APPELLATE CRIMINAL

Before Mr. Justice Dipak Misra and Mr. Justice A.K. Shrivastava
26 September, 2002

JHALLE ---Appellant*
v.
STATE OF MADHYA PRADESH --Respondant

Penal Code Indian (XLV of 1860)–Sections 302,201, Evidence Act Indian,1872, Section 3 and Criminal Procedure Code, 1973, Section 374 (2)–Appeal against conviction and sentence– Murder–Cricumstantial evidence– Deceased Forest guard– Detected commission of forest offence by the deceased person and was taking there to lodge the report–Found missing thereafter–Disclosure statement by accused person lead to discovery of the dead body–Bicycle and other belonging of deceased also recovered at the instance of the accused–No other hypothesis than guilt of the appellant is plausible–No interfere in the conviction recorded by the Trial court.

The above said overwhelming evidence, are sufficient to prove each circumstance pointing towords the guilt of the accused and taking cumulative effect of these circumstance, a complete chain is formed. In the case of *Kanhai Mishra* v. *State of Bihar*[1], wherein in pare 5 the Apex court held as under:-

> "5. It is a well established rule in criminal jurisprudence that cricumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such a character that the same is wholly inconsistent with innocence of the accused and is consistent only with his guilt. The incriminating circumstance for being used against the accused must be such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of inncoence of the accused. In a case of circumstantial evidence the whole endeavour and effort of the court should be to find our whether the crime was committed by the accused and the circumstance proved

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* Cri. A No. 376/90 (1) A.I.R. 2001 S.C 1113

from themselves into a complete chain unerringly pointing to the guilt of the accused. If the circumstances proved against the accused in a case are consistent either with the innocence of the accused or with his guilt, he is entitled to the benefit of doubt. Reference in this connection may be made to a constitution Bench judgment of this Court in the case of M.G. Agrawal V. State of Maharashtra, A.I.R. 1963 S.C. 200 : (1963) (1) Cri. L.J. 235) and recent decisions of this Court in the cases of Ronny alias Ronald James Alwaris V. State of Maharashtra (1968) 3 S.C.C. 625 : (1998 A.I.R. SCW 1103 : A.I.R. 1998 S.C. 1251 : 1998 Cri. L.J (1638) and Joseph S/o Kooveli v. Poulo v. State of Kerala, (2000) 5 S.C.C. 197 : (2000 A.I.R. SCW 1682 : A.I.R. 2000 S.C.1608 2000 Cr. L.J. 2046)."

Adjudged on the anvil of the aforesaid law and considering the circumstances which we have enumerated, we do not have the slightest doubt in our mind that all the circumstances lead towards the guilt of the accused and, in contrary, no other hypothesis is possible or plausible.

K.V. Chacko Alias Kunju v. *State of Kerala*[1]; *Kanhai Mishra* v. *State of Bihar*[2]; relied on.

Abhisek Arjariya, for the appellant.

Wakil Khan, P. L. for the respondent.

JUDGMENT

The Judgment of the Court was delivered by **A.K. Srivastava, J** :-Accused/ appellant Jhalle (hereinafter referred as 'the accused') has filed this appeal against the judgment and sentence dated 6.3..1990 passed by the learned Additional Sessions Judge, Panna in Sessions Trial No. 71/88 convicting him of the offences punishable under Sections 302 and 201 IPC awarding sentence of rigorous imprisonment of life and five years respectively with a further stipulation that both the sentences would run concurrently. By the same judgment, co-accused Lakkhu @ Lakhan Lal has been acquitted.

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(1) (2001) 9 S.C C 277 (2) A.I.R. 2001 S.C 1113

In brief, the case of prosecution is that deceased Shivshanker Sharma (hereinafter referred as deceased) was serving on the post of 'Forest Guard'. On 7.7.1988, deceased Shivshanker went on his bicycle to his place of duty. He was in uniform and was also wearing a wrist-watch. At his duty place, he took attendance of labourers working under him. Pw-2, Ram Das, and PW-4, Sharan Singh, are the labourers of Forest Department and were serving under the deceased. On 7.5.1988 during his duty hours, the deceased caught accused persons with 'Achar' (a forest produce) and teak wood, etc and brought them to village Gandhigram at 7.00 P.M. Preliminary formalities were performed by him at the house of PW-1, Mannulal. The deceased, in presence of Mannualal, kept the seized articles, in his house with a direction, whenever he would send the slip, seized goods be delivered back.

The accused persons, offered bribe of Rs. 50/- to the deceased with a request to close the matter, but, he did not accept the said amount and directed them to accompany him up to Panna. They proceeded through the Jungle route from Village Gandhigram in the night at 9 p.m. On the next day, PW-2, Ram Das, Pw-4, Sharan Singh, and Pw-1, Mannualal, came to Panna and entreated Pw-3, A.K. Tiwari, Ranger for the payment of their wages. Shri Tiwari directed them to call Forest Guard Shivshanker (the deceased). These persons went to the house of the deceased where they were informed by his wife that deceased had not returned home. These witnesses narrated the said fact to Ranger Shri A.K. Tiwari. At the same time Chandra Datt Sharma, the father of the deceased, came and submitted a report (Ex. P-22) to Shri A.K. Tiwari Stating therein that the previous day his son went to his duty place, in the Jungle, but he had not returned. On receiving such report, Ranger Shri Tiwari lodged a written report (Ex. P-21) on 8.5.1998 at 9 p.m. at the Police station, Panna. The police registered it as 'Missing Person' report (4/88). Shri J.P. Khare, Town-Inspector of Police Station Kotwali, Panna started investigation and went to village Gandhigram where he recorded the statements of witnesses. Upon enquiry, it was learnt by him, that on 7.5.1988 at about 9 p.m., the deceased was with the appellant. Thereafter, Shri Khare along with Ranger Shri A.K. Tiwari, Sharan Singh and Ram Das went to the house of accused persons and made queries. The accused persons disclosed the fact that they had

committed murder of the deceased. His dead body and his belongings namely uniform, shoes, bag etc. Were seized at the instance of the accused. The dead-body of the deceased was sent for post-mortem and the Autopsy Surgeon Dr. A.K. Mishra (PW-7) after post-mortem opined that deceased died on account of head injury. The post-mortem report is Ex. P-42.

The police, after investigation, filed the charge-sheet and the case was committed by the Committal Court to the Court of Session, who charged accused persons for the offences punishable under Sections 302 and 201 IPC, which they denied.

In order to bring home the charges, the prosecution examined as many as 13 witnesses. The case of prosecution rests upon the circumstantial evidence. The learned Trial Judge found accuses/appellant guilty and thus convicted him by awarding the sentence mentioned herein above, but, Lakkhu @ Lakhanlal was found to be innocent as a result of which, he was acquitted. The convicted accused has thus filed the appeal.

Shri Abhishek Arjariya, learned counsel for the appellant, has submitted that learned Trial Judge has committed gross error in holding that there is enough circumstantial evidence so as to arrest the accused under the ambit of guilty. According to him, the circumstances are not enough to maintain the conviction.

Shri Wakil khan, the learned Panel Lawyer for the respondent/State, submitted that, there is no infirmity in the judgment and the evidence of the witnesses when appreciated in proper perspective, the chain of events are scrutinised in great deal, there remains no missing link and each circumstance leads to the exclusive involvement of the accused and the appeal deserves to be dismissed.

After hearing the rival contentions of learned counsel for the parties, we are of the considered opinion that the appeal deserves to be dismissed. We have perused the evidence brought on record. On scrutiny of the evidence of PW-1, Mannulal, PW-2, Ram Das, PW-4, Sharan Singh, and PW-6, Madra, the guilt of accused/appellant is proved.

Jhalle v. State of Madhya Pradesh, 2002.

The law regarding basing a conviction on circumstantial evidence is well settled. When a case rests upon circumstantial evidence, such evidence must satisfy three tests :

> (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; (iii) the circumstances, taken cumulatively, should 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. The circumstantial evidence in order to sustain conviction must also be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See *K.V. Chocko Alias Kunju* v. *State of Kerala*[1].

If these tests are applied in the present case, the guilt against appellant is duly proved. Following are the circumstances which complete the chain so as to prove the guilt of the accused :-

> (i) PW-11 Suman Bai, the wife of the deceased, has categorically stated in her statement, that on the date of incident deceased had gone for duty on cycle to 'Sarkoha Beet', and was wearing his brown uniform, belt, shoes and was, also wearing a wrist -watch. He was also having his bag containing official papers.
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> (ii) PW-1 Manulal, PW-2 Ram Das, Pw-4 Sharan Singh and PW-6 Madra have deposed that on 7.5.1988, during their duty hours, deceased Shiv Shanker found accused persons with 'Achar' (a forest produce) and teak wood etc. and brought them, to village Gandhigram.
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> (iii) The preliminary formalities were made at the house of

(1) (2001) 9 S.C.C. 277

Mannualal, PW-1. According to these witnesses, the deceased disclosed his intention, to register a forest offence against the accused persons and thereafter went to Panna at about 9 p.m. from village Gandhigram with the accused.

(iv) The accused did not return home, as a result of which there was a search for his whereabouts. In this regard evidence of PW-11, Suman Bai, PW-4 Sharan Singh, PW-8 Indrajeet Singh and PW-1 Mannulal, are relevant.

(v) At the instance of accused the dead body of deceased was recovered from Chunha Khadam.

(vi) The dead body was found tied with two cement poles with the help of wire. These facts are proved by the evidence of PW-2, Ram Das, PW-3, A.K. Tiwari and PW-4 Sharan Singh.

(vii)The seizure memorandums of the uniform, belt of deceased and cement pole etc. Are Ex. P-4, P-5 P-8 and P-9 and they have been seized at the instance of appellant. An Atlas Cycle belonging to the deceased was recovered vide seizure memo Ex. P-12. This document has been proved by PW-2, Ram Das.

(viii) The blood of the deceased was found on the earth, grass, leaves and small wooden pieces, collected from the place of occurrence and vide report (Ex. P-37) of the Forensic Analyst, human blood was reported to be found on these articles.

(ix) Pieces of cement pole, stone stained with human blood were recovered, at the instance of the appellant and presence of, human blood, was affirmed by Serologist vide its report Ex. P-38.

(x) PW-11, Suman Bai, the wife of deceased, identified the articles, namely Shoes, Bag and Belt of the deceased.

(xi) The other witnesses Shiv Kishore, Pw-14 and Prabhakant Dwivedi, PW-15, also identified these articles. The test identification memo is Ex, P- 39

(xii) PW-12, Sanjay, is a watch-repairer. He repaired the wrist watch of the deceased and has proved the receipt Ex. P-36 by which payment of Rs. 30/- was made by the deceasad towards repairing charges.

(xiii) PW-16, Pyaar Khan, is a witness who sold the Atlas cycle to the deceased and proved the receipt thereof vide Ex. P-34

The above said overwhelming evidence, are sufficient to prove each circumstance pointing towards the guilt of the accused and taking cumulative effect of these circumstances, a complete chain is formed. In the case of *Kanhai Mishra* v. *State of Bihar*[1], wherein in para 5 the Apex Court held as under :-

"5. It is a well established rule in criminal jurisprudence that cricumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such a character that the same is wholly inconsistent with innocence of the accused and is consistent only with his guilt. The incrimination circumstance for being used against the accused must be such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of inncoence of the accused. In a case of circumstantial evidence the whole endeavour and effort of the court should be to find our whether the crime was committed by the accused and the circumstance proved from themselves into a complete chain unerringly pointing to the guilt of the accused. If the circumstances proved against the accused in a case are consistent either with the innocence of the accused or with his guilt, he is entitled to the benefit of doubt. Reference in this connection may be made to a constitution Bench judgment of this Court in the case of M.G. Agrawal V. State of Maharashtra, A.I.R. 1963 S.C. 200 : (1963) (1) Cri. L.J. 235) and recent decisions of this Court in the cases of Ronny alias Ronald James Alwaris V. State of Maharashtra (1968) 3 S.C.C. 625 : (1998 A.I.R. SCW 1103 : A.I.R. 1998 S.C. 1251 : 1998 Cri. L.J 1638) and Joseph S/o Kooveli Poulo v. State of Kerala, (2000) 5 S.C.C. 197 : (2000 A.I.R. SCW 1682 : A.I.R. 2000 S.C. 1608, 2000 Cri. L.J. 2467)."

(1) A.I.R. 2001 S.C. 1113

Jhalle v. State of Madhya Pradesh, 2002.

Adjudged on the anvil of the aforesaid law and considering the circumstances which we have enumerated, we do not have the slightest doubt in our mind that all the circumstances lead towards the guilt of the accused and, in contrary, no other hypothesis is possible or plausible. The chain is complete. There is nothing on record which can raise any doubt to indicate the innocence of the accused to confer on him the benefit of doubt. Thus, we are unable to perceive any error in the judgment passed by the learned Trial Judge.

Consequently, the appeal is dismissed and the judgment of conviction and order of sentence are hereby affirmed.

APPELLATE CRIMINAL

Before Mr. Justice Rajeev Gupta and Mr. Justice S.L. Jain

9 May, 2002

NARESH ...Appellant

v.

STATE OF M.P. ...Respondent

Criminal Procedure Code, 1973 (II of 1974)–Section 374 (2)–Evidence Act, Indian 1872, Sections 3,25,26 and Penal Code, Indian 1860, Section 302–A Murder–Conviction and sentence–Appeal–Appreciation of evidence–Accused himself went to police station and lodged the F.I.R–F.I.R in the nature of confession and inculpates the accused–F.I.R. cannot be used against the accused–Solitary eye witness–Closely related to deceased–In absence of some corroboration his evidence cannot be used to convict the accused–Conviction and sentence set aside.

Prohibition contained in Section 25 of the Evidence Act should be applied very strictly. The intention of Legislature in enacting Section 25 was to deter the police from extorting confession in admissible in proof. Section 25 is intended to hit at an evil to guard against the danger of receiving in evidence testimony from accused person who may stand to

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* Cri. A. No 256/91.

suffer pressure from the police personal. Confession made to a police officer by a person not an accused even if he subsequently become an accused is not admissible in evidence. When the F.I.R. given by the accused to the police officer is in the nature of confession and inculpates him, it can not be used against the accused in evidence.

There remains a sole eye witness. It is true that even where there is a sole eye witness of a crime, a conviction may be recorded against the accused concerned provided the Court regards the same as honest, truthful and wholly reliable. Prudence requires that some corroboration should be sought from the other prosecution evidence in support of the testimony of a solitary witness particularly, where such witness also happens to be closely related to the deceased.

Agnoo Nagesia v. *State*[1], *Khatri* v. *State*[2] and *Ram Bai* v. *State*[3] ; relied on.

Gulichand v. *State of Rajasthan*[4] and *Bahal singh* v. *State of Haryana*[5]; referred to.

G. R. Deshmukh, for the appellant.

S. K. Rai, P. L. for the State.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **S. L. JAIN J.** :- This appeal is directed against the judgment and findings recorded by the learned IInd Additional Sessions Judge, Raisen, in the sessions Trial No. 66/89 whereby the accused -appellant has been convicted under section 302 of the Indian Penal code and sentenced to undergo imprisonment for life together with fine of Rs. 2,000/- in default whereof, to undergo R.I. for six months.

Succinctly narratted, the prosecution case is that the deceased Rammu aged about 15 years was the brother of complainant Santosh Kumar,

(1) AIR 1966 SC 119 (2) AIR 1972 SC 922 (3) 1996 Cr. L.J. 1512
(4) AIR 1974 SC 276 (5) AIR 1976 SC 2032

(P.W.3) and son of Kriparam , (PW5). On the date of incident , the deceased went to his field for grazing the cattle as usual. Rammu used to come back to his home for lunch between 12 to 1 P.M. However , On the date of incident, Rammu did not turn up for taking his lunch up to 3 P.M. making his brother santosh kumar become anxious and left for his field to check his where abouts. Rammu was not found in the field. Therefore, santosh Kumar went towards Nala in search of his brother. To his horror, he saw accused Naresh stabbing Rammu with a knife in abdomen. When Santosh Kumar raised an alarm accused took to heels. Santosh Kumar found that his brother Rammu was dead. Hearing the cries of Santosh, Hargovind, P.W.1 reached at the place of occurrence and saw the accused near the place of incident.

According to the prosecution version, after commiting murder of deceased Rammu, the accused himself went to police station Bareli and confessed to have committed the murder of Rammu. Report of accused was recorded in Rojnamcha sanha No. 521, a copy where of is Ex. P-20-C. Complainant party also left for police station Bareli to lodge the F.I.R. , but in the way they came across the police party of said police station. Police party reached the house of Santosh kumar where Dehati Nalishi, Ex. P-2 was recorded on the information receive from Santosh Kumar. Dead body of Rammu was seized from the place of occurrence. Inquest Panchnama was prepared. The post mortem examination of the deceased was conducted by Dr. P.D. Gogiya, P.W. 10. Dr. Gogiya found the following injuries on the body of the deceased

(1) Swelling about 2" X 1" over the scalp.

(2) Incised wound over the abdomen, 3"X3"X abdomen deep. Intestine was coming out of the wound.

(3) Incised wound of left side of middle line of abdomen measuring 3"X 3"X abdomen deep. Intestinal loop was also cut.

Dr. Gogiya has opined that the cause of death is shock due to haemorrhage. He has further opined that the duration of death was 20 to 25 hours next before the post mortem examination.

During investigation, spot map Ex. P-3 was prepared. One Panchha, one pair of shoes and one stick were seized near the dead body vide Ex.P-4. Blood stained and plain soil was seized from the place of occurrence vide Ex.P.7 and 8 respectively. Accused was arrested on 12.9.88. One bushshirt, one pant and one baniyan were seized from the body of the accused. Some blood stains were found on the shirt seized from the accused. Memorandum of the statement of accused under Section 27 of the Indian Evidence Act was recorded vide Ex. P-11 and at the instance of the accused one knife was seized.

After investigation, a charge sheet was filed and a charge under Section 302 of the I.P.C. was framed against the accused. The accused abjured guilt and pleaded false implication by the police.

The Trial Court, relying predominantly on the evidence of Santosh Kumar recorded the aforesaid conviction and sentence against the accused.

Heard Shri G.R. Deshmukh, learned counsel Lawyer, appearing for the State. Shri Deshmukh led us through the record and contended that the evidence of Santosh Kumar is unnatural and suspicious and conviction cannot rest on his evidence.

On the other hand, the learned Panel Lawyer has supported the judgment of the trial Court and claimed that the prosecution has proved the guilt of the accused beyond reasonable doubt.

Homicidal death of deceased Rammu is proved from the evidence of Dr. P.D. Gogiya, P.W.10, who found the ante mortem injuries which have already been described in the earlier part of the judgment. He has clearly opined that the cause of death of deceased Rammu was shock due to haemorrhage. Therefore, the finding of the learned Trial Judge to this effect is affirmed.

Now, the question which remains for consideration is : whether it was appellant Naresh who caused the death of deceased Rammu?.

Prosecution has relied on three pieces of evidence : (1) the testimony of the self claimed eye witness Santosh Kumar, (2) recovery of knife at the instance of accused; and (3) the report lodged by the accused at Police

Station Bareli, recorded at Rojnamcha Sanha No. 521, dated 11-9-88, (Ex. P.20-C).

Taking the last piece of evidence first the report Ex. P 20-C can not be used against the accused. It is nothing but the confessional statement of the accused made to police which is hit by Section 25 of the Evidence Act. This Prohibition contained in section 25 of the Evidence Act should be applied very strictly. The intention of Legislature in enacting section 25 was to deter the police from extorting confession by rendering such confession in admissible in proof. Section 25 is intended to hit at an evil to guard against the danger of receiving in evidence testimony from accused person who may stand to suffer pressure from the police personal. Confession made to a police officer by a person not an accused even if he subsequently becomes an accused is not admissible in evidence. When the F.I.R. given by the accused to the police officer is in the nature of confession and inculpates him, it can not be used against the accused in evidence. In *Agnoo Nagesia* v. *State*[1], it has been held that confessional F.I.R. by the accused to the police cannot be used against him in view of Section 25. ((See also *Khatri* v. *State*[2]. The first information report which has been written at the instance of a person who is accused of an offence is inadmissible in evidence unless some recovery in pursuance of the statement is made and that part only is admissible in evidence which leads to such recovery (See *Ram Bai* v. *State*[3]. Therefore, the learned Trial Judge has committed a serious error in relying on Ex. P–20-C to base the conviction of the appellant-accused.

Now coming to the second piece of evidence, relied upon by the prosecution, Jagdish Prasad (PW.9) has stated that at the instance of accused a knife was seized but there is nothing to establish that it is the same knife which was used in committing murder of Ramu. Thus, this circumstance, in our considered view, is not of much incriminating value.

Now coming to the first piece of evidence P.W.3, Santosh Kumar has stated that on the relevant date, his younger brother Rammu in the morning left home for grazing cattle. Usually, he used to return home between 12 to 2 P.M. for lunch, but on the date of incident when Rammu did not come to take his lunch till 3.00 P.M, he went towards his field in search of Rammu.

(1) A.I.R 1966 S C 119 (2) A.I.R 1972 S C 922 (3) 1996 Cr L.J 1512

When he reached the place of incident he saw Naresh stabbing the deceased by knife in abdomen. After dealing the knife blow Naresh ran away towards the field. According to the prosecution story, on hearing the shrieks of Santosh Kumar, Hargovind, P.W. 1 reached the place of occurrence and saw the appellant running away. But, Hargovind, P.W. 1 did not support the prosecution case and he was declared hostile.

Thus, There remains a sole eye witness. It is true that even where there is a sole eye witness of a crime, a conviction may be recorded against the accused concerned provided the Court regards the same as honest, truthful and wholly reliable. Prudence requires that some corroboration should be sought from the other prosecution evidence in support of the testimony of a solitary witness particularly, where such witness also happens to be closely related to the deceased.

Further Santosh Kumar appears to be a chance witness. The testimony of chance witness although not necessarily false but is probably unsafe and if such a person happens to be a relative of victim then he is viewed with suspicion. Such a piece of evidence does require caution and close scrutiny. (See *Gulichand* v. *State of Rajasthan*[1], and *Bahal Singh* v. *State of Haryana*[2].

The evidence of Santosh Kumar does not appear to be reliable as it is not supported by other eye witness Hargovind. It also does also not find support from the medical evidence. Dr. P.D. Gopgiya, P.W. 10 has stated that the deceased died due to haemorrhage. In such cases, instantaneous death does not occur. Dr. Gogiya, P.W. 10 has also admitted that had the deceased received immediate medical attention, he would have survived. He also suggested that the death was not instantaneous. Therefore, the version of Santosh Kumar that deceased was stabbed in his presence and he died immediately cannot be believed. According to Santosh Kumar, P.W.3 the death occurred at 3 P.M. On 11.9.88 and post mortem was conducted on 12.9.88 at 11 A.M. According to Dr. Gogiya, there were maggots on the intestinal loop. It appears highly unlikely that maggots will be formed within only 20 hours of the death. This circumstance, indicates that the death did not occur at 3 A.M. on 11.9.88, as alleged by Santosh

(1) A.I.R. 1974 S.C 276. (2) A.I.R. 1976 S.C 2032.

Kumar but it occurred much before that. It appears that some unknown person killed Rammu and accused has been implicated by planting Santosh Kumar as an eye witness.

Hargovind, P.W. 1 has stated that the dead body of Rammu was discovered at about 10 P.M. in the Nala. Mahesh, P.W. 4 has also stated in his cross examination that at about 9 P.M. he was informed that son of Kriparam is not traceable. This suggest that till 10.00 P.M. the dead body could not be traced. There are other circumstances as well that throw a shadow of doubt on the prosecution version. Dehati Nalishi, Ex. P/2 was recorded on 12.9.88 at 00.30 hours. It means there was a delay of about 9-1/2 hours. No explanation has come forward for this delay. Santosh Kumar could lodge the report only when the Station House officer of Police Station Bareli came to his place.

There are certain material contradictions and infirmities in the evidence of Santosh Kumar and his father Kriparam, P.W.5. Kriparam, P.W. 5 has stated that on the relevant date, he went to weekly market of Raisen when he returned home just before the sunset. Santosh informed him that Rammu was lying near the Nala and he has been killed by Naresh with knife. As against this, Santosh Kumar, P.W. 3 does not say that his father had been to weekly market. On the contrary, Santosh, P.W. 3 has stated that first of all he informed to the members of his family. According to Santosh he reached home within half an hour. Thus, he reached home at about 3.30 P.M. when his father was not at home how he could inform him about the incident.

The conduct of Santosh Kumar also appears to be doubtful. According to him, he did not inform the villagers regarding the incident till he reached home. He did not even inform the inmates of the house which came across him while returning from the place of incident.

Surprisingly, Santosh Kumar and his father Kriparam allowed the body of their near and dear deceased Rammu lying unattended in the Nala throughout the night.

the evidence of Santosh Kumar suffers from serious infirmity. He is a chance witness as he claimed to have reached at the place of occurrence in the nick of time when the assailant was dealing knife blows on the deceased in the Nala. We, therefore, unhesitantly hold that evidence of Santosh Kumar is incredible and

In the result, the impugned judgment is not sustainable on facts as well as in law. The conviction and sentence recorded by the Trial Court can not be sustained. Hence, the appeal is allowed and the conviction and sentence of the appellant are set aside and he is acquitted of the charge under Section 302 of the I.P.C. He be released from the jail forthwith, if not required in any other case.

Appeal allowed.

APPELLATE CRIMINAL

Before Mr. Justice Rajeev Gupta and Mr. Justice Uma Nath Singh
10 May 2002

SAMARU BAIGA .....Appellant.

v.

STATE ..... Respondent.

Penal Code Indian (XLV of 1860)–Section 300 Exception Clause I, 302, 304 Part I and Criminal Procedure Code, 1974 Section 374 (2) -- Murder--Conviction and sentence --Appeal--Having seen her in compromising position with paramour accused lost his balance and beat her to death --Defence plea of grave and sudden provocation cannot be slurred over --Conviction altered to one under Section 304 Part I IPC.

On reappreciation of rival contentions and reappraisal of the evidence on record, we need say that there are enough discernible positive evidence in favour of the prosecution to inculpate the accused for killing his wife

*C.r.A. No. 940/97

There was a strong motive for offence as the accused suspected the fidelity of the deceased which is fully established by his extra-judicial confession, leading to discovery of her dead body and the weapons of the offence.

Thus, all that it appears from analysis of the evidence as above is that the accused suspected the fidelity of his wife and having seen her in compromising position with her paramour lost his balance and beat her to death. Under the circumstances, the defence plea of grave and sudden provocation can not be slurred over.

In the premises discussed hereinabove, the conviction of accused under section302 IPC and the sentence of life imprisonment as also a fine of Rs. 100/- thereunder are set aside and instead, he is held guilty of offence under section 304-I IPC.

State of U. P. v. *Lakhmi*[1], Relied on.

Ku. Jyoti Agnihotri, for the Appellant.

S. K. Rai, P. L. for the respondent.

Cur. adv. vult.

JUDGMENT

The following judgment of the Court was delivered by UMA NATH SINGH, J. :–The appellant has preferred this Jail Appeal against the impugned judgment and order dt. 25.2.97 passed by the learned Additional Sessions Judge, Dindori (Mandla) in the Sessions Trial No. 129/95 whereby he has been held guilty of offence under Section 302 IPC and sentenced to life imprisonment for comitting murder of his wife Jithiya Bai.

Succinctly narrated the facts of the prosecution case are that on 13.5.95 in the morning, village Kotwar Aaitu Ram Baiga (PW1) was informed at his residence by Mithu Baiga (PW3/A) and Desaru (not examined) that accused Samaru Baiga came and informed them by way of extra judicial confession that he had seen his wife Jithiya Bai (deceased)

(1) (1998) 4 S.C.C. 336

and Basora Gond (not examined) in a compromising position in a rivulet know as 'Mohgaontola nala' therefore, he killed her on 12.5.95 at 15 hours. On receipt of this information, Aaitu Ram Baiga along with Mitthu went to the place and saw Jithiya Bai lying dead in supine position and bleeding from her head. Accordingly, he lodged an FIR of the incident at Police Station, Shahpur, on 13.5.95 where-upon an offence under Section 302 IPC was registered against the accused/appellant, and taken for investigation. The Investigating Officer recorded the Marg (Ex. P/2) and prepared the spot map (Ex. P/3) on 13.5.95 itself. Inquest Panchayatnama (Ex. P/4), also prepared on the same day, attributed the injuries present on the body of the deceased Jithiya Bai, only to accused Samaru. Memorandum (Ex. P/5) of the accused under Section 27 of the Evidence Act, led to discovery of weapons of offence namely, a piece of wooden baton and three stone pieces lying on the spot of incident which were seized as per Ex. P/6. other incriminating articles i.e. plain and washed off earth, 50 gms each and 4 pieces of red bangles were also seized from the spot of the incident as per Ex. P/7. Vide Ex. P/8 a blood stained stone-piece, plain and blood stained earth, were seized from near the dead body. Clothes of the accused, which he was wearing on the date of incident, namely, a white half baniyan and a lungi, sporadically stained with blood were seized vide Ex. P/9. Further hair of the deceased allegedly pulled out of her head were seized vide Ex. P/10, from the spot of incident. The decomposed body of the deceased with maggots were sent for Forensic opinion vide Ex. P/11. Viscera of the dead body were seized vide Ex. P12. The Autopsy Surgeon (PW8) gave the postmortem report vide Ex. P/16. He opined that the death had taken place between a period of 3-5 days. He found the body highly decomposed with maggots eaten cavities. Injuries were antimortem in nature and could be caused by some hard and blunt object. Looking to the nature of scalp wound, the doctor opined that the death resulted from the injury to brains caused by fracture of the scalp. The said injury was found to be sufficient to cause death. After a complete investigation, a challan was laid, and charge, drawn up for offence under Section 302 IPC. The learned Additional Sessions Judge, Dindori, on a proper appreciation of evidence on record and inparticular, relying on the

evidence of independent witnesses, namely, Aaitu Ram (PW1), Phool Chand (Pw2), Mitthu (PW3/A) and Daduram (PW4) found the prosecution story duly proved beyond reasonable doubt and therefore, recorded the aforesaid conviction and sentence against the accused.

Ku. Jyoti Aghinotri, learned counsel appearing for the appellant apart from assailing the impugned judgment on other grounds submitted that on totality of circumstances, it appears to be a case of sudden and grave provocation, and therefore, the accused ought not to have been held guilty of offence under section 302 IPC. On the other hand, Shri S.K. Rai, learned P.L. for the state submitted that the accused had a strong motive to commit murder of his wife. He countered the defence pleas and contended that looking at the time of assaults after seeing the deceased in compromising position with some other man, the accused had time to think over and cool down. Thus, it does not come under the exception of grave and sudden provocation. Mr. Rai defended the impugned judgment of conviction U/S 302 IPC by placing heavy reliance on the testimony of independant witness Phool chand (PW 2) who is the sole eye witness of actual assaults, apart from extra-judicial confession leading to discovery of incriminating articles.

On reappreciation of rival contentions and reappraisal of the evidence on record, we need hardly say that there are enough discernible positive evidence in favour of the prosecution to inculpate the accused for killing his wife. There was a strong motive for the offence as the accused suspected the fidelity of the deceased which is fully established by his extra- judicial confession, leading to discovery of her dead body and the weapons of the offence. According to village Kotwar Aaitu Ram (PW 1), he was informed by Mitthu (PW3/A), that the accused had admitted to have killed his wife, On seeing her in a compromising position with her paramour in a rivulet. He visited the place with Mitthu and not with Dasaru and saw the dead body lying there. He also mentioned that accused Samaru had accompained him to the police station for lodging a report of the incident at about 12 0' clock and on interrogation the accused had disclosed about the weapons of offence namely; a baton piece and stones, which were seized by the

police. He stated that the place where the dead body was lying was different from the scene of occurrence but it was Visible from there. The deceased was beaten to death in the field of one Mangal but her dead body was located lying in a dry rivulet.

Phool Chand (PW2) an eye-witness, hearing her cry had come out and had seen from a distance of about 200 meters that the deceased was being assaulted and dragged by the accused/appellant from the side of his house to the village. He forbade the accused from doing so but such type of incidents being a regular feature between the couple, he could not visualise the seriousness of the situation and hence, refrained from intervening in the matter, He mentioned that the scene of occurrence was a deserted place and the place of location of the dead body was quite far from there. He had seen the incident of beating at 12 O'clock and in the evening, he had been informed about the death.

According to witness Mitthu (PW3/A), accused had only admitted to have beat his wife to death and said nothing about the time and scene of occurrence. He did not ask him anything. The accused was kept lodged in the house of Dasaru whole night. According to Daduram (PW4), on Tuesday he had gone to Bijora and on next day he had come back. The accused, his wife and one Basora (Paramour of the deceased -not examined) had also gone to village Bijora. This witness received the information about the death only on Thursday. According to R.K. Tripathi (PW5), the Investigating Officer, the report was recorded at 12.5 in the day time. He admitted that on 13.5.97 and 14.5.97, he had completed all Panchanamas and effected seizures thereunder. He had seized a Baniyan and a Lungi from the accused which were stained with blood marks. The witness has not been cross-examined on that point. Dr. V.K. Saklya (PW8) is the Autopsy Surgeon. In his coss-examination, he reiterated fracture of scalp and con-centration of blood in membrances. He clarified that death had occured within a period of 3-5 days prior to the date of postmortem. In his 313 statement, the accused denied his involvement and pleaded that he has been framed up.

Thus, all that it appears from analysis of the evidence as above is that the accused suspected the fidelity of his wife and having seen her in

compromising position with her paramour lost his balance and beat her to death. Under the circumstances, the defence plea of gave and sudden provocation can not be slurred over.

The Apex Court in the matter of *State of U.P.* v. *Lakhmi*[1], held that in case where accused husband killed his wife on seeing something lascivious between her and another person when he returned to his house from the field, the offence was covered under Exception 1 to Section 300 of the IPC. Therefore, the conviction was altered to Section 304 - I.

In the premises discussed hereinabove, the conviction of accused under section 302 IPC and the sentence of life imprisonment as also a fine of Rs. 100/- thereunder are set aside and instead, he is held guilty of offence under section 304-I IPC and sentenced to 6 years R.I. and fine of Rs. 500/-. In default of payment of fine, he shall further undergo simple imprisonment for 3 months. As the appellant is in jail since 15.5.95 and has undergone the jail sentence of six years rigorous imprisonment, he shall be released forthwith, if not wanted in connection with any other case.

Accordingly this Criminal Appeal is allowed in part.

Appeal Party allowed.

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(1) (1998) 4 S.C.C 336.

APPELLATE CIVIL

Before Mr. Bhawani Singh, C. J. and *Mr. Justice Rajeev Gupta.*

4 April, 2001.

RAMNATH ...Appellant*

v.

SHRI PRASANNA KUMAR JAIN and others ...Respondents.

Motor Vehicles Act, (LIX of 1988)–Section 173–Motor Accident–Award of compensation–Appeal–Offending vehicle registered as private vehicle–Carrying marriage party when accident occurred–Passengers known to owner–Owner and driver are the best witnesses to depose whether vehicle was plying on hire or fare–Owner and driver stated that no fare was charged–Inference would be that no fare was charged by owner and there was no violation of the conditions of insurance policy–Order exempting insurance company set aside–Insurance company liable to satisfy the award.

The owner and driver of the vehicle have specifically stated that they did not charge any fare from the claimants since they were known to them. Claimants, owner and driver of the vehicle were the best persons to depose on this aspect of the matter and since they have said that no fare was charged from the claimants for the journey undertaken by them, it is difficult to accept the version of the Insurance Company and the so called investigator appointed by it. We also notice that the vehicle could be used for social, domestic and excursion purposes. The claimants were going to attend the marriage and since the parties were known to each other, it can be accepted that the vehicle was being used for a social trip without monetary consideration. Consequently, it is held that the vehicle was not being used for hire and reward on the date the accident took place.

Second phase of the question is over-loading of the vehicle. On this question, it can be said that the occupants thereof were mostly small children who could not be left out when the purpose of journey was to attend the marriage. They could not be separated from the parents. Practically they are related to each other. This plea is not available to Insurance Company since the

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*M.A.No.923/98.

vehicle was not being used for the purpose other than indicated in the policy and it is to be taken as separate accident for each of the victims of the accident.

For all these reasons stated above, we are of the opinion that Insurance Company (respondent 3) is liable to pay the compensation in these cases and the finding of the claims Tribunal exempting the Insurance Company from payment of compensation is set aside.

National Insurance Company Limited v. *Kumari Anjana Shyam and others*[1] and *United India Insurance Company Limited* v. *Sabeer Ali*[2]; relied on.

Smt. Sneh Mishra, for the appellant.

None, for the respondents No. 1 and 2.

Smt. Amrit Ruprah, for the respondents No. 3.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by

PER : BHAWANI SINGH, CHIEF JUSTICE (ORAL) – This group of ten cases (M.A.No. 923 of 1998, *Ramanth* v. *Shri Prasanna Kumar Jain and others,* M.A.No. 924 of 1998, *Smt. Parvati Bai* v. *Shri Prasanna Kumar Jain and others,* M.A.No.832 of 1998, *Harishkumar and others* v. *Shri Prasanna Kumar Jain and others,* M. A. No. 833 of 1998, *Smt. Sumitra Bai and another* v. *Shri Prasanna Kumar Jain and others,* M.A.No. 834 of 1998, *Har Prasad* v *Shri Prasanna Kumar Jain and others,* M.A.No. 886 of 1998, *Laxman and others* v. *Shri Prasanna Kumar Jain and others,* M. A. No.887 of 1998, *Praveen Kumar and others* v. *Shri Prasanna Kumar Jain and others,* M. A. No.889 of 1998, *Smt. Geeta Bai* v. *Shri Prasanna Kumar Jain and others,* M. A. No. 890 of 1998, *Kali Bai and another* v. *Shri Prasanna Kumar Jain and others,* and M. A. No. 891 of 1998, *Laxman and others* v. *Shri Prasanna Kumar Jain and others*) are proposed to be

(1) II (2000) A. C. C. 476. (2) I (2000) A. C. C. 206 (D.B.)

decided by this judgment since they arise out of the same accident and common award dated March 19 1998 of Motor Accident Claims Tribunal, Sagar. Before dealing with the submissions advanced by learned counsel for both the parties, brief narration about the accident taken from *Smt. Parvati* v. *Prasanna Kumar Jain and others* (M.A.No. 924 of 1998) may be given.

On 7.5.1995, minor Neelu (deceased), Rajendra (deceased) and injured Pravin Kumar, Bharat Kumar, Parvati Bai, Ramnath, Sumitrabai, Pappu alias Harnarayan, Kalibai, Jittu alias Jitendra, Har Prasad, Ku. Rani, Nikhit, Renu and Geetabai were going from Bhopal to Sagar through tempo-trax jeep No. M.P.15-D/1679. Allegation is that the vehicle was being driven rashly and negligently as a result of which it hit Babool tree near Police Station, Rahatgarh resulting in serious injuries to the passengers out of whom, Rajendra and Neelu died. Accordingly, claim petitions were filed claiming compensation for personal injuries and death of two occupants of the vehicle. Respondents 1 and 2 have filed joint written-statement. They have admitted that the respondent 1 was the driver and respondent 2 the owner of the vehicle. They have denied that the vehicle was being driven rashly and negligently resulting in the accident. They have stated that the vehicle was insured with respondent 3. The injured and other persons were known to them, therefore, they were being carried without payment of fare. Therefore, they were not liable to pay the compensation and since the vehicle was insured with the Insurance Company, the liability was of the Insurance Company. The Insurance Company has not admitted the claim. It is stated that the vehicle was to be used for private purpose but it was being used for carrying passengers against payment of fare. Besides, it was carrying excess passengers. The driver did not possess valid driving licence, therefore, he committed breach of policy conditions. Hence, it was not liable to pay the compensation.

On pleadings of parties, the claims Tribunal framed as many ass eight issues. It came to the conclusion that the accident took place on 7.5.1995 when vehicle M.P.No. 15D/1679 driven rashly by driver Prasanna Kumar Jain dashed against Babool tree. As a result of this accident, Rajendra and Neelu died while praveen Kumar, Bharat Kumar, Pravatibai, Ramnath, Sumitrabai, Pappu alias Har Narayan, Kalibai, Jitendra, Har

Prasad, Ku. Rani, Nikhit, Renu and Geetabai suffered injuries from simple to grievous. The Claims Tribunal also held the claimants were entitled to file claim petitions. It also found that the vehicle was being used for carrying passengers against payment of fare, thereby committing breach of policy conditions and the Insurance Company was not liae to pay compensation. The Claims Tribunal also exonerated the Insurance Company from payment of compensation since the vehicle was carrying excess passengers, driver and owner of the vehicle having committed breach of policy conditions. However, it could not be proved that driver Prasanna Kumar Jain did not possess valid driving licence at the time accident. Consequently, compensation has been awarded to the claimants carrying interest at the rate of 12% per annum from the dates of claim petitions. This award has been challenged by the claimants through these appeals and it is submitted that compensation be enhanced and made payable by the Insurance Company.

There is no dispute that the accident took place on 7.5.1995. This happened because the driver Prasanna Kumar Jain was driving the vehicle M.P. 15D/1769 rashly and negligently and it dashed against the tree. This is clearly established from the evidence on record. There is also no dispute about the death of Rajendra and Neelu in this accident and injuries to other occupants mentioned in the preceding part of this judgment. Exact narration of the injuries suffered by the claimants would be mentioned while discussing the individual cases *vis-a-vis* their claim for compensation. The claimants are entitled to claim compensation for the injuries suffered by them.

The allegation that the driver Prasanna Kumar Jain was driving the vehicle without valid driving licence has not been proved by the Insurance Company before the Claims Tribunal by production of his driving licence, therefore, this finding is against the Insurance Company and in favour of the driver. We are of the opinion that it is established that the driver was in possession of valid driving licence at the time of accident. Before discussing the Issue 4 to 6, it is desirable to deal with the individual cases and decide whether compensation paid to the claimants is reasonable or calls for enhancement as prayed :

Ramnath v. Shri Prasanna Kumar Jain, 2001.

(1) M. A. No. 924 of 1998

Smt. Pravati Bai v. *Prasanna Kumar Jain and others.*

Smt. Pravati Bai states that in the accident, she suffered injuries to her head and waist. She was treated at District Hospital for ten days. Due to this injury, she suffered severe pain. Before the accident, she used to manufacture bidis and earn Rs. 17.00 per day but due to the accident, she could not do so far a year and thereafter could not manufacture bidis as much as she used to do before since due to pain in the waist she can not sit for a long time. She was under treatment which continued even after her statement was recorded. Her hand was stiffened due to injuries she suffered. Dr. Nayak (PW-14) has stated that Smt. Pravati Bai suffered injuries on her person. After examination, injury was found on the right side of her head with dimension of 2½"x1½" x ½" X-ray was advised. Another injury was found on the upper part of left elbow with dimension of 1½" x ¼". First injury was of serious nature for which she was referred to District Hospital, Sagar. There is no evidence of fracture, as is evident from the X-ray report, nor it can be inferred from the medical report that the injury is of permanent nature.

Smt. Parvati Bai has been awarded compensation of Rs. 15,000.00 with interest at the rate of 12% per annum. From the statement of Smt. Pravati Bai, we find that she suffered two injuries. First injury described above has been stated to be of serious nature. Of course, the X-ray report does not disclose fracture as per statement of Doctor but the dimension of injury is such which suggests that injury is of a serious nature as a result of which she had to be shifted to District Hospital, Sagar from Tili. She remained in the Hospital for ten days, whereafter the treatment continued and even on the date of her statement in the Court on 6.9.1997, she was taking medicines for the injuries she suffered. Naturally, for this injury, claimant must have suffered great pain. We are of the opinion that the award of lump-sum compensation of Rs. 15,000.00 for the injuries, for pains and sufferings, medicines etc. is not justified. Therefore, amount of compensation is enhanced to Rs. 25,000.00 (twenty five thousand) making

enhancement of Rs. 10,000.00 to the compensation awarded by the Claims Tribunal which will carry interest at the rate of 12% per annum from the date of application till award.

(2) M. A.No. 832 of 1998

Harishanakar and others v. *Prasanna Kumar Jain and others.*

Claimants are father, mother, sister and brother of deceased Rajendra who died in this accident. At the time of accident, Rajendra was 15 year old. He was brilliant student of 5th class. Harishankar states he wanted to make him doctor. He had good physique and was not suffering from any kind of ailment. Apart from studies, he used to work at the shop and earn Rs. 10.00 per day. He has stated that his father died at the age of 85 years. He had great love and affection for his son Rajendra and due to his death, all the hopes of the family had been finished. He could become doctor at the age of 30 years and earn Rs. 6,000-7,000/- per month and after spending Rs. 2,000.00 from the salary on himself, leave the rest to the family and he could survive for 90 years had this accident not taken place. The claims Tribunal has awarded compensation of Rs. 56,000.00 in this case. The amount of no fault liability under the Motor Vehicles Act is Rs. 50,000.00. Therefore, taking into consideration the family background of the deceased, his studies and possibility of good career ahead, it appears that the award of compensation in this case is on the lower side. It has been held in *Pramila Bai and another* v. *Mustafa Khan and another*[1], that looking to the amount of Rs. 50,000.00 payable as no fault liability, compensation in such type of cases not be less than this amount. In the totality of circumstances, compensation of Rs. 70,000.00 (seventy thousand) is avarded which shall take care of Rs. 10,000.00 for loss of expectancy of life, Rs. 2000.00 for funeral expenses and Rs. 2500.00 for loss to the estate. Enhanced compensation of Rs. 14,000.00 (fourteen thousand) over and above the compensation awarded by Claims Tribunal will carry interest at the rate of 12% per annum from the date of application till date of payment.

(3) M.A. No. 833 of 1998

Smt. Sumitra Bai and another v. *Prasanna Kumar Jain and others.*

(1) M.A. No.1446/96 decided on 10-10-2000.

Ramnath v. Shri Prasanna Kumar Jain, 2001.

Smt. Sumitra Bai states that she suffered injury to her chest and waist which remained under plaster for a month. That apart, there was bone fracture in her foot and both the feet had swelling. As a result of these injuries, it was difficult for her to sit and stand. This affected her daily routine. She was treated at Primary Health Centre, Rahatgarh, then shifted to district Hospital at Sagar where she remained for three months and then treated at Bhopal. Before the accident, she used to earn Rs.50.00-Rs. 60.00 per day and thereafter could not earn. Dr. J. P. Nayak has stated that he examined Smt. Sumitrabai and found cut injuries on her foot and chest. These injuries were x-rayed and her second, third and fourth ribs were found fractured. But there is no evidence to suggest that she suffered permanent disability on account of these injuries, Dr. V. K. Mishra states.

With respect to Pappu alias Hari Narayan, Dr. J. P. Nayak states that he examined Pappu (20) and found injuries on left leg of ordinary nature. X-ray test does not disclose any kind of fracture and the injuries suffered by him were of general nature.

Claims Tribunal has awarded Rs. 25,000.00 to Smt. Sumitra Bai and Rs. 5,000.00 to Pappu. We find that Smt. Sumitra Bai has suffered number of injuries. Serious among them appear to be the fracture of second, third and fourth ribs. It may be that she did not suffer permanent disability on account of these injuries but the fact remains that fracture of three ribs is a serious matter. She was placed under plaster for one month and this kind of injury takes long time to recover. During this period, she must have suffered great pain. Award of compensation of Rs. 25,000.00 appears to be on the lower side. It is enhanced by Rs. 15,000.00 taking the total compensation to Rs. 40,000.00 (forty thousand). Enhanced amount of compensation will carry interest at the rate of 12% per annum from the date of application till payment. Pappu does not deserve enhancement in compensation. Injuries suffered by him are not of very serious nature and as per doctor, they are of general nature. Therefore, his request for enhancement is rejected.

(4) M.ANo. 834 fo 1998

Har Prasad v. *Prasanna Kumar Jain and others.*

Ramnath v. Shri Prasanna Kumar Jain, 2001.

