer and others, (2014) 10 SCC 473, a three Judges Bench of this Court held: 16. It is further clarified that the pe on need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to 1 which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

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20. Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act. The very caption of Section 65-A of the Evidence Act, read with Sections 59 and 65-B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under Section 65-B of the Evidence Act.

That is a complete code in itself. Being a special law, the general law under Sections 63 and 65 has to yield.

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22. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied.

Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

2. In Shafhi Mohammad vs. State of Himachal Pradesh, (2018) 2 SCC 801, a two Judges Bench decision, it has been held: 20. An apprehension was expressed on the question of applicability of conditions under Section 2 65-B (4) of the Evidence Act to the effect that if a statement was given in evidence, a certificate was required in terms of the said provision from a person occupying a responsible position in relation to operation of the relevant device or the management of relevant activities. It was submitted that if the electronic evidence was relevant and produced by a person who was not in custody of the device from which the electronic document was generated, requirement of such certificate could not be mandatory. It was submitted that Section 65-B of the Evidence Act was a procedural provision to prove relevant admissible evidence and was intended to supplement the law on the point by declaring that any information in an electronic record, covered by the said provision, was to be deemed to be a document and admissible in any proceedings without further proof of the original.

This provision could not be read in derogation of the existing law on admissibility of electronic evidence.

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24. We may, however, also refer to the judgment of this Court in Anvar P.V. v. P.K. Basheer, delivered by a three-Judge Bench. In the said judgment in para 24 it was observed that electronic evidence by way of primary evidence was covered by Section 62 of the Evidence Act to which procedure of Section 65-B of the Evidence Act was not admissible.

However, for the secondary evidence, procedure of Section 65-B of the Evidence Act was required to be followed and a contrary view taken in Navjot Sandhu that secondary evidence of electronic record could be covered under Sections 63 and 65 of the Evidence Act, was not correct. There are, however, observations in para 14 to the effect that electronic record can be proved only as per Section 65-B of the Evidence Act.

25. Though in view of the three-Judge Bench judgments in Tomaso Bruno and Ram Singh, it can be safely held that electronic evidence is admissible and provisions under Sections 65-A and 65-B of the Evidence Act are by way of a clarification and are procedural provisions. If the electronic evidence is authentic and relevant the same can certainly be admitted subject to the Court being satisfied about its authenticity and procedure for its admissibility may depend on fact situation such as whether the person producing such evidence is in a position to furnish certificate under Section 65-B(4).

26. Sections 65-A and 65-B of the Evidence Act, 1872 cannot be held to be a complete code on the subject. In Anvar P.V., this Court in para 24 clarified that primary evidence of electronic record was not covered under Sections 65-A and 65-B of the Evidence Act. Primary evidence is the document produced before the Court and the expression document is defined in Section 3 of the Evidence Act to mean any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

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29. The applicability of procedural requirement under Section 65-B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in the absence of certificate under Section 65-B (4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65-B (4) is not always mandatory.

3. We are of the considered opinion that in view of Anvar P.V. (Supra), the pronouncement of this Court in Shafhi Mohammad (supra) needs reconsideration. With the passage of time, reliance on electronic records during investigation is bound to increase. The law therefore needs to be laid down in this regard with certainty. We, therefore, consider it appropriate to refer this matter to a larger Bench. Needless to say that there is an element of urgency in the matter.

4. Let the records be laid by the Registry before Hon'ble the Chief Justice of India for appropriate directions.