(5) MA.No. 890 fo 1998

Kali Bai and another v. *Prasanna Kumar Jain and others.*

Har Prasad states that he suffered injuries to head, face and shoulders. Due to injury, he lost his speech and could not speak for 2-3 days. Even now, his speech goes and he can not work properly. After the accident, he was admitted in the Hospital at Sagar where from he was shifted to hospital at Bhopal where he remained for 15 days. He is carpenter and used to earn Rs. 150.00 per day. He can not work the way to used to do before the accident since he has pain in his head and hand. He has spent about Rs. 15/20 thousand in the treatment of injuries but he does not possess the bills of expenditure on medicines. His head was X-rayed. He was treated at Primary Health Centre, Rahatgarh also. During examination, doctors had stated about the necessity of operation of his head for which expenditure was around Rs. 75,000.00.

With respect to his wife Smt. Kali Bai, he states that she suffered fracture of foot at two places, her thigh was subjected to operation due to which she can not walk properly. She remained in the hospital for four months. She used to manufacture bidis and earn Rs. 60/70.00 per day. In the treatment of Smt. Kalibai, an amount of Rs. 40,000.00 has been spent. She was admitted in the hospital at Bhopal. Smt. Kalibai has also stated that she was treated at Tili Hospital, then Sagar and in Hamidia Hospital at Bhopal for 2½ months. At Tili Hospital, she was plastered and steel rod was inserted in her foot during operation at Bhopal. She used to manufacture 2-3 thousand bidies which she cannot do now. She used to earn Rs. 40/50 per week but after the accident due to pain, she can not work.

With respect to Jitendra alias Jitoo, Har Prasad states that he suffered fracture to both feet and left hand. He was treated at Hajela Hospital and Hamidia Hospital at Bhopal for three months and on his treatment, a sum of Rs. 40,000.00 has been spent. He was still under treatment. Smt. Kalibai has also stated about these injuries to Jitendra.

The Tribunal has awarded a sum of Rs. 10,000.00 to Har Prasad, a sum of Rs. 25,000.00 to Smt. Kali Bai and Rs. 25,000.00 to Jitendra. It is

contended by appellants that compensation awarded is too low and requires enhancement, whereas counsel for the Insurance Company contends that it is just and reasonable compensation.

Dr. J. P. Nayak has stated that apparently, the injuries could not be found on the person of Har Prasad. Dr. V. K. Mishra states that Har Prasad was admitted in District Hospital, Sagar. His right shoulder was X-rayed and fracture was found. Fracture was of serious nature but there is no evidence of permanent disability. With respect to Smt. Kali Bai, Dr. J. P. Nayak states that injury was found to left thigh and on X-ray examination, her femur bone was found fractured but there is no evidence of her suffering permanent disability. Jitendra (3) had fracture in both the thighs as per Dr. J. P. Nayak. This fact is also supported by Dr. V. K. Mishra. Evidence of permanent disability is not there. It may be true that it is not there but it is clear from the statement of Dr. J. P. Nayak that Har Prasad suffered injury of serious kind on right shoulder. Therefore, he must have suffered great pain during the course of treatment and this injury has affected his daily routine. For this kind of injury, compensation of Rs. 10,000.00 is on the lower side. Therefore, it is enhanced by Rs. 10,000.00 totalling the compensation to Rs. 20,000.00. The enhanced compensation will be payable with interest at the rate of 12% per annum from the date of application till payment.

Smt. Kali Bai suffered fracture of femur bone. It may be true that symptom of permanent disability has not been pointed out but injury is of serious nature. She was treated at different hospitals, therefore, she must have spent sufficient amount for medical treatment. She is wife of Har Prasad in whose case also, there is no evidence what exact amount has been incurred towards medical treatment. It can not be said that the family did not incur expenditure on the treatment of three persons who are involved in the accident in the instant case. Claims Tribunal has awarded Rs. 25,000.00 as compensation in this case. Looking to the nature of injuries, treatment in the hospitals, pain and suffering, compensation is enhanced by Rs. 10,000.00 payable with interest at the rate of 12% per annum from the date of application till payment.

Jitendra was 3 year old at the time of accident. He has suffered fractures of both thighs. Obviously he must have suffered great pain during the treatment

which must have taken longer time at this age of the child. The family must have spent sufficient amount for his treatment. Compensation of Rs. 25,000.00 in this case appears to be on the lower side, therefore, it is enhanced by Rs. 10,000.00 payable with interest at the rate of 12% per annum from the date of application till payment.

(6) M. A. No. 886 of 1998

Laxman and others v. *Prasanna Kumar Jain and others.*

(7) M. A. No. 889 of 1998

Smt. Geeta Bai v. *Prasanna Kumar Jain and others.*

Laxman Prasad states that his daughter Neelu died in the accident. The matter was reported to the Police by him which is signed by him. Neelu died in the hospital. She was 8 year old at the time of accident. She was studying in class III and was a brilliant student. Smt. Geetabai is his wife. She suffered injuries to head, chest and feet. She remained in hospital at Sagar for three days, then shifted to Hamidia Hospital, Bhopal by ambulance. When it was found that the treatment was not good, she was shifted to Hajeli Hospital where she remained for two months and subjected to operation of waist and foot. Her treatment still continues and a sum of Rs. 90,000.00 has been spent on the treatment. Before accident, she had good health and used to earn Rs. 60/65 per day from knitting. After the accident, she can not work. Ku. Rani, Nikhil and Ku. Renu also suffered injuries in this accident to nose, ear and waist. They were treated at Tili Primary Health Centre Dr. J. P. Nayak has stated that Ku. Rani suffered abrasion above left ear. It was of simple nature. Injuries were not detected on the persons of Nikhil and Ku. Renu.

Dr. J. P. Nayak states that on examination of Smt. Geeta Bai, fracture of tibia and fibula of right foot was found. During operation, nail was inserted and she was advised treatment in the hospital as an indoor patient. The injuries suffered by her were of serious nature. There is permanent disability but the extent thereof is not proved.

Body of Neelu was subjected to post-mortem examination by Dr. Mithilesh. According to doctor, she died as a result of this accident. Claims Tribunal has awarded sum of Rs. 55,000.00 for the death of Neelu.

Rs. 5,000.00 to Ku. Rani and Rs. 45,000.00 for personal injuries to Smt. Geetabai. No compensation has been awarded for injuries to Nikhil and Ku. Renu since evidence did not justify it as per the Claims Tribunal.

Neelu was 8 year old at the time of accident and was studying in class II. She was an intelligent student and had good expectations in life. Award of compensation for no fault liability under Motor Vehicles Act 1988 is Rs. 50,000.00. Therefore, there is justification to enhance the amount of compensation in this case too. A sum of Rs. 75,000.00 would meet the ends of justice. Accordingly, the compensation is enhanced from Rs. 55,000.00 to Rs. 75,000.00 (rupees Seventy Five Thousand). Enhanced amount of compensation would carry interest at the rate of 12% per annum from the date of application till payment. Looking to the nature of injuries suffered by Rani, we do not find any justification to enhance the compensation over and above Rs. 5,000.00 awarded by the Claims Tribunal.

Smt. Geetabai had suffered serious injury of tibia and fibula. She was subjected to operation and nail was inserted. Obviously, she must have undergone great suffering and pain during treatment and afterwards. Of course, there is no evidence about the amount spent on medical treatment but it can not be said that nothing was spent. It may be due to the inadvertence that evidence on medical expenditure must not have been produced. Looking to the nature of injuries and sufferings undergone by her, amount of compensation is enhanced to Rs. 75,000.00 (Rupees Seventy Five Thousand) from Rs. 45,000.00 awarded by the Tribunal. Enhanced amount of compensation will carry interest at the rate of 12% per annum from the date of filing of application till payment. There is no definite evidence with regard to injuries suffered by Nikhil and Renu, therefore, case for awarding compensation in their favour does not arise.

(8) M. A. No. 923 of 1998
Ramnath v. *Prasanna Kumar Jain and others.*

(9) M.A.No. 887 of 1998
Praveen Kumar and others v. *Prasanna Kumar Jian and others.*

Ramnath states that in the accident, he suffered injuries to his face and fracture of foot. He was treated at Tili Hospital, Sagar and X-rayed. He

remained indore patient for ten days and thereafter he was treated at Bhopal. Injury remained under plaster for two months. He used to make furniture and earn Rs. 150.00 per day. After the accident, he can not work, feels pain in the chest and knees, which had developed swelling. Dr. V. K. Mishra has described the injuries suffered by Ramnath on left ankle and found fracture of tibia which is of serious nature though causing of permanent disability is not stated. The Tribunal has awarded compensation of Rs. 5,000.00 in this case. From the nature of injuries and the statement of doctor, it is not difficult to say that the injuries are of serious nature, therefore, compensation of Rs. 5,000.00 is absolutely unreasonable. Consequently it is enhanced to Rs. 25,000.00 (Twenty Five Thousand) - twenty thousand more than the amount awarded by the Claims Tribunal. It shall be paid to the claimant with interest at the rate of 12% per annum.

Praveen Kumar was 13 year old at the time of accident. He suffered injuries on upper lip which is stated to be of simple nature. He has been awarded compensation of Rs. 5,000.00 which appears to be just and proper. No enhancement is therefore called for.

Dharmendra was 9 year old at the time of accident. He suffered abrasion on the left shoulder. He has been awarded compensation of Rs. 5,000.00 which also appears to be just and proper, therefore, no enhancement is called for.

Bharat Kumar was 8 year old at the time of accident. He suffered injury to the left foot but no fracture was found in the X-ray report. The injury has been found to be of simple nature. He has been awarded compensation of Rs. 5,000.00. Looking to the nature of injury, we are of the opinion that no enhancement is warranted in this case.

Having discussed and decided the matter on other aspects, we proceed to examine the question with regard to liability for payment of compensation. Smt. Amrit Ruprah, learned counsel for the New India Insurance Company Limited has submitted that tempo-trax No. MP 15-D/1679 was registered for private use, for social, domestic and excursion but it was being used for hire and reward and was carrying more passengers than permitted. There is violation of terms and conditions of insurance policy, therefore, the Claims Tribunal has

rightly shifted the liability to pay the compensation from the Insurance Company to the owner and driver of the vehicle. This submission is opposed by Smt. Sneh Mishra, learned counsel for the appellants. Learned counsel for appellants contended that there is no evidence suggesting that the vehicle was being used for hire and reward. Smt. Ruprah refers to the statement recorded at the instance of Laxman stating that tempo trax was hired against payment of Rs. 600.00 for this journey from Bhopal to Sagar. Therefore, this is enough to show that the vehicle was used for hire and reward. This witness has admitted having given this kind of statement to the Investigator engaged by the Insurance Company and that there is satisfactory evidence to suggest that the vehicle was carrying more than 20 passengers at the relevant time. This submission is opposed by Smt. Sneh Mishra and it is contended that Laxman has denied having given such a statement.

Having considered the matter, we are of the opinion that respondents can not take benefit of the statement contained in the FIR to the Police with respect to this incident. Firstly, this statement was given for initiation of criminal proceedings, therefore, can not be used in civil proceedings. Secondly, Laxman has denied having given the statement. Statement recorded by private Investigator of the respondent Insurance Company is not on record nor the same is proved in Court, therefore, it is not of much consequence. Perusal of claim petition discloses that nowhere in it has been stated by the claimants that they engaged tempo trax on hire for going from Bhopal to Sagar. They have not said so in their statement before the Claims Tribunal. The owner and driver of the vehicle have specifically stated that they did not charge any fare from the claimants since they were known to them. Claimants, owner and driver of the vehicle were the best persons to depose on this aspect of the matter and since they have said that on fare was charged from the claimants for the journey undertaken by them, it is difficult to accept the version of the Insurance Company and the so called Investigator appointed by it. We also notice that the vehicle could be used for social, domestic and excursion purposes. The claimants were going to attend the marriage and since the parties were known to each other, it can be accepted that the vehicle was being used for a social trip without monetary consideration. Consequently, it is held that the vehicle was not being used for hire and reward on the date the accident took place.

Second phase of the question is over-loading of the vehicle. On this question, it can be said that the occupants thereof were mostly small children who could not be left out when the purpose of journey was to attend the marriage. They could not

be separated from the parents. Practically they are related to each other. This plea is not available to Insurance Company since the vehicle was not being used for the purpose other than indicated in the policy and it is to be taken as separate accident for each of the victims of the accident (See - *National Insurance Company Limited* v. *Kumar Anjana Shyam and others,*[1] and - *United India Insurance Company Limited* v. *Sabeer Ali*)[2]. For all these reasons stated above, we are of the opinion that Insurance Company (respondent 3) is liable to pay the compensation in these cases and the finding of the Claims Tribunal exempting the Insurance Company from payment of compensation is set aside.

In all cases, where enhancement of compention is ordered, the same will carry interest at the rate of 12% per annum from the date of application till payment.

Consequently, the appeals are allowed in terms aforesaid. Compensation awarded be paid within two months. Cost on parties.

Appeal allowed.

CIVIL REVISION

Before Mr. Justice S. P. Khare.

23 September, 1999.

CHUNNILAL ....Applicant*

v.

VINOD KUMAR ...Non-applicant.

Civil Procedure Code (V of 1908)–Section 115, Order 37, Rule 3(4), 4–Civil Revision–Summary suit–Service on defendant in form 4-A is mandatory–Failure to comply is a fatal defect–Trial Court at no stage followed the procedure prescribed by Order 37, Rule 3(4) C.P.C. inasmuch as the summons for Judgment was not served on the defendant in form No. 4-A in Appendix-B–Decree passed without following the mandatory procedural requirements–Decree set aside–Suit restored–Matter remanded to trial Court.

*C.R.No. 1068/98.

(1) II (2000) ACC 476. (2) I (2000) ACC 226 (DB).

Chunnilal v. Vinod Kumar, 1999.

The Scheme of Order 37 thus shows that the defendant has first within ten days of service upon him of a summons under Rule 2 to enter an appearance only to prevent a judgment and decree which may follow in default of that appearance. It is only when summons for judgment in Form 4-A is served upon him that he has to apply for leave to defend.

In view of the above legal position the decree dated 16.07.96 without following the mandatory procedure requirement was not valid. It ought to have been set aside under Order 37 rule 4 C.P.C.

Sharda Talkies v. *Dhadiwal Exhibitors*[1], *United Western Bank* v. *Manoj Hosiery*[2] and *Ramesh Chandra* v. *Central Bank*[3]; referred to.

Ku. M. Bhatia for the applicant.

V. K. Dubey for the Non-applicant.

Cur. adv. vult.

ORDER

S. P. KHARE, J. – This is a revision by the defendant against order dated 2.9.1998 in M.J.C.No. 5 of the 1998 by which his application under Order 37 rule 4 C.P.C. for setting aside the decree dated 16.7.1996 in Civil Suit No. 373-B of 1995 has been rejected.

Plaintiff Vinod Kumar instituted a summary suit against defendant Chunnilal. The summons as required by order 37 rule 2(2) C.P.C. was issued. That was served on the defendant on 11.2.1996. The defendant entered an appearance on 19.2.1996 with his counsel. On that date the Presiding Judge was on leave. The case was fixed on 27.2.1996 but it was not taken up on that date. On 4.4.1996 both parties were present. The trial Court at no stage followed the procedure prescribed by Order 37 rule 3(4) C.P.C. inasmuch as the summons for judgment was not served on the defendant in form No. 4-A in Appendix B. Therefore, there was no occasion for the defendant to apply for leave to defend as required by sub-rule (5) of rule 3. The decree was passed on 16.7.1996.

(1) A.I. R.1987 M. P. 164. (2) 1997 (I) M.P.W.N. 92. (3) 1992 J. L. J. 434

Chunnilal v. Vinod Kumar, 1999.

After hearing the learned counsel for both the sides this Court is of the opinion that non service of summons for judgment in Form No. 4-A on the defendant is a fatal defect. It is only on service of such summons that the defendant could apply for leave to defend. The use of the word "shall" in sub-rule (4) of rule 3 shows that the service of summons in Form No. 4-A is a mandatory requirement. In the absence of such summons the defendant could not apply for leave to defend and therefore further procedure could not be followed.

In *Sharda Talkies* v. *Dhadiwal Exhibitors*[1] it has been held that various Rules and sub-rules of Order 37 prescribe a complete Code for trial and adjudication of such suits. According to sub-rule (3) of Rule 2, the defendant upon whom summons of the suit is served in Form IV in Appendix-B, has to enter appearance. If he does not so enter appearance, the allegations in the plaint shall be deemed to be admitted and a decree shall follow for an amount not exceeding the sum mentioned in the summons together with interest at the rate specified, if any, up to the date of the decree and also costs. In order, therefore, to avoid an *ex parte* decree, the defendant receiving such summons in Form IV must cause appearance. Such appearance by the defendant would, therefore, only prevent the Court from proceeding to pass an immediate decree which may otherwise follow in default of such appearance. Such an appearance by him only permits him to defend the suit. Accordingly to sub-rule (4) of Rule 3, after the defendant has entered appearance and filed an address for service of notice on him, the plaintiff shall serve on him a summons for judgment in Form 4A in Appendix B. This will be supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit. It is then that the defendant's participation comes up. He may at any time within ten days from the service of summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit. Such leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just. (Sub-rule (5) of Rule 3 of Order 37). The scheme of Order 37 thus shows that the defendant has first within ten days of service upon him of a summons under Rule 2 to enter an appearance only to prevent a judgment and decree which may follow in default of that

(1) A. I. R.1987 M. P 164

appearance. It is only when summons for judgment in Form 4-A is served upon him that he has to apply for leave to defend. In *United Western Bank* v. *Manoj Hosiery* [1] it has been held relying upon *Ramesh Chandra* v. *Central Bank*[2] that the provision under rule 3(4) of Order 37 is mandatory.

In view of the above legal position the decree dated 16.7.1996 without following the mandatory procedural requirement was not valid. It ought to have been set aside under Order 37 rule 4 C.P.C. This revision is allowed and the decree is set aside. The trial Court is directed to restore the suit and proceed as per Order 37 rule 3(4) C.P.C. The parties are directed to appear before the trial Court on 1.11.1999.

Revision allowed.

CRIMINAL REVISION

Before Mr. Justice S. C. Pandey.

16 May, 2001.

HARBHAJAN SINGH ...Applicant*

v.

STATE ...Non-applicant

Criminal Procedure Code, 1973 (II of 1974)–Sections 156, 190, 200, 202, 299, 397, 401–Criminal Procedure–FIR and cognizance of offence by Magistrate–An order is a document and has to be construed in its ordinary and natural meaning in absence of any ambiguity–Magistrate in complaint case after examining complainant may order for police investigation under Section 156(3) Cr. P.C.–Mere examination of complainant does not mean that he had taken cognizance–Warrant of arrest–On the date of filing charge sheet accused not present–To secure attendance of accused Magistrate rightly ordered for issuance of warrant of arrest.

The question is when the Chief Judicial Magistrate examined the complainant did he apply his mind to register a complaint after taking cognizance under Section 190(a) of Cr.P.C. Certainly he could do so.

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* Cri. R. No. 51/2001

(1) 1997 (1) M. P. W.N. 92. (2) 1992 J. L. J. 434.

An order is a document. It has to be construed in its ordinary and natural meaning in absence of any ambiguity. It appears to this Court that the learned CJM clearly purported to exercise power under Chapter XII and not under Chapter XV of the code of Criminal Procedure. He was equally armed with powers for taking either course. He chose the one and rejected the other.

Mere examination of witnesses would not result in taking cognizance in a case filed upon complaint depriving the right of CJM to order investigation.

Abhinandan Jha and others v. *Dinesh Mishra*[1] and *Suresh Chand Jain* v. *State of M. P. and another*[2]; referred to.

S. C. Datt, for the Applicant.

Smt. C. Sharma, P. L. for the non-applicant.

Cur. adv. vult.

ORDER

S. C. PANDEY, J. – This revision under Section 397 read with Section 401 of the Code of Criminal Procedure is directed against the Orders dated 21.7.2000 passed by the CJM, Damoh and 29.12.2000 passed by the learned Judicial Magistrate First Class, Damoh (who presided on that day in absence of two CJM) in Criminal Case No. 1355/2000.

The facts of this case disclose that applicant married Smt. Amarjeet Kaur on 14.9.97 according to the rites and customs prevalent in Sikh community. According to facts stated in the memo of revision the applicant and his wife Smt. Amarjeet Kaur lived alongwith the parents of the applicant at Narsinghpur till 27.9.98. Thereafter she lived with the applicant in a separate house situate at Anand Nagar Colony, Narsinghpur. Subsequently she became pregnant and she went to her matrimonial home at Damoh on 3.4.99. On 25.7.99 a male child was born to her. It appears according to memo of revision that after the birth of child the relations between the applicant and his wife became sour and she lodged a report in police station. Kotwali, Damoh with a copy to the District Collector, Damoh, Inspector General of Police, Damoh and Mahila Utpidan Crime Branch, Bhopal. However, the police did not take any action.

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(1) A. I. R. 1968 S. C. 117. (2) A. I. R. 2001 S. C. 571.

Harbhajan Singh v. State, 2001.

Thereafter Smt. Amarjeet Kaur filed a complaint before CJM, Damoh under Section 200 of Code of Criminal Procedure alleging commission of offences under Section 498-A of IPC and Section 3/4 of Dowry Prohibition Act by the applicant and his other relations including his father and mother. The Chief Judicial Magistrate recorded the statement of Amarjeet Kaur under Section 200 of the Code of Criminal Procedure. It is alleged that after recording the statement of Amarjeet Kaur, the learned Chief Judicial Magistrate on 21.7.2000 directed the Station House Officer, Police Station, Kotwali, Damoh to register the offences under Section 498-A IPC and Section 3/4 of Dowry Prohibition Act and further directed that the report be submitted by the police by 30th of July, 2000. Pursuant to that report, the police filed the charge sheet under Section 498-A of IPC and also under Section 3/4 of Dowry Prohibition Act. It was stated in the charge sheet that the applicant is a absconder. The charge sheet was filed in the Court of CJM, Damoh but as he was absent the Judicial Magistrate Ist Class Damoh who presided over the Court passed the order dated 29.12.2000 for taking action under Section 299 of the Code of Criminal Procedure against the applicant. The applicant is aggrieved by both these orders, hence this revision.

It is argued by learned counsel for the applicant that the CJM had no power to treat the complaint as an FIR and order an investigation on 21.7.2000. Once he has recorded the statement of the complainant, it would be deemed that he was proceeding under Section 200 of Code of Criminal Procedure having taken cognizance of the offence under Section 200 of that Code. He could then proceed further as per Section 202 of the Code of Criminal Procedure by postponing the issuance of process and ordering investigation if need be. The learned counsel for the applicant relief upon the decision of Supreme Court in the matter reported in *Abhinandan Jha and others* v. *Dinesh Mishra*[1] and *Suresh Chand Jain* v. *State of M. P. and another*[2] and the cases relied upon in these cases. He also assailed the order dated 20.4.2001 as without jurisdiction.

On the other hand the learned counsel for the State argued that these cases were distinguishable. It was argued that mere examination of the complainant shall not indicate that learned CJM, Damoh had decided to take cognizance of the offence. It was argued that order dated 21.7.2000 purports to be what it says.

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(1) A. I. R.1968 S. C.117. (2) A. I. R. 2001 S. C. 571.

The question that has to be decided is if by examining the complainant the Magistrate is deemed to have taken cognizance of the offence under Section 200 of Cr.P.C. Consequently, he could not exercise his powers under Section 156(3) of Cr.P.C. directing an investigation. When does a Court take cognizance of an offence ? In this connection Section 190 of the Code of Criminal Procedure may be reproduced :-

> "190. Cognizance of offences by Magistrates -(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence -
>
> (a) upon receiving a complaint of facts which constitute such offence.
>
> (b) upon a police report of such facts;
>
> (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed
>
> (2) The chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

It is apparent that a Magistrate has power to take cognizance of an offence under Section 190 of the Code of Criminal Procedure upon receiving (1) a private complaint (ii) police report or (iii) information other than police officer or upon his personal knowledge. An offence under Section 498-A. IPC would be a cognizable offence when the complainant is the aggrieved person. If we read Section 190(a) of Cr.P.C. alongwith Section 200 of Cr.P.C., then the Magistrate is required to follow the procedure in complaint case after taking cognizance of an offence. This procedure falls under Chapter XV of the Code of Criminal Procedure. Section 2(d) of the Code of Criminal Procedure defines a "complaint" as follows :-

> "Complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report."

Harbhajan Singh v. State, 2001.

There is no provision in the Code of Criminal Procedure defining the act of taking cognizance. It will depend upon the facts of each case. In *Supdt. and Remembrancer of Legal Affairs* v. *Abani Kumar Banerjee*[1]. Justice Das Gupta speaking for Division Bench of Calcutta High Court made the following general statement at page 438 in paragraph 7 :-

> "What is taking cognizance" has not been defined in the Criminal Procedure Code, and I have no desire now to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a), Criminal P. C., he must not only have applied his mind to the contents of the petition, but he must have done so far the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter - proceeding under Section 200, and thereafter sending it for enquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g., ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

The Supreme Court has approved the very words quoted in A. I. R. 1951 S. C. 207. and A. I. R. 1961 S. C. 986. Recently the Supreme Court in *Narsingh Das Tapadia* v. *Goverdhan Das Partani and another*[2] in paragraph 8 has summed up thee law as follows :-

> "Taking cognizance an offence" by the Court has to be distinguished from the filing of the complaint by the complainant. Taking cognizance would mean the action taken by the Court for initiating judicial proceedings against the offender in respect of the offence regarding which the complaint is filed. Before it can be said that any Magistrate or Court has taken cognizance of an offence it must be shown that he has applied his mind to the facts for the purpose of proceeding further in the matter at the instance of the complainant. If the Magistrate or the Court is shown to have applied the mind not for the purpose of taking action upon the complaint but for taking some other kind of action

(1) A. I. R. (37) 1950 Cal. 437. (2) A. I R. 2000 S. C. 2946 at p. 2948.

contemplated under the Code of Criminal Procedure such as ordering investigation under Section 156(3) of Cr.P.C. or issuing a search warrant, he cannot be said to have taken cognizance of the offence."

The aforesaid general principles lay down the guidelines for determining whether a Court has taken cognizance. The question is when the Chief Judicial Magistrate examined the complainant did he apply his mind to register a complaint after taking cognizance under Section 190(a) of Cr. P. C. Certainly he could do so. However, by the impugned order he manifested different intention. Could this Court say by construing his order that what he did; he did not mean and what he meant; he did not do ? The answer is clear "no". An order is a document. It has to be construed in its ordinary and natural meaning in absence of any ambiguity. It appears to this Court that the learned CJM clearly purported to exercise power under Chapter XII and not under Chapter XV of the Code of Criminal Procedure. He was equally armed with powers for taking either course. He chose the one and rejected the other. Now it is being argued that because he had followed the mandatory procedure of examining the complainant under Section 200 of Cr.P.C., it should be implied that he had taken the cognizance of the offences. This argument smacks of legalism. It is more important to find out what the learned C.J.M. intended by the totality of his actions. It is clear from his order that he ordered investigation under Section 156(3) of Cr.P.C. This must be opinion formed after reading the complaint. Further examination of the complainant would not add anything to the initial opinion of the Magistrate. The decision of Supreme Court in case of *Suresh Chand Jain* (*supra*) is of no help to applicant. In that case, it was argued that it was necessary to examine the complainant before proceeding under Section 156(3) of Cr.P.C. in a case filed as a private complaint. The contention was rejected. The converse is not true. Mere examination of witnesses would not result in taking cognizance in a case filed upon complaint depriving the right of CJM to order investigation. The act of taking cognizance is discriminatory. The discretion exercised by the Magistrate must be judged by what he purports to do and not by applying any other standard. The Magistrate was not satisfied after going through the complaint that he should take cognizance of the matter. This interpretation of his order is in consonance with what he did. The further act of examination of complainant was also for the purpose of ordering investigation under Section 156(3) of the Code of Criminal Procedure Therefore, this Court is of the view that the order

dated 21.7.2000 is good and valid. It is an order under Section 156(3) of Cr.P.C. Consequently filing of the charge sheet is upheld. The charge sheet indicates that the applicant was reported to be absconding on 29.12.2000. Consequently, the learned Judicial Magistrate First Class had no option but to issue the warrant of arrest. This Court does not find any illegality in the orders passed by the Court below. The revision has no merit. It is dismissed. The record of the Court below be sent back immediately.

Application dismissed

APPELLATE CRIMINAL

Before Mr. Justice S. P. Khare.

11 February, 1999.

SMT. ANNAPURNABAI alias BHOORI ...Appellant*

v.

STATE ...Respondent

Criminal Procedure Code, 1973 (II of 1974), Section 374(2)–Appeal against conviction and sentence–Penal Code Indian, 1860, Sections 306, 498-A–Dying declaration that deceased committed suicide because appellant mother-in-law used to taunt her for being ugly and no demand of dowry alleged–Alleging to be ugly was not such a nature so as to drive the bride to commit suicide–Offence not proved beyond reasonable doubt–Conviction and sentence set aside.

The remark of the member-in-law that Sunita was not beautiful cannot be approved as it was expected of her to treat her with greater love and affection when it was known that she was pregnant. But the remark that the daughter-in-law was not beautiful was not such a nature which could drive her to commit suicide. It was not of sufficient gravity. It is a question of fact-in each case whether the woman was subjected to cruelty within the meaning of clause (a) of the Explanation to Section 498-A, IPC. The letter Ex.-P-1 shows that Sunita was very much emotional, of love tolerance and unstable mind. There was no

*Cri. A No. 695 1988.

grave and serious provocation by the appellant. Even after the introduction of Section 498-A, IPC and 113-A Evidence Act proof must be beyond any shadow of reasonable doubt.

Gurbachand Singh v. *Satpal Singh*[1]; followed.

Sanjay Kumar Agrawal, for the appellant.

R. K. Verma, for the respondent.

Cur. adv. vult.

JUDGMENT

S. P. KHARE, J. – Appellant Smt. Annapurnabai has been convicted under Section 498-A and 306 Indian Penal Code and sentenced to rigorous imprisonment for one year and five years respectively. She has also been convicted under Section 4 of the Dowry Prohibition Act and sentenced to rigorous imprisonment for six months.

Deceased Sunita aged about 18 years married to the appellant's son Ramesh (D.W.-3) in April, 1987 committed suicide by pouring kerosene on her and setting her ablaze on 27.11.1987. She died on 19.12.1987 that is, within eight months of her marriage in the hospital. Phulchand Mishra (P.W.-1) and Rohinibai (P.W.-1) are her parents.

The prosecution case was that the appellant was demanding *Jhumka, Kardhan* and money for T.V. connection from the parents of Sunita. The appellant used to taunt her that she was not beautiful and used to beat her. She treated her with cruelty. Her dying declaration Ex.-P-12 was recorded by Shri S. R. Dewangan, Additional Tehsildar and Executive Magistrate on 27.11.1987 at 3.25 P.M. in the Government Hospital, Raigarh. She had written letter Ex.-P-1 to her father regarding the demand of dowry.

The accused pleaded not guilty. The trial Court after appreciation of the evidence on record convicted and sentenced her as stated at the outset.

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(1) A. I. R.1990 S. C. 209.

Smt. Annapurnabai alias Bhoori v. State, 1999.

In this appeal it is argued that the charges against the appellant are not proved beyond reasonable doubt.

The evidence on record has been closely scrutinised by this Court. Shri S. R. Dewangan (P.W.-7) has deposed that on receipt of instructions from the S.D.M. he went to K.G. Hospital, Raigarh and found Sunita lying on the bed. He obtained certificate from the doctor on duty that she was in a fit physical and mental condition to make her dying declaration. That certificate is written on Ex.-P-12. Then he recorded her statement in question answer form in Ex.-P-12. He read it over to her and she admitted it to be correct. She could not sign this statement because of severe burn injuries. Dr. B. Swarnakar (P.W.-10) has deposed that the had examined Sunita on 27.11.1987 before her statement was recorded by the Magistrate. He found her fully conscious and fit to give her statement. He recorded this certificate on Ex. P-12 and signed it. The relevant portion of the dying declaration of the deceased is as under :-

"प्रश्न : आपको किसी ने जलाने के लिये क्या प्रेरित किया।
उत्तर : मेरी सास मुझे सुन्दर नहीं है कह कर मारती थी दुख देती थी। मुझसे सहन नहीं हुआ मैं अपने ऊपर मिट्टी का तेल डाल कर जली हूँ।"

In the dying declaration Ex.-P-12 the deceased did not mention anything about the demand of any dowry. She does not say that she took the extreme step because of insistence by anyone for payment of the articles of dowry. The demand of dowry was not the driving force to commit suicide. It is true that shortly after the marriage the deceased wrote in the letter Ex.-P-1 addressed to her father that her mother-in-law is asking for Kardhan, Jhumka (of silver) and charges for connection of T.V. But several months had passed thereafter. It is not known whether these articles were given or not but there is no specific evidence that the mother-in-law repeated the demand of these items. The letter shows that these ornaments of traditional nature were asked for Sunita herself and not for the use of the appellant. It is also found that the father of the girl had expressed to give these items in the marriage. Therefore, simply reminding for these small things did not amount to demand of dowry nor this thing weighed or loomed large with the deceased in bringing an end to her life. If that had been the causative factor that wound have found place in the dying declaration. Clause (b) to Explanation to Section 498-A I.P.C. is not attracted as she was not harassed on account of dowry.

Smt. Annapurnabai alias Bhoori v. State, 1999.

The next question is whether the appellant exhibited "wilful conduct" of such a nature which was likely to drive the woman to commit suicide. According to the dying declaration the appellant used to say that Sunita was not beautiful and on that account she used to harass and beat her. In the letter Ex.-P-1 written by Sunita there is no indication of any physical assault or torture by the appellant. There is no precise evidence to that effect. It is in evidence of the parents of the deceased that Sunita had no complaint against her husband. They have also no complaint against him. If the husband was not dissatisfied because of her dark complexion and he never expressed his unhappiness on that ground it is difficult to believe that the appellant would beat or harass her on that count.

The only thing which appears to be true is that the appellant expressed that Sunita was not beautiful. The dying declaration again does not show that the appellant said that she was ugly (badsurat) as stated by the parents of the deceased in evidence. That would have been a stronger word to disturb the mental equilibrium of the deceased. The remark of the mother-in-law that Sunita was not beautiful cannot be approved as it was expected of her to treat her with greater love and affection when it was know that she was pregnant. But the remark that the daughter-in-law was not beautiful was not of such a nature which could drive her to commit suicide. It was not of sufficient gravity. It is a question of fact in each case whether the woman was subjected to cruelty within the meaning of clause (a) of the Explanation to Section 498-A I.P.C. The letter Ex.-P-1 shows that Sunita was very much emotional, of law tolerance and unstable mind. There was no grave and serious provocation by the appellant. Even after the introduction of Section 498-A I.P.C. and 113-A Evidence Act proof must be beyond any shadow of reasonable doubt. *Gurbachan Singh* v. *Satpal Singh*[1]. On a dispassionate consideration of the material on record it is found that the charges against the appellant are not established.

The appeal is allowed. The conviction and sentence of the appellant are set aside and she is acquitted of all the charges.

Appeal allowed.

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(1) A. I.R. 1990 S. C. 209.

SUPREME COURT OF INDIA

Before Mr. Justice Doraiswamy Raju and Mr. Justice Arijit Pasayat
19 August, 2003.

STATE OF M. P. ...Appellant*

v.

KEDIA LEATHER AND LIQUOR LTD., and others ...Respondents

Constitution of India–Article 21, Criminal Procedure Code, 1973 (II of 1974), Sections 133, 144–Public nuisance–Air and water pollution by discharge of Industrial effluents–Right to live with human dignity becomes illusory in absence of humane and healthy environment–Notice by Sub-Divisional Magistrate to close the Industrial units–Air (Prevention and Control of Pollution) Act, 1981–Sections 18, 20 and 22-A and Water (Prevention and Control of Pollution) Act, 1974, Sections 30, 32, 33–Characteristically special enactments–Relate to prevention and control of pollution and also provide for penal consequences in case of breach of statutory provisions–Fields of operation are different–Provisions of Section 133 Criminal Procedure Code can be culled in aid to remove public nuisance caused by effluent of discharge and air discharge causing hardship to general public–High Court not justified in holding that there was any implied repeal of Section 133 Criminal Procedure Code by the Special enactments–Implied repeal–Can be inferred when provisions of two Act are repugnant and cannot stand together.

The two statutes relate to prevention and control of pollution and also provides for penal consequences in case of breach of statutory provisions. Environmental, ecological air and water pollution amount to violation of right to life assured by Article 21 of the Constitution of India, 1950 (in short 'Constitution'). Hygienic environment is an integral facet of healthy life. Right to live with human dignity becomes illusory in the absence of humane and healthy environment.

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*Criminal Appeal Nos. 151-158 of 1996.

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To determine whether a later statute repeals by implication an earlier it is necessary to scrutinize the terms and consider the true meaning and effect of the earlier Act. Until this is done, it is impossible to ascertain whether any inconsistency exists between the two enactments. The area of operation in the Code and the pollution laws in question are different with wholly different aims and objects and though they alleviate nuisance, that is not of identical nature. They operate in their respective fields and there is no impediment for their existence side by side.

The provisions of Section 133 of the Code are in the nature of preventive measures, the provisions contained in the two Acts are not only curative but also preventive and penal. The provisions appear to be mutually exclusive and the question of one replacing the other does not arise. Above being the position, the High Court was not justified in holding that there was any implied repeal of Section 133 of the Code. The appeals deserve to be allowed to the extent indicated above which we direct.

A.B. Krishna v. *State of Karnataka*,[1] *Pt. Rishikesh* v. *Salma Begum (Smt.)*,[2] *R. S. Raghunath* v. *State of Karnataka*,[3] *Ratan Lal Adukia* v. *Union of India*,[4] *Northern India Caterers Pvt. Ltd.* v. *State of Punjab*,[5] *Municipal Council, Palai* v. *T. J. Joseph*[6] and *A. G.* v. *Moore*[7]; relied on.

Vasant Manga Nikumba v. *Baburao Bhikanna Naidu*,[8] *Municipal Corporation of Delhi* v. *Shiv Shankar*,[9] *Berry's Case*[10] and *Garnett* v. *Bradley*[11]; referred to.

Sakesh Kumar, Ms. Vibha Datta Makhija, S. K. Agnihotri, Rohit K. Singh for the appellant.

Vijay Panjwani Advocate for Central Pollution Control Board, *S. K. Gambhir*, Sr. Adv., *K. K. Mohan, Anil Sharma, Awanish Sinha* for the Respondent.

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(1) A.I.R. 1998 S.C. 1050=1998 A.I.R. SCW 827=(1998) 1 JT (SC) 613.
(2) (1995) 4 S.C.C. 718=(1995) 4 JT (SC) 401.
(3) A.I.R. 1992 S.C. 81=1991 A.I.R. SCW 2766.
(4) A.I.R. 1990 S.C. 104.
(5) A.I.R. 1967 S.C. 1581.
(6) A.I.R. 1963 S.C. 1561.
(7) (1878) 3 Ex. D. 276=38 LT 251=26 WR 366 (C.A.).
(8) 1995 Supp. (4) S.C.C. 54=1996 S.C.C.(Cri.) 27.
(9) A.I.R. 1971 S.C. 815=1971 Cri. L.J. 680=(1971) 1 S.C.C. 442.
(10) 1936 Ch. 274=154 LT 335.
(11) (1878) 3 App. Ca. 944=39 LT 261=48 LJOB 186 (HL).

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JUDGMENT

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. – View expressed by High Court Madhya Pradesh, Jabalpur Bench at Indore holding that after introduction of Water (Prevention and Control of Pollution) Act, 1974 (hereinafter referred to as the 'Water Act') and the Air (Prevention and Control of Pollution) Act, 1981 (hereinafter referred to as the 'Air Act'), there was implied repeal of Section 133 of the Code of Criminal Procedure, 1973 (in short the 'Code'), is questioned in these appeals.

Factual background needs to be noted in brief as legal issues of pristine nature are involved. The Sub-Divisional Magistrate (hereinafter referred to as the 'SDM') of the area concerned served orders in terms of Section 133 of the Code directing the respondents who owned industrial units to close their industries on the allegation that serious pollution was created by discharge of effluent from their respective factories and thereby a public nuisance was caused. The preliminary issues and the proceedings initiated by the SDM were questioned by the respondents hereinbefore the High Court under Section 397 of the Code.

The main plank of their arguments before the High Court was that by enactment of Water Act and the Air Act there was implied repeal of Section 133 of the code.

The plea was contested by the SDM on the ground that the provisions of Water Act and the Air Act operate in different field, and, therefore, the question of Section 133 of the Code getting eclipsed did not arise.

The High Court referred to various provisions of the Water Act and Air Act and compared their scope of operation with Section 133 of the Code.

The High Court was of the view that the provisions of the Water and the Air Acts are in essence elaboration and enlargement of the power conferred under Section 133 of the Code. Water and Air pollution were held to be species of nuisance or of the conduct of trades or occupation injuries to the health or physical comfort to the community. As they deal

with special types of nuisance, they ruled out operation of Section 133 of the Code. It was concluded that existence and working of the two parallel provisions would result not only in inconvenience but also absurd results. In the ultimate, it was held that the provisions of the Water and Air Acts impliedly repealed the provisions of Section 133 of Code, so far as allegations of public nuisance by air and water pollution by industries or persons covered by the two Acts are concerned. As a consequence, It was held that the SDM had no jurisdiction to act under Section 133 of the Code.

Learned counsel for the appellant-State submitted that the view expressed by the High Court is not legally tenable. The three statutes operate in different fields and even though there may be some amount of overlapping, they can co-exist. A statutory provision cannot be held to have been repealed impliedly by the Court. Learned Counsel for the respondents-units submitted that this Court had occasion to pass interim orders on 2.1.2001. Exception was taken to the manner of functioning of the Madhya Pradesh Pollution Control Board (in short the 'Board') and directions were given to take necessary action against the delinquent officials. Proceedings were initiated and on the basis of the reports filed by the functionaries of the reconstituted Board, functioning of the factories had been discontinued. The legality of the proceedings and the orders passed therein have been questioned and the Board has been moved for grant of necessary permission for making the factories functional. In this background it is submitted that the issues raised have really become academic. Though learned Counsel for the appellant-State and the Board accepted the position to be factually true. It is submitted that considering the impact of the decision which would have far-reaching consequences, the legal issues may be decided and appropriate directions should be given so far as the functioning of closure of the factories aspect is concerned.

Section 133 of the Code appears in Chapter X of the Code which deals with maintenance of public order and tranquillity. It is a part of the heading 'public nuisance'. The term 'nuisance' as used in law is not a term capable of exact definition and it has been pointed out in Halsbury's Law of England that 'even at the present day there is not entire agreement as to whether certain acts or omissions shall be classed as nuisances or whether

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they do not rather fall under other division of the law of tort'. In *Vasant Manga Nikumba and Ors.* v. *Baburao Bhikanna Naidu (deceased) by LRs. and anr.*[1] it was observed that nuisance is an inconvenience which materially interferes with the ordinary physical comfort of human existence. It is not capable of precise definition. To bring in application of Section 133 of the Code there must be imminent danger to the property and consequential nuisance to the public. The nuisance is the concomitant act resulting in danger to the life or property due to likely collapses etc. The object and purpose behind Section 133 of the Code is essentially to prevent public nuisance and involves a sense of urgency in the sense that if the Magistrate fails to take recourse immediately irreparable damages would be done to the public. It applies to a condition of the nuisance at the time when the order is passed and it is not intended to apply to future likelihood or what may happen at some later point of time. It does not deal with all potential nuisance, and on the other hand applied when the nuisance is in existence. It has to be noted that sometimes there is a confusion between Section 133 and Section 144 of the Code. While the latter is more general provision the former is more specific. While the order under the former is conditional, the order under the latter is absolute. The proceedings are more in the nature of civil proceedings than criminal Proceedings.

Once significant factor to be noticed is that person against whom action is taken is not an accused within the meaning of Section 133 of the Code. He can give evidence on his own behalf and may be examined on oath. Proceedings are not the proceedings in respect of offences. The Water Act and the Air Act are characteristically special Statutes.

The two statutes relate to prevention and control of pollution and also provides for penal consequences in case of breach of statutory provisions. Environmental, ecological air and water pollution amount to violation of right to life assured by Article 21 of the Constitution of India, 1950 (in short 'the Constitution'). Hygienic environment is an integral facet of healthy life. Right to live with human dignity becomes illusory in the absence of humane and healthy environment.

(1) 1995 Suppl. (4) S.C.C. 54.

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Chapter V of the Water Act deals with prevention and control of water pollution. Similarly, Chapter V of the Air Act deals with prevention and control of air pollution. Sections 30, 32 and 33 of the Water Act deal with power of the State Board to carry out certain works, emergency measures in certain cases and power of Board to make application to the Courts for restraining apprehended pollution respectively. Under Sections 18, 20 and 22-A of the Air Act deal with power to give directions, power to give instructions for ensuring standards and power of Board to make application to Court for restraining persons from causing air pollution respectively.

The provisions of Section 133 of the Code can be culled in aid to remove public nuisance caused by effluent of the discharge and air discharge causing hardship to the general public. To that extent, learned Counsel for the appellant is correct in his submission.

There is presumption against a repeal by implication; and the reason of this rule is based on the theory that the legislature while enacting a law has a complete knowledge of the existing laws on the same subject matter, and therefore, when it does not provide a repealing provision, the intention is clear not to repeal the existing legislation. (See : Municipal Council, Palai through the *Commissioner of Municipal Council, Palai* v. *I. J. Joseph*,[1] *Northern India Caterers (Private) Ltd. and anr.* v. *State of Punjab and anr.*,[2] *Municipal Corporation of Delhi* v. *Shiv Shankar*[3] and *Ratan Lal Adukia and anr.* v. *Union of India*.[4] When the new Act contains a repealing section mentioning the Acts which it expressly repeals, the presumption against implied repeal of other laws is further strengthened on the principle expressio unius (*persone vel rei*) est exclusio alterius. (The express intention of one person or thing is the exclusion of an other), as illuminatingly stated in *Garnett* v. *Bradley*.[5] The continuance of existing legislation, in the absence of an express provision of repeal by implication lies on

(1) A.I.R. 1963 S.C. 1561. (2) A.I.R. 1967 S.C. 1581.
(3) 1971 (1) S.C.C. 442. (4) A.I.R. 1990 S.C. 104.
(5) (1878) 3 A.C. 944 (H.L.).

the party asserting the same. The presumption is, however, rebutted and a repeal is inferred by necessary implication when the provisions of the later Act are so inconsistent with or repugnant to the provisions of the earlier Act and that the two cannot stand together. But, if the two can be read together and some application can be made of the words in the earlier Act, a repeal will not be inferred. (See : *A. G.* v. *Moore*,[1] *Ratanlals'a Case* (*supra*) and *R. S. Raghunath* v. *State of Karnataka and anr.*.[2]"

The necessary questions to be asked are :

"(1)Whether there is direct conflict between the two provisions:

(2) Whether the Legislature intended to lay down an exhaustive Code in respect of the subject-matter replacing the earlier law;

(3) Whether the two laws occupy the same field.

(See : *Pt. Rishikesh and Anr.* v. *Salma Begum* (*Smt.*)[3] and *A. B. Krishna & ors.* v. *The State of Karnataka and other.*[4]"

The doctrine of implied repeal is based on the theory that the Legislature, which is presumed to know the existing law, did not intend to create any confusion by retaining conflicting provisions and, therefore, when the Court applies the doctrine, it does not more than give effect to the intention of the Legislature by examining the scope and the object of the two enactments and by a comparison of their provisions. The matter in each case is one of the construction and comparison of the two statutes. The Court leans against implying a repeal, "unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied, or that there is a necessary inconsistency in the two Acts standing together". (See : Craise on Statute Law, Seventh Edition page 366, with reference to *Re : Berry's Case.*[5] To determine whether a later statute repeals by implication an earlier, it is necessary to scrutinize the terms and consider the true meaning and effect of the earlier Act. Until this is done, it

(1) (1878) 3 Ex. D. 276. (2) A.I.R. 1992 S.C. 81.
(3) 1995 (4) S.C.C. 718. (4) 1998 (1) J.T. (S.C.) 613.
(5) (1936) Ch. 274.

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is impossible to ascertain whether any inconsistency exists between the two enactments. The area of operation in the Code and the pollution laws in question are different with wholly different aims and objects : and though they alleviate nuisance, that is not of identical nature. They operate in their respective fields and there is no impediment for their existence side by side.

While as noted above the provisions of Section 133 of the Code are in the nature of preventive measures, the provisions contained in the two Acts are not only curative but also preventive and penal. The provisions appear to be mutually exclusive and the question of one replacing the other does not arise. Above being the position, the High Court was not justified in holding that there was any implied repeal of Section 133 of the Code. The appeals deserve to be allowed to the extent indicated above which we direct.

However, if applications are pending before the Board, it would be appropriate for the Board to take necessary steps for their disposal. The question whether there was no infraction under Section 133 of the Code or the two Acts is a matter which shall be dealt with by the appropriate forum, and we do not express any opinion in that regard.

Appeal allowed.

SUPREME COURT OF INDIA

Before Mr. Justice Doraiswamy Raju and Mr. Justice Arijit Pasayat
11 September, 2003.

STATE ...Appellant*

v.

GHANSHYAM SINGH ...Respondent.

Penal Code, Indian (XLV of 1860)–Sections 148, 149, 300, Explanation 4, 302, 304 Part I, 307 and Criminal Procedure Code 1973 (II of 1974)–Section 28–Sudden and free fight–Deceased came to the spot

*Cr. A. No. 1646 of 1996.

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hearing alarm and received gun shot injuries–Act of accused is relatable to Section 304 Part-I and not Section 302 I.P.C.– Sentence–Duty of the Court to award proper sentence having regard to the nature of offence and the manner in which it was executed– Long pendency of a matter by itself could not justify lesser sentence.

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 ocnduct 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-stated 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 *Mahesh* v. *State of M. P.*,[1] this Court while refusing to reduce the death sentence observed thus :

> "It will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicing system of the 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."

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.

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(1) A. I. R. 1987 S.C.R. 1346=1987 Cr. L. J. 1073 para 6.

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Ravji v. *Staste of Rajasthan*,[1] *Dhananjay Chatterjee* v. *State of W. B.*,[2] *State of Punjab* v. *Bira Singh*,[3] *Jashubha Bharatsingh Gohil* v. *State of Gujrat*,[4] *Sevaka Perumal* v. *State of T. N.*,[5] *Mahesh* v. *State of M. P.*,[6] *Dilbag Singh* v. *State of Punjab*[7] and *Dennis Councle Mc. Gautha* v. *State of California*[8]; referred to.

S. K. Gambhir Sr. Adv. *Siddharth Deve*

M. S. Vibha Data Makhija, Abhijeect P. Medh Advocate (N.P.).

JUDGMENT

The Judgment of the Court was delivered by ARIJIT PASAYAT, J. – State of Madhya Pradesh in Criminal Appeal No. 1646 of 1996 has questioned correctness of the judgment rendered by Division Bench of Mahdya Pradesh High Court, Gwalior Bench, holding that respondent (Ghanshyam Singh) was guilty of offence punishable under Section 304 of Indian Penal Code, 1860 (for short 'IPC'). The sentence imposed was restricted to the period already undergone, which was about 2 years and fine of Rs. 15,000/- which, if deposited was directed to be paid as compensation to the widow of Sarnam Singh (hereinafter referred to as 'the deceased') and in her absence to other dependents and heirs of the deceased. In default of payment of amount of fine, the default stipulation was further imprisonment of two years.

Six persons including accused Ghanshyam faced trial for allegedly having committed offences punishable under Sections 302 read with Section 149 IPC, Section 148 IPC, Section 307 read with Section 149 IPC. While the respondent-Ghanshyam Singh was found guilty of offence punishable under Sections 302 and 307 read with Sections 148 and 149, other accused

(1) 1996 A.I.R. S.C.W. 132=A.I.R. 1996 S.C. 787=(1996) 2 S.C.C. 175.
(2) 1995 A.I..R S.C. W. 510=(1994) 2 S.C.C. 220.
(3) 1995 Supp. (3) S.C.C. 708=1995 S.C.C. (Cri.) 1152.
(4) 1994 A.I.R. S.C.W. 2360=(1994) 4 S.C.C.. 353.
(5) 1991 A.I.R. S.C.W. 1368=A.I.R. 1991 S.C. 1463=1991 Cr. L. J. 1845.
(6) A.I.R. 1987 S.C. 1346=1987 Cri.L.J. 1073=(1987) 2 S.C.R. 710.
(7) A.I.R. 1979 S.C. 680=1979 Cr. L. J. 636=(1979) 2 S.C.C. 1-3.
(8) (1971) 402 US 183=28 Law Ed 2d 711.

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persons were convicted under Section 302 read with Section 149 IPC. They were also convicted under Sections 148 and 307 read with Section 149 IPC. Various sentences were imposed. All the six accused persons filed appeals before the High Court. As accused No. 6 Diwan Singh expired during the pendency of the appeal, it was held that the same stood abated so far as he is concerned.

Prosecution case in a nutshell is as follows :-

On 8.4.1981 Devisingh (P.W.1) with his sister Sushilabai (P.W.3) his sister's husband and elder brother Maharaj Singh went to bus stand of village Barod to see off Sushilabai and her husband, who were going by bus. At that time, all the six accused reached there with different weapons in their hands. Accused Ghanshyam Singh had a gun; Sitaram had a farsa and Harnamsingh and Diwansingh had lathis. They all surrounded Devisingh (P.W.1) and jointly assaulted him. Sitaram gave a farsa blow on the backside of his head. Amarsingh gave a lathi blow on his head which, however, fell on the hand. When he raised a cry for help, Ghanshyam Singh then fired at him but the bullet missed. Hearing the alarm, Hanumant Singh (P.W. 4), father of Devisingh, deceased Sarnam Singh who was his uncle, and Jaswant Singh (P.W.5) came on the spot. Accused Ghanshyam Singh then fired at Jaswant Singh and he received injury on the arm. He fired two shots thereafter which hit Sarnam Singh on his leg and abdomen. Harbir Singh gave a farsa blow on leg of Hanumant Singh (P.W.4). Udhamsingh (P.W.12). Jagannath and Banjara were at that time at motor-stand and they tried to save the assault. Information was lodged at the police station. Injured persons were sent for medical treatment. Subsequently, Sarnam Singh breathed his last. On completion of investigation charge-sheet was placed. Accused persons pleaded innocence and false implication due to strained relationship. They claimed to have been assaulted by deceased and his companions. The Trial Court convicted and sentenced the accused as indicated supra. Accused persons challenged the conviction and sentence.

On consideration of the evidence adduced by the prosecution, the High Court came to hold that the eye-witnesses have given cogent and consistent version that two shots were fired by Ghanshyam Singh causing serious injuries to Sarnam Singh. It was noted that there were two parts of the incident. In the first part it was noted that when Devisingh ran away

from the bus stand to save himself and raised an alarm, accused-Ghanshyam Singh came on the spot with his gun and fired. In the second part, there was free fight between the parties. In this view the plea of self-defence by the accused was rejected. It was however held that the act of using fire-arm and firing two shots by Ghanshyam Singh would fall under Exception 4 of Section 300 IPC. As the act was done in the course of sudden and free fight the offence was not relatable to Section 302 IPC but was one under Section 304 Part I, IPC. He was acquitted of other charges. So far as other accused persons are considered, they were held guilty of offence punishable under Section 323 IPC. On the question of sentence, it was held that Ghanshyam Singh was liable to undergo sentence and fine as noted supra. The special leave petitions, so far as rest of the accused-respondents are concerned, have been dismissed by order dated 6.9.1996.

In needs to be noted that though the High Court had held that the appeal against Diwan Singh had abated, yet he was made a party in the special leave petition. But that is really of no consequence as the special leave petition has been dismissed so far as he and other accused 2 to 5 are concerned.

Learned counsel for the State submitted that the High court was not justified in holding that case under Section 302 IPC was not made out. In any event, after having held that the case of homicide not amounting to murder has been made out against Ghanshyam Singh for offence punishable under Section 304 Part I, IPC, the custodial sentence of two years is too meager, considering the gravity of the offences and the brutal manner of attacks. He referred to the factual background and findings to substantiate both the above pleas.

In response learned counsel for the respondent-Ghanshyam Singh submitted that the High Court had rightly held that the offence was punishable under Section 304 Part I, IPC. In view of the fact that the occurrence took place in 1981, the sentence awarded is just and proper. In any event, after two decades it would be unreasonable and inequitable to send the accused back to custody, particularly when the fine amount has been deposited. Reference was made to *State of Punjab* v. *Bira Singh and others*,[1] *Pashora Singh and another* v. *State of Punjab*,[2] *Dilbag Singh* v. *State of Punjab*[3] to contend that liberal view is desirable in such matters.

(1) 1995 Supp. (3) S.C.C. 708. (2) 1993 Supp. (2) S.C.C. 33.
(3) 1979 (2) S.C.C. 103.

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We have considered the rival submissions.

So far as conclusion of the High Court about the applicability of Section 304, Part I, IPC is concerned, the High Court has rightly held on the evidence on record that the offence committed by accused-Ghanshyam Singh is relatable to Section 304, Part I and not Section 302, IPC.

The crucial question which needs to be decided is the proper sentence and merely because of lapse of time, the accused is to be waived from undergoing it. It is to be noted that the sentences prescribed for offences relatable to Section 304, Part I are imprisonment for life or up to a period of 10 years. It is true that no minimum sentence has been prescribed. The sentences can be compared with prescription of similar sentences and other provisions like Section 326, IPC and Section 307, IPC when hurt is caused. Section 304, Part I is a species of homicidal death. It is statutorily described as culpable homicide though not amounting to murder as defined under the IPC. Taking note of the purpose for which a sentence is imposed, it cannot be laid down as a rule of universal application that long passage of time in all cases would justify minimal sentence. Long pendency of a matter by itself could not justify lesser sentence.

The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross cultural conflict where living law must find answer to the new challenges and the Courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. 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 murder of innocent people would call for imposition of death sentence as deterrence. In *Mahesh* v. *State of M. P.*[1] this Court while refusing to reduce the death sentence observed thus :

> "It will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicing system of the 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."

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 its was executed or committed etc. This position was illuminatingly stated by this Court in *Savaka Perumal etc.* v. *State of Tamil Nadu.*[2]

The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

(1) (1987) 2 S.C. 710. (2) A.I.R. 1991 S. C. 1463.

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Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilized societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

After giving due consideration to the facts and circumstances of each case, 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 are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in *Dennis Councile MCG Dautha* v. *State of California*[1] that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.

In *Jashubha Bharatsingh Gohil* v. *State of Gujrat*,[2] it has been held by this Court that in the matter of death sentence, the Courts are required to answer new challenges and mould the sentencing system to meet these challenges. The object should be to protect the society and to deter the criminal in achieving the avowed object to 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

(1) 402 U.S. 183; 28 Ld. 2d. 711. (2) 1994 (4) S.C.C. 353.

and the sentencing process has to be stern where it should be. Even though the principles were indicated in the background of death sentence and life sentence, the logic applies to all cases where appropriate sentence is the issue.

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 counter productive 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.

In *Dhananjoy Chatterjee* v. *State of W. B.*,[1] this Court has observed 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 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.

Similar view has also been expressed in *Ravji* v. *State of Rajasthan.*[2] 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

(1) (1994) (2) S.C.C.. 220. (2) (1996) (2) S.C.C. 175.

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.

Taking into account the all relevant aspect of this case in the background of principles governing award of appropriate sentence, we feel that even on a liberal approach, custodial sentence of 6 years would serve the ends of justice. While fixing the sentence we have taken note of the fine imposed which remains unaltered. It is said to have been paid. There was stipulation for 2 years RI in case of default. The respondent, who is on bail, shall surrender to custody to serve balance of sentence.

Criminal Appeal No. 1646 of 1996 is allowed to the extent indicated. In view of the order passed in Criminal Appeal No. 1646 of 1996, there is no necessity for passing any order in Criminal Miscellaneous Petition No. 489/1996 filed by the informant for enhancement of sentence and the same is rejected.

Appeal is allowed.

SUPREME COURT OF INDIA

Before Mr. Justice N. Santosh Hegde and Mr. Justice B. P. Singh.

18 September, 2003.

K. PANDURANGAN ETC. ...Appellants*

v.

S. S. R. VELUSAMY and another ...Respondents.

Criminal Procedure Code, 1973 (II of 1974)–Sections 374(3), 386, 401, 432 and Penal Code, Indian (XLV of 1860)–Sections 109, 409, 420, 468 and 477–Conviction and sentence–Remission of sentence–Power to grant of–Vests with the appropriate Government and the accused has to be in custody–Court has no jurisdiction of remission of sentence–Order of remission by Court–Illegal–Revision at the

*Cr. A. No. 1682/1996.

instance of complainant–Maintainable–Lower appellate Court in appeal not considered factual aspect of the case but merely proceeded to consider the quantum of sentence and remission–Appellants have been denied opportunity of agitating their case on merits–Order of High Court set aside and matter remanded to the lower appellate Court.

Under the provisions of Code of Criminal Procedure, 1973 the Court has *suo motu* power of revision, if that be so, the question of the same being invoked at the instance of an outsider would not make any difference because ultimately it is the power of revision which is already vested with the High Court statutorily that is being exercised by the High Court. Therefore, whether the same is done by itself or at the instance of a third party will not effect such power of the High Court.

The right to grant remission is governed by the provisions of S. 432 of the Code of Criminal Procedure which vests the said power with appropriate Government and not in any Court. Even that power is subject to conditions enumerated in that Section and one such condition is that an accused person who is being granted remission of sentence will have to be in custody, when the decision to grant remission is made by the Government concerned.

We have also perused the said judgment and we do not think there is any application of mind in regard to the factual aspect of the case by the lower appellate Court which has merely proceeded to consider the quantum of sentence and grant of remission. Apart from the fact that right of appeal is statutorily provided by the Code, a Constitution Bench of this Court in the case of *A.R.Antulay* v. *R. S. Nayak & Anr.*[1] has held that deprivation of one statutory right of appeal would amount to denial of procedure established by law under Article 21 and further such denial violates the guarantee of equal protection of law under Article 14 of the Constitution. Placing reliance on the said judgment of this Court, we are of the opinion that since the lower appellate Court, which was the first Court of appeal, has not considered the factual aspect of the case while considering the appeal, we think the appellants have been denied an opportunity of agitating their case on facts against the judgment of the

(1) (1988) (2) S.C.C. 602.

trial Court. In such circumstances, we think the prayer of the learned counsel is justified. Therefore, we allow these appeals, set aside the impugned judgment of the High Court and remand the matter back to the Court of the Sessions Judge at Thiruchirapalli who will hear all appeals.

A. R. Antulay v. *R. S. Nayak*[1] and *Nadir Khan* v. *State (Delhi Admn.*[2]; relied on.

M. N. Krishnamani Sr. Adv, *T. Raja* and *Madasamy, S. Muralidhar* for the appellant.

A. T. M. Ranga Ramanujam Sr. Adv., *P. N. Ramalingam, V. Balaji* and *M. T. George* for the Respondents.

JUDGMENT

The Judgment of the Court was delivered by SANTOSH HEGDE, J. – In these appeals, the appellants were charged for offences punishable under S. 420, 477(a), 468, 420 read with S. 109, 409 read with 109 and 468 read with 109, IPC. The trial Court, namely, the VIth Additional Assistant Sessions, Judge, Thiruchirapalli, convicted the appellants under various sections, among them, for offences punishable under S. 420 and S. 420 read with 109, IPC. It awarded a maximum sentence of 5 years R.I.

On an appeal filed by the convicted accused, the appellate Court confirmed the conviction recorded by the trial Court but reduced the sentence to 2½ years each and further acting purportedly under various GOs. of the Government, it granted remission of the said sentence of 2½ years also.

In a revision filed by the complainant, the High Court of Judicature at Madras considering the question of jurisdiction of the Court to remit the sentence under the various G.Os. came to the conclusion that such a remission could not have been granted by the Court, hence, allowed the revision. It also came to the conclusion that there is no need to remit the matter back to the lower appellate Court, accordingly, set aside the impugned judgment of

(1) 1998 Cri. L. J. 1661=(1988) 2 S.C.C. 602.
(2) A.I.R. 1976 S.C. 2205=1976 Cri. L. J. 1721.

the lower appellate Court and restored the judgment of the trial Court both in regard to conviction and sentence. The effect of the said judgment was that the appellants have to undergo the sentence of 5 years awarded by the trial Court.

In these appeals, Shri M. N. Krishnamani, learned Senior Counsel appearing for the appellants contended that the High Court was in error in entertaining the revision at the instance of the complainant. He also submitted that the High Court was in error in setting aside the judgment of the lower appellate Court which granted the appellants benefit of remission. Alternatively he contended that neither the lower appellate Court nor the High Court have gone into the merits of the case on facts, hence, they have been denied the benefit of appeal which is otherwise provided under the Criminal Procedure Code.

While Shri A. T. M. Ranga Ramanujam, learned Senior Counsel appearing for the State strongly supported the judgment of the High Court and contended that from the purport of the order of the lower appellate court, it is clear that the Court had applied its mind in regard to the facts of the case before confirming the conviction. He also submitted that it is possible that the counsel appearing for the appellants before the lower appellate Court did not address any argument on merits, therefore, the complaint of the learned counsel for the appellants that the appellants did not get benefit of the appeal on facts is not correct. He supported the finding of the High Court on the question of grant of remission which he submitted, was without jurisdiction.

So far as the first question as to the maintainability of the revision at the instance of the complainant is concerned, we think the said argument has only to be noted to be rejected. Under the provisions of Code of Criminal Procedure, 1973, the Court has *suo motu* power of revision, if that be so, the question of the same being invoked at the instance of an outsider would not make any difference because ultimately it is the power of revision which is already vested the High Court statutorily that is being exercised by the High Court. Therefore, whether the same is done by itself or at the instance of a third party will not affect such power of the High Court. In this regard, we may note the following judgment of this Court in the case of *Nadir Khan* v. *The State (Delhi Administration)*.[1]

(1) A.I.R. 1976 S.C. 2205.

K. Pandurangan Etc. v. S. S. R. Velusamy, 2003.

The second question that has come up for our consideration in this case pertains to the right of the lower appellate Court to grant various remissions under various notifications issued by the State, reference to which has been made by the lower appellate Court in its judgment. The right to grant remission is governed by the provisions of S. 432 of the Code of Criminal Procedure which vests the said power with appropriate Government and not in any Court. Even that power is subject to conditions enumerated in that Section and one such condition is that an accused person who is being granted remission of sentence will have to be in custody, when the decision to grant remission is made by the Government concerned. See proviso to S. 432(5) of the Code which was not the factual position in this case apart from the fact the Court has no jurisdiction of remission of sentence under S. 432 of the Code. Therefore, in our opinion, the first appellate Court was not justified in granting the remission.

This leaves us to consider the last question argued before us by the learned counsel for the appellant that the appellants had a right of appeal on facts conferred statutorily by the Code of Criminal Procedure wherein they could have convinced the appellate Court that the findings of the Court below are erroneous and not based on facts. He pointed out from the judgment of the lower appellate Court that there has been no such consideration by the said Court. He submitted that if we are not inclined to accept his argument in regard to the right of the appellate Court to grant remission, then he is entitled to the benefit of hearing before the appellate Court on merits of the case. On facts, he submitted that the contention of the learned counsel for the State that there was no argument addressed by his counter part on merits of the case before the lower appellate Court is not correct and the same is also not so reflected in the judgment of the said Court. We have also perused the said judgment and we do not think there is any application of mind in regard to the factual aspect of the case by the lower appellate Court which has merely proceeded to consider the quantum of sentence and grant of remission. Apart from the fact that right of appeal is statutorily provided by the Code, a Constitution Bench of this Court in the case of *A. R. Antulay* v. *R. S. Nayak & Anr.*[1] has held that deprivation of one statutory right of appeal would amount to denial of procedure established by law under Article 21, and further such denial violates the guarantee of equal protection of law

(1) 1988 (2) S.C.C. 602.

under Article 14 of the Constitution. Placing reliance on the said judgment of this Court, we are of the opinion that since the lower appellate Court, which was the first Court of appeal, has not considered the factual aspect of the case while considering the appeal, we think the appellants have been denied an opportunity of agitating their case on facts against the judgment of the trial Court. In such circumstances, we think the prayer of the learned counsel is justified. Therefore, we allow these appeals, set aside the impugned judgment of the High Court and remand the matter back to the Court of the Sessions Judge at Thiruchirapalli who will hear all appeals which were filed against the judgment and conviction made by the VIth Additional Assistant Sessions Judge, Thiruchirapalli in Calendar Case No. 2 of 1988 and other connected matters. Since the matter is very old, we think it appropriate to direct the said appellate Court to dispose of the same on merits within three months from the receipt of the records.

Appeal is allowed.

FULL BENCH

Before Mr. Justice N. K. Jain, Mr. Justice A. M. Sapre and
Mr. Justice S. L. Kochar.
5 March, 2003.

RATANLAL ...Appellant*

v.

BARDI BAI and others ...Non-applicants.

Civil Procedure Code (V of 1908)–Section 100, 101, 140, Order 41, Rule 11 and Order 47 Rule 1–Review Application–Review of the Order of Single Bench–Placed before the Full Bench in peculiar fact situation–Power of Full Bench is limited to what the Single Bench could do while exercising power of Review–Review permissible only on three grounds specified-(i)–Discovery of new and important matter of evidence which could not be produced when the decree or order was passed ,(ii) mistake apparent on the face of record

*M. C. C. No. 308/2000.

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and (iii) any other sufficient ground–"Any other sufficient ground" mean reasons sufficient on ground at-least analogous to those specified immediately previously–Second Appeal dismissed holding "no substantial question of law involved for adjudication"–No ground supplied–Can be a ground for appeal but not for Review–Recourse to Review–Misconceived.

At the outset it needs to be mentioned that this Bench (F.B.) while hearing this review application is in no better position than the Bench (S.B.) which passed the order dated 26.6.2000 dismissing applicant's second appeal in limine, notwithstanding the fact that the said order was passed by a Single Judge and the present application is being heard by a Full Bench consisting of three Judges. Such an unusual course was inevitable because of peculiar fact situation, as already stated hereinbefore. We are conscious of our limits that we are substituting ourselves for the learned Judge who passed the order dated 26.6.2000 and we are expected to do nothing which the learned Judge himself could not have done while exercising power under Rule 1 of Order 47.

The scope of review is much more restricted than that of appeal. We cannot as successor Bench, examine the correctness or otherwise of the order. Any such effort on our part would convert this review into an appeal in disguise and would rather set a very wrong precedent.

However, non-supply of grounds cannot be characterised as "error apparent". It could be a ground for the applicant to assail the order in appeal, but not to invoke review jurisdiction of this Court. Recourse to Order 47, Rule 1 of the C.P.C. by the applicant is wholly misconceived.

P. Nalla Thampy v. *B. L. Shanker*,[1] *Mahadev's Case*,[2] *Umakant's Case*,[3] *Peera's Case*,[4] *Jayanmti De's Case*[5]; referred to.

Hari Vishun's Case[6] and *Thungabhadra's Case*[7]; followed.

M.G. Upadhyaya for the Applicant.

T. N. Singh for the opposite parties.

Cur. adv. vult.

(1) A.I.R. 1984 S.C. 135. (2) A.I.R. 1972 S.C. 1932.
(3) A.I.R. 1973 S.C. 218. (4) 1996 (II) M.P.W.N. 151.
(5) 2000 (II) M.P.W.N. 209. (6) A.I.R. 1995 S.C. 233.
(7) A.I.R. 1964 S.C. 1372.

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ORDER

The Order of the Court was delivered by

N. K. JAIN, J. – It is aptly said "A Judge must not alter the material of which the Act is woven, but he could and should iron out the creases". These famous words of Lord Denning are quoted with approval by the Supreme Court in *P. Nalla Thampy* v. *B. L. Shankar*.[1] We are also here required to iron out some such creases which have surfaced on account of difference of opinion between two Hon'ble Judges of the Division Bench of this Court while deciding this Review Petition arising from the Order dated 28.6.2000 passed by Single Bench of this Court in Second Appeal No. 497/1998.

Late Kanhaiyalal who has since died and now represented by the respondents, filed a suit No. 66-A/1990 in the Court of Civil Judge, Class I, Khilchipur, against the present applicant Ratanlal and others for declaration and injunction in respect of certain agricultural lands. The suit was decreed by the trial Court on 25.6.1992 and the appeal (No. 38-A/1997) filed by the defendants including the present applicant was also dismissed by Ist Additional District Judge, Raigarh, vide his judgment and decree dated 21.7.1998. Out of the unsuccessful defendants, only the present applicant-defendant came in Second Appeal before this Court. Learned Single Judge before whom the appeal came up for admission, dismissed the same in motion hearing in following terms :

> "Perused the record.
> No substantial question of law is involved for adjudication.
> Dismissed".

Applicant Ratanlal moved application under Order 47, Rule 1 of the Code of Civil Procedure, seeking review of the aforesaid order of dismissal, mainly on the ground that no reasons were supplied by the learned Single Judge for dismissing the appeal so as to indicate that the Judge has applied his mind to the points raised in appeal memo. According to the applicant this infirmity in the order stares in the face and manifests clear case of error, apparent on the face of the record.

Initially the application for review was placed before the Judge who dismissed the appeal but as the Judge was transferred, the matter, as per Rules, was placed before the Division Bench of this Court. However, the

(1) A.I.R. 1984 S.C. 135.

two Hon'ble Judges who heard the Review petition deferred from each other and recorded conflicting Opinions. The matter was initially sought to be referred to a third Judge, but as no question for such a reference was formulated by the Division Bench, the matter, by the order of Hon'ble the Chief Justice has been placed before the Full Bench. This is how the matter has come up before us and only a short but important question requiring determination is "whether non-supply of detailed reasons or as a matter of that even brief reasoning while dismissing the second appeal in motion hearing would be a case of mistake or error apparent on the face of record so as to constitute a ground for review ?"

We have heard Mr. M. G. Upadhayay, learned counsel for the applicant and Mr. T. N. Singh, learned counsel for respondents.

Mr. Upadhyay, learned counsel for applicant with his usual vehemence contended that the second appeal filed by the applicant should not have been dismissed in limine without assigning proper reasons. Even when the appeal was disposed of under Order 41, Rule 11 of CPC, it was mandatory on the part of the Judge to have passed a speaking order so as to make it clear that he has applied his mind to the facts and features of the case and the grounds taken by the applicant in his Memo of Appeal, submitted the counsel. Passing of an order in a cryptic manner like the one in hand, asserted the counsel, is a mistake or error apparent on the face of the record and is, therefore, liable to be recalled. Mr. Upadhayay has cited a catena of rulings in support of his contentions, vide *Mahadev*,[1] *Umakant*,[2] *Peera*[3] and *Jayanmti De*.[4]

The opposition is equally vehement. Mr. T. N. Singh, learned counsel for respondents contended that this Bench is not sitting in appeal to judge the correctness or otherwise of the order passed by learned Single Judge and the remedy of the applicant did not lie in moving application for review under Order 47, Rule 1 of CPC. According to him, the present application is nothing but an appeal in disguise which this Bench is not competent to hear or allow.

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(1) A.I.R. 1972 S.C. 1932. (2) A.I.R. 1973 S.C. 218.
(3) 1996 II M.P.W.N. 151. (4) 2000 (II) M.P.W.N. 209.

Before we proceed to consider the rival contentions, at the outset it needs to be mentioned that this Bench (F.B.) while hearing this review application is in no better position than the Bench (S.B.) which passed the order dated 26.6.2000 (err) dismissing applicant's second appeal in limine, notwithstanding the fact that the said order was passed by a Single Judge and the present application is being heard by a Full Bench consisting of three Judges. Such an unusual course was inevitable because of peculiar fact situation, as already stated hereinbefore. We are conscious of our limits that we are substituting ourselves for the learned Judge who passed the order dated 26.6.2000 (err) and we are expected to do nothing which the learned Judge himself could not have done while exercising power under Rule 1 of Order 47.

In order to appreciate the rival contentions it would be useful here to read the relevant part of Rule 1 of Order 47, which is as follows :

> "1. Application for review of judgment - (1) Any person considering himself aggrieved -
>
> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
>
> (b) by a decree or order from which no appeal is allowed, or
>
> (c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error, apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.
>
> 2. ...."

This Rule should be read with Section 140. Scope of an application for review is much more restricted than that of an appeal. The Court of Review has only a limited jurisdiction circumscribed of the definitive limits fixed by the language used in Order 47, Rule 1. It may allow a review on three specified grounds, namely; one : discovery of new and important matter

or evidence, which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or order was made : two : mistake or error apparent on the face of the record; or, three : or any other sufficient reason. Needless to add that the words "any other sufficient reason" mean a reason sufficient on grounds at least analogous to those specified immediately previously. In the instant case, we are concerned only with the ground two : i.e., "mistake or error apparent on the face of the record". The error apparent on the face of the record could not be and has not been defined precisely or exhaustively there being an element of indefiniteness inherent in its very nature and so it has always been left to be determined judicially on the facts of each case. [See : *Hari Vishnu*[1]]. Such an error may be of fact or of law or of both, but the same ought to be apparent on the face of the record and should have been a reason for passing of the order sought to be reviewed. In other words, the Court undertaking review of the order passed by it, should be satisfied that but for the said error the order in question could not have been passed. One has to distinguish "error apparent" from mere erroneous decision. Hon'ble the Supreme Court in *Thungabhadra*,[2] has made the legal position on the point luculent, in following terms :

> "There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by "error apparent". A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. Where without any elaborate argument one could point to the error - and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."

At this stage it would be appropriate to read Section 100 of CPC providing for Second Appeal. Sub-section (1) thus reads :

> "100. Second Appeal.-(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law."
>
> (emphasis supplied)

(1) A.I.R. 1955 S.C. 233. (2) A.I.R. 1964 S.C. 1372.

Section 101 further provides : "No Second Appeal shall lie except on the grounds mentioned in Sections 100". So, read with Section 101, Section 100 expressly bars Second Appeal unless a question of law and that too a substantial one is involved in a case. The High Court before admitting a Second Appeal has to satisfy itself that the case involves a substantial question of law. Needless to say that the satisfaction has to be arrived at after considering the grounds as put forth by the appellant as also the record and judgments of the two courts below.

In the backdrop of the aforesaid legal position when we examine the order dated 28.6.2000, we find that the Court while heaning the applicant/ appellant on the question of admission, considered the record of the case (the records of the two courts below were also before the Court) and recorded a clear finding : "No substantial question of law is involved for adjudication". With this finding the appeal was dismissed in limine. It may be noted here that all the issues involved in the case were decided against the applicant defendant by both the courts below. Obviously, the order was passed in terms of Ss. 100 and 101 r/w. Order 41, Rule 11 of CPC. Whether or not the aforesaid satisfaction was justified on material on record, is none of our concern while hearing this review petition where we sitting as successor Bench of the Bench which passed the order, are required to see only as to whether the order is vitiated by "mistake or error apparent on the face of the record". We cannot, for that purpose, undertake a review of the evidentiary material or take recourse to long drawn process of reasoning. Even where there may conceivably be two opinions on a particular point, that can hardly be said to be an error apparent. As already stated, the scope of review is much restricted than that of appeal. We cannot as successor Bench, examine the correctness or otherwise of the order. Any such effort on our part would convert this review into an appeal in disguise and would rather set a very wrong precedent. It would also destroy the distinction which the apex court in *Thungbhadra* (*supra*) characterised as real, between a mere erroneous decision and a decision which could be characterised as vitiated by "error apparent".

The various decisions cited by the learned counsel for applicant only lay down that even when a case is disposed of in motion hearing, the court is required to record in brief its ground for doing so. However, non-

supply of grounds cannot be characterised as "error apparent". It could be a ground for the applicant to assail the order in appeal, but not to invoke review jurisdiction of this Court. Recourse to Order 47, Rule 1 of CPC by the applicant is wholly misconceived and his application deserves dismissal with costs.

Since we have heard this case independently of the conflicting opinion recorded by two Hon'ble Judges of Division Bench of this Court, we need not to send the case back to the Division Bench. We ourselves dispose of the application and dismiss the same with costs. Counsel's fee Rs. 2,000/-, if certified.

Application dismissed.

WRIT PETITION

Before Mr. Bhawani Singh, Chief Justice & Mr. Justice Shantanu Kemkar.

24 April, 2003.

SUNIL KUMAR RAI ...Petitioner*

v.

UNION OF INDIA THROUGH : THE GENRAL MANAGER CENTRAL RAILWAY, BHOPAL & others ...Respondents

Constitution of India, Article 227 and Administrative Tribunal Act (XIII of 1985)–Section 19–Service Law–Compassionate appointments–Provided by Railways only if an employee is medically decategorised–Father of petitioner not medically decategorised but voluntarily retired from the Railways–Petitioner not entitled to compassionate appointments.

The Railways provide for appointment on compassionate ground provided the Railway employee has been medically decategorised. For this purpose, the Committee of the Doctor is constituted. In this case, the

* W. P. No. 2041 of 2001.

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petitioner's father may not be keeping good health, but he had not been medically decategorised at any stage by the Railways. Therefore, the claim of the petitioner for appointment on compassionate ground cannot be sustained.

R. L. Gupta for the petitioner.

S. K. Mukherjee for the Respondents.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **BHAWANI SINGH, CHIEF JUSTICE (ORAL)** – This writ petition is directed against the order of the Central Administrative Tribunal, Jabalpur Bench (CAT), dated March 13, 2001, Original Application No. 102/2001.

The petitioner is seeking appointment on compassionate ground. He alleges that his father Suresh Kumar Rai was Senior Loco Inspector, Central Railways, Bhopal. In Bhopal Gas Tragedy 1984, his father was affected and suffered Hypertension and Diabetes etc. Consequently he was treated at Bombay and many other hospitals. Since he was not keeping good health, he requested for change of his post/cadre and providing alternative job, vide communication dated 9.2.1981. Subsequently, his father sought voluntary retirement on the ground of ill-health from 31.3.1997. The petitioner preferred repeated representations for compassionate appointment. However, he was not appointed. Consequently, he filed Original Application No. 513/99, which was disposed of by order dated 7.10.1999 directing the petitioner to file representation and the respondents to dispose of the same within six week by speaking order. The respondents rejected the representation and the petitioner filed Original Application No. 102/2001.

The respondents submitted that the petitioner's father had not been medically de-categorised. Rather he opted for voluntary retirement for personal reasons, therefore, his son could not be given compassionate appointment. The Original Application No. 863/1990 by the petitioner's father, sought declaration from the CAT that he was MIC Gas Victim, therefore, entitled to all benefits in the event of his death or being found

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medically unfit, was withdrawn on 13.5.1999. The CAT considered the matter and did not agree with the contentions raised by the petitioner, therefore, rejected the application by the impugned order.

Counsel for the parties heard. Record perused.

Shri R. L. Gutpa, learned counsel appearing for the petitioner, submits that the petitioner's father suffered from Bhopal Gas Leak Tragedy. In support of this contention, reference is made to order of the Deputy Commissioner, Bhopal Gas Disaster Claims Tribunal, dated 12.4.1994, whereby compensation of Rs. 58,800/- was awarded, various medical prescriptions and Committee decision dated 24.4.1989 (Annexure-P-4). It is submitted that the petitioner's father was a medically unfit case. Reference is also made to letter dated 23.2.2001 (Annexure-P-5) providing that for retirement on medical/health ground, the dependent would be offered appointment on retirement. Since the petitioner's father could not perform the duty due to ill-health, he sought retirement on health ground by communication dated 31.3.1997 (Annexure-P-6).

Shri S. K. Mukherjee, learned counsel appearing for the Railways, submits that the petitioner's father may have been awarded compensation by Bhopal Gas Disaster Claims Tribunal, but that would not make him medically decategorised. The decision of the Committee dated 24.4.1989 (Annexure-P-4) does not show that the petitioner's father is medically decategorised. It simply records that in the event of petitioner's father becoming unsuitable to continue in the job or he is retired compulsorily or voluntarily, he shall be treated as medically unfit railway employee. More over, the Committee has not declared him medically decategorised nor it has jurisdiction. Same is the position of communication dated 23.2.1991 (Annexure-P-5) issued by the Subordinate Officer of the Railways, who is not competent to suggest/offer compassionate appointment on behalf of the Railways. The petitioner's father sought voluntary retirement on 19.12.1996, but withdrew due to improvement of his health, thereafter, submitted again on 31.3.1997. The claim that he is medically unfit because of Bhopal Gas Leak Tragedy, cannot survive after withdrawing the OA No. 863/90.

Giving consideration to the whole matter, we find that the Railways provide for appointment on compassionate ground provided the railway employee has been medically decategorised. For this purpose, the Committee

Sunil Kumar Rai v. Union of India Through : The Genral Manager Central Railway, Bhopal, 2003.

of the Doctor is constituted. In this case, the petitioner's father may not be keeping good health, but he had not been medically decategorised at any stage by the Railway. Therefore, the claim of the petitioner for appointment on compassionate ground cannot be sustained.

Consequently, we find no merit in this petition and the same is dismissed. Costs on parties.

Petition dismissed.

WRIT PETITION

Before Mr. Justice Dipak Misra and Mr. Justice Shantanu Kemkar.
21, October, 2003.

DR. MANOJ SINGH TOMAR ...Petitioner*

v.

THE STATE OF M. P. and others ...Respondents

Constitution of India, Article 227 and Administrative Tribunal Act, (XIII of 1985)–Section 19–Service Law–Recruitment–Post of Assistant Surgeon advertised–Petitioner participated but could not be selected by the Public Service Commission–After participation petitioner is estopped and cannot be permitted to turn around and challenge the procedure.

The petitioner having participated in the selection by appearing in the interview cannot be permitted to turn around and challenge the procedure of the selection by alleging that the advertisement issued for inviting application for appointment to the posts of Assistant Surgeon was vague. In our considered view, the petitioner is estopped from challenging his non-selection on this score.

University of Cochin V N. S. Kanjoonjamma and others with V. Vasudevan v. *University of Cochin and others*[1];

Adarsh Muni Trivedi, Sr. Adv. with *Sushil Kumar Mishra* for the petitioner.

S. K. Agrawal P. L. for the State.

Cur. adv. vult.

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* W. P. No. 3449/2001.

(1) 1997 (4) S.C.C. 426.

Dr. Manoj Singh Tomar v. The State of M. P., 2003.

ORDER

The Order of the Court was delivered by Shantanu Kemkar, J. – This petition under Article 227 of the Constitution of the India has been preferred against the order dated 15.12.2000 passed by M. P. State Administrative Tribunal, Jabalpur (for brevity "the Tribunal") in Original Application No. 6895/2000.

The facts as have been depicted are that the petitioner was appointed as Assistant Surgeon on "adhoc basis" vide order dated 4.7.1992 and is working on the same post since then. An advertisement was issued on 10.6.1999 by the respondent No. 2. Public Service Commission, inviting applications for regular appointment to the posts of Assistant Surgeon. In response to the advertisement the petitioner applied for the said post and was called for the interview. He appeared in the interview held by the Public Service Commission but could not be selected. After his non-selection in the interview the petitioner approached the Tribunal by filing Original Application No. 6895/2000. It was contended by the petitioner before the Tribunal that the criteria adopted by the Public Service Commission for selection had not been disclosed in the advertisement, and the Public Service Commission left it open for itself, whether it would hold any competitive written test, or would select the candidates merely through interview by stating that it depends upon the number of candidates, and because of such non disclosure about the criteria in the advertisement there was a confusion and thus process of selection as well as the select list being based upon vague advertisement, was vulnerable and deserves to be quashed. The Tribunal, after hearing the parties dismissed the Original Application by the order impugned. Hence, this petition.

We have heard Shri Adarsh Muni Trivedi, learned senior counsel for the petitioner and Shri S. K. Agrawal, learned Penal Lawyer for the respondents and perused the record.

Admittedly, the petitioner participated in the selection process as per the advertisement issued by the Public Service Commission but he could not succeed and only after his non-selection to the post advertised by the Public Service Commission, he approached the Tribunal challenging the correctness of the procedure of selection.

Dr. Manoj Singh Tomar v. The State of M. P., 2003.

The Apex Court in the case of *Unviersity of Cochin V. N. S. Kanjoonamma and others with V. Vasudevan* v. *University of Cochin and others*[1] has laid down.

> ".....that the correctness of the procedure of recruitment process cannot be challenged after participation in the recruitment process."

The aforesaid pronouncement of law by the Apex Court is squarely applicable to the facts of the present case on all fours. Applying the ratio of the aforesaid decision we hold that the petitioner having participated in the selection by appearing in the interview cannot be permitted to turn around and challenge the procedure of the selection by alleging that the advertisement issued for inviting applications for appointment to the posts of Assistant Surgeon was vague. In our considered view, the petitioner is estopped from challenging his non-selection on this score.

No other point being raised we have no hesitation to conclude that the petition is devoid of merit. Consequently, the petition fails, and is hereby dismissed. No orders as to the costs.

Petition dismissed.

LETTERS PATENT APPEAL

Before Mr. Justice R. B. Dixit and Mr. Justice Chandresh Bhushan.

2 July, 2002.

SMT. VINOD SHRIVASTAVA ...Appellant*

v.

LAXMINARAYAN SHARMA & others ...Respondents

Letters Patent, Clause X, Civil Procedure Code (V of 1908)–Section 96 and Limitation Act, (XXXVI of 1963)–Article 113–Suit for declaration against order of removal from service and for arrears of pay–Limitation is three years from the date when cause of action

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*L. P. A. No. 35/1991.

(1) 1997 (4) S.C.C. 426.

Smt. Vinod Shrivastava v. Laxminarayan Sharma, 2002.

accrued–Subsequent representation can not be considered for fixing limitation–Ashashkiya Shikshan Sanstha (Adhyapakon Tatha Anya Karmchariyon Ke Vatano Ke Sanday) Adhiniyam, M.P., 1978, Section 6(a) and Ashashkiya Shikshan Sanstha (Adhyapakon Tatha Anya Karmachari) Appeal Rules, M. P., 1978, Rule 10–Provision for appeal against order of removal–Includes an order passed without obtaining approval of competent authority–Appeal so provided not preferred and the suit also was filed beyond the period of limitation–Suit rightly dismissed.

Rule 10 Clause (a) of M. P. Ashashkiya Shikshan Sanstha (Adhyapakon Tatha Anya Karmchari) Appeal Rules, 1978, clearly suggests that the appeal would lie even if there was no such prior approval of the Competent authority. This Rule provided that the appellate Authority while passing the order shall keep in view whether prior approval of the Competent Authority was obtained before the order appealed against was passed. In case appeal could be preferred only where prior approval of Competent Authority was obtained, this question whether the approval was obtained or not could not be required to be kept in view while passing the order because in that case if there was no such prior approval no appeal would have been there.

The Adhiniyam of 1978 in proviso 2 of sub-clause (iii) of Clause (a) of Section 6 provides for an appeal against the orders of dismissal. No other remedy or recourse has been provided in the said Act. The appeal so provided under the Act was not preferred by the appellant. In view of this position and the law as discussed before, the only conclusion was that the suit having been filed on 20.4.1984, i.e. beyond a period of three years after the accrual of the right to sue, was clearly barred by the law of limitation and therefore the finding to this effect by the learned Single Judge could not be called as incorrect or against the law.

Premier Automobiles v. *K. S. Wadke*,[1] *Rajasthan State Road Transport Corporation & another* v. *Krishna Kant & others*,[2] *Sidhi Bala Bose Library Association & others* v. *State of M. P. & others*[3]; referred to.

(1) A.I.R. 1975 S.C. 2238. (2) (1995) 5 S.C.C. 75.
(3) 1979 J.L.J. 485.

Smt. Vinod Shrivastava v. Laxminarayan Sharma, 2002.

Tilakram v. *State of M. P.*,[1] *S. S. Rathore* v. *State of M. P.*,[2] *State of Punjab* v. *Gurdev Singh*,[3] *Union of India* v. *Nandlal Raigar*,[4] *Rukhmabai* v. *Laxminarayan*[5]; relied on.

A. M. Naik Sr. Adv. with B. K. Agrawal for the appellant.

R. D. Jain Sr. Adv. with *Ashish Saraswat* for the resps. no. 1. to 3.

K. B. Chaturvedi Govt. Adv. for resp. no. 4.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by CHANDRESH BHUSHAN, J. – This Letters Patent Appeal under Clause 10 of the Letters Patent has been preferred by the appellant against the judgment and decree passed by the learned Single Judge in First Appeal No. 17/90 on 23.1.1991 reversing the judgment and decree passed in her favour by Third Additional Sessions Judge to the court of District & Sessions Judge, Morena in Civil Suit No. 203-A/85, on 30.3.1990.

The facts giving rise to this appeal in brief are that the appellant was employee as a teacher in a school run by the society of which respondent No. 1 was the Secretary. The respondent No. 2 was the Head Master and respondent No. 3 was the Principal of the said school. Appellant's services as such a teacher were terminated w.e.f. 22.3.1979 vide resolution dated 12.3.79 of the said Managing Committee. This order of termination was passed without any prior approval from any authority. The District Education Officer on that basis on 29.8.79 issued communication (Ex.-P-12) to the Secretary of the Society that the appellant may be reinstated with immediate effect. The appellant thereafter went to the school on 31.8.1979, but was not permitted to join. She approached the President of the Managing Committee, who directed the Principal to peruse the order of District Education Officer and to comply. Still the appellant was not allowed to join on her job as a teacher. No salary was paid to her. She also went on

(1) 1965 M. P.L.J. 982. (2) A.I.R. 1980 S.C. 10.
(3) A.I.R. 1991 S.C. 2219. (4) A.I..R 1996 S.C. 2206.
(5) A.I.R. 1960 S.C. 335.

hunger strike and during her hunger strike, the respondent No. 3, Principal gave a letter in writing (Ex.-P-13) on 30.4.1982 to the Collector, Morena that the appellant will be allowed to join in the school and the Collector, Morena also on the same day communicated this consent to the Union leaders. Still she was not permitted to join. Thereafter, the District Education Officer also wrote to the Secretary of the Society on 7.4.83 (Ex.-P-14) that the appellant should be taken back within seven day otherwise his office shall be constrained to terminate the recognition of the said institute. Still the appellant was not permitted to join back. Thus, she filed a civil suit claiming the arrears of her salary amounting to Rs. 34,211.60 p. together with future wages and for declaration of the order of her removal dated 22.3.1979 as illegal and for injunction prohibiting the respondents from interfering with her service in the said school. This suit registered as Civil Suit 203-A/85 was decided by Third Additional Sessions Judge to the Court of District & Sessions Judge, Morena on 30.3.90 in her favour. On an appeal by the respondents No. 1 to 3, impugned judgment and decree dated 23.1.91 was delivered by the learned Single Judge holding that the suit of the appellant was non-maintainable and was hopelessly barred by limitation.

Aggrieved by the said judgment and decree passed against her by the learned Single Judge this L.P.A. has been preferred by the appellant on the ground that the decision by the learned Single Judge was wrong. She has contended that the said order of her dismissal was passed without any prior approval of the Competent Authority and was therefore *non-est* being in violation of the provisions contained in sub-clause (iii) of Clause (a) of Section 6 of M. P. Ashashkiya Shikshan Sanstha (Adhyapakon Tatha Anya Karmachariyon Ke Vetano Ka Sanday) Adhiniyam, 1978. It has been further contended that therefore no appeal under such Adhiniyam could have been filed by her and therefore this suit was maintainable and that it was also within limitation because the cause of action accrued to her on 1.2.1984, only, i.e., after refusal by the respondents to permit her to work on the post of teacher inspite of written acknowledgement dated 30.4.1983 by the respondent No. 3 and the directions of the District Education Officer, dated 7.4.1983.

As far as the question of maintainability of the suit itself was concerned, it cannot be disputed that the claim of the appellant that her removal was void *ad-initio* was based on the protection given to such

teachers under sub-clause (iii) of Clause (a) of Section 6 of M.P. Ashashkiya Shikshan Sanstha (Adhyapakon Tatha Anya Karmchariyon Ke Vetano Ka Sanday), Adhiniyam, 1978, as it stood at that time. This provision as it stood at that time, i.e. before amendment in 1981 was as follows :-

"Section 6(1) :-

(i) ....

(ii) ....

(iii) no teacher or other employee shall be dismissed or removed from service or his services terminated without prior approval of the Competent Authority;"

Thus, this case was not of a dispute arising out of a right or liability under the general common law but was a dispute arising out of a right created under a special Statute. It is true that this special Statute nowhere expressly exclude the jurisdiction of a civil Court in respect of any dispute arising out of a right created under the Act. But relying on the decision of Hon'ble Apex Court in the case of *Premier Automobiles* v. *K. S. Wadke*,[1] *Rajasthan State Road Transport Corporation & another* v. *Krishna Kant & others*,[2] wherein the question involved was regarding jurisdiction of a Civil Court in cases involving recognition, observance or enforcement of rights and obligations created by enactments like Industrial Employment Act and Industrial Disputes Act and it was held that the only remedy available to the aggrieved party was to approach the forums created by Industrial Disputes Act provided the dispute was industrial dispute, it was submitted by the learned counsel for the respondents that a suit for enforcement of any such right by the appellant was not maintainable in any civil Court because there was a specific appellate forum provided under the proviso to the said Sub-Clause (iii) of Section 6 of the said Act.

The underlying basic principle in the above referred cases, that where any right or obligation under special Statute is sought to be enforced or recognised and where the said Act provides a forum in that respect then the

(1) A.I.R. 1975 S.C. 2238. (2) (1995) 5 S. C.C. 75.

only remedy that is available to the person claiming it was by approaching the forum so provided, has not been disputed by the learned counsel for the appellant during the course of his arguments. The learned counsel for the appellant however submitted in this respect that the remedy of appeal was not available to her under the said proviso because the remedy in appellate forum was available only to those whose orders of termination were passed after prior approval of the Competent Authority had been obtained by the Managing Committee. In the present case, no such prior approval was obtained by the society and therefore, according to him, the appellate forum or the remedy by way of appeal was not available to her. For this, he places reliance on the following observations made by this High Court in *Sidhi Bala Bose Library Association & others* v. *State of M. P. & others*,[1] in para 26 of it's judgment :-

> ".....Even where the Competent Authority approves the management's action, the aggrieved employee can appeal against the same and the appellate authority may set it aside."

It was argued by him that no appeal would lie where the management's action has not been approved by the Competent Authority as was in the present case. But after hearing the learned counsel for appellant at length we are unable to agree to this submission of his. The said observations of the Court only implied that even where there was approval by the Competent Authority the aggrieved employee had the opportunity to prefer appeal against it as provided under the said Act. It has nowhere been observed in that case that the appeal would not lie if there was no approval by the Competent Authority of management's action. On the otherhand, a perusal of Rule 10 clause (a) of M. P. Ashashkiya Shikshan Sanshta (Adhyapakon Tatha Anya Karmachari) Appeal Rules, 1978, clearly suggests that the appeal would lie even if there was no such prior approval of the Competent Authority. This Rule provided that the appellate Authority while passing the order shall keep in view whether prior approval of the competent Authority was obtained before the order appealed against was passed. In case appeal could be preferred only where prior approval of competent Authority was obtained,

(1) 1979 J.L.J. 485.

this question whether the approval was obtained or not could not be required to be kept in view while passing the order because in that case if there was no such prior approval no appeal would have been there.

It is also not disputed that no such appeal was filed by the appellant. Thus, considering all this, the finding of the learned Single Judge of this Bench in First appeal that the suit by appellant itself was not maintainable was correct and lawful.

Similarly inspite of our sympathy with the appellant-teacher, the contentions regarding bar of limitation put forward on her behalf, cannot be accepted.

A Division Bench of this Court had in the case of *Tilakram* v. *State of M. P.*,[1] held that such a suit for declaration was governed by Article 120 (new 113) of the Limitation Act. The Hon'ble Apex Court has also in the case of *S. S. Rathore* v. *State of M. P.*,[2] *State of Punjab* v. Gurdev *Singh*[3] and *Union of India* v. *Nandlal Raigar*[4] respectively held that such suits against orders of removal from service were governed by Article 113 of the Limitation Act (36 of 1963). The period of limitation provided under this Article 113 was of three years from the date when the right to sue accrued.

In the case of *State of Punjab* (*supra*), a Full Bench of Hon'ble Apex Court has also laid down that it cannot be said that there was no limitation for instituting the suit for declaration by a dismissed or discharged employee on the ground that the dismissal or discharge was void or inoperative. Again in the case of *Union of India* (*supra*), it was specifically held that a plea that the order of dismissal was wrong being in violation of rules and therefore it could be ignored and that the suit therefore could be filed at any time cannot be allowed. Therefore, the contentions that the order being without prior approval of the Competent Authority and thus being in violation of legal provision was void, *ab-initio* or *non-est*, even if accepted, would not-make any difference as far as the limitation is concerned.

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(1) 1965 M. P. L. J. 982.
(2) A.I.R. 1990 S.C. 10.
(3) A.I.R. 1991 S.C. 2219.
(4) A.I.R. 1996 S.C. 2206.

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The starting point of limitation under Article 113 as per the principle laid down by Hon'ble Apex Court in the case of *Rukhmabai* v. *Laxminarayan*[1] would be from the date the right asserted in the suit was clearly and un-equivocally infringed by the defendant. In the present case, the communication dated 22.3.79, received by the appellant on 31.3.79 that as per resolution dated 12.3.79 of the Committee she was dismissed from service with effect from the date of her suspension was very clear and unequivocal and therefore the limitation clearly ran from 31.3.79. The learned Single Judge has been generous enough to even extend to 4.9.79, i.e. the date when the then President of the Society communicated in unequivocal terms to the District Education Officer that his directions dated 29.8.79 for reinstatement of appellant are not acceptable to the society.

The contentions advanced for the appellant by her learned counsel in this respect that the written assurance dated 30.4.83 (Ex,-P-13) by respondent No. 3, who was the Principal of the said school amounted to acknowledgement and therefore gave a fresh cause of action from that date also cannot be accpeted because there was nothing to show that the respondent No. 3 was in any way authorised by the Society to acknowledg any such liability on its behalf. Similarly, the communication of the Distirct Education Officer dated 7.4.83 to the Secretary of the Society or reiterated refusal by the Society also do not give any fresh cause of action. In the case of *S. S. Rathore* (*supra*) it was also observed by the Hon'ble Apex Court that repeated un-successful representations would not amount to fresh first date for the fresh cause of action. In that case it was held that where an appeal was provided and was made, the cause of action shall first arise when the authority made its order on appeal or where such order was not made till the expiry of six months, then on the expiry of six months from the date the appeal filed and submission of any subsequent representation to the head of establishment cannot be taken into consideration in the matter of fixing limitation.

The said enactment of the State, i.e. the Adhiniyam of 1978 in proviso 2 of sub-clause (iii) of Clause (a) of Section 6 provides for an appeal against the orders of dismissal. No other remedy or recourse has been provided in

(1) A.I.R. 1960 S.C. 335.

Smt. Vinod Shrivastava v. Laxminarayan Sharma, 2002.
Letters Patent, C

the said Act. The appeal so provided under the Act was not preferred by the appellant. In view of this position and the law as discussed before, the only conclusion was that the suit having been filed on 20.4.1984, i.e. beyond a period of three years after the accrual of the right to sue, was clearly barred by the law of limitation and therefore the finding to this effect by the learned Single Judge could not be called as incorrect or against the law.

No other ground against the impugned order was argued before this Bench. The impugned order passed by the learned Single Bench was in effect as discussed earlier, in accordance with law and thus, valid and called for no interference. This L.P.A. thus fails and it is accordingly dismissed. However, considering the facts and circumstances of the case and the circumstances of the parties, it is ordered that each of the party shall bear it's own costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice S. P. Khare,
25 February, 2003.

PETER MESSIAS ...Appellant*

v.

MRS. JENNIFER MESSIAS ...Respondents.

Divorce Act, Indian (as amended), (IV of 1869), Sections 10(1)(x), 22, 23 and 55–Appeal–Suit for judicial separation–Amendment came in force during pendency of appeal–Relief to be granted could be moulded in view of the amended provision–Wife developing intimacy with another male causing embarrassment and humiliation to the husband–Lodging police complaint against husband alleging theft of articles which she could retrieve in a decent way–Conduct of wife falls within the ambit of

*F.A. No. 189/98.

Peter Messias v. Mrs. Jennifer Messias, 2003.

cruel treatment–By amendment "cruelty" made a ground for dissolution of marriage–Cruelty on part of wife proved–Marriage between the parties dissolved–Judgment and decree of trial Court set aside.

The behaviour of the defendant in the present case towards her husband is such which must be held to have caused reasonable apprehension in his mind that it is not safe for him to continue the matrimonial relationship with his wife. The plaintiff has reasonable apprehension in his mind that it would harmful or injurious for him to live with his wife.

The "cruelty" was a ground for "judicial separation" as per Section 22 of the Indian Divorce Act, 1869. This Act has been amended by the Indian Divorce (Amendment) Act, 2001. Section 10 of the principal Act has been substituted by new Section 10. According to this Section, any marriage solemnised whether before or after the commencement of this Act may be dismissed on the grounds enumerated therein. The ground provided in Clause (x) of Sub-section (1) of Section 10 is cruelty. There can be dissolution of the marriage if the respondent has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent. This amending Act has come into force during the pendency of this appeal and, therefore, the relief to be granted to the appellant can be moulded in view of the amended provisions in the Act.

V. Bhagat v. *D. Bhagat*,[1] *Savitri Pandey* v. *Prem Chandra Pandey*,[2] *G. V. N. Kameswara Rao* v. *G. Jabilli*[3] and *Praveen Mehta* v. *Inderjit Mehta*[4]; referred to.

Shri Sanjay Sanyal, Advocate for the appellant.

Shri Surendra Singh, Sr. Advocate with *Shri Ashwini Dubey*, Adv. for the Respondent.

Cur. adv. vult.

JUDGMENT

S. P. KHARE, J. – This is an appeal by the husband under Section 55 of the Indian Divorce Act, 1860 (hereinafter to be referred to as 'the Act') against the judgment and decree by which his application under Section 23 of the Act for "judicial separation" has been rejected.

(1) A.I.R. 1994 S.C. 710.
(2) (2002) 2 S.C. 73.
(3) (2002) 2 S.C.C. 296.
(4) A.I.R. 2002 S.C. 2582.

Peter Messias v. Mrs. Jennifer Messias, 2003.

It is not in dispute that plaintiff Peter Messias and defendant Mrs. Jennifer Messias are Christians; the plaintiff is Chargeman Grade-I (Technical) in Vehicle Factory, Jabalpur (a Govt. of India Undertaking) and the defendant is a Teacher in English and Music in St. Joseph's Convent Girls' High Secondary School, Jabalpur holding M. A. degree in English Literature; the plaintiff is an accomplished musician playing guitar and the defendant is fond of playing piano; it is this "common bond of music" that brought them together and after their courtship for 8 years they married at Jabalpur on 31.5.1980; unfortunately they have no issue out of this wedlock; they lived together in Flat No. 19, L.I.G., M. P. Housing Board Colony, South Civil Lines, Jabalpur; the present petition was filed on 7.5.1992; the plaintiff has purchased Flat No. 101-A, Amba Apartment, South Civil Lines, Jabalpur on 25.9.1994 and the defendant has also purchased a separate house in June, 1994 and she is living there; the efforts of the trial Court and this Court to bring reconciliation between the plaintiff and the defendant have failed and they are living separately since more than a decade now.

The plaintiff's case is that his wife is treating him with cruelty. The acts of cruelty attributed to the wife are (a) the defendant is of peevish nature and dominating tendency; (b) the defendant made him to part with his guitar; (c) the defendant does not prepare tea or breakfast nor cares to cook food for him; (d) she picks-up quarrels with him and she is not in talking terms with him; (e) she extorts written apologies and false admissions from him; (f) there is no peace or harmony at home for the plaintiff; (g) the defendant after becoming Secretary of Jabalpur Branch of All India Anglo-Indian Association has completely "written-off" her husband and she goes on the pillion seat of the scooter of C. W. Paul who was President of this Association; (h) her questionable conduct has made her talk of the town and in consequence the plaintiff has to suffer much embarrassment and humiliation; (i) due to intimate relation of the defendant with Mr. C. W. Paul the plaintiff was suspected of having committed his murder in the 1st week of August, 1992 and he was interrogated by the police which caused damage to his reputation; (j) on 29.9.1994 the defendant lodged report against the plaintiff for having committed theft of a Luna Moped and gas cylinder and the plaintiff had to face humiliation on that score; (k) the defendant has no love for the plaintiff and she always tries to harm, harass and humiliate him, (l) the

defendant is not fulfilling her marital obligation and they are living under the same roof as complete strangers and (m) on 27.3.1992 the brother of Mr. C. W. Paul trespassed into his house and thrashed him on the allegation that he is not preventing his wife from keeping alliance with Mr. Paul.

The defendant has "categorically" denied all the allegations made by the plaintiff against her. It is further pleaded by her that she does all the house-hold work and prepares breakfast and food for the plaintiff. According to her, the plaintiff has a "vile temper" and at times assaults the defendant for no fault of her. The defendant loves the plaintiff. She has explained that Mr. Paul being the President of the Association used to come to her house from 1991 and there is no intimacy between the two. The brother of Mr. Paul trespassed into the house because of personal quarrel between them. It is further stated by the defendant that the plaintiff is insisting that she should prevail upon her parents to transfer the ownership of a house to him as a dowry.

On these pleadings the trial Court framed a number of issues and after recording evidence of both the sides it has been held that the defendant is not treating the plaintiff with cruelty. On this finding the application for judicial separation has been rejected.

In this appeal it is argued on behalf of the appellant that there is sufficient evidence to prove that the defendant has been treating the appellant with cruelty and there has been irretrievable breakdown of marriage as the parties are admittedly living separately for about 11 years and, therefore, the decree for dissolution of their marriage should be passed in view of the amendment in the Indian Divorce Act in 2001 which has come into force from 3.10.2001, according to which cruelty is now a ground for passing the decree of dissolution of marriage. On the other hand it is submitted that the defendant is still ready and willing to live with the plaintiff as his wife and the ground of cruelty for divorce has not been established.

The evidence on record has been scrutinised by this Court. Peter Messias (P.W.1) has deposed that after the marriage the defendant was treating him very shabily and she has adopted dominating nature. According to him she wanted him to dance at her tune. She was not providing him food. She was not talking to him. She was always angry. He used to remain hungry for days together. He used to go to the hotel for taking food or to go to his

friends for that purpose. The defendant did not prepare tea for him when he returned from his duties and she used to quarrel with him. She did not permit him to play guitar. He has further deposed that the defendant developed intimacy with Mr. Paul and after his murder it was suspected that he had his hand in this crime. According to him, the brother of Mr. Paul trespassed into his house and thrashed him because of the intimacy of his wife with Mr. C.W. Paul. His wife lodged a report on 14.10.1994 for committing theft of gas cylinder and Luna Moped. She took away these two items with the help of Mahila Police. That is borne out from the document Ex.-P-2. In cross-examination he has stated that during the period of courtship also he had noticed the dominating nature of the defendant and still married her. He has further stated that the brother of Mr. Paul thrashed him because he was not controlling his wife and for that reason she was having illicit intimacy with his brother. In para 17 he has admitted that he had once thrashed his wife and then apologised in writing. He has denied that he ever asked his wife to get the house of her parents transferred to him.

C.I. Browne (P.W.-2) is the friend of the plaintiff. He has deposed that the plaintiff had complained to him that he was not being treated properly by his wife and their relations are strained. According to this witness plaintiff lived with him from the year 1991 to 1994 and he used to have his food there.

On the other hand Jennifer Messias (D.W.-1) has denied having treated her husband with cruelty. She has admitted that as Secretary of the Association she came in contact with Mr. C. W. Paul, who was the President. There was no intimacy between the two. She has further deposed that she lived with the plaintiff as his wife upto the year 1994 and thereafter he shifted to Amba Apartment and she is living separately in the house purchased by her. She has admitted having made a complaint to Mahila Police as her husband had taken away gas cylinder and Luna Moped to his new house. According to her these articles belong to her and these were given back to her by the police. In cross-examination she has admitted that the gas cylinder was in the name of the plaintiff and the Luna Moped was purchased in her name. Mrs. Henny Watt (D.W.-2) has deposed that the defendant was doing the entire house-hold work and her relations with her husband were good.

Peter Messias v. Mrs. Jennifer Messias, 2003.

After considering the entire evidence adduced by both the sides, this Court is of the opinion that the cumulative effect is that the defendant was treating the plaintiff with cruelty. There are two glaring instances which go to show that the behaviour of the wife was abnormal. One was her intimacy with Mr. Paul. Even the brother of Mr. Paul did not like it and he wanted the plaintiff to control his wife from having any relation with Mr. Paul. The defendant could act as Secretary of the Association, but it was not proper on her part to have such relations with the President to give rise to suspicion in the mind of the plaintiff or the brother of Mr. Paul. This conduct of the wife was definitely causing embarrassment and humiliation to the plaintiff. The second instance also shows the abnormal behaviour of the wife. She went to the extent of lodging the report at the police station against her husband for committing theft of gas cylinder and the Luna Moped. In case she wanted these items with her she could have chosen a more decent way to retrieve them. The manner in which she went to the police station and lodged the report against her husband shows that it has become difficult for the husband to live in her company. These two instances definitely go to support the case of the plaintiff that the defendant is of quarrelsome and dominating nature. The net effect of all the facts and circumstances of the case is that the conduct of the wife towards her husband falls within the ambit of cruel treatment by her towards him.

The word cruelty has been used in section 13(1)(ia) of the Hindu Marriage Act, 1955 and that has been judicially interpreted in several decisions of the Supreme Court. In *V. Bhagat* v. *D. Bhagat*,[1] it has been held that "Mental cruelty in S. 13(1)(ia) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or

(1) A.I.R. 1994 S.C. 710.

otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the extent in which they were made."

In *Savitri Pandey* v. *Prem Chandra Pandey*[1] the Supreme Court observed that treating the petitioner with cruelty is a ground for divorce under Section 13(1)(i-a) of the Act. Cruelty has not been defined under the Act but in relation to matrimonial matters it is contemplated as a conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering or to have injured health. Cruelty may be physical or mental. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other.

Again in *G. V. N. Kameswara Rao* v. *G. Jabilli*[2] it has been observed : "The Court has to come to conclusion whether the acts committed by the counter-petitioner amount to cruelty, and it is to be assessed having regard to the status of the parties in social life, their customs, traditions and other similar circumstances. Having regard to the sanctity and importance of marriage in a community life, the Court should consider whether the conduct of the counter-petitioner is such that it has become intolerable for

(1) (2002) S.C.C. 73. (2) (2002) 2 S.C.C. 206.

the petitioner to suffer any longer and to live together is impossible, and when only the Court can find that there is cruelty on the part of the counter-petitioner. This is to be judged not from a solitary incident, but on an overall consideration of all relevant circumstances."

Recently in *Praveen Mehta* v. *Inderjit Mehta*,[1] the entire case law has been dealt with and it has been held that cruelty for the purpose of Section 13(1)(ia) is to be taken as a behaviour by one spouse towards the other which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behavioural pattern by the other. Unlike the case of physical cruelty the mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty in will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other.

Keeping in view the meaning of cruelty laid down in the above decisions and testing the evidence of the present case on the touch-stone of the principles laid down therein, it must be held that the behaviour of the defendant in the present case towards her husband is such which must be held to have caused reasonable apprehension in his mind that it is not safe for him to continue the matrimonial relationship with his wife. The plaintiff has reasonable apprehension in his mind that it would be harmful or injurious for him to live with his wife. It is not a case of ordinary wear and tear in married life, but it has gone beyond that and assumed more serious proportions especially in view of the intimacy of the defendant with Mr. Paul and lodging of the report in the police station by her against her husband. It is a case of "mental cruelty" towards the husband by the wife.

(1) A.I.R. 2002 S.C. 2582.

Peter Messias v. Mrs. Jennifer Messias, 2003.

The "cruelty" was a ground for "judicial separation" as per section 22 of the Indian Divorce Act, 1869. This Act has been amended by the Indian Divorce (Amendment) Act, 2001. Section 10 of the principal Act has been substituted by new section 10. According to this section, any marriage solemnised whether before or after the commencement of this Act may be dissolved on the grounds enumerated therein. The ground provided in Clause (x) of Sub-section (1) of Section 10 is cruelty. There can be dissolution of the marriage if the respondent has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent. This amending Act has come into force during the pendency of this appeal and, therefore, the relief to be granted to the appellant can be moulded in view of the amended provisions in the Act. As stated above, it has been found that the defendant has been treating the plaintiff with cruelty and they are not living together for the last 11 years. The efforts to bring reconciliation between the two have failed. This is a clear case of irretrievable breakdown of the marriage and there is no use of keeping the marital bond itact.

In the result this appeal is allowed. The judgment and decree of the trial Court are set aside. The marriage between the plaintiff and the defendant is hereby dissolved on the ground provided in Section 10(1)(x) of the Indian Divorce Act as amended in 2001. The parties will bear their own costs in the trial Court and also in this appeal.

Appeal is allowed.

APPELLATE CRIMINAL

Before Mr. Justice P. C. Agrawal,
31 July, 2002.

SHYAM BABU and others ...Appellants*

v.

STATE OF M. P. ...Respondent.

Penal Code, Indian (XLV of 1860), Sections 34, 325, 333 and Criminal Procedure Code, 1973 (II of 1974)–Sections 320(2) and 374(2)–Conviction and appeal–Application to compromise on behalf of

*Cri. A.No. 315/96.

- *Shyam Babu v. State of M. P., 2002.*

late father–Son–Legal representative–Can be allowed if compromise is in the interest of better future relation of parties–Non-compoundable offence–Fact of compromise can be taken into consideration while deciding the question of sentence–Jail sentence reduced to period undergone and fine enhanced.

Radiologist has noted fractures on persons of both Brijmohan and his father Laluram. It is, noteworthy, that Kaluram had died before his statement could be recorded in trial Court and thus he was not available for his examination.

Brijmohan has applied for permission to compound under Section 320(2) of the Code of Criminal Procedure. He has entered into a compromise also with the appellants. He could compromise on behalf of his late father Kaluram, being his legal representative. If such compromise is in the interest of better future relations of the parties, it is just and proper to allow Brijmohan (P.W.-2) to compound the compoundable case under Section 325 of the Code.

Compounding of non-compoundable offences is not permissible. Any how, the fact of composition can be taken into consideration while deciding the question of sentence. About 12 years have elapsed since after the occurrence. Appellants have already undergone detention of 41 days each. In view of these factors, jail sentences awarded to the appellants is reduced to that already undergone.

Rampal v. *State of M. P.*,[1] *Parmeshwari* v. *Vennila*[2]; relied on.

Ramlal v. *State of J. & K.*[3] and *Surendra Nath Mohanti* v. *State of Orissa*[4]; referred to.

R. K. Goyal for the appellants.

A. K. Ahirwar Addl. Govt. Adv. for the State.

Cur. adv. vult.

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(1) (2000) 9 S.C.C. 61.
(2) (2000) 10 S.C.C. 348.
(3) (1999) 2 S.C.C. 213.
(4) (1999) 5 S.C.C. 238.

Shyam Babu v. State of M. P., 2002.

JUDGMENT

P. C. AGRAWAL, J. – Shyam Babu (A-1) is convicted under Sections. 333, 325/34 of the Indian Penal Code (Code for short) and other appellants are convicted under Sections 333/34 and 325/34 of the Code. They have been sentenced to undergo R.I. for two years and to pay a fine of Rs. 200/- and to undergo R.I. for one year and to pay a fine of Rs. 100/- and in default to undergo R.I. for one month on each count.

As per prosecution Brijmohan (P.W.-2) is posted as E.D.N.C. in post office Ramnagar. He carries the post bag from post office to load the same to Bus and distributes the letters and other postal articles. On dispute of land, some civil litigation was pending between him and the appellants in which he was successful in the Court of Civil Judge but on appeal, appellants were successful. Anyhow, on 16.11.90, at about 7 A.M. when Brijmohan (P.W.-2) was going by bicycle with a post bag to Bhaura Chauraha, he was surrounded by all the appellants, was abused and belabored. Shyam Babu (A-1) was armed with Farsi, while other appellants were armed with Lathis. On shouts of Brijmohan (P.W.-2) his father, Kaluram rushed to the spot but he too was beaten badly. Post bag and some letters were torn. Gangaram (P.W.-3), Rambharosa (P.W.-4) and Dayaram rushed to the spot and pacified. Brijmohan (P.W.-2) reported the matter to Police Station Fategarh situate at a distance of 12 kms. from the spot at 5.30 P.M. vide Ex.-P/3. Brijmohan (P.W.-2) was medically examined by Dr. H.H.N. Garg (P.W.-1) who noted in all 10 injuries on different parts of body. There were two lacerated wounds and rest contusions. His father Kaluram had seven contusions on the body. On X-ray photographs being taken, R. K. Jain (P.W.-7), radiologist found fractures of left ulna and right fibula on Brijmohan (P.W.-2) and fractures of left radius and index finger of Kaluram. X-ray plates relating to Kaluram are there on record though X-ray plates pertaining to Brijmohan (P.W.-2) are not there on record, yet, X-ray reports are there. The post bag with cash bag, torn papers of account and envelopes were seized from Brijmohan (P.W.-2) by Police of Fategarh vide Ex.-P-4. Certificate about employment of Brijmohan (P.W.-2) in post office Ramnagar was taken from R. P. Shrivastava (P.W.-5), Inspector Post Office. Thus, after due investigation chargesheet under Sections 353, 341,294, 186, 426, 333 was filed against the appellants.

Shyam Babu v. State of M. P., 2002.

Appellants pleaded not guilty. They claim that they have been falsely implicated.

The trial Court relying upon prosecution evidence has found the appellants guilty and sentenced them as aforesaid.

Prosecution story was fully supported by Brijmohan (P.W.-2), injured complainant, Gangaram (P.W.-3) and Rambharosa (P.W.-4). Their statements have been consistent, natural and probable. F.I.R. (Ex.-P-3) is lodged by Brijmohan (P.W.-2) on the same date at P. S. Fategarh, situate at a distance of 12 kms. from the spot which takes the case of prosecution very far. Dr. H. H. N. Garg (P.W.-1) has medically examined Brij Mohan (P.W.-2) and his father Kaluram on 17.11.90 and has noted several injuries on their persons which could be caused by hard and blunt objects. Obviously, these injuries were neither self-inflicted nor artificial. Dr. R. K. Jain (P.W.-7), radiologist has noted fractures on persons of both Brijmohan (P.W.-2) and his father Kaluram. It is noteworthy, that Kaluram had died before his statement could be recorded in trial Court and thus he was not available for his examination. The appellants have merely denied the offence and claim that they have been falsely implicated. Such offence (err) is merely evasive and does not rebut the case of prosecution. In view of *Asa Singh* v. *State of Punjab*[1] and *State of Punjab* v. *Juvraj Singh*,[2] conviction of the appellants was not unfounded.

However, Brijmohan (P.W.-2) has applied for permission to compound under Section 320(2) of the Code of Criminal Procedure. He has entered into a compromise also with the appellants. He could compromise on behalf of his late father Kaluram, being his legal representative. If such compromise is in the interest of better future relations of the parties, it is just and proper to allow Brijmohan (P.W.-2) to compound the compoundable case under Section 325 of the Code. *Ramphal* v. *State of M. P.*,[3] *Parmeshwari* v. *Vennila*[4] are the authorities whereby such compromise could be allowed. Obviously, more than 12 years have elapsed since after the occurrence. Hence, permission to compound the compoundable offence

(1) A.I.R. 1973 S.C. 512.
(2) (2002) 3 S.C.C. 234.
(3) (2000) 9 S.C.C. 61.
(4) (2000) 10 S.C.C. 348.

is granted to Brijmohan (P.W.-2) and compoundable offence under Section 325 of the Code of Criminal Procedure are allowed to be compounded and in view of compromise, appellants are acquitted under Section 325/34 of the Code.

However, offence under Sections 333 or 333/34 is non-compoundable. In view of *Ramlal* v. *State of J. & K.*[1] and *Surendra Nath Mohanti* v. *State of Orissa*[2] compounding of non-compoundable offences is not permissible. Anyhow, the fact of composition can be taken into consideration while deciding the question of sentence. About 12 years have elapsed since after the occurrence. Appellants have already undergone detention of 41 days each. In view of these factors, jail sentences awarded to the appellants is reduced to that already undergone. They would pay a fine of Rs. 5,000/- each, in default of payment of which they shall undergo R.I. for 6 months.

Thus, appeal allowed in part. Conviction under Sections 333 and 333/34 is maintained. Sentences modified. Conviction under Section 325/34 is set aside. This sentence is substituted for sentence awarded by the trial Court.

Appeal is allowed.

INCOME TAX APPEAL

Before Mr. Justice Dipak Misra and Mr. Justice A. K. Shrivastava

28 April, 2003.

COMMISSIONER OF INCOME TAX ...Appellant*

v.

SHIKHARCHAND JAIN ...Respondent.

Income Tax Act (XLIII of 1961), Sections 143(1)(a) and 260-A–Appeal–Deduction claimed by assessee in income-tax return–Somewhat controversial–Cannot be treated prima-facie *disallowable–Debatable issue–Expression of divergent views by the High Courts–*

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* I.T.A. No. 22/99.

(1) (1999) 2 S.C.C. 213. (2) (1995) 5 S.C.C. 238.

Commissioner of Income Tax v. Shikharchand Jain, 2003.

Claim made by the assessee treated not to be free from debate or argument–Bound to be treated as debatable issue–Adjustment could not have been made by the Assessing Officer while passing order under Section 143(1)(a).

The singular question that arises for adjudication is whether the issue before the Assessing Officer was debatable in nature or whether he could have proceeded to make the *prima facie* adjustment as he has done.

If, on the basis of the return filed by the assessee any tax or interest found out after adjustment, an intimation shall be sent to the assessee.

When a deduction is claimed and it is some what controversial it can not be treated to be *prima facie* disallowable. If the claim made by the assessee is treated not to be free from debate and argument it is bound to be regarded as debatable issue.

By no stretch of imagination it can be said that the issue was not a debatable one and the Assessing Officer could have taken recourse to the path of *prima facie* adjustment.

C.I.T. v. *G. H. Jhamal*,[1] *Khatau Junkar Ltd. and another* v. *K. S. Pathania and another*,[2] *Chimanbhai H. Patel* v. *C.I.T.*[3] and *R. K. Salhotra* v. *Income-tax Officer*[4]; referred to.

Rohit Arya for the Appellant.

Hemant S. Modh for the Respondent.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by **DIPAK MISRA, J.** – In this appeal preferred under Section 260-A of the Income-tax Act, 1961 (for brevity 'the Act') the Revenue has called in question the pregnability of the order dated 5.1.1999 passed by the Income Tax Appellate Tribunal, Jabalpur Bench, Jabalpur (in short 'the Tribunal') in ITA/234/Jab/96.

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(1) (1996) 227 I.T.R. Pg. 219.
(2) (1992) 196 ITR 55 (Bombay).
(3) 1999 TAXMAN 63.
(4) (2002) 125 Taxman 624 (J. & K.).

Commissioner of Income Tax v. Shikharchand Jain, 2003.

The facts which are essential to be adumbrated are that the assessee is Development Officer in the Life Insurance Corporation of India. He received incentive bonus from his employer and on the said sum he claimed 40 per cent deduction in his return filed for the assessment year 1994-95. The Assessing Officer disallowed the deduction of the amount on the incentive bonus received by the assessee as it formed a part of salary and hence, no such deduction was allowable. Being of this view he made *prima facie*, adjustment and disallowed the claim while processing the return of the income under Section 143(1)(a) of the Act.

Being aggrieved by the aforesaid order the respondent-assessee preferred an appeal before the Commissioner Income Tax (Appeals) Jabalpur, who allowed the appeal and set aside the order of the Assessing Officer on the ground that the adjustment made could not have been done while passing the order under Section 143(1)(a) of the Act as the said adjustment by its very nature was debatable. The Revenue did not accept the order passed by the First Appellate Authority and preferred an appeal before the Tribunal. The Tribunal concurred with the view expressed by the Commissioner Income Tax (Appeals) and consequently dismissed the appeal.

It is noteworthy to mention here that this appeal was admitted on the following question of law :

> "Whether on the facts and in the circumstances of the case, the ITAT is justified in affirming the order of the LD.CIT(A) holding that the issue of incentive bonus is of highly debatable nature and no such addition could be made, while the contrary decision has been taken by the Hon'ble High Court of Rajasthan in 227 ITR pg. 7 and pg. 24 holding that the incentive bonus is a part of salary and taxable. The jurisdictional High Court of M. P. has also admitted a reference u/s. 256 in *CIT* v. *G. H. Jhamal*[1] and is pending ?"

Mr. Rohit Arya, learned counsel for the Revenue in support of the appeal submitted that grant of deduction on incentive bonus might have been accepted in the past and there may be divergent views expressed by various High Courts but that does not make the issue debatable.

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(1) (1996) 227 I.T.R. Pg. 219.

Commissioner of Income Tax v. Shikharchand Jain, 2003.

Mr. Hemant S. Modh, learned counsel appearing for the respondent, on the contrary, submitted that the controversy has not been put to rest and indubitably it is contentious one and this is reflected and projected by the views expressed by various High Courts. It is urged by him, the matter would have been different had there been a judgment of the Apex Court on this count. It is also highlighted by Mr. Modh that deduction was allowed in the earlier years and, therefore, it can be irrefragably said that the issue that emerged is in the compartment of a debatable one.

In view of the submissions putforth at the Bar, the singular question that arises for adjudication is whether the issue before the Assessing Officer was debatable in nature or whether he could have proceeded to make the *prima facie* adjustment as he has done. In this context we think it appropriate to refer to Section 143(1)(a) of the Act. The said provision reads as under :

"143.(1)(a) Where a return has been made under Section 139, or in response to a notice under sub-section (1) of Section 142 :-

(i) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under Section 156 and all the provisions of this Act shall apply accordingly; and

(ii) if any refund is due on the basis of such return, it shall be granted to the assessee :

Provided that in computing the tax or interest payable by, or refundable to, the assessee, the following adjustments shall be made in the income or loss declared in the return, namely :-

(i) Any arithmetical errors in the return, accounts or documents accompanying it shall be rectified;

(ii) Any loss carried forward, deduction, allowance or relief, which, on the basis of the information available in such return, accounts or documents, is *prima facie* admissible but which is not claimed in the return, shall be allowed;

(iii) Any loss carried forward, deduction, allowance or relief claimed in the return, which, on the basis of the information available in such return, accounts or documents, is *prima facie* inadmissible, shall be disallowed.

Provided further that an intimation shall be sent to the assessee whether or not any adjustment has been made under the first proviso and notwithstanding that no tax or interest is due from him :

Provided also that an intimation under this clause shall not be sent after the expiry of two years from the end of the assessment year in which the income was first assessable."

On a plain reading of the aforesaid provision it is clear as noon day that if, on the basis of the return filed by the assessee any tax or interest found out after adjustment, an intimation shall be sent to the assessee. The scope of the aforesaid provision came to be interpreted in the case of *Khatau Junkar Ltd. and another* v. *K. S. Pathania and another*[1] and the Division Bench after referring to the brief history of the provision and circulars issued by the Central Board of Direct Taxes from time to time came to hold (that) as under :

".....This is because the scope of the powers to make *prima facie* adjustments under Section 143(1)(a) is somewhat coterminous with the power to rectify a mistake apparent from the record under section 154. Therefore, the Board itself has viewed the power to make adjustments as coterminous with the power to rectify mistakes apparent from the record under Section 154."

And again the Bench expressed the view as under :

"The use of the phrases "*prima facie*" admissible in clause (ii) to the proviso also lend support to this interpretation. In its literal sense, "*prima facie*" means on the face of it. Hence, on the face of the return and the documents and accounts accompanying it, the deduction claimed must be inadmissible. Only then, can it be disallowed under the proviso to section 143(1)(a). If any further enquiry is necessary,

(1) (1992) 196 ITR 55 (Bomba

or if the Income-tax Officer feels that further proof is required in connection with the claim for deduction, he will have to issue a notice under sub-section (2) of section 143."

Thus, it is manifest that when a deduction is claimed and it is some what controversial it can not be treated to be *prima facie* disallowable. If the claim made by the assessee is treated not to be free from debate and argument it is bound to be regarded as a debatable issue.

It is not disputed before us that there are divergent views of the High Courts. In this context we may note that the High Court of Gujrat in the case of *Chimanbhai H. Patel* v. *CIT*[1] and the High Court of J. & K. in the case of *R. K. Salhotra* v. *Income-tax Officer*[2] held that the allowance under claim of deduction on incentive bonus is allowable. Other High Courts have taken a different view. Thus, there is expression of divergent views by the High Courts. Quite apart from the above, on earlier years the appeals were allowed.

In view of the aforesaid, by no stretch of imagination it can be said that the issue was not a debatable one and the Assessing Officer could have taken recourse to the path of *prima facie* adjustment. Hence we have no hesitation in holding that the order passed by the Tribunal is absolutely justified and does not warrant any interference by this Court. Hence, no substantial question of law is involved.

Resultantly, the appeal, being sans merit, stands dismissed without any order as to costs.

Appeal dismissed.

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(1) 1999 Taxman 63. (2) (2002) 125 Taxman 624 (J. & K.).

SUPREME COURT OF INDIA

Before Mr. Justice K. G. Balakrishnan and Mr. Justice B. N. Shrikrishna
26 September, 2003.

KARAN SINGH & ors. ...Appellants*

v.

STATE OF MADHYA PRADESH ...Respondent.

Penal Code Indian (XLV of 1860) Sections 100, 101,.148,149, 307 and Evidence Act, 1872, Sections 3 and 145–When a previous Statement is to be proved as an admission the statement as such should be put to the witness–Object is to give the witness a chance of explaining the discrepancy or inconsistencies–Witness not given opportunity to explain his previous statement–Not of any assistance to accused–Self defence–Accused received minor injuries–Had there been an assault they would have sustained some serious injuries–The well spoken about by the witness close to his own house–House of accused at 1½ furlong away–Not possible to assume that PW-1 came to the house of appellant and appellants acted in self defence.

When a previous statement is to be proved as an admission, the statement as such should be put to the witness and if the witness denies having given such a statement, it does not amount to any admission and if it is proved that he had given such a statement, the attention of the witness must be drawn to that statement. Section 145 of the Evidence Act is clear on this aspect. The object is to give the witness a chance of explaining the discrepancy or inconsistency and to clear up the particular point of ambiguity or dispute.

The evidence of PW-1 clearly shows that the well referred to by him in his evidence was close to his own house. He deposed that he was attacked when he was going from the well to his house. He also stated that the house of the accused was about one and half furlong away from the place. From this fact also, it is not possible to assume that PW-1 and others came to the appellant's house and attacked them and the appellants had only acted in private defence.

Mr. Sushil Kumar, Sr.Adv., *Mr. Sanjay Jain, Mr. Adolf Mathew, Mr. Harsvardhan Jha* and *Mr.Hari Shankar K.* for the appellants.

Mr. R. P. Gupta Sr. Adv., *Mrs. Kamakshi S. Mehlwal* and *Mr. Vinod Kumar Jha* for the respondent.

*Cr.A.No. 271/2003.

JUDGMENT

The Judgment of the Court was delivered by **K. G. Balakrishnan, J.** – Appellants challenge their conviction and sentence for the offences punishable under sections 148 and 307 of Indian Penal Code. Appellant Karan Singh was convicted for the offences punishable under Sections 148 and 307 IPC without the aid of Section 149 whereas the other appellants were convicted for the offences punishable under Section 148 and Section 307 read with Section 149. The prosecution case was that these appellants were on inimical terms with PW-1 Hari Singh, and that on 29.11.1981 at about 10 a.m., when Hari Singh was returning from his well to his house, the appellants attacked him and caused injuries. Appellant Karan Singh was armed with a '*farsa*' whereas the other appellants were armed with '*lathis*'. PW-1 Hari Singh suffered serious injuries and his left hand was cut off from the body just above the wrist joint. He suffered three other incised injuries and three lacerated wounds. Altogether, Hari Singh had 12 injuries on his body when he was examined by PW-12 and PW-13. PWs-2, 3 and 4 were examined as eye witnesses. Though PW-2 and PW-3 fully supported the prosecution version. PW-4 did not support the prosecution case. The sessions judge found that the prosecution had succeeded in proving the case against the appellants and his findings were affirmed by the High Court. Appellants Karan Singh and Banab Singh on being questioned under Section 313 Code of the Criminal Procedure, stated that they were attacked by PW-2 and PW-3 and contended that whatever they had done was done by way of self-defence. The other appellants stated that they were falsely implicated in the case. The sessions court as well as the High Court found that the plea of alibi raised by these appellants was not true and held that there was no attack initiated from the side of PW-1 to PW-3.

Shri Sushil Kumar, the learned senior counsel appearing on behalf of the appellants contended that the place of incident is very near to the house of the appellants and PW-1 to PW-3 had come to the place of incident fully armed and attacked Karan Singh and Banab Singh and that the other appellants were falsely implicated in the case. In order to substantiate this contention, the counsel drew our attention to exhibit D-4, which is the statement of PW-1 Hari Singh, recorded by the Dr. Jain, who had first examined him. The exhibit D-4 is to the following effect :

"How this incident happened : I had gone to the well. Was coming back. On the way by catching me Girdhari Singh and his sons, by dragging me took to the room. There beat me with *farsi, luhogi,* brought me outside by dragging."

It is true that PW-12 while giving evidence admitted that he had recorded the aforesaid exhibit D-4 statement of PW-1.

Relying on the above statement, the learned counsel for the appellants submitted that the incident happened inside the house of the appellants when PW-1 and others came there to attack the appellants. The counsel for the appellants also contended that in exhibit D-4 statement, injured had stated only about Girdhari Singh and his sons and did not name all the appellants and this indicated that the two sons of Girdhari Singh were being falsely implicated.

A similar plea was raised by the appellants before the sessions court as well as the High Court. The High Court brushed aside that plea by stating that exhibit D-4 statement was not put to PW-1 when he was examined as a witness. This observation by the Division Bench regarding exhibit D-4 is partially correct. In fact, when PW-1 was cross-examined, his attention was drawn to exhibit D-4, but it is incorrect to say that the said witness was confronted with exhibit D-4 statement as such during cross-examination. PW-1, when asked whether he had given any statement to the doctor in the hospital, said he did not remember to have given any statement.

When a previous statement is to be proved as an admission, the statement as such should be put to the witness and if the witness denies having given such a statement, it does not amount to any admission and if it is proved that he had given such a statement, the attention of the witness must be drawn to that statement. Section 145 of the Evidence Act is clear on this aspect. The object is to give the witness a chance of explaining the discrepancy or inconsistency and to clear up the particular point of ambiguity or dispute. In the instant case, the exhibit D-4 statement as such was not put to the witness nor the witness was given an opportunity to explain it. Therefore, D-4 statement, even if it is assumed to be a statement of PW-1, Hari Singh, that is of no assistance to the appellants to prove their case of private defence.

Karan Singh v. State of Madhya Pradesh, 2003.

The contention of the appellants that PW-1 and others came and attacked the appellants Karan Singh and Banab Singh is not supported by any evidence or circumstance. These two appellants put forward the plea of self-defence based on the fact that they had sustained some injuries. It is pertinent to note the injuries sustained by these two appellants. Karan Singh had a minor lacerated injury on the left ring finger, a minor injury on the right palm and another minor injury on the right little finger. All these injuries were on the palm and the fingers of right hand. Appellant Banab Singh had also a small lacerated injury on the right index finger. According to the prosecution, these appellants were wielding '*farsa*' and '*lathis*'. The injuries of these two appellants would only probabilise the prosecution case that they had used the weapons of offence with full force. Had there been an assault on these appellants by a group of persons as alleged by them, they would certainly have sustained some serious injuries. Minor injuries sustained by these appellants do not advance the case that PW-1 to PW-3 attacked them, and in all probability, they must have sustained these injuries when they used the weapons of offence in assaulting Hari Singh.

The appellants' counsel urged before us that the incident happened very near to the house of the appellants. The learned counsel stated that PWs-1, 2 and 3 must have come there to attack the appellants and that the well spoken of by PW-1 in his evidence was the well close to the house of the appellants. This contention is not correct. The houses of the appellants and PW-1 are in the same locality and it appears that even the properties of these two groups were lying contagiously. The evidence of PW-1 clearly shows that the well referred to by him in the evidence was close to his own house. He deposed that he was attacked when he was going from the well to his house. He also stated that the house of the accused was about one and half furlong away from that place. From this fact also, it is not possible to assume that PW-1 and others came to the appellant's house and attacked them and the appellants had only acted in private defence.

It is proved satisfactorily that the appellants had caused grievous injuries of PW-1 Hari Singh and the sessions court as well as the High Court rightly found the appellants guilty of the offences punishable under Section 148 and 307. Considering the grievous nature of the injuries sustained

by Hari Singh, we do not see any reason to take a lenient view in the matter of sentence awarded to the appellants. The appeal, therefore, fails and is dismissed.

Appeal dismissed.

SUPREME COURT OF INDIA

Before Mr. Justice Doriaiswamy Raju and Mr. Justice Arijit Pasayat.

26 September, 2003.

JINESHWARDAS (DEAD) THROUGH
L.Rs. and others ...Appellants*

v.

SMT. JAGRANI & another ...Respondents.

Civil Procedure Code (V of 1908)–Section 100 and Order 23, Rule 3–Suit for specific performance–Second appeal disposed of by High Court on the basis of admission made by Counsel appearing for the parties–No allegation made attributing any impropriety to their action–Judgment or decree passed as a result of consensus arrived at before the Court–Cannot always be one passed on compromise or settlement and adjustment–May at times be also a judgment on admission.

We are in respectful agreement with the above statement of law. Consequently it is not permissible for the appellant, to contend to the contrary. That apart we are also of the view that a judgment or decree passed as result of consensus arrived at before Court, cannot always be said to be one passed on compromise or settlement and adjustment on admission, as in this case. Considering the fact and circumstances of the case. We find that there are no adequate reasons on merits also to call for interference in a second appeal. The so called questions formulated cannot be considered to be even questions of law and, at any rate, not substantial questions of law, as required under Section 100, C.P.C. The Courts below have concurrently rejected the claim of the plaintiff/appellants on pure findings of fact based upon relevant

*C.A.No. 8104-8105/2003 arising out of S.L.P. (c) Nos. 23323=23324 of 2002.

Jineshwardas (Dead) Through L.Rs. v. Smt. Jagrani, 2003.

evidence and nothing survived for consideration at all in such an appeal. Further, respondent side alone appears to have been saddled with additional liabilities under the decision of the High Court, though on the basis of admission made by counsel appearing for parties. There is nothing said against the counsel, who appeared for parties, and no allegations have been made also attributing any impropriety to their action. Therefore, we are not persuaded to agree the submissions made on behalf of the appellant.

* *Gurpreet Singh* v. *Chatur Bhuj Goel*[1]; referred to.

Byram Pestonji Garlwala v. *Union Bank of India & ors.*[2]; relied on.

JUDGMENT

The Judgment of the Court was delivered by **D. RAJU, J.** – Special Leave granted.

The appellant before this Court was the appellant in Second Appeal No. 693 of 1996 on the file of the Madhya Pradesh High Court at Jabalpur. The original plaintiff Jineshwardas, whose legal representatives are the appellants in this Court filed, the Civil Suit No. 102-A of 1980 before the Court of IV Civil Judge Class I, Jabalpur, seeking for a decree for specific performance and recovery of the possession of the suit land or in the alternative, damages at market value as may be proved for non-performance of the contract and for recovery of Rs. 2,500/- paid by the plaintiff as deposit. The defendants disputed the suit claim by attributing fraud and undue influence as vitiating the agreement stating that it was opposed to public policy as well and really constituted no agreement of sale of immovable property. After trial and on consideration of the materials on record, the suit filed was dismissed. The matter was pursued on appeal before the VIth Additional District Judge, Jabalpur, and the learned First Appellate Judge also, after an elaborate consideration of the evidence on record, affirmed the findings of the learned Trial Judge by holding that the suit agreement cannot

(1) (1988) 1 S.C.C. 270. (2) (1992) 1 S.C.C. 31.

be considered an agreement for sale of the land. The First Appellate Judge also noticed the specific fact that the father of the plaintiff was a practising Advocate and it is in respect of certain amounts spent for the litigation only, the agreement came to be executed and that it was merely an agreement to repay and not to convey the property itself. On that view of the matter, while partly allowing the appeal and affirming the judgment of the Trial Judge denying specific performance and recovery of possession, decreed the claim of the plaintiff to receive the sum of Rs. 2,500/- with interest from 18.8.1963 till the date of filing of the suit, namely, 28.8.1975, at Rs. 1/- per month and thereafter interest at the rate of paise 50 per month. Aggrieved, the matter appears to have been pursued further before the High Court by means of a Second Appeal. From the copy the order-sheet filed relating to the order made at the time of entertaining the appeal when it came up for admission, it is seen that the Second Appeal was admitted on 27.2.1998 on the following questions of law :-

> "1) Whether the courts below were in error in holding that the agreement dated 23.4.63 (Ex.P-2) was not a genuine agreement to sell the property in suit and the same is not enforceable ?
>
> 2) Whether the Court below was right in non-suiting the plaintiff also on the ground of limitation ?"

Thereupon, when the Second Appeal came up before the Court for final hearing, before another learned Single Judge, the following order came to be passed on a consensus expressed by both the learned counsel before the High Court at the time of hearing. It would be useful and necessary to set out the said order :-

> "Both the counsel are in agreement to settle the matter. The counsel for the respondents submits that respondents will pay an amount of Rs. 25,000/- to the appellant within a period of one month failing it will carry interest at the rate of 12% per annum from the date of suit. On this agreed submission, this appeal is decided and judgment and decree passed by the Court below is modified to this extent.
>
> 1. The respondents will pay Rs. 25,000/- (Rupees Twenty Thousand) to the appellants within a period of one month

Jineshwardas (Dead) Through L.Rs. v. Smt. Jagrani, 2003

2. If this amount is not deposited in the Court on or before 10th June, 2002, the above amount will carry interest @ 12% per annum till its realization.

3. Cost of the litigation will be borne by both the parties.

The appeal is disposed of in view of the above said agreed submissions."

Thereupon, the appellants seem to have filed an application for review contending that the order passed on 9.5.2002 disposing of the appeal is nothing but a compromise decree and since the compromise could, if at all, had been entered into only under Order 23, Rule 3, CPC, and the one in this case has not been so entered into in writing and signed by the parties, the same is not to be made the basis for disposal of the appeal and submissions, if any, made in this regard by the counsel appearing for the appellants in the High Court was without any instructions of the appellants. The learned Judge by an order dated 15.7.2002 rejected the review application observing that the aforesaid settlement was arrived at between the parties in the Court at the time of hearing and if the applicants are aggrieved, they may take appropriate action under law but no case for review has been made out. At this stage, the above appeal has been filed.

Pursuant to the notice ordered, the respondents entered appearance and have filed their counter affidavit contending that in the teeth of the factual findings made by both the courts below that the transaction was not one for sale of any property, there was no merit in the claim to be effectively adjudicated in the appeal before the High Court, that the counsel appearing were dully authorized by their respective parties to argue the Second Appeal on merits and, if necessary, compromise the same and the counsel on either side, who have expressed such a desire to settle, being Advocates of repute with a long standing of more than 35 years at the bar, could not be attributed with any motive and in the absence of any concrete material to show that something illegal has been done, the appellants cannot take advantage of hyper-technicalities to avoid the decree in the Second Appeal, which, if at all, is really more in favour of the appellants in the teeth of the concurrent findings recorded by the courts below.

Jineshwardas (Dead) Through L.Rs. v. Smt. Jagrani, 2003.

The learned counsel for the appellants strongly placed reliance upon the decision of this Court reported in *Gurpreet Singh* v. *Chatur Bhuj Goel*,[1] to contended that in the absence of compliance with the provisions contained in Order 23, Rule 3, CPC, the judgment of the High Court could not be sustained. The learned counsel for the respondent reiterated the stand taken in the counter, noticed supra.

We have carefully considered the submissions of the learned counsel appearing on either side. Though, in *Gurpreet Singh's Case* (*supra*) this Court explained the object and purport of Rule 3 of Order 23, CPC, by lying emphasis on the words, "in writing and signed by parties", to be necessitated in order to prevent false and frivolous pleas that a suit had been adjusted wholly or in part by any lawful agreement or compromise with a view to protect or delay the proceedings in the suit itself. It was also observed therein that as per Rule 3 of Order 23, CPC, when a claim in the suit has been adjusted wholly or in part by any lawful agreement or compromise, such compromise must be in writing and signed by the parties and there must be a complete agreement between them and that to constitute an adjustment, the agreement or compromise must itself be capable of being embodied in a decree. The fact that the parties entered into a compromise during the hearing of the suit or appeal was considered not to be sufficient, to do away with the requirement of the said rule and that courts were expected to insist upon the parties to reduce the terms into writing. In *Byram Pestonji Garlwala* v. *Union Bank of India & Others*,[2] this Court while adverting to the very amendment in 1976 to Rule 3, of Order 23, CPC, noticed also the effect necessarily to be given to Rule 1 of Order 3, CPC, as well and on an extensive review of the case law on the subject of the right of the counsel engaged to act on behalf of the client observed as follows :-

> "37. We may, however, hasten to add that it will be prudent for counsel not to act on implied authority except when warranted by the exigency of circumstances demanding immediate adjustment of suit by agreement or compromise and the signature of the partly cannot be obtained without undue delay. In these

(1) (1988) 1 S.C.C. 270. (2) (1992) 1 S.C.C. 31.

days of easier and quicker communication, such contingency may seldom arise. A wise and careful counsel will no doubt arm himself in advantage with the necessary authority expressed in writing to meet all such contingencies in order that neither his authority nor integrity is ever doubted. This essential precaution will safeguard the personal reputation of counsel as well as uphold the prestige and dignity of the legal profession.

38. Considering the traditionally recognised role of counsel in the common law system, and the well sought to be remedied by Parliament by the C.P.C. (Amendment) Act, 1976, namely, attainment of certainty and expeditious disposal of cases by reducing the terms of compromise to writing signed by the parties, and allowing the compromise decree to comprehend even matters falling outside the subject matter of the suit, but relating to the parties, the legislature cannot, in the absence of express words to such effect, be presumed to have disallowed the parties to enter into a compromise by counsel in their cause or by their duly authorised agents. Any such presumption would be in consistent with the legislative object of attaining quick reduction of arrears in court by elimination of uncertainties and enlargement of the scope of compromise.

39. To insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorised representative. If a power-of-attorney holder can enter into an agreement of compromise on behalf of his principal, so can counsel, possessed of the requisite authorization by Vakalatnama, act on behalf of his client. Not to recognise such capacity is not only to cause much inconvenience and loss to the parties personally, but also to delay the progress of proceedings in court. If the legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated.

40. Accordingly, we are of the view that the words 'in writing and signed, by the parties', inserted by the C.P.C. (Amendment) Act, 176 (err), must necessarily mean, to borrow the language of Order III, Rule 1, CPC.

> "any appearance, application or act in or to any court, required or authorized by law to be made or done by a party in such court, may except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader, appearing, applying or acting as the case may be, on his behalf.
>
> Provided that any such appearance shall, if the court so directs, be made by the party in person."
>
> (emphasis supplied)

We are in respectful agreement with the above statement of law. Consequently it is not permissible for the appellant, to contend to the contrary. That apart we are also of the view that a judgment or decree passed as result of consensus arrived at before court, cannot always be said to be one passed on compromise or settlement and adjustment. It may, at times, be also a judgment on admission, as in this case.

Considering the fact and circumstances of the case, we find that there are no adequate reasons on merits also to call for interference in a second appeal. The so-called questions formulated cannot be considered to be even questions of law and, at any rate, not substantial questions of law, as required under Section 100, C.P.C. The courts below have concurrently rejected the claim of the plaintiff/appellants on pure findings of fact based upon relevant evidence and nothing survived for consideration at all in such an appeal. Further, respondent side alone appears to have been saddled with additional liabilities under the decision of the High Court, though on the basis of admission made by counsel appearing for parties. There is nothing said against the counsel, who appeared for parties, and no allegations have been made also attributing any impropriety to their action. Therefore, we are not persuaded to agree with the submissions made on behalf of the appellants.

Jineshwardas (Dead) Through L.Rs. v. Smt. Jagrani, 2003.

The appeals, therefore, fail and shall stand dismissed.

No costs.

Appeal dismissed.

SUPREME COURT OF INDIA

Before Mr. Justice N.Santosh Hegde and Mr. Justice B. P. Singh.
15 October, 2003.

STATE OF M. P. ...Appellant*

v.

GHUDAN ...Respondent.

Penal Code, Indian (XLV of 1860), Sections 302, 380 and 457 and Evidence Act, Indian, 1872, Sections 3, 9, 27 and 45–Identification of accused–Witness not able to see the stature nor hair nor the mole on his nose–Witness not reliable–Recovery of weapon allegedly used in the crime–Place of recovery cannot be said to be in exclusive access of accused–Much importance cannot be placed on the recovery–Report of ballistic expert–Empties recovered were not sealed at the time of seizure–Sent to ballistic expert after six months–Identity of empties seized and those tested by the expert cannot be tallied–No merit in State appeal against setting aside of conviction and sentence by the High Court.

From the above extract of his evidence, it is clear that he was neither able to see the stature of the respondent, nor the hair, nor the mole on his nose, nor his complexion or his height. For the above reason, we are in agreement with the High Court that the identification of the respondent by PW-26 is not reliable especially in the background of the fact a similarly situated witness like PW-11 had failed to identify this respondent.

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*Cr.A.No. 551/1996.

We have already noticed that the weapon allegedly used in the crime was recovered from the house of one Chandan who though examined did not support the prosecution case. There recovery infact cannot be said to be from a place to which the respondent alone had the exclusive access. The possibility of the said weapon being with the said Chandan always cannot be ruled out. In such factual background much importance cannot be placed on a recovery of this nature.

We are also in agreement with the finding of the High Court that it is not safe to place reliance on report of the ballistic expert because it is an admitted fact that the empties which were sent to the ballistic expert after six months were not sealed at the time of seizure. Therefore, the identify of the empties seized from the place of incident and those tested by the expert can not be safely tallied.

R. P. Gupta Sr. adv., *Ms. Kamakshi S. Mehlwal* and *Mr. Prakash Jha* for the Appellant.

Siddarth Dave for the Respondent.

JUDGMENT

The Judgement of the Court was delivered by SANTOSH HEGDE, J. – State of Madhya Pradesh is in appeal before us against a judgment of the High Court of Madhya Pradesh at Jabalpur in Cr. A. No. 825 of 1988 whereby the High Court allowed the appeal of the respondent herein and set aside the conviction and sentence imposed on him by the Additional Sessions Judge, Bhopal under Sections 302, 380 and 457 of the IPC in S. T. No. 90 of 1986.

Brief facts necessary for the disposal of this appeal are as follows :-

According to the prosecution, Arun Kumar Mehta (PW-26) was a typist working with a member of Legislative Assembly who was residing in quarter no. 116/17. Shivaji Nagar, Bhopal and at that relevant point of time the said MLA was not in town and this PW-26 was occupying the garage attached to the house of the said MLA. On 13.2.1985 at about 10 p.m. PW-26 noticed some flashing of the light inside the unoccupied house of the MLA

and apprehending that there was something wrong, he went to the house of Narayan Dubey (the deceased) who was living just behind the house of the MLA. At the request of PW-26, the said Narayan Dubey came out of the house with a sword in his hand along with him came a little later Dubey's son (PW-11) when they saw a person with medium height aged about 20-25 years with curly hair and having somewhat darkish complexion covering himself with a white shawl coming out of the house of the MLA. When PW-26 called out to him to stop, the said person started abusing him and threatened him to fire with a pistol carried by him and in fact fired at PW-26 with the pistol which missed PW-26. The prosecution then alleged that Narayan Dubey tried to stop the said person, consequent to which the said person fired three times which caused gun shot injury on Narayan Dubey. Thereafter, the said person allegedly ran away from the place of incident. The injured Narayan Dubey was rushed to the hospital where he succumbed to gun shot injury. As per the prosecution case, the investigation commenced on a complaint made by PW-26 which did not make much progress. It is the further case of the prosecution that on 22.9.1985 about 7 months after the incident in which Narayan Dubey died and during the investigation of another crime no. 7/85 by the police of police station Sarni, the respondent herein was arrested and on an alleged disclosure statement made by him as per exhibit P-18 one 22 bore pistol was recovered from the house of one Chandan and same was seized as per seizure memo exhibit P. 18. During the course of the investigation of the case involving the death of Narayan Dubey certain empty cartridges had been seized from the spot of incident and the pistol then recovered at the instance of the respondent herein was sent for ballistic examination who opined that the empty cartridges found at the place of incident could have been fired by the pistol recovered at the instance of the respondent. The report of the ballistic expert was marked as exhibit P-19. On this basis the respondent was arrested. A week after the respondent was arrested a test identification parade was held at Betul jail where PW-26 allegedly identified the respondent as the person who shot Narayan Dubey in the date of incident, hence, a charge sheet under Sections 302, 457, 380 IPC was laid against the respondent who, as stated above, was convicted by the additional sessions judge but on appeal was acquitted by the High Court.

The High Court during the course of its judgment which is now impugned before us came to the conclusion that the evidence of PW-26 which was the basis for conviction of the respondent cannot be relied upon because the High Court was of the opinion that PW-26 could not have identified the respondent for want of sufficient light. It is, of course, an admitted fact that the respondent was a stranger to PW-26. The High Court also came to the conclusion that the identification by the appellant at the test identification parade cannot also be relied upon and there was every possibility of the respondent being shown to PW-26 prior to the test identification parade. The High Court also chose not to place any reliance on the ballistic report because even according to the prosecution the empties which were recovered from the place of incident six months earlier were not really sealed. Therefore, it came to the conclusion that these being the only two circumstances relied upon by the trial Court and the same being not very trustworthy, the respondent herein was entitled to benefit of doubt, hence, acquitted him.

In this appeal Shri R. P. Gupta, learned senior counsel appearing for the State of M. P. contended that the finding of the High Court in regard to the possible identification by PW-26 of the respondent is highly erroneous. Learned counsel contended that there was sufficient light at the place where the incident in question took place and PW-26 had sufficient time to have a good look at the respondent. Therefore, there was every possibility of the witness properly identifying the accused even though the test identification parade took place about six months after the incident in question. He also contended that the High Court erred in not placing reliance on the evidence of the ballistic expert which clearly showed that the empties which were found at the place of incident have in fact been fired from the pistol that was recovered at the instance of the respondent. Therefore, there was sufficient material for the courts below to have based a conviction on the respondent which the trial Court did, but the High Court erroneously failed to do so.

Shri Siddarth Dave, learned counsel appearing for the respondent strongly supported the judgment of the High Court. He contended that from the material produced by the prosecution itself it is clear that there was not enough light at the place of incident and the respondent being a stranger to PW-26 could not have properly identified him. More so, because of the fact

that he saw the respondent next time only after about six months. He pointed out that under similar circumstances PW-11 who also supposed to have seen the accused at the time of incident did not identify the accused in the identification parade. Learned counsel pointed out the very recovery of the pistol at the instance of the respondent is unbelievable because the person from whose house the said weapon was recovered allegedly at the instance of respondents did not support the prosecution case. He contended admittedly the weapon was in possession of Chandan, therefore, no inference could be drawn that at any point of time this weapon was with the respondent. Learned counsel also submitted that the High Court was justified in coming to the conclusion that the report of the ballistic expert cannot be relied upon because the empties which were recovered from the place of incident were not sealed.

We have heard the learned counsel for the parties as also perused the records. The prosecution in this case relies on three facts to establish its case; firstly the eyewitness version of the incident as stated by PW-26; secondly the recovery of the weapon allegedly at the instance of the respondent and thirdly the report of the ballistic expert.

From the evidence of PW-26, it is seen that he states that he noticed a person of medium height with curly hair having somewhat darkish complexion coming out of the house of the MLA who after threatening him shot the deceased three times. According to him, there was a tube light near the place of incident, hence, he could identify the accused. The High Court in its judgment has observed that the factum of the existence of a tube light at the place of incident is doubtful because the sketch of the place of the incident as prepared by the prosecution did not indicate any such light. It is only for the first time while giving evidence before the court, PW-26 pointed out a place in the sketch where according to him the tube light was placed. The trial Court accepted it and came to the conclusion that there was sufficient light at the place of incident. The High Court, per contra, observed that if really there was a tube light at the place of the incident, the investigation officer would not have failed to mark the existence of that tube light in the sketch. The omission to do so creates doubt as to the possibility of there being sufficient light for identification. We are in agreement with this finding of the High Court. If really there was a tube light by which PW-26 identified the respondent then investigating agency would certainly have shown the

existence of a tube light and its placement in the sketch because it was a very important fact mainly because the identification of the accused is a vital factor to be proved by the prosecution. The benefit of the omission to point out the existence of such light in the sketch, in our opinion, should go to the accused. That apart, we find some serious discrepancies in the manner in which the PW-26 identified the respondent in the parade. As noticed above, this witness has specifically stated certain salient physical features of the respondent which assisted him in identifying the accused respondent. But if we peruse his evidence given in the court in regard to test identification parade, we notice that none of those features which assistant in identifying the accused really existed at the time of the test identification parade. PW-26 in the course of his examination stated thus :

> "The tehsildar called five-six prisoners from inside. All those who were brought were wrapped in blankets and all of them were young. I do not remember their looks as all were wrapped in blankets. Their hair were not visible. I did not notice this even, how many of them had moles on their noses, I cannot tell how many of them were dark and how many were fair. I cannot tell how many of them were of medium stature that and how many were short statured. I did not tell the tehsildar, about the mark of my identification. I did not tell the tehsildar, that the person whom I have come to identify possesses curly hair and is dark coloured."

From the above extract of his evidence, it is clear that he was neither able to see the stature of the respondent, nor the hair, nor the mole on his nose, nor his complexion or his height. For the above reason, we are in agreement with the High Court that the identification of the respondent by PW-26 is not reliable especially in the background of the fact a similarly situated witness like PW-11 had failed to identify this respondent.

We have already noticed that the weapon allegedly used in the crime was recovered from the house of one Chandan who though examined did not support the prosecution case. The recovery in fact cannot be said to be from a place to which the respondent alone had the exclusive access. The possibility of the said weapon being with the said Chandan always cannot be ruled out. In such factual background much importance cannot be placed on a recovery of this nature.

State of M. P. v. Ghudan, 2003.

We are also in agreement with the finding of the High Court that it is not safe to place reliance on the report of the ballistic expert because it is an admitted fact that the empties which were sent to the ballistic expert after six months were not sealed at the time of seizure. Therefore, the identif of the empties seized from the place of incident and those tested by the expert can not be safely tallied.

For the above reasons, we are in agreement with the findings of the High Court. We find no merit in this appeal, the same is dismissed.

Appeal dismissed.

FULL BENCH

Before Mr. Bhawani Singh, C.J., Mr. Justice Dipak Misra, Mr. Justice K.K.Lahoti, Mr. Justice S.L.Jain and Mr. Justice A.K.Shrivastava.

17 December, 2002.

JABALPUR BUS OPERATOR ASSOCIATION and ors. ...Petitioners

v.

STATE and another ...Respondents.

Constitution of India, Articles 141, 226 and 227–Writ Petition–Law of precedent–Conflict in two decisions of co-equal Benches–Decision rendered without considering earlier decision expressing contrary view–Have no value–Earlier decision is binding on the Bench of equal strength–Matter should be referred to the larger Bench in case of conflict–Apex Court's decision–Conflicting decisions of Benches comprising equal number of Hon. Judges–Decision of earlier Bench is binding unless explained by the latter decision–High Court and subordinate Courts should lack competence to interpret decisions of Apex Court–Great value has to be attached to precedent for purpose of consistency and exactness in decisions of Courts.

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*W. P. No. 177/2001.

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Decisions which are rendered without considering the decisions expressing contrary view have no value as a precedent. But in our considered opinion, the position may be stated thus -

With regard to the High Court, a Single Bench is bound by the Decision of another Single Bench. In case, he does not agree with the view of the other Single Bench, he should refer the matter to the Larger Bench. Similarly, Division Bench is bound by the judgment of earlier Division Bench. In case, it does not agree with the view of the earlier Division Bench, it should refer the matter to Larger Bench. In case of conflict between judgments of two Division Benches of equal strength, the decision of earlier Division Bench shall be followed except when it is explained by the latter Division Bench in which case the decision of latter Division Bench shall be binding. The decision of Larger Bench is binding on smaller Benches. In case of conflict between two decisions of the Apex Court, Benches comprising of equal number of Judges, decision of earlier Bench is binding unless explained by the latter Bench of equal strength, in which case the latter decision is binding. Decision of a Larger Bench is binding on smaller Benches. Therefore, the decision of earlier Division Bench, unless distinguished by latter Division Bench, is binding on the High Courts and the Subordinate Courts. Similarly, in presence of Division Bench decisions and Larger Bench decisions, the decisions of Larger Bench are binding on the High Courts and the subordinate Courts.

High Courts and subordinate Courts should lack competence to interpret decisions of Apex Court since that would not only defeat what is envisaged under Article 141 of the Constitution of India but also militate hierarchical supremacy of Courts.

Great value has to be attached to precedent which has taken the shape of rule being followed by it for the purpose of consistency and exactness in decisions of Court, unless the Court can clearly distinguish the decision put up as a precedent or is per incuriam, having been rendered without noticing some earlier precedents with which the Court agrees.

Full Bench decision in *Balbir Singh's Case* (*supra*) which holds that if there is conflict of views between the two co-equal Benches of the Apex Court, the High Court has to follow the judgment which appears to it

to state the law more elaborately and more accurately and in conformity with the scheme of the Act, in our considered opinion, for reasons recorded in the preceding paragraph of this judgment, does not lay down the correct law as to application of precedent and is, therefore, over ruled on this point.

Municipal Corporation, Indore and others v. *Smt. Ratnaprabha Dhanda, Indore and others*,[1] *Indian Oil Corporation Limited* v. *Municipal Corporation and another*,[2] *M/s. New Krishna Bhawan, Malleswaram Bangalore-3* v. *Commercial Tax Officer, No. IV Circle (Addl.) Bangalore*,[3] *R. Rama Subbarayalu Reddiar* v. *Rengammal*,[4] *U. P. State Road Transport Corporation* v. *State Transport Appellate Tribunal, U. P. Lucknow and others*,[5] *Gopal Krishna* v. *5th Additional District Judge, Kanpur*,[6] *Bengal Immunity Co.* v. *State of Bihar*,[7] *Davis* v. *Johnson*,[8] *State of U. P.* v. *Ram Chandra*,[9] *U. P. S. R. T. C* v. *State Road Transport Tribunal, U. P., Locknow*,[10] *Govindanaik G. Kalghatagi* v. *West Patent Press Co. Ltd.*,[11] *Ram Swarup Rai's Case*,[12] *Ratan Lal Singhal's Case*,[13] *Ballabhdas Mathuradas Lakhani* v. *Municipal Committee, Malkapur*,[14] *Ambika Prasad Misra* v. *State of U. P.*,[15] *M/s. Sovachand Mulchand* v. *Collector of Central Excise and Land Customs*,[16] *U. P. S. R. T. C.* v. *State Road Transport Tribunal, U. P., Lucknow*,[17] *Miles* v. *Jarvis*,[18] *Baker* v. *White*,[19] *Vasant Totba Hargude and others* v. *Dikkaya Muttaya Pujari*,[20] *Govindanaik G. Kalaghatigi* v. *West Patent Press Company Limited and another*,[21] *Rajeshwar Prasad* v. *State of West Bengal*,[22] *Sharma Rao* v. *Union Territory of Pandicherry*,[23] *Mattulal* v. *Radheylal*,[24] *Mumbai Kamgar Sabha* v. *Abdhulbhai*,[25] *Union of India* v. *K. S. Subramaniam*,[26] *M/s. Indo Swiss Time Limitated, Dundahera* v. *Umrao and others*,[27] *Municipal Corporation of the City of Ahmedabads' Case*,[28]

(1) 1989 M.P.L.J. 20.
(2) A.I.R. 1995 S.C. 1480.
(3) A.I.R. 1961 Mysore 3.
(4) A.I.R. 1962 Madras 450.
(5) A.I.R. 1977 Allahabad 1.
(6) A.I.R. 1981 Allahabad 300.
(7) A.I.R. 1955 S.C. 661.
(8) (1978) 2 W.L.R. 152.
(9) A.I.R. 1976 S.C. 2547.
(10) A.I.R. 1977 All. 1.
(11) A.I.R. 1980 Kant. 92.
(12) 1980 All. L. J. 651.
(13) A.I.R. 1980 S.C. 635.
(14) A.I.R. 1970 S.C. 1002.
(15) 1980 R.D. 227=AIR 1980 S.C. 1762.
(16) A.I.R. 1968 Cal. 174.
(17) AIR 1977All I=1976 1 All L.J. 683.
(18) (1983) 24Ch. D. 633.
(19) (1877) 5 Ch. D. 183.
(20) A.I.R. 1980 Bom. 341.
(21) A.I.R. 1980 Karnatkaa 92.
(22) A.I.R. 1965 S.C. 1887 at p. 1981 para 8.
(23) A.I.R. 1967 S.C. 1480.
(24) A.I.R. 1974 S.C. 1596 at p. 1602.
(25) A.I.R. 1976 S.C. 1455 at p. 1467 para 38.
(26) A.I.R. 1976 S.C. 2433 at p. 2437 para 12.
(27) A.I.R. 1981 P & H 213.
(28) (1970) 1 S.C.W.R. 183.

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Himalayas Tile's Case,[1] *Hampton* v. *Holman*,[2] *Hayes* v. *Hays*,[3] *Young* v. *Bristol Aeroplane Co. Ltd.*,[4] *A. J. Aramha* v. *Mysore Road Transport Corporation*,[5] *Smt. Kamla Soni's Case*,[6] *Sarvate T. B.'s Case*,[7] *Union of India* v. *K. S. Subramanian*,[8] *R. Ramanujam* v. *D. Venkat Rao and another*,[9] *Anand Niwas* v. *Anandji Kalyanji Pedhi*,[10] *J. C. Chatterji* v. *Shri Krishna Tandon*,[11] *Damadilal* v. *Parashram*,[12] *Bholanath Karamkar and others* v. *Madanmohan Karmakar and others*,[13] *Pramatha Nath* v. *Chief Justice*,[14] *Sovachand Mulchand* v. *Collector, Central Excise*,[15] *U. P. State Road Transport Corporation* v. *Trade Transport Corporation Tribunal*,[16] *Gopal Chandra Kalay* v. *State*,[17] *Union of India* v. *Ashok*,[18] *D. D. Bilimoria* v. *Central Bank of India*,[19] *Atma Ram* v. *State of Punjab*,[20] *Bagala Sundari* v. *Prosanna Nath*,[21] *Ram Chandra Verma* v. *Manmal Singhi and another*,[22] *Gurjat Housing Board, Ahmedabad* v. *Nagajibhai Laxmanbhai and others*,[23] *Municipal Corporation of the City of Ahmedabad* v. *Chandulal Shamldas Patel*,[24] *M/s. Pandit Munshi Ram and Associates (Pvt.) Limited* v. *Delhi Development Authority and another*,[25] *State of M. P.* v. *Balveer Singh*,[26] *State of U. P.* v. *Ram Chandra*,[27] *Amar Singh Yadav and another* v. *Shanti Devi and others*,[28] *Shukkla Kachi* v. *State*,[29] *State* v. *Narayan Prasad*,[30] *Mahadeolal* v. *Administrator General of W. P.*,[31] *Sharmu Banjare* v. *State*,[32] *Rana Natwar Singh* v. *Stat*,[33] *Suresh Seth* v. *State*,[34]

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(1) A.I.R. 1980 S.C. 1118.
(2) (1877) 5 Ch. D. 183.
(3) (1828) 38 E.R. 822.
(4) (1994) K.B. 718.
(5) (1974) 1 Kant. L. J. 344.
(6) A.I.R. 1969 N.S.C. 186.
(7) 1966 M.P.L.J. 26.
(8) A.I.R. 1976 S.C. 2433.
(9) A.I.R. 1982 A.P. 227.
(10) A.I.R. 1965 S.C. 414.
(11) A.I.R. 1972 S.C. 2526.
(12) A.I.R. 1976 S.C. 2229.
(13) A.I.R. 1988 Cal. 1.
(14) A.I.R. 1961 Cal. 545 at p. 551 para 26.
(15) A.I.R. 1968 Cal. 174 at p. 186 para 56.
(16) A.I.R. 1977 All 1 at p. 5.
(17) 1981 Lab IC 422 at p. 423, 425 (Sikkim)
(18) A.I.R. 1983 Sikkim 19 at pp. 23, 25,26.
(19) A.I.R. 1943 Nag. 340.
(20) A.I.R. 1959 S.C. 519.
(21) A.I.R. 1917 Cal. 668.
(22) A.I.R. 1983 Sikkim 1.
(23) A.I.R. 1986 Guj. 81.
(24) (1971) 3 S.C.C. 821.
(25) A.I.R. 2001 Delhi 82.
(26) (2001) 2 M. P.L.J. 644.
(27) A.I.R. 1976 S.C. 2547.
(28) A.I.R. 1987 Patna 191.
(29) 1960 J.L.J. 1078 C.N. 265.
(30) 1963 J.L.J. 390 C.N. 81.
(31) A.I.R. 1960 S.C. 936.
(32) 1985 J.L.J. 460.
(33) 1980 J.L.J. 69.
(34) 1969 J.LJ. 499.

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Bhagwandas Tiwari v. *Gayaprasad and others*,[1] *Narbada Prasad* v. *Awadesh Narain*,[2] *Balkishan* v. *State*,[3] *Union of India and others* v. *Raju Construction Company Bhopal*,[4] *M/s. Harbans Singh Tuli and Sons Builders (P) Ltd.* v. *Union of India*,[5] *Atmaram* v. *State of Punjab*,[6] *Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj and others* v. *The State of Gujrat and others*,[7] *State of U. P.* v. *Ram Chandra Trivedi*,[8] *Anugrah Narain Singh and another* v. *State of U. P. and others*,[9] *Superintendent and Remembrancer of Legal Affairs, West Bengal* v. *Corporation of Calcutta*,[10] *Bengal Immunity Co. Ltd.* v. *State of Bihar*,[11] *Union of India & another* v. *Raghubir Singh (Dead) by L.Rs. etc.*,[12] *John Martin* v. *State of West Bengal*,[13] *Haradhan Saha* v. *State of West Bengal*,[14] *Bhutnath Mate* v. *State of West Bengal*,[15] *Smt. Indira Nehru Gandhi* v. *Rajnarain*,[16] *His Holiness Kesavananda Bharati Sri Padagalavaru* v. *State of Kerala*,[17] *Ganapti Sitaram Belavalkar* v. *Waman Shripad Mage (Since Dead) Through L.Rs.*,[18] *Union of India* v. *Godfrey Philips India Ltd.*,[19] *Sundarraj Kanyalal Bhathija* v. *Collector, Thane, Maharashtra and others*,[20] *Mahadev Lal Kanodia* v. *The Administrator General of West Bengal*,[21] *Deorajina's Case*,[22] *Union of India* v. *Raghubir Singh*,[23] *State of U. P. and another* v. *Synthetics and Chemicals Ltd. and another*,[24] *Vijayalaxmi Cashew Company and others* v. *Dy. Commercial Tax Officer and another*,[25] *Sanjay Dutt* v. *State through C.B.I., Bombay*,[26] *Hitendra Vinshnu Thakur* v. *State of Maharashtra*,[27] *Uday Mohanlal Acharya* v. *State of Maharashtra*,[28] *Commissioner of Sales Tax, J. & K. and others* v. *Pine Chemicals Ltd. and others*,[29] *N. S. Giri* v. *Corporation of Manglalore and others*,[30] *District Manager, A. P. S. R. T. C. Vijaywada* v. *K. Sivaji and others*,[31] *Dr. Vijay Laxmi Sadho* v. *Jagdish*,[32]

(1) 1973 J.L.J. 469.
(2) 1973 J.L.J. 641.
(3) (1994) 1 M.P.J.R. 206.
(4) (2000) 3 M.P.L.J. 27.
(5) A.I.R. 1992 S.C. 1124.
(6) A.I.R. 1959 S.C. 519.
(7) (1975) 1 S.C.C. 11.
(8) A.I.R. 1976 S.C. 2547.
(9) (1996) 6 S.C.C. 303.
(10) A.I.R. 1967 S.C. 997.
(11) (1995) 2 S.C.R. 603.
(12) A.I.R. 1989 S.C. 1933.
(13) (1975) 3 S.C.R. 211=AIR 1975 S.C. 775.
(14) A.I.R. 1974 S.C. 2154.
(15) A.I.R. 1974 S.C. 806.
(16) (1076) 2 S.C.R. 347=AIR 1975 SC 299.
(17) A.I.R. 1973 S.C. 1461.
(18) (1981) 4 S.C.C. 143=A.I.R. 1981 S.C. 1956.
(19) (1985) 4 S.C.C. 369=A.I.R. 1989 S.C. 806.
(20) A.I.R. 1990 S.C. 261.
(21) A.I.R. 1960 S.C. 936 at p. 941.
(22) 58 Cal. W.N. 64=A.I.R. 1954 Cal. 119.
(23) (1999) 2 S.C.C. 754=A.I.R. 1989 S.C. 1933.
(24) 1991 (4) S.C.C. 139.
(25) (1996) 1 S.C.C. 468.
(26) (1991) 5 S.C.C. 410.
(27) (1994) 4 S.C.C. 602.
(28) (2001) 5 S.C.C. 453.
(29) (1995) 1 S.C.C. 58.
(30) (1999) 4 S.C.C. 697.
(31) (2001) 2 S.C.C. 135.
(32) (2001) 2 S.C.C. 247.

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Chandra Prakash and others v. *State of U. P. and another*,[1] *Furest Day Lawson Ltd.* v. *Jindal Exports Ltd.*,[2] *Lily Thomas and others* v. *Union of India and others*,[3] *Union of India and another* v. *Hansoli Devi and others*,[4] *A. R. Antulay's Case*,[5] *Nanakram* v. *Kundalrat*,[6] *United India Assurance Company Limited* v. *Bhushan Sachendra*,[7] *Chinnama George and others* v. *N. K. Raju and another*,[8] *Narendra Kumar* v. *Yorenissa and others*,[9] and *Rita Devi (Smt.) and others* v. *New India Assurance Company Limited and another*,[10] referred to.

Amar Singh Yadav and another v. *Shanti Devi and others*,[11]; overruled.

B. K. Rawat for the petitioners.

S. K. Seth Addl. A.G. with *Sanjay K. Agrawal* for the Respondents.

JUDGMENT

The Judgment of the Court was delivered by **BHAWANI SINGH, CHIEF JUSTICE** – Petitioners in both the Writ Petitions (W.P. No. 177 of 2001, *Jabalpur But Operators Association and others* v. *The State of M. P. and another* and W. P. No. 1629 of 2001 *Daya Chand Jain* v. *State of M.P. and another*) have challenged the competence of Municipal Corporation to impose toll to the entry of vehicles within the Municipal Limits under sub-section (6) of Section 132 of the M. P. Municipal Corporation Act, 1956 (for short the Act of 1956) and submit that the entry tax is being collected from the bus owners without any authority' more so when tax is being paid under Section 3 of the M. P. Motoryan Adhiniyam, 1991 (for short The Act of 1991). Section 6 of the Act of 1991 is similar to Section 6 of the Motor Vehicles Taxation Act, 1947 which imposes bar on any local authority to impose tax in respect of the motor vehicles in question. Contention is that tax is being paid by the petitioners for use of roads maintained by the State, therefore, they can bring in and take

(1) 2002 A.I.R. S.C.W. 1573.
(2) (2001) 6 S. C.C. 356.
(3) (2000) 6 S.C.C. 224.
(4) A.I..R 2002 S.C.W. 3755.
(5) (1992) 1 S.C.C. 225.
(6) (1986) 3 S.C.C. 83.
(7) A.I.R. 2002 S.C. 662.
(8) (2000) 4 S.C.C. 130.
(9) (1998) 9 S.C.C. 202.
(10) (2002) 5 S.C.C. 113.
(11) A.I.R. 1987 Patna 191 (F.B.).

out the buses from the bus-stand since they pay tax for it. Petitioners depend on the decision in *Madhya Pradesh State Road Transport Corporation* v. *Municipal Council, Mansa and another*.[1] Municipal Corporation, Jabalur maintains that sub-section (6) of Section 132 of the Act of 1956 authorises it to levy tax on entry of vehicles within its territorial limits. It seeks sustenance on the decision in *Cantonment Board, Mhow* v. *Madhya Pradesh State Road Transport Corporation.*[2]

Shri B. K. Rawat contended that decision of Apex Court in Municipal Council, *Mansa* (*supra*) is a later decision, therefore, it should be followed while Shri Sanjay K. Agrawal submitted that since this decision does not consider the effect of earlier decision in *Cantonment Board, Mhow* (*supra*), earlier decision should prevail as against the later. Therefore, learned counsel for both sides submitted that there is a conflict between the two decisions of the Apex Court, both rendered by two Judge Bench seeking to follow one against the other. Besides, there is Full Bench decision of this Court in *State of M. P.* v. *Balveer Singh*[3] holding that in case of conflict between decisions of co-equal Benches of Apex Court. High Court should follow the judgment which appears to it more elaborate and more accurate and in conformity with the scheme of the Act, following decision of this Court in *Municipal Corporation, Indore and others* v. *Smt. Ratnaprabha Dhanda, Indore and others*[4] and *Amar Singh Yadav and another* v. *Shanti Devi and others*[5]. With this background and taking into consideration Apex Court decisions including *Indian Oil Corporation Limited* v. *Municipal Corporation and another*,[6] one of us (Dipak Misra, J.) thought it apposite that law laid down in *Balveer Singh's Case* (*supra*) requires re-consideration, consequently, made reference to Larger Bench for consideration of the following question of law :

> "In case of conflicting views between the decisions rendered by the co-equal Benches of the Apex Court, which view is to be followed by the High Court as a binding precedent ?"

Before considering the Apex Court decisions on this question, appropriate, it is to refer to the decisions of various High Court since this question has confronted not only the High Courts but also the Apex Court from time to time, realising that theory of precedent and mandate of Article 141 of the

(1) M.P. No. 1540 of 1975.
(2) A.I.R. 1997 S.C. 2013.
(3) (2001) (2) M.P.L.J. 644.
(4) 1989 M.P.L.J. 20.
(5) A.I.R 1987 Pat. 191 (F.B.).
(6) A.I.R. 1995 S.C. 1480.

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Constitution of India requires exact approach by Courts to make the law clear, consistent and exact so that people and the Courts which are bound to follow them are not put to choice for following one or the other decisions and/or be in a dilemma what do to.

In *M/s. New Krishna Bhawan, Malleswaram Bangalore-3* v. *Commercial Tax Officer, No. IV Circle (Addl) Bangalore,*[1] it has been said in paragraph 10 that :

> "10. In my opinion, the view expressed by the majority of the Judges on this point in the case reported in AIR 1959 SC 648 is binding on this Court, as the law declared by the Supreme Court to be binding on this Court that the actual decision of the case should proceed on that proposition. Nor is it necessary for such proposition to be the law declared by the Supreme Court that all the Judges shall express their views one way or the other on the point. In my opinion, if the majority of Judges of the Supreme Court in a particular case express a view on a proposition of law then that view of the majority of the Judges would be the law declared by the Supreme Court. That being my view, the opinion expressed by the majority of the Judges in the said case shall be held to be the law declared by the Supreme Court and binding on this Court."

Thereafter, it is said in paragraph 11 :

> "11. The next question which arises for consideration is which of the two views - one expressed in 1958 SCJ 459 : *Vijayalxami Cashew Company & ors.* v. *Dy. Commercial Tax officer and anor.*[2] and the other in AIR 1959 SC 648 - will be binding on us. On this point again there is no doubt some difficulty. But in my opinion, it is the latest pronouncement of the Supreme Court which would be binding on us. When, in my opinion, the Supreme Court expressed its view on any particular point of law such expression of view shall be considered as over-riding all contrary views expressed on the point in earlier decisions of the same Court. That being my conclusion on these questions the contention of Mr. T. Krishna Rao fails."

(1) A.I.R. 1961 Mys. 3.
(2) A.I.R. 1958 S.C. 468.

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Full Bench decision of Madras High Court in *R. Rama Subbrayalu Reddiar* v. *Rangammal*[1] examines the question with regard to High Court decisions. However, it is pertinent to quote, it being in line with some decisions of other High Courts holding that in case of conflict between two decisions by Bench consisting of same number of Judges, one which seems to be more correct, whether later or earlier, should be followed. In paragraph 4 of the judgment, it has been said that :-

> "4. Before we deal with the question, involved in the appeal, it is necessary to examine the propriety of the procedure adopted by the learned District Judge. The normal rule as to the precedents is that Subordinate courts are bound in the absence of any decision of the Supreme Court to follow the decision of the High Court to which they are subordinate. Where, however, there is a conflict between two decisions of the High Court, the rule to be adopted is as follows : where the conflict is between the judgment of a Single Judge and a Bench or between a Bench and a larger Bench, the decision of the Bench or larger Bench as the case may be, will have to be followed. But where the conflict is between two decisions both pronounced by a Bench consisting of the same number of Judges and the subordinate court after a careful examination of the decision came to the conclusion that both of them directly apply to the case before it, it will then be at liberty to follow that decision which seems to it more correct, whether such decision be the later or the earlier one.
>
> To enabe the subordinate court to do so, the two apparently conflicting decisions must directly relate to and expressly decide the question that arises before the Court : otherwise a subordinate court should follow that ruling which specially deals with the point. It will not be open to it for example to follow the other decision which only impliedly or indirectly or by way of a mere observation gave expression to a contrary view. It follows that the learned District Judge in the present case was not justified in refusing to follow the decision referred to in 1956-2 Mad. LJ 288 : (AIR 1956 Mad. 680) for his preference a decision which impliedly decided the point as against the one that directly did so is neither consistent with established rules relating to precedents nor conducive to orderly administration of justice."

(1) A.I.R. 1962 Mad. 450.

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In Full Bench decision of Allahabad High Court in *U.P. State Road Transport Corporation* v. *State Transport Appellate Tribunal, U. P., Lucknow and ors.*,[1] it is said :

> "12. It is noteworthy that the Supreme Court's decision in Mysore State Transport Corporation is later in time. Even if there is some conflict in the two Supreme court decisions, we have to follow the law as declared in the later case of Mysore State Transport Corporation."

In Full Bench decision of Allahabad High Court in *Gopal Krishna* v. *5th Additional District Judge, Kanpur,*[2] the Court said in paragraphs 15 to 23 that -

> "15. Article 141 of the Constitution provides that :
>
> The law declared by the Supreme Court shall be binding on all Courts within the territory of India.
>
> 16. This Auricle gives a constitutional status to the theory of the precedent in respect of the law declared by the Supreme Court which is essential for a proper administration of justice. It is a basic principle of administration of justice that like cases should be decided alike. For this reason, a Judge tends to decide a case in the same way in which a similar case had been decided by another Judge. Every Court is bound to follow any case decided by a Court above it in the hierarchy and appellate Court are bound by the previous decisions."

17. In *Bengal Immunity Co.* v. *State of Bihar*,[3] the Supreme Court observed :-

> "Article 141 which lays down that the law declared by this Court shall be binding on all Courts within the territory of India quite obviously refers to Courts other than this Court."

18. Dealing with the utility of precedent, Lord Gardiner, L.C. observed in *Davis* v. *Johnson*[4] :-

(1) A.I.R. 1977 All. 1. (2) A.I.R. 1981 All. 300.
(3) A.I.R. 1955 S.C. 661. (4) (1978) 2 W.L.R. 152.

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"Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affaris, as well as a basis for orderly development of legal rules."

19. The Supreme Court has dealt with the binding nature of its pronouncements in a number of decisions. It is not necessary to refer to those cases. In a case where a High Court finds any conflict between views expressed by larger and smaller Benches of the Supreme Court, the Supreme Court said that proper course for such a High Court is to follow the opinion expressed by larger Benches of the Supreme Court in preference to those expressed by smaller Benches of the Court (see *State of U. P.* v. *Ram Chandra.*[1]

20. The difficulty, however, before us is slightly different and is not covered by the authority cited above. We are faced with a situation where there are conflicts between the two decisions of the Supreme Court given by Judges of equal strength. We are not concerned here with reasons which led to these conflicts.

21. Ruport Cross in his book on "Precedent in English Law" third edition page 133, has dealt with this matter in the following words :-

"If there is an increasing tendency to recognise the possibility that previous decisions of the same Court may conflict, it is a tendency which is to be applauded. The Court's attention is frequently not drawn to all the relevant authorities, some cases are not particularly well argued, and unreserved Judgments are often delivered. It is useless to deplore these occurrences because they will continue as long as barristers, Judges and litigants remain human....."

22. To meet a situation like the present reference may be made to a Full Bench decision of our Court in *U. P. S. R. T. C.* v. *State Road Transport Tribunal, U. P., Lucknow*,[2] where the Full Bench held-"

(1) A.I.R. 1976 S.C. 2547. (2) A.I.R. 1977 All. 1-1976 L. J. 683.

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"Even if there is some conflict in the two Supreme Court's decisions, we have to follow the law as declared in the latter case of Mysore State Transport Corporation."

23. To the same effect is the view taken by a Full Bench of Karnataka High Court in *Govindanaik G. Kalighatagi* v. *West Patent Press Co. Ltd.*[1] and by Calcutta High Court in *M/s. Sovachand Mulchand* v. *Collector of Central Excise and Land Custom*[2] the event of there being clear conflict, the decision of such latter Bench would be binding on us."

Further the Court said in paragraphs 24 to 27 that :-

"24. Counsel appearing for the petitioner, submitted that since in *Ram Swarup Rai's Case*,[3] the earlier decision given in *Ratan Lal Singhal's Case*[4] had not been cited, the decision being in ignorance of a case which was binding on the Court is per *incuriam. Counsel* urged that Ram Swarup Rai's decision does not have a binding authority. We are unable to agree with the submission of the learned counsel for the petitioner. In *Ballabhdas Mathuradas Lakhani* v. *Municipal Committee, Malkapur*,[5] the Supreme Court held that a Supreme Court's judgment is binding on High Court and it can not be ignored on ground that relevant provision was not brought to the notice of the Supreme Court. To us, it appears that it is only in cases of decision of concurrent Courts that the doctrine of per *incuriam* can be applied. Thus, the law declared by the Supreme Court can not be ignored on that basis. A failure to cite authority of the earlier decision of the Supreme Court before it is not sufficient to render its latter decision per *incuriam*. Overruling a similar argument made in *Ambika Prasad Misra* v. *State of U. P.*,[6] Krishna Iyer, J., agreed with the following observations made in Salmond "Jurisprudence", page 215 (11th edition) :-

"A decisions does not lose its authority merely because it was badly argued, inadequately considered and fallaciously reasoned.

(1) A.I.R. 1980 Kant. 92.
(2) A.I.R. 1968 Cal. 174.
(3) 1980 All. L. J. 651 (S.C.).
(4) A.I.R. 1980 S.C. 635.
(5) A.I.R. 1970 S.C. 1002.
(6) 1980 R.D. 227=A.I.R. 1980 S.C. 1762.

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25. We, therefore, can not ignore the subsequent decision of the Supreme Court on the basis of the same being per *incuriam*.

26. Counsel appearing for the landlord contended that if there was any objection to the rule of law laid down in *U. P. S. R. T. C.* v. *State Road Transport Tribunal, U. P., Lucknow*,[1] this Court should examine the merits of the contentions of the parties itself and follow the decision which may appear to be better in point of law. For the above proposition, reliance had been placed on a decision reported in *Miles* v. *Jarvis*[2] where Kay, J. observed -

> .....The question is which of these two decisions I should follow and it seems to me that I ought to follow that of the Master of the Rolls, as being the better in point of law.

27. To the same effect is the law laid down by Jassel M. R. in *Baker* v. *White*.[3] We do not with to express opinion on this aspect of the matter. We would only content ourselves by saying that since we are bound by the latter decision of the Supreme Court, we must follow the same. To us, it appears that the latter decision has impliedly overruled the earlier."

In *Vasant Tatoba Hargude and others* v. *Dikkaya Muttaya Pujari*,[4] it is held that in case of conflict between earlier and later decisions of Supreme Court, each consisting of equal number of Judges, later decision prevails. However, learned Judges do not record any reasons for taking this line. Full Bench of Karnataka High Court, Five Judge Bench in *Govindanaik G.Kalaghatigi* v. *West Patent Press Company Limited and another*,[5] said by majority, speaking through learned Chief Justice D.M. Chandrashekhar, in paragraph 5 that -

> "5. In the light of pronouncement of the Supreme Court in *Mattulal's Case* (*supra*), and *Subramaniam's Case* (*supra*) we hold that the Full Bench of three Judges in *Aramha's Case* (*supra*) did not lay down the law correctly and, we over-rule that decision. The answer to the question referred to this Bench, should in our opinion, be as follows :-

(1) A.I.R. 1977 All. 1 = 1976 All. L. J. 683. (2) (1983) 24 Ch. D. 633 at page 636.
(3) (1877) 5 Ch. D. 183 (?) (4) A.I.R. 1980 Bom. 341.
(5) A.I.R. 1980 Kar. 92.

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> "If two decisions of the Supreme Court on a question of law can not be reconciled and one of them is by a larger Bench while the other is by a smaller Bench, it is earlier or later in point of time, should be followed by High Courts and other courts. However, if both such Benches of the Supreme Court consist fo equal number of Judges, the later of the two decisions should be followed by High Courts and other court."

While minority view by Jagannatha Shetty, J. holds otherwise. In paragraphs 7 to 10, it is said that -

> "7. Article 141 of the Constitution provides that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. On the same principle the law declared by the Supreme Court is also binding on all States and its officers. The principle underlined in this article is salutary in the interest of the administration of justice. The settled practice governing precedents has been given the force of a rule of law. It promotes consistency which is one of the great objectives of law.
>
> 8. In this context, it may not be out of place to mention that there should not be a tendency to read the observations of the Supreme Court as statutory enactments. Hidayutlla, J. (as he then was) speaking for the Supreme Court in *Rajeshwar Prasad* v. *State of West Bengal*[1] observed :-
>
> > ".....No doubt, the law declared by this Court binds Courts in India but it should always be remembered that this Court does not enact....."

In *Sharma Rao* v. *Union Territory of Pandicherry*,[2] Shelat, J. speaking for the majority view observed :

> "It is trite to say that a decision is binding not because of its conclusion but in regard to its ratio and the principle laid down therein."

The question presented, therefore, has to be examined on these principles.

(1) A.I.R. 1965 S.C. 1887 pg.1891para 8.

(2) A.I. R. 1967 S.C. 1480 at p. 1486 para 8.

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"9. In *Aramha's Case,* a Full Bench of three Judges of this Court held that if several decisions of the Supreme Court are irreconcilable the latest pronouncement of the Supreme Court should be followed by the High Court. *But in Rudrayya's Case,* a Division Bench of this Court held that where there are conflicting judgments, one of a larger Bench and another of a smaller Bench of the Supreme Court, the High Court must prefer to follow the decision of a larger Bench. This conclusion was based on the observation in *Mittulal* v. *Radheylal*[1] wherein, Bhagwati, J., speaking for the Supreme Court observed :-"

> "But whatever be the reason it can not be gainsaid that it is not possible to reconcile the observations in these two decisions. That being so, we must prefer to follow the decision in *Sarvate T. B.'s Case* as against Kamla Soni's Case as the former is a decision of a larger Bench than the latter. Moreover, on principle, the view taken in *Sarvate T. B's. Case* commends itself to us and we think that is the right view."

In *Mumbai Kamgar Sabha* v. *Abdulbhai*,[2] Krishna Iyer, J. said :-

"Realism dictates that a judgment has to be read, subject to the facts directly presented for consideration and not affecting those matters which may lurk in the record. Whatever be the position of subordinate court's causal observations, generalisations and sub-*silientio* determinations must be judiciously read by courts of co-ordinate jurisdiction....."

In *Union of India* v. *K. S. Subramaniam*,[3] Beg, J. (as he then was) advised the High Courts to follow the practice that has been followed by the Supreme Court whenever there is a conflict between the views expressed by a larger Bench and a smaller Bench of the Supreme Court. The learned Judge said :

> "But we do not think that the High Court acted correctly in skirting the views expressed by larger Benches of this Court in the manner in which it had done this. The proper course for a High Court, in such

(1) A.I.R. 1974 S.C. 1596 at p. 1602. (2) A.I.R. 1976 S.C. 1455 at p. 1967 para 38.
(3) A.I.R. 1976 S.C. 2433 at p. 2437 para 12.

a case, is to try to find out and follow the opinions expressed by larger Benches of this Court in preference to those expressed by smaller benches of the Court. That is the practice followed by this Court itself, the practice has now crystalized into a rule of law declared by this Court."

10. It may now be said without contradiction that High Courts should follow the preference to that expressed by a larger Bench in preference to that expressed by a smaller Bench of the Supreme Court. Before adopting this rule, the High Court, if possible, should try the reconcile the diversity of decisions casting away any general observations. General observations do not decide an individual case. The Judges may not agree on general principles and yet reach the same conclusion on the issues before them. It has been said :

"As against persons not parties to the suit, the only part of a case which is conclusive (with the exception of cases relating to status) is the general rule of law for which it is authority. This rule or proposition, the ratio *decidendi*, may be described roughly as the rule of law applied by and acted on by the court, or the rule which the Court regarded as governing the case."

Judged from these principles, *Aramha's Case* can no longer be said to be valid and therefore, stands overruled.

Finally in paragraph 11, it is said that -

"11.But the difficulty may still arise for the High Court when confronted with two inconsistent decisions of the Supreme Court by Benches consisting of equal number of Judges. Both cannot be said to be binding on Courts. But the choice is still more difficult as there is no firm general rule on the principle of precedent. The learned Chief Justice has opined that in such a case the later of the two decisions should be followed by the High Court and other Courts. This practice, according to us, is neither a rule of propriety nor a rule to promote justice. It may be a convenient rule to promote consistency and avoid uncertainly. If it is meant to promote consistency in the administration of justice, we may as well ask the question, why not the High Court

follow the former of the two rulings when both them are of equal sancity. Why alone the later caries (err) the obligation and not the former ? The adherence to one practice would be as good or as bad as adherence to the other.

In our view, a conservative approach to any of these, may deny justice in a given case or series of cases and those clients may not be in a position to approach the Supreme Court for the redressal of their grievances. When confronted with two inconsistent co-ordinate authorities, Kay, J., in *Miles* v. *Jarvis*[1] said :

> .....The question is which of these two decisions I should follow, and it seems to me that I ought to follow that of the Master of the Rolls as being the better in point of law.

Jessel M. R. in a like circumstance said in *Baker* v. *White*[2] that he was left with liberty to say which was not sound law. It seems to us, therefore, the High Court would be well advised to consider which of two conflicting decisions it will follow in the interest of the administration of justice and it ought to follow that which is better in point of law than in point of time."

Full Bench of Punjab High Court in *M/s. Indo Swiss Time Limited, Dundahera* v. *Umrao and others*[3] expresses the view similar to the minority view in *Govindnaik's Case (Karnataka) (Supra)*. Pertinent it is to quote the following paragraphs from the judgment :

> "22. A perusal of the judgments in the *Municipal Corporation of the City of Ahmedabad*[4] and *Himalaya Tiles's Case*[5] cases would plainly indicate that there is a direct conflict on the point therein. Both the judgments have been rendered by a Bench consisting of two Hon'ble Judges and can not possibly be reconciled. This situation at once brings to the fore the somewhat intricate question which is now not of infrequent occurrence, namely....." when there is a direct conflict between two decisions of the Supreme Court rendered byco-equal Benches, which of them should be followed by the High Courts and the Courts below".

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(1) (1983) 24 Ch.D. 633 at p. 636. (2) (1877) 5 Ch. D. 183 at p. 190.
(3) A.I.R. 1981 (Punj. & Har.) 213. (4) (1970) 1 S.C.W.R. 183
(5) A.I.R. 1980 S.C. 1118.

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23. Now the contention that the latest judgment of a co-ordinate Bench is to be mechanically followed and must have pre-eminence irrespective of any other consideration does not commend itself to me. When judgments of the superior Court are of co-equal Benches and therefore of matching authority then their weight inevitably must be considered by the rationale (err) and the logic thereof and not by the mere fortuitous circumstances of the time and date on which they were rendered. It is manifest that when two directly conflicting judgments of the superior Court and of equal authority are extent than both of them cannot be binding on the Courts below. Inevitably a choice, though a difficult one, has to be made in such a situation. On principle it appears to me that the High Court must follow the judgment which appears to it to lay down the law more elaborately and accurately. The mere incidence of time whether the judgments of co-equal Benches of the superior Court are earlier or later is a consideration which appears to me as hardly relevant.

24. The view I am inclined to take has to support of the high authority of Jessel M. R. in *Hampton* v. *Holman*.[1] Therein also the learned Master of the Rolls was faced with the difficult task of choosing between the two decisions of equal authority which were directly in conflict with each other. He observed as follows :

"Now I take it that both the cases to which I have referred are not to reconciled with *Haves* v. *Hays*,[2] at all events, they differ from it so far as to leave me at liberty now to say that *Hayes* v. *Hayes* is not sound law; indeed it appears that Sir John Leach himself was dissatisfied with his decision."

"Again in *Miles* v. *Jarvis*,[3] Kay, J., was similarly faced with two judgments of equal weight which were in conflict. He observed as follows :-

*** The question is which of these two decisions I should follow, and it seems to me that I ought to follow that of the Master of the Rolls as being the better in point of law."

(1) (1877) 5 Ch.D. 183. (2) (1828) 38 E.R. 822.
(3) (1883) 24 Ch. D. 633.

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"Reference in this context may in particular be made to the celebrated case of *Young* v. *Bristol Aeroplane Co. Ltd.*[1]. Therein in a similar context of the Court of appeal being bond by its previous decisions it was held that it was only entitled but indeed duty bound to decide which of the two conflicting decisions of its own will it follow in case of a clear divergence of the opinion in the earlier precedents.

25. I am conscious of the fact that a narrowly divided Bench in *Govindanaik G. Kalaghatigi* v. *West Patent Press Co. Ltd.*[2] has taken the view by a majority of three to two that in such a situation the later of the two decisions should be followed. A perusal of the judgment, however, would show that in fact there were two questions before the Full Bench - firstly, that where there was conflict of two decisions of the Supreme Court of unequal Benches which one is to be followed and secondly where these decisions were of co-equal Benches then which decision is to be followed, it is patent that the majority view adverted to the first of the two questions alone and there does not appear to be any discussion whatsoever on the second issue, minority view on the other hand whilst agreeing with the majority view on the first question specifically adverted to and discussed the second aspect of the matter in detail and concluded as follows :-

> ".....It seems to us, therefore, the High Court would be well advised to consider which of the two conflicting decisions it will follow in the interest of the administration of justice and it sought to follow that which is better in point of law than in point of time."

With great respect I am inclined to wholly agree with the aforesaid view of the minority and it bears repetition that the majority view does not seem to have even adverted to the question in essence.

26. Even though it is perhaps unconventional to quote a living authority, it deserves recalling that Mr. Seervai in this latest edition of his authoritative work in the Constitutional Law of India has opined as follows :-

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(1) (1944) K.B. 718. (2) A.I.R. 1980 Kant. 92. (F.B.).

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"***But judgments of the Supreme Court, which can not stand together, present a serious problem to the High Courts and to subordinate Courts. It is submitted that in such circumstances the correct thing is to follow that judgment which appears to the Court to state the law accurately or more accurately than the other conflicting judgment."

As a matter of recent legal history it may be noticed that it was earlier even advocated that the latest judgment of the final court must be followed irrespective of the fact whether it was rendered by a larger or a smaller Bench (See : *A. J. Aramha* v. *Mysore Road Transport Corporation.*[1] However this theory of pre-eminence by time alone has not been conclusively exploded. In *Mattulal* v. *Radhelal,*[2] the final court itself was faced with two directly contradictory judgments and Bhagwati, J., speaking for the Bench in following the earlier judgment in preference to the later one observed as follows (at p. 1602):-

"***Now there can be no doubt that these observations made in *Smt. Kamla Soni's Case,*[3] are plainly in contradiction of what was said by this court earlier in *Sarvate T.B's. Case.*[4] It is obvious that the decision in Sarvate T. B's. case was not brought to the notice of this Court while deciding Smt. Kamla Soni's Case or else this Court would not have landed itself in such patent contradiction. But whatever be the reason, it can not be gain said that it is not possible to reconcile the observations in these two decisions. That being so, we must prefer to follow the decision in Sarvate T. B's. case as against the decision in Smt. Kamla Soni's case, as the former is a decision of a larger Bench than the latter. Moreover, on principle the view taken in Sarvate T. B's. case commends itself to us and we think that is the right view."

It would be evidenct from the underlined observations above that even in such a situation their Lordships conceded the principle and the correctness of the view to be a relevant factor again in *Union of India* v. *K. S. Subramanian,*[5] a similar issue arose and Beg, J., speaking for the Bench held as follows :-

(1) (1974) 1 Kant. L.J. 344. (2) A.I.R. 1974 S.C. 1596.
(3) A.I.R. 1969 N.S.C. 186. (4) 1966 M.P.L.J. 26.
(5) A.I.R. 1976 S.C. 2433.

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"*** But, we do not think that the High court acted correctly in skirting the views expressed by larger Benches of this Court in the manner in which it had done this. The proper course for a High Court, in such a case, is to try to find out and follow the opinions expressed by larger Benches of this Court in preference to those expressed by smaller Benches of the Court. That is the practice followed by this court itself. The practice has now crystalised into a rule of law declared by this Court. If, however, the High Court was of opinion that the views expressed by larger Benches of this Court were not applicable to the facts of the instant case, it should have said so giving reasons supporting its point of view."

It seems manifest from the above that the theory of pre-eminence of a judgment by virtue of its time and being the latest alone has now been conclusively laid to rest.

28. It appears to me that in the present case the issue would be interestingly highlighted if one were to interchange the dates of the two judgments in *Himalaya Tiles Case*[1] and *Ahmedabad Municipal Corporation Case*.[2] If the judgment in Ahmedabad Municipal Corporation case had been rendered later on the time theory it would have to be followed even though no elaborate reasoning or principle or any authority had been cited on an intricase question of law whilst disposing of a preliminary point. With great respect, doing so in my view can not be possibly justified.

29. I am keenly aware of the great difficulty of making a choice between the decisions of a superior Court when they are in direct conflict with each other. However, when such divergence arises and the litigants' fortune depends there on the issue can not possibly be evaded. Obviously in such a situation it is not the province of the High Courts or the subordinate Courts to comment on the judgments of a superior Court which are patently entitled to respect. Its plain duty in the interest of justice is to respectfully follow that which appears to it to state the law accurately or in any case more accurately than the other conflicting judgment.

(1) A.I.R. 1980 S.C. 1118. (2) (1970) 1 S.C.W.R. 183.

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30. Applying the aforesaid principle, I would with great respect prefer to follow *Himalaya Tiles Case* (*supra*). Finally in paragraph 31, learned Chief Justice said :-

> "31. To conclude, the answer to the question posed at the very outset is, therefore, rendered in the affirmative, viz., that a company, for whose benefit the land is acquired, can be impleaded as a aparty in the court of the District Judge, in a reference preferred that as observed in the earlier paras 15 and 16 of this judgment, such an impleading would be within the confines spelled out in Section 50 sub-section (2) of the Act aforesaid."

P.C. Jain, J. concurring with views of Chief Justice S.S. Sandhwalia on this point said in paragraphs 38 and 39 that :-

> "38. On a careful consideration of the respective contentions of the learned counsel for the parties, in the light of various decisions cited by them, it transpires that the view taken in the judgment of the Supreme Court in *Himalaya Tiles and Marbles (P) Ltd.*,[1] on which reliance has been placed by Mr. Sarin, is in conflict with the view taken in the earlier judgment in Municipal Corporation of the City of *Ahemdabad's Case*.[2] As observed by my Lord the Chief Justice a perusal of the two judgments plainly indicates that there is a direct conflict on the point which needs our decision. Both the judgments have been rendered by a Bench consisting of two Hon'ble Judges and cannot possibly be reconciled. In this situation, a somewhat interesting, though tricky question arises for determination, i.e. when there is a direct conflict between the two decisions of the Supreme Court rendered by co-equal Benches, which of them should be followed by the High Courts and the Courts below.
>
> 39. On this question, my Lord the Chief Justice in this elaborate judgment has held that the Courts may follow the judgment which appears to them to state the law accurately and that mere incidence of time whether the judgments of the co-equal Benches

(1) A.I.R. 1980 S.C. 1118. (2) 1970 1 S.C.W. R. 183.

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of the superior Court are earlier or later is a consideration which appears to be hardly relevant. I have also given by thoughtful consideration to the entire matter and find myself in respectful agreement with the aforesaid observations of my Lord the Chief Justice."

Andhra Pradesh High Court in *R. Ramanujan* v. *D. Venkat Rao and anothers*[1] said in paragraph 31 that :-

"31. We find it difficult to accept this contention in view of the proposition of law laid down by their Lordships in this case. In that case, as stated above the main controversy was the question of heritability of the tenancy after the death of the deceased tenant. In the earlier decision in *Anand Niwas* v. *Anandji Kalyanji Pedhi*[2] and *J. C. Chatterji* v. *Shri Krishna Tandon*[3] their Lordships unequivocally held that the tenancy under rent Acts is not at all heritable and with the determination of the tenancy the estate disappears and the statute can preserve only his status of irremovability. But in *Damadilal* v. *Parashram*,[4] their Lordships declined to follow the view taken in *Anand Niwas* v. *Anandji Kalyanji Pedhi* (*supra*) and *J.C. Chatterji* v. *Shri Krishna Tandon* (*supra*) with regard to the heritability. Their Lordships, on the other hand, positively laid down that just as the contractual tenant, the statutory tenant also has an estate or property in the subject matter of the tenancy and the heritability is an incident of the tenancy."

Thus there is a conflict of view taken in *Anand Niwas* v. *Anandji Kalyanji Pedhi* (*supra*) and *J.C. Chatterji v. Shri Krishna Tandon* (*supra*) and the case in *Damadi Lal* v. *Parashram* (*supra*). It is now well settled that Article 141 gives a constitutional status to the theory of the precedents in respect of the law declared by the Supreme Court, which is essential for proper administration of justice. Where there is conflict two decisions of the Supreme Court given by Judges of equal strength, the question of the later would be binding. If that be so, the

(1) A.I.R. 1982 A.P.227. (2) A.I.R. 1965 S.C. 414.
(3) A.I.R. 1972 S.C. 2526. (4) A.I.R. 1976 S.C. 2229.

decision in *Damadilal's Case* (*supra*) will prevail over the ruling in *J. C. Chatterji's Case* (*supra*) which was rendered by a Bench of two judges, the ruling in Damadilal's Case prevails."

Special Bench of Calcutta High Court in *Bholanath Karmakar and others* v. *Madanmohan Karmakar and others*[1] has discussed this question and the view taken by it falls in line with the minority view of *Govindanaik's Case* (*supra*) and Full Bench of Punjab & Haryana High Court in *M/s. Indo Swiss Time Limited* (*supra*). Since detailed reasonings have been offered, it would be necessary to quote paragraphs 10 to 18 as under :

"10. When faced with contrary decisions of the Supreme Court, the fist course to be adopted by the High Court is to ascertain which one of them is decided by a larger Bench and to govern itself by such larger Bench decision, if any. This has been laid down by the Supreme Court itself in a series of decisions and must be taken to be the settled law and reference may be made, among others, to the decision of the Supreme Court in *Union of India* v. *K. S. Subramaniam*[2] even though, it may be noted, a two-Judge Bench of the Supreme Court in *Javed Ahmad* v. *State of Maharashtra*[3] has thought that" it may be inappropriate for a Division Bench of three Judges to purport to over-rule the decision of a Division Bench of two Judges". But when such contrary decisions of the Supreme Court emanate from Benches of equal strength, the course to be adopted by the High Court is, firstly, to try to reconcile and to explain those contrary decisions by assuming, as far as possible, that they applied to different sets of circumstances. This in fact is a course which was recommended by our ancient jurists "Srutirdwaibhe Smritirdwaidhe Sthalaveda Prakalpate" - in case there be two contrary precepts of the Sruties or the Smritis, different cases are to be assumed for their application. As Jurist Jaimini said, contradictions or inconsistencies are not to be readily assumed as they very often be not real but only apparent resulting from the

(1) A.I.R. 1988 Cal. 1. (2) A.I.R. 1976 S.C. 2433 at p. 2437.
(3) A.I.R. 1985 S.C. 231 at p. 236.

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application of the very same principle to different sets of facts - "Prayoge Hi Virodha Syat". But when such contrary decisions of co-ordinate Benches can not be reconciled or explained in the manner as aforesaid, the question would arise as to which one of the High Court is obliged to follows."

11. One view is that in such a case the High Court has no option in the matter and it is not for the High Court to decide which one it would follow but it must follow the later one. According to this view, as in the case of two contrary orders issued by the same authority, the later would supersede the former and would bind the subordinate and as in the case of two contrary legislations by the same Legislature, the later would be the governing one, so also in the case of two contrary decisions of the Supreme Court rendered by the Benches of equal strength the later would rule and shall be deemed to have over ruled the former. P. B. Mukharji, J. (as his Lordships then was) in his separate, though concurring, judgment in the Special Bench decision of this Court in *Pramatha Nath* v. *Chief Justice*[1] similar view, S.P. Mitra, J. (as his Lordships then he was) also took such a view in the Division Bench decision of this Court in *Sovachand Mulchand* v. *Collector Central Excise.*[2] To the same effect is the decision of a Division Bench of the Mysore High Court in *New Krishna Bhavan* v. *Commercial Tax Officer*[3] and the decision of the Division Bench of the Bombay High Court in *Vasant* v. *Dikkaya.*[4] A full Bench of the Allahabad High Court in *U. P. State Road Transport Corporation* v. *Trade Transport Tribunal*[5] has also ruled to that effect. The view appears to be that in case of conflicting decisions by Benches of matching authority, the law is the latest pronouncement made by the latest Bench and the old law shall change yielding place to new.

12. The other view is that in such a case the High Court is not necessarily bound to follow the one which is later in point of time, but may follow the one which, in its view, is better in point

(1) A.I.R. 1961 Cal. 545 at p. 551 para 26.
(2) A.I.R. 1968 Cal. 174 at p. 186 para 56.
(3) A.I.R. 1961 Mys. 3 at p. 7.
(4) A.I.R. 1980 Bom. 341 at p. 345.
(5) A.I.R. 1977 All.1 at p. 5.

of law. Sandhawalia, C. J.,in the Full Bench decision of the Punjab & Haryana High Court in *Indo-Swiss Time Limited* v. *Umarao*[1] took this view with the concurrence of the other two learned Judges, though as to the actual decision, the other learned Judges differed from the learned Chief Justice. In the Kanataka Full Bench decision in *Govinda Naik* v. *West Patent Press Co.*,[2] the minority consisting of two of the learned Judges speaking through Jagannatha Shetty, J., also took the same view (supra at p. 95) and infact the same has been referred to with approval by Sandhawalia, C. J., in the Full Bench decision in *Indo-Swiss Time* (*supra*).

13. This later view appears to us to be in perfect consonance with what our ancient Jurist Naraba declared Dharmashastra Virodhe To Yuktiyukta Vidhe Smrita - that is, when the Dharmashastraas or Law Codes of equal authority conflict with one another, the one appearing to be reasonable, or more reasonable is to be preferred and followed. A modern jurist, Seervai, has also advocated a similar view in his Constitutional Law of India, which has also been quoted with approval by Sandhawalia, C. J. in *Indo-Swiss Time* (*supra*) at p. 220 and the learned Jurist has observed that 'Judgments of the Supreme Court, which cannot stand together, present a serious problem to the High Courts and Subordinate Courts' and that 'in such circumstances, the correct thing is to follow that judgment which appears to the Court to State the law accurately or more accurately than the other conflicting judgment.'

14. I had also occasion to consider this question in *Gopal Chandra Kalay* v. *State*[3] and the *Union of India* v. *Ashok*[4] where, for the reasons stated therein. I accepted this view and agreed respectfully with the views of Sandhawalia, C.J., in the Punjab Full Bench decision in *Indo-Swiss Time* (*supra*) and the minority view of Jagannath Shetty, J. in the Karnataka Full Bench decision in *Govinda Naika* (*supra*). I held that where there are contrary

(1) A.I.R. 1981 Punja &Har. 213 at pp. 219-220.
(2) A.I.R. 1980 Kant 92.
(3) 1981 Lab. I. C. 422 at pp. 423, 425 Sikkim.
(4) A.I.R. 1983 Sikkim 19 at pp. 23, 25, 26.

decisions of the Supreme Court rendered by Benches of equal strength, the High Court, in theory, being bound by each one, is, in effect, bound by none and is not necessarily obliged to follow the later in point of time, but may follow the one which, according to it, is better in point of law.

15. It appears that the Full Bench decision of the Madras High Court in *R. Rama Subbrayalu* v. *Rangammal*,[1] would also support this later view where it has been observed (at p. 452) that "where the conflict is between two decisions pronounced by a Bench consisting of the same number of Judges, and the subordinate Court after a careful examination of the decisions came to the conclusion that both of them directly apply to the case before it, it will then be at liberty to follow that decision which seems to it more correct, whether such decision be the later or the earlier one." According to the Nagpur High Court also, as would appear from its Full Bench decision in *D. D. Bilimoria* v. *Central Bank of India*[2] in such case of conflicting authorities, "the result is not that the later authority is substituted for the earlier, but that the two stand side by side conflicting with each other", thereby indicating that the subordinate Courts would have to prefer one to the other hand, therefore, would be at liberty to follow the one or the other.

16. Needless to say that it would be highly embarrassing for the High Court to declare one out of two or more decisions of the Supreme Court to be more reasonable implying thereby that the other or others is or are less reasonable. But it such a task calls upon the High Court because of irreconcilable contrary decisions of the Supreme Court emanating from Benches of co-ordinate jurisdiction, the task, however, uncomfortable, has got to be performed.

17. We are inclined to think that a Five Judge Bench of the Supreme Court in *Atma Ram* v. *State of Punjab*,[3] has also indicated (at p. 527) that such a task may fall on and may have to be performed

(1) A.I.R. 1962 Mad. 450. (2) A.I.R. 1943 Nag. 340 at p. 343.
(3) A.I.R. 1959 S.C. 519.

by the High Court. After pointing out that "when a Full Bench of three Judges was inclined to take a view contrary to another Full Bench of equal strength", "perhaps the better course would have been to constitute a larger Bench", it has been observed that for "otherwise the subordinate Courts are placed under the embarrassment of preferring one view to another, both equally binding on them." According to the Supreme Court, therefore, when confronted with two contrary decisions of equal authority, the subordinate Court is not obliged to follow the later, but would have to perform the embarrassing task, "of preferring one view to another".

18. It is true that if there are two contrary legislations enacted by the same Legislature, the later would impliedly repeal the earlier and would be the binding law. But we do not think that this legislative analogy would at all be apposite and can help us in solving the question before us because the very same Legislature can always repeal or alter its own law, even impliedly, while over-ruling being an act of superior jurisdiction, one Bench can not over-rule expressly or by implication, a decision of a co-equal Bench. It is also true that the view that when there are conflicting decisions rendered by co-ordinate authorities, the later decision would govern us, would be conducive to certainty in the field of law. But the same certainty would also be achieved if it is also ruled that the later Bench being not competent to over-rule the earlier decision of a co-ordinate Bench, the earlier decision would still continue to be the good law. A similar view in favour of the earlier decision was in fact taken by a Division Bench of this Court in *Begala Sundari* v. *Prosanna Nath*,[1] where it was held that even though there might be later decisions not easy to reconcile since the earlier one was not or could not be over-ruled, it would be binding, "that being a decision of this Court and the earliest on the point". We are, however, inclined to think that no blanket proposition can be laid down either in

(1) 21 Cal. W. N. 375 at page 377 = AIR 1917 Cal. 668 at p. 669.

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favour of the earlier or the later decision and, as indicated hereinbefore, and as has also been indicated by the Supreme Court in *Atmaram* (*supra*), the subordinate Court would have to prefer one to the other and not necessarily obliged, as a matter of course, to follow either the former or the later in point of time, but must follow that one, which according to it, is better in point of law. As old may not always be the gold, the news is also not necessarily golden and ringing out the old and bringing in the new cannot always be an invariable straight-jacket formula in determining the binding nature of precedents of co-ordinate jurisdiction."

(See also *Ram Chandra Verma* v. *Manmal Singhi and another*,[1] *Bilimoria, Electric Contractor* v. *Central Bench of India Ltd., Bombay*.[2]

Full Bench of Gujrat High Court in *Gujrat Housing Board, Ahmedabad* v. *Nagajibhai Laxmanbhai and others*[3] examined this question and said in paragraph 11 that -

11. .....Now we have to consider as to whether the decision in *Municipal Corporation of the City of Ahmedabad* v. *Chandulal Shamaldas Patel*[4] prevails or that the decision in *Himayala Tiles and Marble (P) Ltd.* v. *Francies Victor Coutinho*[5] prevails. Mr. Trivedi, the learned counsel appearing for the 1st respondent, submitted that the decision in Municipal Corporation of the City of *Ahmedabad* v. *Chandulal Shamaldas Patel* (*supra*) is more accurate and as such the said decision has to prevail. In support of his contention, he prevail. In support of his contention, he cited the decision reported in *Indo Swiss Time Limited, Dundahera* v. *Umrao*.[6] In that Full Bench decision the majority view is spoken to as follows :-

"23.Now the contention that the latest judgment of a co-ordinate Bench is to be mechanically followed and must have pre-eminence irrespective of any other consideration does not

(1) A.I.R. 1963 Sikkim 1 and D.D.
(2) A.I.R. 1943 Nag. 340.
(3) A.I.R. 1986 Guj. 81.
(4) 1971 3 S.C.C. 821.
(5) A.I.R. 1980 S.C. 1118.
(6) A.I.R. 1981 Pun. and Har. 213.

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commend itself to me. When judgments of the superior Court are of co-equal Benches and therefore of matching authority then their weight inevitably must be considered by the rationale and the logic thereof and not by the mere fortuitous circumstances of the time and date on which they were rendered. It is manifest that when two directly conflicting judgments of the superior Court and of equal authority are extent then both of them can not be binding on the courts below. Inevitably a choice though a difficult one, has to be made in such a situation. On principle it appears to it to lay down the law more elaborately and accurately. The mere incidence of time whether the judgments of co-equal Benches of the superior Court are earlier or later is a consideration which appears to me as hardly relevant."

In contra-distinction to the above-said decision, we have catena of decisions which say that in respect of the decision of the Superior Court of co-equal Benches, the later one prevails over the former. In *Vasant Tatoba Hargude* v. *Dikkaya Muttaya Pujari*[1] a Bench of the Bombay High Court has held that in case of conflict between earlier and later decisions of Supreme Court where each Bench consists of equal number of Judges, the later decision should prevail. In *Govindanaik G. Kalghatigi* v. *West Patent Press co. Ltd.*[2] the Full Bench of the Karnataka High Court has definitely held that when there are two conflicting decisions of the Supreme Court, one given by the larger Bench should be followed and that if both Benches of the Supreme Court consist of equal number of Judges, the later of the two decision should be followed by High Courts and other courts. We are in complete agreement with the principle laid down by the Bombay and Karnataka High Courts in *Vasant Tatoba Hargude* v. *Dikkaya Muttaya Pujari*[3] and *Govindanaik G. Kalaghatigi* v. *West Patent Press Company Ltd.*[4] respectively. In this view we hold that the decision reported in *Himayalay Tiles and Marble (P) Ltd.* v. *Francis Victor Coutinho*[5] holds the field.....

(1) A.I.R. 1980 Bom. 341. (2) A.I.R. 1980 Kant. 92.
(3) A.I.R. 1980 Bom. 341. (4) A.I.R. 1980 Kat. 92 (F.B.).
(5) A.I.R. 1980 S.C. 1118.

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Finally, in paragraph 12, the Court said -

"12.....We also declare that when there are two conflicting decisions of the Supreme Court consisting of equal number of Judges, the later of the two decisions should be followed by the High Courts and other Courts....."

Single Bench decision of Delhi High Court in *M/s. Pandit Munshi Ram and Association (Pvt.) Limited* v. *Delhi Development Authority and another*[1] is brought to our notice. It holds that when two decisions of Supreme Court on same question of law by equal number of Judges do not reconcile, later of the two should be followed and in case of decision by larger Bench and that of smaller Bench, decision of larger Bench whether it is earlier or later in point of time should be followed. But why decision of later Bench of two Judges as against decision of earlier bench of two Judges should be followed, reasons have not been recorded.

Full Bench decision of this Court in *State of M.P.* v. *Balveer Singh son of Babulal*[2] observes in paragraphs 45 to 50 that -

"45.It may be noticed that the doctrine of judicial precedent is to declare the law and not the facts and not the facts and the declaration itself has to be taken to be binding upon all persons whether parties to the proceedings or not. The decision of the Supreme Court is binding not only under Article 141 of the Constitution of India but also under the doctrine of the binding precedent.

46. Where however various judgments of the Supreme Court cannot be reconciled in view of the fact that even if some inconsistency may be there this Court is, on the facts of the instant case, bound to follow the decision of the Supreme Court having been rendered by a Bench of larger number of Hon'ble Judges in preference to the decision in a case having been rendered by a Bench of lesser number of Hon'ble Judges. This is so in view of the decision of the Hon'ble Supreme Court in the case of *State of U. P.* v. *Ram Chandra*[3] wherein it was observed as follows :-

(1) A.I.R. 2001 Delhi 82. (2) 2001 (2) M.P.L.J. 644.
(1) A.I.R. 1976 S.C. 2547.

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"It is also to be borne in mind that even in cases where a High Court finds any conflict between the view expressed by larger and small Benches of this court, it cannot disregard to skirt the views expressed by the larger benches. The proper course for a High Court in such a case, as observed by this Court in *Union of India* v. *K. S. Subramaniam*[1] to which one of us was a party, is to try to find out and follow the opinion expressed by larger Benches of this Court in preference to those expressed by smaller benches of the Court which practice, hardened as it has into a rule of law is followed by this Court itself -"

47. In *Mattulal* v. *Radhe Lal,*[2], it was held by the Supreme Court that where are contradictory decisions of the Supreme Court the decision of the larger Bench has to be followed even if that decision was rendered earlier in point of time than the decision of the smaller Bench.

48. Further, where there is a direct conflict between the decision of Hon'ble Supreme Court in its co-equal Benches, the High Court has to follow the judgment, which appears to it to state the law more elaborately and more accurately and in conformity with the scheme of the Act. The date of delivery of the judgment cannot be a guiding factor. This was so indicated by a Division Bench of this Court in its decision in the case of *Municipal Corporation, Indore and others* v. *Smt. Ratnaprabha Dhanda, Indore and others*[3] reported in -

49. The observations to the aforesaid effect were also made by the Patna High Court in its decision in the case of *Amar Singh Yadav and another* v. *Shanti Devi and others*[4] reported in rendered by a Full Bench -

50. It may also be noticed that in its decision in the case of *Mattulal* v. *Radhe Lal*[5] reported in well as in its decision in the case of the *State of U. P.* v. *Ram Chandra Trivedi*[6] reported in, the Apex Court had clearly observed that its former decision of the larger Bench should be followed -

(1) C.A.No. 212 of 1975 D-30.7.1976=AIR 1976 S.C. 2433.
(2) A.I.R 1974 S.C. 1596.
(3) 1989 M.P.L.J. 20 at page 27.
(4) A.I.R. 1987 Pat. 191.
(5) A.I.R. 1974 S.C. 1596.
(6) A.I.R. 1976 S.C. 2547.

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Some other decisions of this Court may be mentioned. In *Sukhlal Kachhi* v. *State*,[1] it is held that unless a single Judge decides to refer the matter to a Larger Bench, he is bound to follow the decision given by a Single Judge. These are matters of judicial etiquette which are always to be expected from Judges of coordinate jurisdiction and similar Benches. In *State* v. *Narayan Prasad*,[2] relying on *Mahadeolal* v. *Administrator General of W. B.*,[3] it has been held that when a Single Bench differs from a decision of another Single Judge in a previous case, he should refer the case to a Larger Bench instead of deciding the case in accordance with his own view, while Full Bench decision in *Samaru Banjare* v. *State of M. P. and others*[4] holds that in case of two conflicting decisions, later view has to be accepted, thereby over-ruling the view in Full Bench case of *Rana Natwar Singh* v. *State of M. P.*[5] to the extent it holds that recording of reasons is necessary in case required by statute, otherwise not, approving view in *Suresh Seth* v. *State of M. P.*[6] and the Full Bench held that "rule of reason" is integral part of principles of natural justice which a statutory authority is required to observe even in absence of provision in the statute in this behalf.

In *Bhagwandas Tiwari* v. *Gayaprasad and others*,[7] it has been held that when in a case, view is expressed contrary to and in ignorance of the previous ruling, such view can not be accepted. In *Narbada Prasad* v. *Awdesh Narian*,[8] it has been held that whenever a relevant prior decision is not cited before the Court or mentioned in the judgment, it must be assumed that the Court acts in ignorance or forgetfulness of it. If the new decision is in conflict with the old, it is given per incuriam and not binding on a latter Court.

In *Balkishan* v. *State of Madhya Pradesh*,[9] it is held that in case of conflict between Benches of equal strength the case which deals with the law more elaborately and accurately should be followed and it is immaterial whether it is earlier or later but in *Union of India and others* v. *Raju Construction Company, Bhopal*.[10] Court holds that subsequent decisions of

(1) 1960 J.L.J. 1078 C.N. 265.
(2) 1963 J.L.J. 390 C.N. 81.
(3) A.I.R. 1960 S.C. 936.
(4) 1985 J.L.J. 460.
(5) 1980 J.L.J. 69.
(6) 1969 J.L.J. 499.
(7) 1973 J.L.J. 469.
(8) 1973 J.L.J. 641.
(9) 1994 (i) M.P.J. R 206.
(10) 2000 (3) M.P.L.J. 27.

Apex Court would be per incuriam since its earlier decision in *M/s. Harbans Singh Tuli and sons Builders (P) Ltd.* v. *Union of India*[1] was not brought to its notice and also *sub-silientio*, therefore, later decision is not binding.

Having discussed the views expressed by some of the High Courts, we advert to the decisions of Apex Court on this question. In *Atmaram* v. *State of Punjab*,[2] Apex Court said in paragraph 12 that -

> "Where a Full Bench of three Judges is inclined to take a view contrary to that of another Full Bench of equal strength, the better course would be to constitute a larger Bench. Such a course becomes necessary in view of the fact that otherwise the subordinate Courts are placed under the embarrassment of preferring one view to another, both equally binding upon them."

This decision does not hold that in a case of conflict amongst two decisions given by equal number of Judges the later decision should be followed. In *Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj and others* v. *The State of Gujrat and others*,[3] Apex Court said in paragraph 28 that -

> "28.It is submitted by Mr. Tarkunde that the above observations of this Court are inconsistent with the ratio of the decision in *Rustam Cavasjee Cooper's Case* (*supra*), popularly known as the Bank of Nationalisation case, which was decided by a larger Bench. It is difficult to accept the submission that the views expressed in Khajamian Wakf Estates" case (*supra*) are contrary to Rustam Cavasjee Cooper's Case. Apart from that this Bench cannot pass upon the correctness or otherwise of the view expressed in "Khajamian Wakf Estates" case. Besides, we do not even think that the submission is well-founded even to merit reconsideration of the "Khajamian Wakf Estates" case."

In *State of U. P.* v. *Ram Chandra Trivedi*,[4] it is held that even in cases where High Court finds any conflict between the various views expressed by a Larger Bench and Smaller Benches of this Court, it can not

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(1) A.I.R. 1992 S.C. 1124.
(2) A.I.R 1959 S.C. 519.
(3) (1975) 1 S.C.C. 11.
(4) A.I.R 1976 S.C. 2547.

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disregard or skirt the views expressed by the Larger Bench. This practice has hardened into a rule of law being followed by the Supreme Court itself; and in *Anuragh Narian Singh and another* v. *State of U. P. and others*,[1] it has been held that where one Division Bench disagrees with another Division Bench, proper course would be to refer the matter to a Larger Bench. In *Superintendent and Remembrancer of Legal Affairs, West Bengal* v. *Corporation of Calcutta*,[2] Apex Court said in paragraph 5 that -

> "5. The third contention need not detain us, for it has been rejected by this Court in *Bengal Immunity Company Limited* v. *State of Bihar*.[3] there is a Bench of seven Judges unanimously held that there was nothing in the Constitution which prevented the Supreme Court from departing from a pervious decision of its own if it was satisfied of its error and of its baneful effect on the general interests of the public. If the aforesaid rule of Constitution accepted by this Court is inconsistent with the legal philosophy of our Constitution, it is our duty to correct ourselves and lay down the right rule. In constitutional matters which affect the evolution of our policy, we must more readily do so than in other branches of law, as perpetuation of a mistake will be harmful to public interests. While continuity and consistency are conducive to the smooth evolution of the rule of law, hesitancy to set right deviations will regard its growth. In this case, as we are satisfied that the said rule of Constitution is inconsistent with our republican polity (err) and, if accepted, bristles with anomalies, we have no hesitation to reconsider our earlier decision."

In *Union of India and another* v. *Raghubir Singh (dead) by L. Rs. etc.*,[4] Supreme Court has said in paragraphs 28 and 29 that -

> "28. What then should be the position in regard to the effect of the law pronounced by a Division Bench in relation to a case raising the same point subsequently before a Division Bench of a smaller number of Judges ? There is no constitutional or statutory prescription in the matter, and the point is governed entirely by

(1) 1996 (6) S.C.C. 303.
(2) A.I.R. 1967 S.C. 997.
(3) 1955-2 S.C.R. 603=AIR 1955 S.C. 661.
(4) A.I.R. 1989 S.C. 1933.

the practice in India of the Courts sanctified by repeated affirmation over a century of time. It cannot be doubted that in order to promote consistency and certainty in the law laid down by a superior Court, the ideal condition would be that the entire court should sit in all cases to decide questions of law, and for that reason the Supreme Court of the United States does so. But having regard to the volume of work demanding the attention of the Court, it has been found necessary in India as a general rule of practice and convenience that the Court should sit in Divisions, each Division being constituted of Judges whose number may be determined by the exigencies of judicial need, by the nature of the case including any statutory mandate relative thereto, and by such other considerations which the Chief Justice, in whom such authority devolves by convention, may find most appropriate. It is in order to guard against the possibility of inconsistent decisions on points of law by different Division Benches that the rule has been evolved, in order to promote consistency and certainty in the development of the law and its contemporary status, that the statement of the law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges. This principle has been followed in India by several generations of Judges. We may refer to a few of the recent cases on the point. In *John Martin* v. *State of West Bengal*,[1] : a Division Bench of three Judges found it right to follow the law declared in *Haradhan Saha* v. *State of West Bengal*,[2] decided by a Division Bench of five Judges in preference to *Bhutnath Mate* v. *State of West Bengal*[3] decided by a Division Bench of two Judges. Again in *Smt. Indira Nehru Gandhi* v. *Rajnarain*[4] Beg, J., held that the Constitution Bench of five Judges was bound by the Constitution Bench of thirteen Judges in *His Holiness Kesavananda Bharati Shri Padagalavaru* v. *State of Kerala*.[5] In *Ganapati Sitaram Balvalkar* v. *Waman Shripad Mage, Since (dead) Through L.Rs.*,[6] this Court expressly stated that the view

(1) (1975) 3 S.C.R. 211.
(2) (1975) 1 S.C.R. 778=AIR 1974 S.C. 2154.
(3) A.I.R. 1974 S.C. 806.
(4) (1976) 2 S.C.R. 347=AIR 1975 SC 2299.
(5) 1973 Supp. S.C.R. 1=AIR 1973 S.C. 1461.
(6) (1981) 4 SCC 143=AIR1981 S.C. 1956.

taken on a point of law by a Division Bench of four Judges of this Court was binding on a Division Bench of three Judges of the Court. And in *Mattulal* v. *Radhe Lal*[1] this court specially observed that where the view expressed by two different Division Benches of this Court could not be reconciled, the pronouncement of a Division Bench of a larger number of Judges had to be preferred over the decision of a Division Bench of a smaller number of Judges. This Court also laid down in *Acharya Maharajshri Narandraprasadji Anandprasadji Maharaj* v. *State of Gujrat*,[2] that even where the strength of two differing Division Benches consisted of the same number of Judges, it was not open to one Division Bench to decide the correctness or otherwise of the views of the other. The principle was re-affirmed in *Union of India* v. *Godfrey Philips India Ltd.*[3] which noted that a Division Bench of two Judges of this Court in *Jit Ram* v. *State of Haryana*[4] had differed from the view taken by an earlier Division Bench of two Judges in *Motilal Padampat Sugar Mills* v. *State of U.P.*,[5] on the point whether the doctrine of promissory estoppel could be defeated by invoking the defence of executive necessity and holding that to do so was wholly unacceptable reference was made to the well accepted and desirable practice of the later Bench referring the case to a larger Bench when the learned Judges found that the situation called for such reference.

29. We are of the opinion that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or a similar number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution bench of the Court. We would, however, like to think that for the purpose of imparting certainty and endowing due authority decisions of this Court in the future should be rendered by Division Benches of atleast three Judges unless, for compelling reasons that is not conveniently possible."

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(1) (1975) 1S.C.R. 127=AIR 1974 S.C. 1596. (2) (1975) 2 S.C.R. 317=AIR 1974 SC 2098.
(3) (1985) 4 S.C.C. 369=AIR 1986 SC 806. (4) (1980) 3 SCR 689=AIR 1980 SC 1285.
(5) (1979) 2 S.C.R. 641=AIR 1979 SC 621.

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In *Sundarraj Kanyalal Bhathija* v. *Collector, Thane, Maharashtra and others*,[1] it has been said in paragraph 17 to 22 that -

> "17.It would be difficult for us to appreciate the judgment of the High Court. One must remember that pursuit of the law, however, glamorous it is, has its own limitation on the Bench. In a multi-Judge Court, the Judges are bound by the precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of coordinate jurisdiction, the matter shall be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure.

18. Deprecating this kind of tendency of some Judges, Das Gupta, J. in *Mahadev Lal Kanodia* v. *The Administrator General of West Bengal*[2] :

> "We have noticed with some regret that when the earlier decision of two Judges of the same High Court in *Deorajin's Case*,[3] was cited before the learned Judges who heard the present appeal, they took on themselves to say that the previous decision was wrong, of following the usual procedure in case of difference of opinion with an earlier decision, of referring no less than legal propriety form the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if Judges of coordinate jurisdiction in a High Court start over-ruling one another's decision."

The attitude of Chief Justice, Gajendragadkar, in Lala *Shri Bhagwan* v. *Ramchandra*[4] was not quite different;

> "It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a Single Judge need to be considered, he should not embark upon that enquiry sitting as

(1) A.I.R. 1990 S.C. 261.
(2) A.I.R. 1960 S.C. 936 at p. 941.
(3) 58 Cal.W.N. 64=AIR 1954 Cal. 119.
(4) AIR 1965 SC 1767 at p. 1773.

Single Judge but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger bench to examine the question. Tha is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned single Judge departed from this traditional way in the present case and chose to examine the question himself."

The Chief Justice Pathak, in a recent decision stressed the need for a clear and consistent enunciation of legal principle in the decisions of a Court. Speaking for Constitution Bench *Union of India* v. *Raghubir Singh* learned Chief Justice said (at page 766) (of Supreme Court Cases); (at page 1939 of AIR) :

"The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individua as to the consequence of transactions forming part of daily affairs. And, therefore, the need for a clear and consistent enunciation o legal principle in the decisions of a Court."

Cardozo pronounced a similar thought with more emphasis :

"I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reasons, which will commonly by some consideration of history or custom or policy of justice. Lacking such a reason, I must be logical just as I must be impartial, and upon like grounds. It will not do to decide the same question one way between one set of litigants and the opposite way between another." (the nature of the Judicial Process by Benjamin N. Cardozo p. 33).

In our system of judicial review which is a part of our Constitutional scheme, we hold it to be the duty of judges of superior courts anc tribunals to make the law more predictable. The question of law directly arising in the case should not be dealt with apologetic

(1) (1989) 2 S.C.C. 754=AIR 1989 SC 1933.

approaches. The law must be made more effective as a guide to behaviour. It must be determined with reasons which carry convictions within the Courts, profession and public. Otherwise, the lawyers would be in a predicament and would not know how to advice their clients. Subordinate courts would find themselves in an embarrassing position to choose between the conflicting opinions. The general public would be in dilemma to obey or not to obey such law and it ultimately fails into disrupt.

21. Judge learned Hand has referred to the tendency of some judges "who win the game by sweeping all the chessmen off the table". (The Spirit of Liberty by Alfred A. Knopf, New York (1953) p. 131). This is indeed to be deprecated. It is needless to state that the judgment of superior courts and Tribunals must be written only after deep travail and positive vein. One should never let a decision go until he is absolutely sure it is right. The law must be made clear, certain and consistent. But certitude is not the test of certainty and consistency does not mean that there should be no word of new content. The principle of law may develop side by side with new content but not inconsistencies. There could be waxing and waning the principle depending upon the pragmatic needs and moral yearnings. Such development of law particularly, is inevitable in our developing country. In *Raghubir Singh's Case* (*supra*) learned Chief Justice Pathak had this to say :

"Legal compulsions can not be limited by existing legal propositions, because, there will always be, beyond the frontiers of the existing law, new areas inviting judicial scrutiny and judicial choice-making which could well affect the validity of existing legal dogma. The search for solutions responsive to a changed social era involves a search not only among competing propositions of law, or competing versions of a legal proposition, or the modalities of an indeterminacy such as "fairness" or "reasonableness", but also among propositions from outside the ruling law, corresponding to the empirical knowledge or accepted values of present time and place, relevant to the dispensing of justice within the new para-metres."

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And he continued :

"The universe of problems presented for judicial choice making a the growing points of the law is an expanding universe. The area brought under control by the accumulation of past judicial choic may be large. Yet the areas newly presented for still further choic because of changing social, economic and technological condition are far from inconsiderable. It has also to be remembered, that man occasions for new options arise by the mere fact that no generatio looks out on the world from quite the same vantage-point as it predecessor, nor for that matter with the same perception. A differen vantage point or a different quality of perception often reveals th need for choice making where formerly no alternatives, and n problems at all, were perceived."

Holmes tells us :

"The Truth is, that the law is always approaching, and never reaching consistency. It is forever adopting new principles from life at the end, and it always retains old ones from history the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow." (Holmes The Common Law p. 36 (1881)).

Apart from that the judges with profound responsibility could ill-afford to take stolid satisfaction of a single postulate past or present in any case. We think, it was Cicero who said about someone "He saw life clearly and he saw it whole". The Judges have to have a little bit of that in every case while construing and applying the law."

In *State of U. P. and another* v. *Synthetics and Chemicals Ltd. and another*,[1] Supreme Court said in paragraphs 40 and 41 that -

"40."Incuria" literally means "carelessness". In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decicis. The 'quotable in law' is avoided and ignored if it is rendered, 'in

(1) 1991 (4) S.C.C. 139.

ignoratium of a statute or other binding authority'. (*Young* v. *Bristol Aeroplane Co. Ltd.*). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In *Jaisri Sahu* v. *Rajdeven Dubey* this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from Halsbury's Laws of England incorporating one of the exceptions when the decision of an appellate Court is not binding."

41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of Law ? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-*silientio*. "A decision passes sub-*silientio*, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind," (Salmond on jurisprudence 12th Edn., P. 153.). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd. the Court did not feel bound by earlier decision as it was rendered "without any argument, without reference to the crucial words of the rule and without any citation of the authority". It was approved by this Court in Municipal Corporation of Delhi v. Gurnam Kaur. The bench held that, "precedents sub-silientio and without argument are of no moment. The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not *ration decidendi*. In B. Shama Rao v. Union Territory of Pondicherry it was observed, "it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein". Any declaration of

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conclusion arrived without application of mind or preceded without any reason can not be deemed to be declaration of law or authority of a general nature binding as a precedent Restraint indissenting or overruling is for sake of stability and uniformity but rididity beyond unreasonable limits is inimical to the growth of law."

(See : *Vijayalaxmi Cashew Company and others* v. *Dy. Commercial Tax Officer and another*[1] :

In *Sanjay Dutt* v. *State through C.B.I., Bombay*,[2] Constitution Bench of the Apex Court, examine the meaning of "indefeasible right" in light of decision in *Hitendra Vishnu Thakur* v. *State of Maharashtra*,[3] Apex Court held that right of accused for grant of bail on expiry of the initial period of 180 days for completion the investigation or the extended period prescribed by Section 20(4)(bb) of the TADA Act could be enforced only up to the filing of challan and did not survive for enforcement on the challan being filed in the Court against him. In *Uday Mohanlal Acharya* v. *State*[4], majority explained *Sanjay Dutt's case* (*supra*) on the ground that counsel for accused had conceded before the Court that individual's right for grant of bail on expiry of initial period of 180 days for completing the investigation or extended period prescribed by Section 20(4)(bb) of TADA Act could be enforced only up to the filing of the challan against him and decision of Division Bench in *Hitendra Vishnu Thakur's Case* (*supra*) could not be read to confer on the accused an 'indefeasible right' to be released on bail under this provision once the challan has been filed and the accused continues in custody. Therefore, the majority holds that expression "if not already availed of" in *Sanjay Dutt's Case* (*supra*) must be understood to mean that when the accused files an application and is prepared to offer bail on being directed, in other words, on the expiry of the period under clause (a) of Proviso to sub-section (2) of Section 167 of the Code of Criminal Procedure, if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed his indefeasible right even though the Court has not considered the said application and has not communicated the terms and conditions of the bail

(1) (1996) 1 S.C.C. 468.
(2) (II) (1991) 5 S.C.C. 410.
(3) (1994) 4 S.C.C. 602.
(4) (2001) 5 S.C.C. 453.

and the accused has not furnished the same, meaning thereby accused must file application for release on bail before the expiry of 180 days or the extended period and filing of challan before his application is considered and allowed by the Court, would not defeat his right which is indefeasible. However, minority decision by B. N. Agrawal, J. holds that the right of accused can not be enforced after the challan is filed since it is extinguished the moment challan is field, thus, following *Sanjay Dutt's Case* (*supra*) as against Hitendra Vishnu Thakur's Case (*supra*).

In *Commissioner of Sales Tax, J. & K. and others* v. *Pine Chemicals Ltd. and others*,[1] Apex Court in paragraphs 10 and 13 said that -

> "10.In *International Cotton Corpn. (P) Ltd.* v. *C. T. O.*, a Bench of this Court comprising four Judges observed that "the object of sub-section (2-A) of Section 8 is to exempt transaction of sale of any goods if they are wholly exempt from tax under the Sales Tax law of the appropriate State and make the said sale chargeable at lower rates where under the Sales Tax Act of the State that sale transactions are chargeable to tax at a lower rate.....", though it is true, the point raised and determined in that case was a different one. In our respectful opinion, the decision, in Indian Aluminium which was a decision rendered by a Bench of three learned Judges was binding upon the Bench which decided the Pine Chemicals. (This Bench too comprised three learned Judges). It is, however, interesting to notice that when the above two decisions were brought to the notice of the Bench, it referred to the ration of the said decisions but neither followed it nor made any attempt to distinguish it but proceeded to make it a basis for their decision notwithstanding the fact that the said ratio ran exactly counter to the one adopted by the Bench. The two decisions did not certainly support the interpretation adopted in the judgment under review. On the contrary, they and in particular the decision in Indian Aluminium, militated against the said interpretation. It is for this reason, coupled with the fact that the interpretation placed in the judgment under review on

(1) (1995) 1 S.C.C. 58.

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Sections (2-A) may affect a larger number of cases all over the country, that we agreed to re-examine the issue, which we would not have agreed to ordinarily.

xxx xxx xxx

xxx xxx xxx

13. Shri K. K. Venugopal urged strongly that the error, if any, in the judgment under review is not an error apparent on the face of the record, that it is also a possible view and that, in any event, it can not be said that the view taken in the judgment under review is a view which could not have been possible taken. Learned counsel pointed out that a large number of High Courts have taken the same view and hence, the error, if any, in the judgment under review is not an error apparent on the face of the record. With respect, we can not agree. To us, the language employed in the sub-section looks quite clear and umabiguous. It does not admit of any other interpretation that the one placed by us. More important, it was already construed by a Bench of coordinate jurisdiction in Indian Aluminium earlier. Another Bench of four learned Judges had also understood the purport of the said sub-section in the same manner-vide International Cotton Corpn. In the light of the said binding decisions, it was not open, with great respect, to the Bench deciding Pine Chemicals to place the interpretation it did on the sub-section."

In *Indian Oil Corporation Limited* v. *Municipal Corporation and another*,[1] Supreme Court has held that High Court is bound by the decision of the Supreme Court, even co-equal Bench of Supreme Court can not take different view. In paragraph 8, the Apex Court has said that -

"8. It is thus clear that the decision of this Court in *Ratna Prabha* (*supra*) on the construction of Section 138(b) of the M. P. Act has all along been understood and justified on the basis of the presence of then on *obstante* clause in Section 138(b) of the M.P.

(1) A.I.R. 1995 S.C. 1480.

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Act and the later decisions have distinguished it on that ground. That is the basis on which the decision in *Padma Debi* (*supra*) was distinguished in *Ratna Prabha* (*supra*) itself. It is also obvious that a Bench of 3-Judges only in the later decisions could not over rule the decision of this Court in *Ratna Prabha* (*supra*) and, therefore, none of the later decisions could be so read to have that effect. The Division Bench of the High Court in 1989 MPLJ 20 was clearly in error in taking the view that the decision of this Court in *Ratna prabha* (*supra*) was not binding on it. In doing so, the Division Bench of the High Court did something which even a later co-equal Bench of this Court did not and could not do. The view taken by the Division Bench of the High Court in 1989 MPLJ 20 proceeds on a total misunderstanding of the law of precedents and Article 141 of the Constitution of India, to which it referred. But for the fact that the view of the Division Bench of the High Court proceeds on a misappropriations of the law of precedents and Article 141 of the Constitution, it would be exposed to the criticism of an aberration in judicial discipline. The decision of the Division Bench of the High Court was, therefore, rightly over-ruled by the Full Bench in the impugned judgment."

In *N. S. Giri* v. *Corporation of City of Manglalore and others*,[1] Apex Court said that -

"12.However, suffice it to observe that the Constitution Bench decision in New Maneck Chowk Spg. and Wvg. Co. Ltd. and also the decision of this Court in Hindustan Times Ltd. which is a four-Judge Bench decision, were not placed before the learned Judges deciding LIC of India case. A decision by a constitution Bench and a decision by a Bench of more strength as of a binding authority; more so, when the attention of the Judges deciding the latter case was not invited to the earlier decisions available....."

In District Manager, AP SRTC *Vijaywada* v. *K. Sivaji and others*,[2] it is held that judicial discipline requires the single Judge either to follow the decision of another single Bench or refer the matter to a Larger Bench.

(1) (1999) 4 S.C.C. 697. (2) 2001-2S.C.C. 135.

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Sitting Singly, he can not take a different view on the specious ground that the decision is based upon facts, even this conclusion is unsustainable. In *Dr. Vijay Laxmi Sadho* v. *Jagdish*,[1] it has been said in paragraphs 33 and 34 that :

> "33. As the learned Single Judge was not in agreement with the view expressed in Devilal case it would have been proper, to maintain judicial discipline, to refer the matter to a larger Bench rather than to take a different view. We note it with regret that distress that the said course was not followed. It is well settled that if a Bench of coordinate jurisdiction disagrees with another Bench of coordinate jurisdiction whether on the basis of "different arguments" or otherwise, on a question of law, it is appropriate that the matter be referred to a Larger Bench for resolution of the issue rather that to leave two conflicting judgments to operate, creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety forms the basis of judicial procedure and it must be respected at all costs.

34. Before parting with this aspect of the case, we wish to recall what wsa opined in *Mahadeolal Kanodia* v. *Administrator General of W. B.* :

> If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if Judges of coordinate jurisdiction in a High Court start over-ruling one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Bench, and holding the view that the view that the earlier decision is wrong, itself gives effect to that view the result would be utter confusion. The position would be equally bad where a Judge sitting singly in High Court is of opinion that the previous decision of another single Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench. In such a case, lawyers would not know how to advise their clients and all Courts subordinate to the High Court would find themselves in an embarrassing position of having to choose between dissentient judgments of their own High Court."

(1) 2001-2 S.C.C. 247.

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Thereafter the Apex Court in *Chandra Prakash and others* v. *State of U. P. and another*[1] considered the some previous decisions of the Court on the question and said in paragraphs 20 to 23 that -

"20. The principles of the doctrine of binding precedent are no more in doubt. This is reflected in a large number of cases decided by this Court. For the purpose of deciding the issue before us, we intend referring to the following two judgments of this Court.

21. In the case of *Union of India* v. *Raghubir Singh* (*supra*), a 5-Judge Bench of this Court speaking through Pathak, C. J., held that pronouncement of a law by a Division Bench of this Court is binding on another Division Bench of the binding on another Division Bench of the same or small number of Judges. The judgment further states that in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of the Court. To avoid a repetition of the discussion on this subject, we think it appropriate to reproduce the following paragraph of that judgment which reads as follows :"

"28. What then should be the position in regard to the effect of the law pronounced by a Division Bench in relation to a case raising the same point subsequently before a Division Bench of a smaller number of Judges ? There is no constitutional or statutory prescription in the matter, and the point is governed entirely by the practice in India of the Courts sanctified by repeated affirmation over a century of time. It cannot be doubted that in order to promote consistency and certainty in the law laid down by a superior Court, the ideal condition would be that the entire court should sit in all cases to decide questions of law, and for that reason the Supreme Court of the United States does so. But having regard to the volume of work demanding the attention of the Court, it has been found necessary in India as a general rule of practice and convenience that the Court should sit in Divisions, each Division being constituted of Judges whose number may

(1) 2002 AIR S.C.W. 1573.

be determined by the exigencies of judicial need, by the nature of the case including any statutory mandate relative thereto, and by such other considerations which the Chief Justice, in whom such authority devolves by convention, may find most appropriate. It is in order to guard against the possibility of inconsistent decisions on points of law by different Division Benches that the rule has been evolved, in order to promote consistency and certainty in the development of the law and its contemporary status, that the statement of the law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges. This principle has been followed in India by several generations of Judges. We may refer to a few of the recent cases on the point. In *John Martin* v. *State of West Bengal*,[1] a Division Bench of three Judges found it right to follow the law declared in *Haradhan Saha* v. *State of West Bengal*[2] decided by a Division Bench of five Judges in preference to *Bhutnath Mate* v. *State of West Bengal* (*supra*) decided by a Division Bench of two Judges. Again in *Smt. Indira Nehru Gandhi* v. *Rajnarain* (*supra*), Beg., J., held that the Constitution Bench of five Judges was bound by the Constitution Bench of thirteen Judges in His Holiness Kesavananda Bharati *Sri Padagalavaru* v. *State of Kerala*, (*supra*). In *Ganapati Sitaram Belvalkar* v. *Waman Shripad Mage* (*Since Dead*) *Through L.Rs.* (*supra*) this Court expressly stated that the view taken on a point of law by a Division Bench of four Judges of this Court was binding on a Division Bench of three Judges of the Court. And in *Mattulal* v. *Radhe Lal* (*supra*) this Court specially observed that where the view expressed by two different Division Bench of this Court could not be reconciled, the pronouncement of a Division Bench of a larger number of Judges had to be preferred over the decision of a Division Bench of a smaller number of Judges. This Court also laid down in *Acharya Maharajshri Narandraprasadji Anandprasadji, Maharaj* v. *State of Gujrat* (*supa*); that even where

(1) (1975) 3 S.C.R. 211=AIR 1975 S.C. 775.
(2) (1975) 1 S.C.R. 778=AIR 1974 S.C. 2154.

the strengthof two differing Division Benches consisted of thesame number of Judges, it was not open to one Divisoin Bench to decide the correctness or otherwise of the views of the other. The principle was re-affirmed in Union of India v. *Godfrey Philips India Ltd.* (*supra*) which noted that a Division Bench of two Judges of this Court in *Jit Ram* v. *State of Haryana* (*supra*) had differed from the view taken by an earlier Division Bench of two Judges in *Motilal Padapat Sugar Mills* v. *State of U. P.*,[1] on the point whether the doctrine of promissory estoppel could be defeated by invoking the defence of executive necessity and holding that to do so was wholly unacceptable reference was made tothe well accepted and desirable practice of the later Bench referring the case to a larger Bench when the learned Judges found that the situation called for such reference."

22. Almost similar is the view expressed by a recent judgment of 5-Judges bench of this Court in *Parija's Case* (*supra*). In that case, a Bench of 2 learned Judges doubted the correctness of the decision of a Bench of 3 learned Judges, hence, directly referred the matter to a Bench of 5 learned Judges for reconsideration. In such a situation, the 5 Judge Bench held that judicial discipline and propriety demanded that a Bench of 2 learned Judges should follow the decision of a Bench of 3 learned Judges. On this basis, the 5-Judges Bench found fault with the reference made by the 2-Judges Bench based on the doctrine of binding precedent.

23. A careful perusal of the above judgments shows that this Court took note of the hierarchical character of the judicial system in India. It also held that it is of paramount importance that the law declared by this Court should be certain, clear and consistent. As sated in the above judgments, it is of common knowledge that most of the decisions of this Court are of significance not merely because they constitute an adjudication on the rights of the parties and resolve the disputes between them but also

(1) (1979) 2 S.C.R. 641=A.I.R. 1979 S.C. 621.

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because in doing so they embody a declaration of law operating as a binding principle in future cases. The doctrine of binding precedent is of utmost importance in the administration of our judicial system. It promotes certainty and consistency in judicial decisions. Judicial consistency promotes confidence in the system, therefore, there is this need for consistency in the enunciation of legal principles in the decisions of this Court. It is in the above context, this Court in the case of Raghubir Singh held that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the Division Bench of the same or similar number of Judges. It is in furtherance of this enunciation of law, this Court in the latter judgment of *Parija's* (*supra*) held that -

> "But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned Judges stating out the reasons why it could not agree with the earlier judgment. If, then, the Bench of three learned Judges also comes to the conclusion that the earlier judgment of a Bench of three learned Judges is incorrect, reference to a Bench of five learned Judges is justified."

It is held in paragraph 24 that-

"24. We are in respectful agreement with the enunciation of law made by this Court in the above noted judgments in *Raghubir Singh* and *Parija's Case* (*supra*)."

Finally, the Court held in paragraph 25 that -

"25.Applying the principles laid down in the above said cases, we hold that the judgment of the 2-Judge Bench of this Court dated 23.3.1999 as modified by the subsequent order dated 26.7.1996 by the same Bench does not lay down the correct law, being in conflict with the larger Bench judgment. If that be so, the above writ petitions, from which this reference has arisen, will have to be decided dehors the law laid down by those two judgments of

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the Bench of two learned Judges. Therefore, having decided the issue that has arisen for our consideration, we think it just that these writ petitions should now be placed before a Bench of three learned Judges for final disposal."

In *Fuerst Day Lawson Ltd.* v. *Jindal Exports Ltd.*,[1] the Apex Court said in paragraphs 19 to 22 that :

"19.In *Mamleshwar Prasad* v. *Kanhaiya Lal* reflecting on the principle of judgment *per incuriam*, in paras 7 and 8, this Court has stated thus : (SCC p. 235) -"

"7. Certainty of the law, consistency of rulings and comity of Courts all flowering from the same principle-converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where by obvious inadvertence or oversight a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of binding precedents. It should be a glaring case, an obtrusive omission. No such situation presents itself here and we do not embark on the principle of judgment *per incuriam.*

8. Finally it remains to be noticed that a prior decision of this Court on identical facts and law binds the Court on the same points in a later case. Here we have a decision admittedly rendered on facts and law, indistinguishably identical, and that ruling must bind."

This Court in A.R. Antulay v. R. S. Nayak in para 42 has quoted the observations of Lord Goddard in Moore v. Hewitt and Penny v. Nicholas to the following effect ; (SCC p/ 652) :

""*Per incuriam*" are those decision given in ignorance of forgetfulness of some inconsistent (*sic*) statutory provision or of some authority binding on the Court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong."

(1) (2001) 6 S.C.C. 356.

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21. This Court in State of U. P. v. Synthetics & Chemicals Ltd. inpara 40 has observed thus : (SCC p. 162) :

"40."*Incuria*" liberally means "carelessness". In practice *per incuriam* appears to mean *per ignoratium.* English Courts have developed this principle in relaxation of the rule of star decisis. The "quotable in law" is avoided and ignored if it is rendered," in ignoratium of a statute or other binding authority". (*Young v. Bristol Aeroplane Co. Ltd.*)"

22. The two judgments[1] Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court, Chandigarh and,[2] State of U. P. v. Synthetics and Chemicals Ltd. were cited in support of the argument. Attention was drawn to paras 40,41 and 43 in the first judgment and paras 39 and 40 in the second judgment. In these two judgments no view contrary to the views expressed in the aforesaid judgments touching the principle of judgment *per incuriam* is taken."

Thereafter, in paragraph 23,the Court held that -

"23.A prior decision of this Court on identical facts and law binds the Court on the same points of law in a latter case. This is not an exceptional case by inadvertence or oversight of any judgment or statutory provisions running counter to the reason and result reached. Unless it is a glaring case of obtrusive omission, it is not desirable to depend on the principle of judgment "*per incuriam*". It is also not shown that some part of the decision was based on a reasoning which was demonstrably wrong, hence the principle of per incuriam can not be applied. It cannot also be said that while deciding Thyssen the promulgation of the first Ordinance, which was effective from 25.1.1996, or subsequent Ordinance were not kept in mind more so when the judgment of the Gujrat High Court in Western Shipbreaking Corpn. did clearly state in para 8 of the said judgment thus :

"8. We now come to the Arbitration and Conciliation Ordinance 1996 which was promulgated on 16.1.1996 and brought into force with effect from 25.1.1996. The second Ordinance, 1996 was also

promulgated on 26.4.1991 as a supplement to the main Ordinance giving retrospective effect from 25.1.1996. The Ordinance received assent of the President on 16.8.1996 giving the retrospective effect from 25.1.1996. Thus the Ordinance has now become an Act. All the provisions of the Ordinance as well as the Act are same. Therefore, the use of the words 'the Ordinance' shall also mean the Act and vice versa.

It appears in the portion extracted above that there is a mistake as to the date of promulgation of the second Ordinance as 26.3.1991. But the correct date is 26.3.1996.

(See *Lily Thomas and others* v. *Union of India and others*[1]"

Again, the Supreme Court considered the theory of precedent in *Union of India and another* v. *Hansoli Devi and others*[2] and said that -

"Judicial discipline and propriety demands that a Bench of two learned Judges should follow a decision of a Bench of three learned Judges. But if a Bench of two learned Judges concludes that an earlier Judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is, to refer the matter be forfeit to a Bench of three Judges setting out the reasons why it could not agree with the earlier judgment and then if the Bench of three learned Judges also comes to the conclusion that the earlier judgment of a bench of three learned Judges is incorrect, then a reference could be made to a Bench of five learned Judges."

Five-Judge Bench of Supreme Court in *P. Ramachandra Rao* v. *State of Karnataka* (*supra*) holds that the two and three-Judge Bench decisions in common cause cases (1996) 4 SCC 33, (1996) 6 SCC 755 *Raj Deo Sharma's Case*,[3] and Raj Deo Sharma run counter to the dictum of the Constitution Bench in *A.R. Antulay's Case*,[4] therefore, could not be said to be good law to the extent they are in breach of the doctrine of precedents which has

(1) 2000 (6) S.C.C. 224.
(2) 2002 AIR SCW 3755.
(3) (1998) 7 S.C.C. 507.
(4) (1992) 1 S.C.C. 225.

crystalised the rule of law that a Bench of lesser strength is bound by the view expressed by a Bench of larger strength and can not take a view in departure or in conflict therefrom. In paragraphs 28 and 29, the Apex Court said that -

"28. The other reason why the bars of limitation enacted in Common Cause (I), Common Cause (II) and Raj Deo Sharma (I) and Raj Deo Sharma (II) can not be sustained is that these decisions, though two or three-Judge Bench decisions, run counter to that extent to the dictum of the Constitution Bench in A. R. Antulay case and therefore can not be said to be good law to the extent they are in breach of the doctrine of precedents. The well-settled principle of precedent which has crystalised into a rule of law is that a Bench of lesser strength is bound by the view expressed by a Bench of larger strength and cannot take a view in departure or in conflict therefrom. We have in the earlier part of this judgment extracted and reproduced passages from A. R. Antulay case. The Constitution Bench turned down the fervent plea of proponents of right to speedy trial for laying down time-limits as bar beyond which a criminal proceeding or trial shall not proceed and expressly ruled that it was neither advisable nor practicable (and hence not judicially feasible) to fix any time-limit for trial of offences. Having placed on record the exposition of law as to right to speedy trial flowing from Article 21 of the constitution, this Court held that it was necessary to leave the rule as elastic and not to fix it in the frame of defined and rigid rules. It must be left to the judicious discretion of the court seized of an individual case to find out from the totality of circumstances of a given case if the quantum of time consumed upto a given point of time amounted to violation of Article 21, and if so, then to terminate the particular proceedings, and if not, then to proceed ahead, the test is whether the proceedings or trial has remained pending for or such a length of time that the inordinate delay can legitimately be called oppressive and unwarranted, as inordinate delay can legitimately be called oppressive and unwarranted, as suggested in A. R. Antulay. In Kartar Singh case the Constitution

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Bench while recognising the principle that the denial of an accused's right of speedy trial may result in a decision to dismiss the indictment or in reversing of a conviction, went on to state :

"92. Of course, no length of time is per se too long to pass scrutiny under this principle nor the accused is called upon to show the actual prejudice by delay of disposal of cases. On the other hand, the court has to adopt a balancing approach by taking note of the possible prejudices and disadvantages to be suffered by the accused by avoidable delay and to determine whether the accused in a criminal proceeding has been deprived of his right of having speedy trial with unreasonable delay which could be identified by the factors- (1) length of delay, (2) the justification for the delay, (3) the accused's assertion of his right to speedy trial, and (4) prejudice caused to the accused by such delay."

29. For all the foregoing reasons, we are of the opinion that in Common Cause case (I) [as modified in Common cause (II)] and Raj Deo Sharma (I) and (II) the Court could not have prescribed periods of limitation beyond which the trial of a criminal case or a criminal proceeding cannot continue and must mandatorily be closed followed by an order acquitting or discharging the accused. In conclusion, we hold :

"(1) The dictum in A. R. Antulay case is correct and still holds the field.

(2) The propositions emerging from Article 21 of the Constitution and expounding the right to speedy trial laid down as guidelines in A. R. Antulay case adequately take care of right to speedy trial. We uphold and reaffirm the said propositions.

(3) The guidelines laid down in A. R. Antulay case are not exhaustive but only illustrative, they are not intended to operate as hard-and-fast rules or to be applied like a straitjacket formula. Their applicability would depend on the fact situation of each case. It is difficult to foresee all situations and no generalization can be made.

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(4) It is neither advisable, nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings. The time-limits or bars of limitation prescribed in the several directions made in Common Cause (I), Raj Deo Sharma (I) and Raj Deo Sharma (II) could not have been so prescribed or drawn and are not good law. The criminal courts are not obliged to terminate trial or criminal proceedings merely on account of lapse of time, as prescribed by the directions made in Common Cause case (I), Raj Deo Sharma case (I) and (II). At the most of periods of time prescribed in those decisions can be taken by the Courts seized of the trial or proceedings to act as reminders when they may be persuaded to apply their judicial mind on the facts and circumstances of the case before them and determine by taking into consideration the several relevant factors as pointed out in A. R. Antulay case and decide whether the trial or proceedings have become so in ordinarily delayed as to be called oppressive and unwarranted. Such time-limits can not and will not by themselves be treated by any court as a bar to further continuance of the trial or proceedings and as mandatorily obliging the Court to terminate the same and acquit or discharge the accused.

(5) The criminal courts should exercise their available powers, such as those under Sections 309, 311 and 258 of the Code of Criminal Procedure to effectuate the right to speedy trial. A watchful and diligent trial Judge can prove to be a better protector of such right than any guidelines. In appropriate cases, jurisdiction of the High Court under Section 482 Cr.P.C. and Articles 226 and 227 of the Constitution can be invoked seeking appropriate relief or suitable directions.

(6) This is an appropriate occasion to remind the Union of India and the State Governments of their constitutional obligation to strengthen the judiciary quantitatively and qualitatively by providing requisite funds, manpower and infrastructure. We hope and trust that the Government shall act."

Raju, J. comprising the Bench and concurring on question said in paragraph 36 that :

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"36. The declaration of law made by the Constitution Bench of five learned Judges of this Court in the decision reported in A. R. Antulay case still holds the field and its binding force and authority has not been undermined or whittled down or altered in any manner by any other decision of a larger Bench. Consequently, the Benches of lesser number of constitution of Judges which dealt with the cases reported in "Common Cause A. Regd. Society v. Union of India, "Common Cause A Regd. Society v. Union of India, Raj Deo Sharma v. State of Bihar and Raj Deo Sharma (II) v. State of Bihar could not have laid down any principles in derogation of the ratio laid down in A. R. Antulay case either by way of elaboration, expansion, clarification or in the process trying to distinguish the same with reference to either the nature of cause considered therein or the consequences which are likely to follow and which, in their view, deserve to be averted. Even where necessities or justification, if any, were found therefore, there could not have been scope for such liberties being taken to transgress the doctrine of binding precedents, which has come to stay firmly in our method of administration of justice and what is permissible even under such circumstances being only to have had the matter referred to for reconsideration by a larger Bench of this Court and not to deviate by any decisions. The correctness of which stands referred to for consideration by this Bench. All the more so, when there is no reason to doubt the correctness of the decision in A. R. Antulay case and the Bench concurs with the principles laid down therein."

In *Nutan Kumar* v. *2nd Additional District Judge and others*,[1] the Apex Court said in paragraph 7 that -

"7. In the case of *Nanakram* v. *Kundalrat*[2] the question was whether a lease in violation of statutory provisions was void. It was held that in the absence of any mandatory provision obliging eviction in case of contravention of the provisions of the Act the lease

(1) (2002) A.I.R. S.C.W. 4040. (2) (1986) 3 S.C.C. 83.

would not be void and the parties would be bound, as between themselves, to observe the conditions of lease. It was held that neither of them could assail the lease in a proceeding between themselves. This authority was in respect of the Central Provinces and Berar Letting of Houses and Rent Control Order, 1949, where under also the landlord laws obliged to intimate a vacancy to the Deputy Commissioner of the District and the Deputy Commissioner could allot or direct the landlord to let the house to any person. The provisions were more or less identical to the provisions of the said Act. This authority has directly dealt with the questions under consideration and answered them. The majority judgment takes note of this authority and holds as follows :

"With utmost humility and reverence it is stated that above observations are not compatible with provisions of Ss. 10 and 23 of the Contract Act. Otherwise also, it is most respectfully pointed that the statement of law contained in the said observation is, perhaps, in conflict with the law declared in the decisions of the Hon'ble Supreme Court in Waman Shrintwas Kini v. Rati Lal Bahgwan Das and Co. : Shrikrishna Khanna v. Additional District Magistrate, Kanpur and others, and Manna Lal Khetan v. Kedar Nath Khetan."

Thus it is to be seen that the majority judgment, with a pretence of humility and reverence refuse to follow a binding authority of this Court. It was not open for the Full Bench to comment that the authority was not compatible with provisions of Ss. 10 and 23 of the Contract Act. The Full Bench also realised that there are no conflicting authorities. They therefore say that this authority is "perhaps in conflict with" the decisions in Waman Shrintwas Kini, Shri Krishna Khanna and Manna Lal Khetan. One must therefore see whether there is any conflict of decisions. If there is no conflict then judicial discipline and propriety required that the majority of the Full Bench followed the binding authority of this Court."

Article 141 of the Constitution of India envisages that :

"The law declared by the Supreme Court shall be binding on all Courts within the territory of India."

Therefore, all Courts in India are bound on follow the decision of the Apex Court, exception being doctrine of "*per incuriam*" and "*sub-silentio*". This article empowers the Apex Court to declare the law which becomes the law of the land which is essential for a proper administration of justice with the expectation that like cases should be decided alike. Every Court is bound to follow any case decided by a Court above it in the hierarchy and Court is bound by precedents. A case is regarded as a precedent when it furnishes rules which may be applied in setting the rights of the parties. The doctrine "*Stare-decisis*", commonly called "The doctrine of precedent" means adherence to decided cases on settled principles and not to disturb matters which have been established by judicial decisions. The precedents should serve as a rule for future guidance in deciding analogous cases (Words and Phrases, Permanent Edition Vol. 33 p. 372-373). It cannot be doubted that in the development of law, promotion of consistency and certainty in decisions on all the law is maintained and inconsistency avoided. However, perusal of various decisions demonstrates that the Apex Court and High Courts have been called upon to consider the question of binding precedents from time to time. Indisputable question is that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. There seems no dispute to the proposition that decision of Larger Bench of the Apex Court is binding on Smaller Bench of the same Court and the High Courts. The difficulty arises in case of conflict between the two decisions by Benches consisting of same number of Judges, whether to follow the earlier or later and in absence of the Apex Court decision, similar difficulty may arise with regard to the High Court decisions. The normal rule is that in the absence of any decision of the Apex Court, subordinate Courts are bound to follow the decisions of High Court to which they are subordinate, and where conflict is between the judgments of a single Bench and Division Bench. Division Bench decision will have to be followed and where there is conflict between Division Bench and Larger Bench, the decision of Larger Bench has to be followed. But where the conflict is between two decisions pronounced by Benches consisting of same number of Judges, difficulty arises which decision is to be followed when after careful examinations of the decisions, conclusion is that both of them directly apply to the case before

the Court. High Courts have expressed different views, we have found, some taking the line that the Court will be at liberty to follow that decision which seems to it more correct irrespective of the fact it is earlier or later in point of time while others hold that the earlier decision should be followed.

By now the Supreme Court has dealt with the binding nature of its pronouncements in catena of cases, some of which have been discussed in this judgment. The common thread passing through the judgments seems to be that where High Courts find any conflict between the views expressed by Larger and Smaller Benches of the Supreme Court, the proper course for the High Court is to follow the opinion expressed by Larger Bench in preference to those expressed by similar Benches of the Court. With respect to a situation where there are conflicts between the two decisions of the Court given by Judges of equal strength, one view is that latter decision of the Apex Court must be followed since it impliedly over-rules the earlier and other view is that this practice is neither a rule of propriety nor a rule to promote justice. It may be a convenient rule to promote a consistency and avoid uncertainty. If it is meet to promote consistency in the administrative of justice, why not follow the former of the two decisions when both of them are of equal sanctity. The adherence to one practice would be as good or as bad as adherence to the other. However, when the Apex Court was faced with two directly contradictory judgments, Bhagwati, J., speaking for the Bench, followed the earlier judgment in preference to the latter for two reasons, namely earlier decision of Court in Sarvate T. B's. case was not brought to the notice of the Court while deciding Smt. Kamla Soni's Case resulting in patent contradiction, former being a decision by Larger Bench than the latter and on principle the view taken in Sarvate T. B's. case commended to the Court to be the right view. This decision and K. S. Subramaniam's case led to rest the opinion to follow later decision. Moreover, doing so would be clear manifestation of violating precedents and defeat the principle that the High Courts lack competence to sit over the judgments of the Apex Court and give them interpretation they may choose, result of which may cause violence to theory of precedents and hierarchy and the supermacy of Courts. It is well settled that Article 141 gives a Constitution status to the theory of the precedents in respect of the law declared by the Supreme Court which is essential for proper administration of justice.

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In Raghubir Singh's Case, the Apex Court said that the rule has been evolved in order to promote consistency and certainty in the development of the law and it is necessary, therefore that the statement of the law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges. This Principle has been followed in India by several generations of Judges and law laid down in Acharya Maharajshri Narandra Prasadji Anandprasadji Maharaj (AIR 1974 SC 2098) is that even where the strength of two different differing Division Benches consisted of the same number of Judges, it was not open to one Division Bench to decide the correctness or otherwise of the views of the other. The principle was re-affirmed in *Godfrey Philips India Limited's Case* (*supra*) and found the well accepted and desirable practice of the latter bench referring the case to a Larger Bench justified. Deprecating the tendency of some Judges violating the principle, desirable it would be to quote paragraphs 17 to 19 again to emphasise the point as under :

> "17.It would be difficult for us to appreciate the judgment of the High Court. One must remember that pursuit of the law, however, glamorous it is, has its own limitation on the Bench. In a multi-Judge Court, the Judges are bound by the precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of coordinate jurisdiction, the matter shall be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure.
>
> 18. Deprecating this kind of tendency of some Judges, Das Gupta, J. in *Mahadev Lal Kanodia* v. *The Administrator General of West Bengal* (*supra*) :
>
> "We have noticed with some regret that when the earlier decision of two Judges of the same High Court in *Deorajin's Case* (*supra*), cited before the learned Judges who heard the present appeal, they took on themselves to say that the previous decision was wrong, of following the usual procedure in case of difference of

opinion with an earlier decision, of referring no less than legal propriety form the basis of judicial procedure. If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if Judges of coordinate jurisdiction in a High Court start over-ruling one another's decision."

19. The attitude of Chief Justice, Gajendragadkar, in *Lal Shri Bhagwan* v. *Ramchandra* (*supra*), was not quite different :

"it is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge need to be considered, he should not embark upon that enquiry sitting as single Judge but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned single Judge departed from this traditional way in the present case and chose to examine the question himself."

Unless the Bench can explain the earlier decision on sound reasonings as in *Sanjay Dutt's Case,* artificial and casual attempt may violate efficacy of binding effect contemplated by Art. 141 of the Constitution of India. Uniformity and consistency being the core of the judicial discipline. Again, it is necessary to re-emphasise what the Apex Court said in paragraphs 20 to 23 to *Chandra Prakash's Case* (*supra*) :

"20.The principles of the doctrine of binding precedent are no more in doubt. This is reflected in a large number of cases decided by this Court. For the purpose of deciding the issue before us, we intend referring to the following two judgments of this Court.

21. In the case of *Union of India* v. *Raghubir Singh* (*supra*), a 5-Judges Bench of this Court speaking through Pathak, C. J., held that pronouncement of a law by a Division Bench of this Court is

binding on another Division Bench of the same or small number of Judges. The judgment further states that in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of the Court. To avoid a repetition of the discussion on this subject, we think it appropriate to reproduce the following paragraph of that judgment which reads as follows :

"28. What then should be the position in regard to the effect of the law pronounced by a Division Bench in relation to a case raising the same point subsequently before a Division Bench of a smaller number of Judges ? There is no constitution or statutory prescription in the matter, and the point is governed entirely by the practice in India of the Courts sanctified by repeated affirmation over a century of time. It cannot be doubted that in order to promote consistency and certainty in the law laid down by a superior court, the ideal condition would be that the entire court should sit in all cases to decide questions of law, and for that reason the Supreme Court of the United States does so. But having regard to the volume of work demanding the attention of the Court, it has been found necessary in India as a general rule of practice and convenience that the Court should sit in Divisions, each Division being constituted of Judges whose number may be determined by the exigencies of judicial need, by the nature of the case including any statutory mandate relative thereto, and by such other considerations which the Chief Justice, in whom such authority devolves by convention, may find most appropriate. It is in order to guard against the possibility of inconsistent decisions on points of law by different Division Benches that the rule has been evolved, in order to promote consistency and certainty in the development of the law and its contemporary status, that the statement of the law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges. This principle has been followed in India by several generations of Judges. We may refer to a few of the recent cases on the point. In *John Martin v. State of West Bengal* (*supra*), a Division Bench of three Judges found it right to follow

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the law declared in *Haradhan Saha* v. *State of West Bengal* (*supra*) decided by a Division Bench of five Judges in preference to *Bhutnath Mate* v. *State of West Bengal*, (*supra*) decided by a Division Bench of two Judges. Again in *Smt. Indira Nehru Gandhi* v. *Rajnarain* (*supra*) Beg, J., held that the Constitution Bench of five Judges was bound by the Constitution Bench of thirteen Judges in *His Holiness Kesavananda Bharati Sri Padagalavaru* v. *State of Kerala*, (*supra*). In *Ganapati Sitaram Belvalkar* v. *Waman Shripad Mage (Since Dead) Through L. Rs.* (*supra*) this Court expressly stated that the view taken on a point of law by a Division Bench of four Judges of this Court was binding on a Division Bench of three Judges of the Court. And in *Mattulal* v. *Radhe Lal* (*supra*), this Court specially observed that where the view expressed by two different Division Bench of this Court could not be reconciled, the pronouncement of a Division Bench of a larger number of Judges had to be preferred over the decision of a Division Bench of a smaller number of Judges. This Court also laid down in *Acharya Maharajshri Narandraprasadji Anandprasadji Maharaj* v. *State of Gujrat* (*supra*) that even where the strength of two differing Division Benches consisted of the same number of judges, it was not open to one Division Bench to decide the correctness or otherwise of the view of the other. The principle was re-affirmed in *Union of India* v. *Godfrey Philips India Ltd.* (*supra*) which noted that a Division Bench of two Judges of this Court in *Jit Ram* v. *State of Haryana* (*supra*) had differed from the view taken by an earlier Division Bench of two Judges in *Motilal Padampat Sugar Mills* v. *State of U. P.* (*supra*) on the point whether the doctrine of promissory estoppel could be defeated by invoking the defence of executive necessity and holding that to do so was wholly unacceptable reference was made to the well accepted and desirable practice of the later Bench referring the case to a larger Bench when the learned Judges found that the situation called for such reference.

22. Almost similar is the view expressed by a recent judgment of 5-Judge bench of this Court in *Parija's Case* (*supra*). In that case, a Bench of 2 learned Judges doubted the correctness of the

decision of a Bench of 3 learned Judges, hence, directly referred the matter to a Bench of 5 learned Judges for reconsideration. In such a situation, the 5 Judge Bench held that judicial discipline and propriety demanded that a Bench of 2 learned Judges should follow the decision of a Bench of 3 learned Judges. On this basis, the 5-Judge Bench found fault with the reference made by the 2-Judge Bench based on the doctrine of binding precedent.

23. A careful perusal of the above judgments shows that this Court took note of the hierarchical character of the judicial system in India. It also held that it is of paramount importance that the law declared by this Court should be certain, clear and consistent. As stated in the above judgments, it is of common knowledge that most of the decisions of this Court are of significance not merely because they constitute an adjudication on the rights of the parties and resolve the disputes between them put also because in doing so they embody a declaration of law operating as a binding principle in future cases. The doctrine of binding precedent is of utmost importance in the administration of our judicial system. It promotes certainty and consistency in judicial decisions. Judicial consistency promotes confidence in the system, therefore, there is this need for consistency in the enunciation of legal principles in the decisions of this Court. It is in the above context, this Court in the case of Raghubir Singh held that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the Division Bench of the same or similar number of Judges. It is in furtherance of this enunciation of law, this Court in the latter judgment of *Parija* (*supra*) held that -

> "But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned Judges stating out the reasons why it could not agree with the earlier judgment. If, then, the Bench of three learned

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Judges also comes to the conclusion that the earlier judgment of a Bench of three learned Judges is incorrect, reference to a Bench of five learned Judges is justified."

Therefore, the well settled principle of precedent which has crystalised into the rule of law, a Bench of lesser strength is bound by the view expressed by a Bench of larger strength and can not take a view in departure or in conflict therefrom. Otherwise, the Apex Court and High Courts would be called upon to decide such question time and again despite repeated assertion of law on the subject and this seems to have happened in recent decision when the three-Judge Bench of the Apex Court over ruled decision in *United India Assurance Company Limited* v. *Bhushan Sachdeva*,[1] for taking stand inconsistent to the stand taken by coordinate Bench in *Chinnama George and others* v. *N. K. Raju and another*,[2] *Narendra Kumar* v. *Yorenissa and others*[3] and *Rita Devi (Smt.) and others* v. *New India Assurance Company Limited and another*.[4]

Having considered the matter with broader dimensions, we find that various High Courts have given different opinion on the question involved. Some hold that in case of conflict between two judgments on a point of law, later decision should be followed; while others say that the Court should follow the decision which is correct and accurate whether it is earlier or later. There are High Courts which hold that decision of earlier Bench is binding because of the theory of binding precedent and Article 141 of the Constitution of India. There are also decisions which hold that single Judge differing from another single Judge decision should refer the case of Larger Bench otherwise he is bound by it. Decisions which are rendered without considering the decisions expressing contrary view have no value as a precedent. But in our considered opinion, the position may be stated thus -

With regard to the High Court, a Single Bench is bound by the decision of another Single Bench. In case, he does not agree with the view of the other Single Bench, he should refer the matter to the Larger Bench. Similarly, Division Bench is bound by the judgment of earlier Division Bench. In case, it does not agree with the view of the earlier Division Bench, it should

(1) AIR 2002 S.C. 662.
(2) 2000 (4) S.C.C. 130.
(3) 1998 (9) S.C.C. 202.
(4) 2000 (5) S.C.C. 113.

refer the matter to Larger Bench. In case of conflict between judgments of two Division Benches of equal strength, the decision of earlier Division Bench shall be followed except when it is explained by the latter Division Bench in which case the decision of latter Division Bench shall be binding. The decision of Larger Bench is binding on smaller Benches.

In case of conflict between two decisions of the Apex Court, Benches comprising of equal number of Judges, decision of earlier Bench is binding unless explained by the latter Bench of equal strength, in which case the later decision is binding. Decision of a Larger Bench is binding on smaller Benches. Therefore, the decision of earlier Division Bench, unless distinguished by latter Division Bench, is binding on the High Courts and the Subordinate Courts. Similarly, in presence of Division Bench decisions and Larger Bench decisions, the decisions of Larger Bench are binding on the High Courts and the subordinate Courts. No decision of Apex Court has been brought to our notice which holds that in case of conflict between the two decisions by equal number of Judges, the later decision is binding in all circumstances, or the High Courts and subordinate Courts can follow any decision which is found correct and accurate to the case under consideration. High Courts and Subordinate Courts should lack competence to interpret decisions of Apex Court since that would not only defeat what is envisaged under Article 141 of the Constitution of India but also militate hierarchical supermacy of Courts. The common thread which runs through various decisions of Apex Court seems to be that great value has to be attached to precedent which has taken the shape of rule being followed by it for the purpose of consistency and exactness in decisions of Court, unless the Court can clearly distinguish the decision put up as a precedent or is *per incuriam*, having been rendered without noticing some earlier precedents with which the Court agrees. Full Bench decision in *Balbir Singh's Case* (*supra*) which holds that if there is conflict of views between the two co-equal Benches of the Apex Court, the High Court has to follow the judgment which appears to it to state the law more elaborately and more accurately and in conformity with the scheme of the Act, in our considered opinion, for reasons recorded in the preceding paragraph of this judgment, does not lay down the correct law as to application of precedent and is, therefore, over ruled on this point.

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After having answered the reference, writ petitions be placed before the Single Judge for decision on merits.

Reference answered accordingly.

MISCELLANEOUS PETITION

Before Mr. Bhawani Singh, C. J. and Mr. Justice K. K. Lahoti,
17 January, 2002.

PREMLAL SHRIVAS ...Petitioner*

v.

STATE OF M. P. & others ...Respondents.

Constitution of India, Article 227 and Administrative Tribunals Act, (XIII of 1985), Section 19–Service Law–Correction in father's name and date of birth in service record–Wrong entries–Came to knowledge on promotion to the post of Head Constable–School leaving certificate from Govt. School–Satisfactory piece of evidence–Has to be accepted–Reliance cannot be placed on Medical report being based on estimation–Entry cannot be treated conclusive as per Rule 84 of M. P. Financial Code–Order of Tribunal set aside.

On the record placed before us, there is no document with regard to the qualifications of the petitioner. Had it been there, date of birth of the petitioner would have been clearly found out, which happens, for the first time when the petitioner filed representation for correction of his date of birth accompanied by the said school leaving certificate dated 6.6.1990 (Annexure-P-4). Similarly, reliance cannot be placed on the date of birth mentioned in the medical report being based on estimation. The respondents could have no difficulty in correcting the record from his school certificate at the stage of enrolment, since his qualification has been mentioned upto 8th class from the Government School, where the record was available.

The irresistible conclusion, which can be drawn from the facts of the case is that the correct date of birth of the petitioner is 30.6.1945 and not 1.6.1942. The school leaving Certificate (Annexure-P-4) is a satisfactory

*W. P. No. 2561/2001.

piece of evidence, which supports the claim of the petitioner, therefore, it has to be accepted and when the entries incorporated in the service record are found to be incorrect, they cannot be conclusive as per Rule 84 of the M. P. Financial Code.

K. K. Trivedi for the petitioner.

Vivek Awasthy for the Respondents.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **BHAWANI SINGH, CHIEF JUSTICE (ORAL)** – This writ petition is directed against the order of the M. P. Administrative Tribunal, Jabalpur, dated 18.4.2001, passed in O.A. No. 1253/1995.

The petitioner is serving in the Police Department of the State Government. He preferred representation to the respondents seeking correction of his father's name and date of birth in the service record, which was rejected by the Assistant Director General of Police (Works), Police Head Quarters, Bhopal. The petitioner was appointed Constable in the Police Department in 1965. In the service record prepared at the time of enrolment in the service, his date of birth is 1.6.1942 and father's name is Gayadeen. This position continued till 1990, when he came to know about in corrections as to father's name and date of birth in the service record. Accordingly, he preferred representation, which was rejected. In support of this plea, he depends on fact that he did not sign the service record at the time of entry in service nor he knew the contents thereof, otherwise he would have pointed out that the father's name was not Gayadeen nor was his date of birth 1.6.1942. The correct date of birth as per petitioner is reflected in the school leaving certificate (Annexure-P-4) dated 6.6.1990 being 30.6.1945. The respondents submit that the service record was filled up on the instructions of maternal grand father accompanying the petitioner at the time of enrolment. It is signed/thumb marked by the petitioner, therefore, he cannot resile from what he had accepted at the time of enrolment in service. Another submission is that the petitioner has been shown to be 23 year old as on 27.9.1965, when he was subjected to medical test at the time of enrolment. With this

background, the petitioner knew that his date of birth was 1.6.1942 and asking for correction after two decades was not justified. Reference on Rule 84 of the M. P. Financial Code is made and it is submitted that date of birth written in the service record is treated conclusive and correction of clerical mistake is permissible, if required. These submissions are accepted by the Tribunal and case of the petitioner for correction of date of birth in the service record has been rejected, though entry with regard to his father's name is liable to be corrected by the Superintendent of Police concerned.

We have considered the whole matter carefully. Shri K. K.Trivedi, learned counsel appearing for the petitioner, contended that the action of the respondents in not making correction in the service record of the petitioner as to his father's name and his date of birth, is unreasonable and arbitrary. The petitioner filed representation seeking these correctness immediately after coming to know about the same. This happened when he was promoted to the rank of Head Constable. The petitioner supported the claim on the basis of documentary evidence, which clearly points out that the correction sought was absolutely genuine and justified and the defence taken by the respondents has no merit.

Shri Vivek Awasthy, learned Government Advocate appearing for the State, submits that the record has been thumb marked by the petitioner, when he entered in service. Seeking correction after two decades is thoroughly delayed and cannot be allowed, more so, in the light of the Rule 84 of the M. P. Financial Code. So far as correction as to the name of the petitioner's father is concerned, the Tribunal has left it to the Superintendent of Police, who is competent to make the correction. Consequently, the request for correction is not justified and claim is liable to be dismissed.

From perusal of the service record placed before us by the learned counsel for the State, we find that the name of the petitioner's father is mentioned Gayadeen. The entry against the date of birth of the petitioner has been attested by the Superintendent of Police, Jabalpur, on 7.9.1976, while he entered in service on 6.10.1965. This from has been filled up on 17.10.1965 signed by the Superintendent of Police. Of course, it is thumb marked, but it is not indicated whose thumb marks they are. It is not understandable on what material the Superintendent of Police, Jabalpur,

attested the date of birth of the petitioner on 7.9.1976, since there is no material to justify this attestation. Consequently, this attestation cannot be the basis for accepting the date of birth of the petitioner as 1.6.1942. Had the petitioner been confronted with this document and apprised of the contents, he would have pointed out the mistake therein as to the date of birth and the name of his father, since this form records the name of his maternal grand father and not his father whose name is Ghaseetelal. Moreover, on the record placed before us, there is no document with regard to the qualifications of the petitioner. Had it been there, date of birth of the petitioner would have been clearly found out, which happens, for the first time, when the petitioner filed representation for correction of his date of birth accompanied by the said school leaving certificate dated 6.6.1990 (Annexure-P-4). Similarly, reliance cannot be placed on the date of birth mentioned in the medical report being based on estimation. The respondents could have no difficulty in correcting the record from his school certificate at the stage of enrolment, since his qualification has been mentioned upto 8th class from the Government School, where the record was available.

The irresistible conclusion, which can be drawn from the facts of the case is that the correct date of birth of the petitioner is 30.6.1945 and not 1.6.1942. The School leaving Certificate (Annexure-P-4) is a satisfactory piece of evidence, which supports the claim of the petitioner, therefore, it has to be accepted and when the entries incorporated in the service record are found to be incorrect, they cannot be conclusive as per Rule 84 of the M. P. Financial Code.

The next question is whether the petitioner should be granted relief after lapse of time. We have come to the conclusion that the petitioner did not know contents of the form (Annexure-R-1), therefore, he did not know what date of birth has been recorded in that document by the respondents. He came to know when he was promoted as Head Constable. Filing of representation with School leaving Certificate (Annexure-P-4) clearly demonstrates that the petitioner did not knows about incorrect date of birth recorded in the service record. Therefore, it cannot be said that correction of date of birth is belated. With this background, it would not be in the interest of justice to deny him relief. Making change in the service record would amount to correcting the error in service record after conclusiveness of entry is demonstrated to be wrong.

Premlal Shrivas v. State of M. P., 2002.

Consequently, the writ petition is allowed. The order of the Tribunal dated 18.4.2001 is set aside. The respondents are directed to correct the service record of the petitioner incorporating his date of birth as 30.6.1945 in place of 1.6.1942 and also record his father's name as Ghaseetelal in place of Gayadeen. This order shall be implemented within a period of one month from today. Costs on parties.

Petition allowed.

MISCELLANEOUS PETITION

Before Mr. Justice Dipak Misra and Mr. Justice Shantanu Kemkar.
21 October, 2003.

B. S. P. GOUR ...Petitioner*

v.

STATE and others ...Respondents.

Constitution of India, Article 227 and Administrative Tribunals Act, (XIII of 1985)–Section 19 and 21–Service Law–Promotion–Supersession–Representation made rejected by State Government–In the matter of seniority and promotion one should be vigilant and delight to approach the Court in quite promptitude–Stale claims are not to be agitated–Approach to Administrative Tribunal after 7 years of rejection of Representation–No explanation for delay–Tribunal rightly refused to condone the delay–No interference in writ petition.

In the matter of seniority and promotion one should be vigilant and delight to approach the Court in quite promptitude as stale claims are not to be agitated. It is so, by delayed approach settled position are not to be unsettled.

The whole thing can also viewed from another angle. Section 21 of the Administrative Tribunals Act provided for limitation of one year from passing of the order. The petitioner's representation was decided on

*W. P. No. 1025/2001.

18.05.1993. He waited for about more than seven years and thereafter approached to the Tribunal without sufficiently explaining the reasons of delay. The Tribunal therefore, has rightly refused to condone the delay.

Union of India and other v. *S. S. Kothiyal and others*[1]; referred to.

P. S. Sadasivaswamy v. *State of Tamil Nadu*[2]; followed.

Ms. Malti Dadaria for the petitioner.

Sanjay K. Agrawal for the Respondents.

Cur. adv. vult.

ORDER

The Order of the Court was delivered by SHANTANU KEMKAR, J. – The petitioner has approached this Court under Article 226/227 of the Constitution of India Challenging the order dated 15.1.2001 passed by the Madhya Pradesh State Administrative Tribunal in O.A. No. 226/2001.

Briefly stated, the petitioner was working as an Agriculture Assistant (L. D.). He was superseded firstly on 13.8.1971 when Shri B. K. Singh (respondent No. 3) was promoted to the post of Agriculture Assistant (U.D.) and secondly on 15.7.1987 when the same person was further promoted to the post of Assistant Director. The petitioner for the first time filed a representation on 10.4.1991, which was rejected by the respondent State vide order dated 18.5.1993.

The petitioner challenged the aforesaid orders of supersession and the order dated 18.5.1993 by which his representation was rejected by filing application under Section 19 of the Administrative Tribunals Act, 1985 in the month of January, 2001, which was dismissed by the Tribunal holding it to be barred by limitation.

We have heard Ms. Malti Dadaria, learned counsel for the petitioner and Mr. Sanjay K. Agrawal, learned counsel for the State.

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(1) (1998) 8 S.C.C. page 682.
(2) A.I.R. 1974 S.C. 2271.

B. S.P. Gour v. State, 2003.

As per the averments made by the petitioner, he was superseded by the respondent No. 3 on two occasions, once on 13.8.1971 and again on 15.7.1987. With regard to the aforesaid orders by which he was twice superseded, he preferred representation on 10.4.1991. His representation was rejected by order dated 18.5.1993. The petitioner approached to the Tribunal in January, 2001. The contention of the petitioner was that he was making repeated representations but the same were not decided. The Tribunal relying on the judgment passed in the case of *Union of India and others* v. *S. S. Kothiyal and others*[1] has held that petition is highly bleated. It is well settled in law that the repeated representation do not extend the cause of action. That apart in the matter of seniority and promotion one should be vigilant and delight to approach the Court in quite promptitude as stale claims are not to be agitated. It is so, by delayed approach settled position are not to be unsettled. In this context we may recall the observations of the Apex Court in the case of *P. S. Sadasivaswamy* v. *State of Tamil Nadu*,[2] which reads as under :-

> "A person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters."

The whole thing can also viewed from another angle. Section 21 of the Administrative Tribunals Act provided for limitation of one year from passing of the order. The petitioner's representation was decided on 18.5.1993. He waited for about more than seven years and thereafter approached to the Tribunal without sufficiently explaining the reasons of delay. The Tribunal, therefore, has rightly refused to condone the delay.

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(1) (1998) 8 S.C.C. page 682. (2) A.I.R. 1974 S.C. 2271.

Thus, in view of the aforesaid findings we concur with the judgment passed by the State Administrative Tribunal by which the original application submitted by the petitioner has been dismissed on the ground of delay and laches as doctrine of laches is squarely applicable to the present case.

Accordingly, we decline any interference in the impugned order passed by the Tribunal, the same being absolutely presentable. Hence, the petition is dismissed without any order as to costs.

Petition dismissed.

LETTERS PATENT APPEAL

Before Mr. Justice S. K. Kulshreshtha and Mr. Justice Shantanu Kemkar.
1 October, 2003.

HARICHAND ...Appellant*

v.

DHARAMPAL SINGH BABA
and others ...Respondents

Letters Patent, Clause X–Appeal–Maitnainability–Suit for declaration and injunction–Agreement for sale by plaintiff and delivery of possession during pendnecy of the suit–Vendee permitted by the Court to join as defendant and also to conduct the suit on behalf of plaintiff–Cannot be estopped from pursuing further remedy available to the plaintiff–Suit decreed but reversed in First Appeal–Letters Patent Appeal by vendee defendant–Maintainable subject to restrictions already imposed earlier.

The Trial Court vide order dated 14.11.1971 has permitted the appellant defendant to conduct the suit on behalf of the plaintiff. It would be travesty of justice of hold that the permission to conduct the suit extinguished with the decision of the suit. The suit conducted by the appellant defendant on behalf of the plaintiff was decreed in favour of the plaintiff. The defendants

(1) L.P.A. No. 55/1989.

No. 1 and 2 filed First Appeal before this Court in which the appellant Harichand was respondent. The said first appeal was allowed and the judgment of the Trial Court was set aside. Harichand who was defendant in the suit in the Trial Court and who was permitted to conduct the suit on behalf of the plaintiff has got full right to file this L.P.A. and he cannot be estopped from pursuing the further remedy available to the plaintiff.

We hold that the appellant Harichand is entitled to file this L.P.A. Even otherwise when the trial Court had permitted the appellant Harichand to conduct the suit we allow the appellant to file and conduct this appeal subject to restrictions as imposed on him vide order dated 12.12.1968.

Garikapati v. *Subbiah Choudhary*,[1] *Kondiba Dagadu Kadam* v. *Savitribai Sopan Gujart and others*,[2] *Shyam Sunder and others* v. *Ram Kumar and another*,[3] *Shiv Shakti Coop. Housing Society, Nagpur* v. *Swaraj Developers and others*,[4]; referred to.

A. D. Deoras for the appellant.

Ravish Agrawal Sr. Adv. with *Pranay Verma* for the respondent no. 1 and 2.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **SHANTANU KEMKAR, J.** – Heard Shri A. D. Deoras, learned counsel for the appellant and Shri Ravish Agrawal, learned Senior Counsel with Shri Pranay Verma, Counsel for the respondents No. 1 and 2 on I. A. No. 2579/03 an application submitted on behalf of respondent No. 1 and 2 raising an objection to the maintainability of this Letters Patent Appeal.

This Letters Patent Appeal arises out of the judgment and decree dated 22.8.1989 passed by Single Judge of this Court Bench at Gwalior in Civil First Appeal No.1/75.

In order to decide I.A. No. 2579/2003 we feel it necessary to state brief facts of the case.

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(1) A.I.R. 1957 S.C. 540.
(2) (1993) 3 S.C.C. 722.
(3) A.I.R. 2001 S.C. 2472.
(4) (2003) 6 S.C.C. 659.

Harichand v. Dharampal Singh Baba , 2003.

Plaintiff Shiv Singh had filed a suit for declaration of his title over the suit house and for declaration that the sale deed dated 10.1.1963 executed by defendant No. 2 in favour of defendant No. 1 are not binding upon him and prayed for permanent injunction restraining the defendants No. 1 and 2 from interfering with his possession.

The present appellant Hari Chand filed an application in the said suit praying therein that he may be joined either as plaintiff No. 2 or as defendant on the ground that during the pendency of the suit the plaintiff has executed a registered agreement of sale on 18.3.1967 in his favour and since then he is in possession of the suit house. This application submitted by the appellant Hari Chand was rejected by the Trial Court. Against which Harichand had filed a Civil Revision NO. 272/68 before this Court, which was decided vide order dated 12.12.1968 in the following terms.

> "Having regard to the facts and circumstances of this case and particularly because the plaintiff himself joined Shri Ram Babu tenant as a defendant in the suit, the applicant should be allowed to intervene. He should be joined as a defendant. It must, however, be observed that the trial of the suit shall be restricted to the questions raised in the plaint and it is not as if the rights of Harishchandra shall be determined in the suit. No fresh issue shall be framed. It may be mentioned that the Court may reconsider whether issue No. 2 should be allowed to remain or should be deleted."

Thereafter the appellant Harichand who was arrayed as defendant No. 6 as per the aforesaid order dated 12.12.1968 filed an application under Order 1, Rule 11 of the Code of Civil Procedure alleging therein that as the plaintiff is not taking any interest in the prosecution of suit, which is detrimental to his interest and that the plaintiff has collided with other defendants, therefore, prayed for his transposition as plaintiff or to permit him to conduct the suit. The Trial Court vide order passed on 14.10.1971 partly allowed the application of appellant defendant No. 5 and permitted him to conduct the suit on behalf of the plaintiff, however, his prayer for transposition as plaintiff was rejected. Thus, appellant Harichand defendant No. 6 conducted the suit on behalf of the plaintiff. The suit so conducted by the appellant Harichand was decreed by the Trial Court vide judgment dated 14.9.1974.

Harichand v. Dharampal Singh Baba, 2003.

Dharamwatibai defendant No. 1 challenged the judgment dated 14.9.1974 passed by the Trial Court by filing an appeal No. 1.1975 before this Court at Gwalior Bench. Dharamwati Bai appellant in F. A. No. 1/75 died during the pendency of appeal and the names of Dharampal Singh and Rajendra Siyal were substituted in her place. Shiv Singh the sole plaintiff also died during the pendency of the F.A. 1/75 and his name was deleted from the array of respondents. The Single Bench of this Court vide order passed on 22.8.1989 allowed the appeal filed by the defendant No. 1, thereby the plaintiff's suit stood dismissed.

Present appellant Harichand, defendant No. 6 and respondent No. 7 in F.A.No. 1/75 who was permitted by the Trial Court to conduct the suit on behalf of the plaintiff has preferred the present L.P.A. challenging the legality of the judgment passed by the first appellate Court by which the judgment and decree passed in favour of the plaintiff has been set aside.

Shri Ravish Agrawal, learned Senior Counsel for the respondent No. 1 and 2 has submitted that Harichand was permitted to be joined as defendant vide order dated 12.12.1968 passed in Civil Revision No. 272/68 by this Court with limited rights only, it was made clear vide the said order 12.12.1968 that trial of the suit shall be restricted to the questions raised in the plaint and it is not as if the rights of Harichand shall be determined in the suit. The Trial Court also vide order dated 14.10.1971 permitted the appellant only to conduct the suit on behalf of the plaintiff. In view of the aforesaid restricted rights granted by this Court and also by the trial court, the learned Counsel has submitted that Harichand has got no right to file this Letters Patent Appeal. He further submitted that his right to conduct the suit exhausted with the life of the suit and as soon as the suit was decided his right has extinguished. The learned counsel in support of his submission relied on the decisions reported in 1964 MPLJ 402, (1999) 3 SCC 722 and (2003) 6 SCC 658.

Shri A. D. Deoras, learned Counsel for the appellant submitted that the appellant by filing this Letters Patent Appeal is only prosecuting the rights of the plaintiff and is not claiming his own rights be decided in this appeal. Harichand was defendant in the suit was allowed to conduct the suit on behalf of the plaintiff so he has got right to pursue the remedy of

appeal too as appeal is a continuation of suit. In support of his contention he relied upon the judgment of the Apex Court in *Garikapati* v. *Subbiah Choudhary.*[1]

The Apex Court in *Garikapati* v. *Subbaiah Choudhay* (*supra*) has held that the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding. The right of appeal is not a mere matter of procedure but is a substantive right. The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit. The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such a right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of filing of the appeal. In *Kondiba Dagadu Kadam* v. *Savitribai Sopan Gujar and others*[2] it has been held that right to appeal is a substantive statutory right and thus has to be regulated in accordance with the law in force at the relevant time. Right to appeal is neither a natural nor inherent right attached to the litigation. In *Shyam Sundar and others* v. *Ram Kumar and another*[3] it has been held that it is no doubt true that in certain context an appeal is continuation of suit and appellate Court is rehearing the suit, but such wide appellate power has not shown to be exercised to affect the vested right of a pre-emptor. In *Shiv Shakti Coop. Housing Society, Nagpur* v. *Swaraj Developers and others*[4] it has been held that appeal is continuation of proceedings. Right of appeal carries with it a right of rehearing on law and fact including the power to review evidence subject to any statutory limitation.

After considering the rival submissions on the preliminary objection and the case law cited by the learned counsel for both the parties, we find that the objection is not maintainable. The Trial Court vide order dated 14.11.1971 has permitted the appellant defendant to conduct the suit on behalf of the plaintiff. It would be travesty of justice to hold that the permission to

(1) A.I.R. 1957 .SC. 540.
(2) (1993) 3 S.C.C. 722.
(3) A.I.R. 2001 S.C. 2472.
(4) (2003) 6 S.C.C. 659.

conduct the suit extinguished with the decision of the suit. The suit conducted by the appellant defendant on behalf of the plaintiff was decreed in favour of the plaintiff. The defendants No. 1 and 2 filed First Appeal before this Court in which the appellant Harichand was respondent. The said first appeal was allowed and the judgment of the Trial Court was set aside. Harichand who was defendant in the suit in the Trial Court and who was permitted to conduct the suit on behalf of the plaintiff has got full right to file this L.P.A. and he cannot be estopped from pursuing the further remedy available to the plaintiff.

The restrictions imposed by this Court vide order dated 12.12.1968 cannot be stretched to the extent that appellant Harichand is not entitled to file L.P.A. to agitate against judgment passed by the First Appellate Court reversing the judgment and decree passed by the trial Court in the suit conducted by him. Admittedly appellant Harichand is not claiming any rights of his own by filing this appeal but he wants the rights of the plaintiff alone to be adjudicated.

In view of this we hold that the appellant Harichand is entitled to file this L.P.A. Even otherwise when the Trial Court had permitted the appellant Harichand to conduct the suit we allow the appellant to file and conduct this appeal subject to restrictions as imposed on him vide order dated 12.12.1968.

Accordingly, I.A. No. 2579/2003 submitted by respondents No. 1 and 2 is dismissed. The Letters Patent Appeal is held to be maintainable.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice S. P. Khare.
27 February, 2003.

UMESH KUMAR ...Appellant*

v.

SMT. CHANDRAKRIPA ...Non-applicant

Hindu Marriage, Act (XXV of 1955)–Sections 9, 13(1)(1-b) and 28–Appeal–Petition for divorce dismissed and decree of restitution of conjugal rights passed–Husband alleging desertion and cruelty–'Desertion' is a withdrawal not from a place but from a state of thing–Essence of desertion is the forsaking and abandonment of one spouse by the other without reasonable cause and without consent or against the wish of the other–Wife living separately for continuing to practice as an advocate as the husband insisted–Absence of consent on part of husband not proved–Wife cannot be held guilty for deserting the husband–Daughters have grown up–Husband no longer in employment–Husband should leave his obdurate obstinate approach and think of living with his wife as per decree of restitution of conjugal rights.

For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*), similarly, two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petition for divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period.

It has been established that the husband was encouraging and prevailing upon his wife to continue her practice as an Advocate at Sidhi and to take part in politics. Thus, there was consent of the husband and because of his encouragement she continued to live at Sidhi. The essential

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* F.A.No. 113/98.

Umesh Kumar v. Smt. Chandrakripa, 2003.

ingredient i.e. absence of consent on the part of the husband is not proved and, therefore, the wife cannot be held guilty for deserting the husband. So far as the charge of cruelty is concerned, the evidence on record falls sort of the proof to establish cruelty. It is an admitted fact that during 3 years of the married life there was no problem between the parties to the marriage except that there was frequent travelling by one or the other from Sidhi or from Manawar. During this period the wife gave birth to two children. The relations appear to have fallen a part after 3 years and then each party started making allegations and accusation against each other. Now the daughters have grown-up and the husband is no longer in the employment and, therefore, he should leave his obstinate and obdurate approach and think of living with his wife as per decree of restitution of conjugal rights granted by the trial Court.

Adhyatma Bhattar Alwar v. *Adhyatma Bhattar Sri Devi*[1] and *Savitri Pandey* v. *Prem Chandra Pandey*[2]; referred to.

Self for the appellant.

R. N. Singh Sr. Adv. with *A. P. Singh* for the resp.

Cur. adv. vult.

JUDGMENT

S. P. KHARE, J. – These are two appeals under Section 28 of the Hindu Marriage Act, 1955 (hereinafter to be referred to as 'the Act') by the husband against the judgment and decree by which his application under Section 13 of the Act for divorce has been rejected and the application of the wife under Section 9 of the Act for restitution of conjugal rights has been allowed.

It is not in dispute that Chandra Kripa was an Advocate and practising at Sidhi. Umesh Kumar Soni was working as a Chemist in a Cement Factory at Manawar in district Dhar. They married on 7.12.1989. The distance between Sidhi and Manawar is about 1000 kilometres and it could be easily foreseen that it was bound to create trouble in the matrimonial life unless there was a deep understanding between the couple. The wife lived in

(1) AI.R. 2002 S.C. 88. (2) A.I.R. 2002 S.C. 591.

Manawar at some intervals and the couple had two daughters. The wife did not leave her practice and continues to work as an Advocate at Sidhi. From the various letters exchanged between the parties which are on record and marked as Ex.-D-1 to Ex-D-20 it appears that the husband encouraged his wife to pursue her career as an Advocate and to enter into politics. The wife initially by her letter dated 27.12.1989 Ex.-D-12 expressed that she is prepared to leave her practice and shift to Manawar to live with her husband. But the husband continued to insist upon his wife to pursue her career as an Advocate at Sidhi.

The case of the husband is that there was an agreement between the parties before the marriage that the wife would shift to Manawar and live with her husband there. After the marriage the wife lived with the husband for about one and half months and then came back to Sidhi for giving her briefs to other lawyers or to make some alternative arrangement. According to the husband his wife revealed to him that she has illicit intimacy with the husband of her elder sister. She started treating him with cruelty. She deserted him without reasonable excuse. She used to quarrel and abuse him. She made a proposal for divorce in May, 1990. The same story was repeated in November, 1992. In April, 1994 the papers for divorce were prepared but the wife refused to sign the same. He has claimed divorce on the grounds of cruelty and desertion.

The case of the wife is that after the marriage she was always prepared to leave her practice and live with the husband at Manawar, but he made her to continue her practice at Sidhi and encouraged her to do so. She had no illicit relation with anyone and the charge of adultery levelled against her by her husband is totally false. She has expressed that she is still willing to live with her husband. She has not treated her husband with cruelty nor she has deserted him.

The trial Court after recording the evidence of both the sides has held that the wife has not treated her husband with cruelty and she has also not deserted him. On these findings the relief of restitution of conjugal rights has been granted to the wife and suit of the husband for divorce has been dismissed.

In this appeal the husband appeared and argued his case. It was stated that he is no longer in employment. He has argued that the parties are living separately for more than 10 years and there has been irretrievable breakdown

of the marriage and, therefore, the decree for divorce should be granted. On the other hand, it has been argued on behalf of the respondent that the marriage should be kept intact as there are to grown-up daughters of the couple and in the absence of proof of cruelty or desertion on the part of the wife, there can be no decree of divorce.

The evidence on record has been scanned by this Court. A perusal of the letters Ex.-D-1 to Ex.-D-20 written during the period of 3 years after the marriage goes to show that the husband was insisting upon his wife repeatedly to continue her practice as an Advocate and to take part in politics. He did not unequivocally ask her to come and live with him at Manawar. In such a situation the wife was living at Sidhi with the consent of her husband and he was also encouraging her to continue her practice as an Advocate and also to take part in politics. It cannot be said that she has deserted him. The letters reveal that the husband wanted that he should get some employment at Sidhi through the political influence of the persons with whom his wife was having contacts. As already stated, the wife had already expressed her desire in her letter dated 27.12.1989 Ex.-D-12 to leave her practice and shift to Manawar to live with her husband. Thereafter the husband made his wife to stay at Sidhi through several letters written by him to her.

Umesh Kumar Soni (P.W.-1) has deposed that his wife told him that she was having illicit intimacy with the husband of her elder sister. That has been denied by the wife. There is no evidence in support of the stand taken by the husband on this point. Therefore, the allegation of the husband that his wife is having illicit relationship with any other person has been rightly disbelieved by the trial Court. Umesh Kumar Soni (P.W.-1) has described various incidents showing that his wife used to insult him and show her supremacy but these allegations have not been substantiated. He has admitted in his cross-examination that he was encouraging his wife to continue her practice as an Advocate at Sidhi. Vinod Kumar Jain (P.W.-2), Krishnanand Dwivedi (P.W.-3) and Haneef Khan (P.W.-4) have been examined on behalf of the husband, but their evidence does not advance his case for divorce. Their evidence is of general nature and is not sufficient to establish that the husband was being treated with cruelty by the wife or she has deserted him.

On the other hand Chandrakripa (D.W.-1) has deposed that she went to Manawar with her husband and lived with him for some time at various intervals and during this period she conceived twice and gave birth to two daughters. According to her, the husband was always insisting that she should continue her practice as an Advocate at Sidhi. She is still prepared to live with him. In cross-examination she has denied that she treated her husband with cruelty or quarrelled with him or tried to show her upper hand. In para 18 of cross-examination she has stated that in view of the changed circumstances it is not possible for her to leave Sidhi and go to Manawar. It has been admitted during the course of hearing of this appeal that the husband is no longer in the employment of the company at Manawar. Therefore, the proper course for the husband is now to go to Sidhi and live with his wife and children.

The essence of desertion is the forsaking and abandonment of one spouse by the other without reasonable cause and without the consent or against the wish of the other. The 'desertion' is 'a withdrawal not from a place, but from a state of things'. In *Adhyatma Bhattar Alwar* v. *Adhyatma Bhattar Sri Devi*[1] the Supreme Court has held that the essential ingredients of 'desertion' in order that it may furnish a ground for divorce are (i) the factum of separation (ii) the intention to bring cohabitation permanently to an end-*animus deserendi* and (iii) the element of permanence which is a prime condition requires that both these essential ingredients should continue during the entire statutory period. It has been further observed that from the Explanation to Section 13(1)(i-b) of the Hindu Marriage Act, 1955 it is clear that the legislature intended to give to the expression a wife import which includes wilful neglect of the petitioner by the other party to the marriage. Therefore, for the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*), similarly, two elements are essential so far as the deserted spouse is concerned; (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petition for divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period.

(1) A.I.R. 2002 S.C. 88.

Umesh Kumar v. Smt. Chandrakripa, 2003.

In *Savitri Pandey* v. *Prem Chandra Pandey*,[1] it has been observed that the approach of the Court should be to preserve the matrimonial home and be reluctant to dissolve the marriage on the asking of one of the parties. The marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no useful purpose would be served to keep it alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses. Irretrievable breakdown of the marriage is not a ground by itself to dissolve it.

In the present case the wife was practising as an Advocate at Sidhi at the time of her marriage and the husband was employed in a private company at Manawar in district Dhar. It has been established that the husband was encouraging and prevailing upon his wife to continue her practice as an Advocate at Sidhi and to take part in politics. Thus there was consent of the husband and because of his encouragement she continued to live at Sidhi. The essential ingredient i.e. absence of consent on the part of the husband is not proved and, therefore, the wife cannot be held guilty for deserting the husband. So far as the charge of cruelty is concerned, the evidence on record falls sort of the proof to establish cruelty. It is an admitted fact that during 3 years of the married life there was no problem between the parties to the marriage except that there was frequent travelling by one or the other from Sidhi or from Manawar. During this period the wife gave birth to two children. The relations appear to have fallen a-part after 3 years and then each party started making allegations and accusation against each other. Now the daughters have grown-up and the husband is no longer in the employment and, therefore, he should leave his obstinate and obdurate approach and think of living with his wife as per decree of restitution of conjugal rights granted by the trial Court.

In view of the above discussion the appeals filed by the husband are dismissed. The parties will bear their own costs.

Appeal dismissed.

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(1) A.I.R. 2002 S.C. 591

APPELLATE CRIMINAL

Before Mr. Justice S. L. Jain
18 November, 2003.

SUKHRAM ...Appellant*

v.

STATE ...Respondent

Penal Code, Indian (XLV of 1860)–Section 376(2)(g) and Criminal Procedure Code, 1973, (II of 1974) Section 374(2)–Rape on minor–Conviction and sentence–Appeal–Eye witnesses examined–Merely because the lady doctor could not opine definitely about rape the eye witness cannot be disbelieved–Conviction & sentence maintained.

Merely because the lady doctor could not get any definite opinion regarding rape, prosecutrix and other eye witnesses cannot be discarded. Normally no woman would come forward to make a humiliating statement against her honour of having been raped unless it was true. Testimony of a victim in the case of sexual offence is vital and the Court should not find any difficulty in acting on the testimony of the victim of sexual assault and her relatives. The evidence of prosecutrix and her relatives inspires confidence.

The contention cannot be accepted. It is true that from the evidence of the prosecution witnesses it is clear that the prosecutrix was raped by appellant alone, but the explanation one added to Section 376 IPC provides that where woman is raped by one or more in a group of persons acting in furtherance of their common intention, each to the persons shall be deemed to have committed gang rape within the meaning of sub-section (2). From the evidence it is clear that co-accused Rajaram acted in furtherance of the common intention of both the accused persons, therefore, the appellant shall be deemed to have committed gang rape within the meaning of sub-section (2)(g) of Section 376 IPC.

Ku. Jyoti Agnihotri for the Appellant.

Dinesh Joshi P. L. for the State.

Cur. adv.vult.

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*Cri. A.No. 680 of 1996.

Sukhram v. State, 2003.

JUDGMENT

S. L. JAIN, J. – Appellant Sukhram has been convicted under Section 376(2)(g) IPC and sentenced to R.I. for ten years for committing rape on prosecutrix Mahawati on 4.5.91.

In order to establish its case, the prosecution has examined Mahawati (P.W.-11), Rajwati (P.W.-14). Parasram (P.W.-10) husband of the prosecutrix and Tilakram (P.W.-9) as eye witnesses as also Dr. Smt. Sobha Moitra who examined the prosecutrix, Dr. S. K. Dubey who conducted ossification text., Dr. Sanjay Kumar Nigam who examined appellant Sukhram and Investigating Officer D. R. Alonkar, A.S.I.

The Trial Court believed the eye witnesses and held that appellant Sukhram alongwith co-accused Rajaram committed gang rape on the prosecturix and as such convicted and sentenced him as indicated above.

Mahawati (P.W.-11) has stated that on the date of incident she alongwith Rajwati (P.W.-14) went in the forest to collect the fire wood. Appellant Sukhram caught hold of her and took her towards Nala where Rajaram caught hold of her feet and appellant Sukhram removed her clothes and committed rape on her. On hearing cries, her husband rushed to the spot. Appellant and co-accused then overthrew Parasram. When Tilakram cam to the rescue, appellant and co-accused Rajaram took to their heals.

Parasram (P.W.-10) has stated that on the relevant date he alongwith Tilakram (P.W.-9) wen to the forest in search of is good. When he went towards Nala he saw appellant committing rape on his wife Mahawati and at that time co-accused Rajaram was standing about 25-30 feet away from the place of incident. When he caught hold of Sukhram, co-accused and appellant overthrew him. When Tilakram reached there both the accused persons run away.

Tilakram (P.W.-9) has stated that on the date of incident he had been at Jhiplani to purchased an Ox. He saw an ox but did not approve the same. After seeing the ox Parasram told him that his goat has been lost and is not traceable since 2-3 days and he asked him to accompany him to search the goat. When he went near the Nala, he saw appellant committing rape on prosecutrix Mahawati and co-accused Rajaram was standing nearby.

All the aforesaid eye witnesses were cross examined at length but nothing has come in their cross examination to discard their testimony. The evidence of prosecutrix is corroborated by FIR (Ex.-P-12) lodged by herself at outpost Dhamora of police station Batka.

Learned counsel appearing for the appellant vehemently argued that the evidence of prosecutrix and other eye witnesses cannot be believed as the FIR was lodged after a delay of two days. The incident is alleged to have been occurred on 4.5.91 and the report was lodged on 6.5.91 at about 10.45 AM, while the distance of outpost from the place of incident is only 25 Kms.

Mahawati (P.W.-11) Tilak, (P.W.-9) and Parasram (P.W.-10) have given satisfactory explanation for delay in lodging the FIR. The witnesses have stated that on the request of the accused persons and the father of the appellant a Panchayat was called. In the Panchayat co-accused Rajaram had appeared but appellant did not appear therefore, Panchas advised to lodge the report and on the next day they lodged the report. The prosecution witnesses cannot be disbelieved in this regard. Thus, delay in lodging the FIR has been sufficiently explained by the prosecution.

Merely because the lady doctor could not get any definite opinion regarding rape, prosecutrix and other eye witnesses can not be discarded. Normally no woman would come forward to make a humiliating statement against her honour of having been raped unless it was true. Testimony of a victim in the case of sexual offence is vital and the Court should not find any difficulty in acting on the testimony of the victim of sexual assault and her relatives. The evidence of prosecutrix and her relatives inspire confidence.

Learned counsel for the appellant further contended that the prosecutrix was a consenting party therefore, no case for committing rape is made out. On careful scrutiny of the evidence of the prosecutrix and other eye witnesses it does not appear that the prosecutrix was a consenting party. From the evidence of prosexutrix it is clear that she did not give consent and the appellant and co-accused Rajaram Committed rape on her by using force, therefore, her act cannot be considered as a result of her will.

Sukhram v. State, 2003.

Learned counsel for the appellant lastly contended that co-accused Rajaram did not participate in the commission of offence and therefore, it cannot be said to be a case of gang rape.

The contention cannot be accepted. It is true that from the evidence of the prosecution witnesses it is clear that the prosecutrix was raped by appellant alone, but the explanation one added to Section 376 IPC provides that where woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of sub-section (2). From the evidence it is clear that co-accused Rajaram acted in furtherance of the common intention of both the accused persons, therefore, the appellant shall be deemed to have committed gang rape within the meaning of sub-section (2)(g) of Section 376 IPC.

In view of the aforesaid discussion. I do not find any reason to interfere with the conviction and sentence passed against the appellant. The sentence of rigorous imprisonment for 10 years for the offence of gang rape can not be said to be harsh in any manner. In the absence of special reason minimum sentence prescribed under Section 376 (2) IPC is 10 years. I do not find any reason much less special and adequate reasons to award a lesser sentence.

The appeal is accordingly dismissed and the impugned judgment and order of the trial Court convicting and sentencing the appellant for the offence punishable under Section 376 (2)(g) IPC is hereby maintained.

Appeal dismissed.

CIVIL REVISION

Before Mr. Justice Subhash Samvatsar
13 September, 2002.

SUNDERLAL and others ...Applicants*

v.

GOPAL SARAN ...Non-applicant

Civil Procedure Code (V of 1908), Section 115, Order 21 and Rule 11–Revision–Execution proceedings–It is the duty of the executing court to find out exact meaning of the decree and give effective relief to the decree holder–Decree for specific performance of contract for sale–Itself implies delivery of possession–No error committed by executing court in directing the JDr to hand over possession.

Though the executing Court cannot go behind the decree under the execution but that does not mean that it has no duty to find out the true effect of the decree. For construing a decree it can and in appropriate cases it ought to take into consideration the pleadings as well as the proceedings leading up to the decree. In order to find out the meaning of the words employed in a decree, the Court often has to ascertain the circumstances under which these words came to be used. As per the said judgment, it is the duty of the executing court to find out the exact object of passing of the decree and giving effective relief to the decree-holder.

In the present case, it is true that in the plaint the plaintiff has alleged that he is in possession of the suit property but the Court has not given any finding about the possession of the land in the present case. Moreover, in the case of *Shrikrishna Gupta* (*supra*), the relief of possession was not claimed by the plaintiff in the plaint and in spite of the said fact this Court has held that the relief of possession can be given by the court even in absence of prayer for the same, as the decree for specific performance itself implies the decree for possession.

The executing Court has not committed any jurisdictional error in directing the defendants to hand over the possession in execution of the decree for specific performance.

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*C. No. 907/2000.

Sunderlal v. Gopal Saran, 2002.

Adcon Electronics Pvt. Ltd. v. *Daulat and another*[1]; distinguished.

Sardar Ravindra Singh v. *Smt. Gurubachan Kaur*,[2] *Babulal* v. *M/s. Hazarilal Kishori Lal and others*,[3] *Bata Shoe Co. Preetamdas and others*,[4] *Dadulal Hanumanlala* v. *Deo Kunwar*,[5] *Brijmohan* v. *Chandrabhaga Bai*,[6] *Subodh Kumar Banerjee* v. *HiramoniDasi and others*,[7] *Debabrata Tarafder* v. *Biraj Mohan Bardhan*,[8] *Shrikrishna Gupta* v. *Sitaram Mohanswaroop Nigam*,[9] *Mohd. Yakub* v. *Abdul Rauf and another*,[10] *Bhavan Vaja and others* v. *Solanki Hanuji Khodaji Mansang and another*,[11]; referred to.

K. L. Mangal and *D. D. Bansal* for the Applicants.

A. M. Naik Sr. Adv. with *B. K. Agrawal* for the Non-applicant.

Cur. adv. vult.

ORDER

S. Samvatsar, J. – This revision is filed by the judgment-debtor against an order whereby the executing Court has directed them to hand over the vacant possession of the suit property.

The facts of the case are that the respondent filed a suit for specific performance of a contract against the present petitioners. In the said suit relief for possession was not asked by the plaintiff, as the plaintiff alleged that he is in possession of the suit property. Ultimately, a decree for specific performance was passed in favour of the plaintiff. As the plaintiff has not prayed for the relief of possession in the plaint itself, the decree is silent on the point of possession. After obtaining the decree for specific performance the respondent filed execution proceedings in which he has claimed not only the relief of execution of the document but also for possession.

The petitioners objected to the relief of possession. The said objections were overruled by the executing Court and the executing Court directed the petitioners to execute the sale-deed as well as to hand over the possession of the suit property. This order is under challenge in the present revision.

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(1) (2001) 7 S.C.C. 698.
(2) 1996 (1) M.P.W.N. 52.
(3) (1982) 1 S.C.C. 525.
(4) 1983 J.L.J. 422.
(5) 1983 J.L.J. 234.
(6) A.I.R. 1948 Nagpur 406.
(7) A.I.R. 1955 Cal. 267 (D.B.).
(8) A.I.R. 1983 Cal. 51.
(9) 1997 (2) M.P.L.J. 501.
(10) (2002) (1) M.P.H.T. 216.
(11) A.I.R. 1972 S.C. 1371.

Sunderlal v. Gopal Saran, 2002.

The main contention of the petitioners in this revision is that the executing Court cannot go behind the decree and is required to execute the decree as it is. The executing Court has no jurisdiction to alter or change the nature of the decree and in spite of the said settled principle of law the executing Court in this case has directed to hand over the vacant possession of the suit premises in favour of the decree-holder. This direction, according to the petitioner, is without jurisdiction. Hence, this revision.

Shri K.L.Mangal, learned counsel for the petitioners, for this purpose relied on the provisions of Section 22 of the Specific Relief Act. According to him, under Section 22 of the Specific Relief Act the plaintiff along with the suit for specific performance may pray for appropriate relief including the relief of possession. According to him, sub-section (2) of the said Section creates a bar on the Court to grant any relief in favour of plaintiff which is not specifically asked for by him in the plaint. Section 22 of the Specific Relief Act reads as under :-

> "Sec. 22. - Power to grant relief for possession, partition, refund of earnest money, etc. - (1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908, any person suing for the specific performance of a contract for the transfer of immoveable property may, in an appropriate case, ask for -
>
> (a) possession, or partition and separate possession, of the property in addition to such performance; or
>
> (b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or (made by) him, in case his claim for specific performance is refused.
>
> (2) No relief under Cl. (a) or Cl. (b) of sub-section (1) shall be granted by the Court unless it has been specifically claimed.
>
> Provided that where the plaintiff has not claimed any such relief in the plaint the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms may as be just for including a claim for such relief.
>
> The power of Court to grant relief under Cl. (b) of Sub-section (1) shall be without prejudice to its powers to award compensation under Sec. 21."

Sunderlal v. Gopal Saran, 2002.

Shri K. L. Mangal relying on sub-section (2) of Section 22 has vehemently urged that in the present case the plaintiff has not asked for any relief for possession and, therefore, the said relief cannot be granted to him in execution proceedings. For this purpose, he relied on the judgment of the Apex Court in the case of *Adcon Electronics Pvt. Ltd.* v. *Daulat and another*,[1]. He invited my attention to para 16 of the said judgment, In para 16 of the said judgment, the Apex Court has reproduced Section 22 and has laid down that in a suit for specific performance of a contract for sale of immovable property containing a stipulation that on execution of the sale-deed the possession of the immovable property will be handed over to the purchaser. In such a case, it is necessary for the purchaser to specifically ask for relief of possession.

Shri Mangal also relied on the judgment of this Court in the case of *Sardar Ravindra Singh* v. *Smt. Gurubachan Kaur*,[2] to support his argument that the executing Court cannot go behind the decree and is bound to execute the decree as it is. The executing Court cannot modify or amend the decree.

There is no doubt about the Proposition that the executing Court cannot go behind the decree. The question in the case is whether the decree for specific performance implies the decree for possession.

Shri A. M. Naik, Learned Senior Advocate for the respondent, urged that in a suit for specific performance it is not necessary for the plaintiff to ask for possession, as the decree for specific performance necessarily follows the relief of possession. The relief of possession is implicit in the decree for specific performance. For this purpose he relied on number of authorities.

In the present case, it is no doubt true that the plaintiff has not claimed relief for possession. On the other hand, he has approached the Court on the allegation that he is in possession of the suit property and, therefore, there was no question of asking the relief of possession. After perusing the original judgment and decree, I found that the Court below has not addressed its mind to the question about the possession of land and has not given any specific finding about the possession of the land.

(1) (2001) 7 S.C.C. 698. (2) 1996 (1) M.P.W.N. 52.

Shri A. M. Naik, for supporting his submission, has urged that the judgment of the Apex Court in the case, of *Adcon Electronics Pvt. Ltd.* (*supra*), relied by the counsel for the petitioner is quite distinguishable. According to him, the question involved in the said judgment was quite different. He invited my attention to paras 1, 4 and 11 of the said judgment.

After perusing the said judgment, I found that the main question involved in the case was about the maintainability of the Letters Patent Appeal. Under clause 12 of the Letters Patent of Bombay High Court, the Letters Patent Appeal lies against a judgment in a suit relating to land. The question before the Apex Court was whether the suit for specific performance can be said to be a suit for land or its title. In para 15 of the judgment, the Apex Court has held that a suit for land is a suit in which the relief claimed relates to title or delivery of possession of land of immovable property. Whether a suit is a suit for land or not has to be determined on the basis of the averments in the plaint with reference to the reliefs claimed therein; where the relief relates to adjudication of title to land or immovable property or delivery of possession of the land or immovable property, it will be a "suit for land". According to the Apex Court, the suit for specific performance of an agreement to sell of the suit property wherein the relief for delivery of suit property is not specifically claimed cannot be treated as suit for land and, hence, the Apex Court has held that the Letters Patent Appeal in the said case was not maintainable under Clause 12 of the Letters Patent of Bombay High Court.

The question whether the relief for possession is implicit in a decree for specific performance was not there before their Lordships in the aforesaid case. Moreover, earlier judgment of the Apex Court in the case of *Babulal* v. *M/s. Hazarilal Kishori Lal and others*[1] was not brought to the notice of their Lordships nor the provisions of Section 55 of Transfer of Property Act were under consideration before the Apex Court and, therefore, the said judgment is quite distinguishable from the facts and circumstances of the present case. Section 55 of the Transfer of Property Act castes a duty on the seller of immovable property to hand over the possession of the property to the purchaser. The Apex Court in its earlier judgment in the case of *Babulal* (*supra*) has specifically laid down that a decree for specific performance

(1) (1982) 1 S.C.C. 525.

embraces within its ambit not only the execution of the sale-deed but also possession of the property. A similar view is taken by this Court in its judgment in the case of *Bata Shoe Co.* v. *Preetamdas and others.*[1] In the said judgment, this Court has held that in execution of a decree for specific performance of sale where the decree is silent on the question of delivery of possession, the executing Court can direct delivery of possession. For this purpose this Court has relied on its judgment in the cases of *Dadulal Hanumanlala* v. *Deo Kunwar*[2] and *Birjmohan* v. *Chandrabhaga Bai.*[3] Similar view is taken by Calcutta High Court in the case of *Subodh Kumar Banerjee* v. *Hiramoni Dasi and others*[4] and *Debabrata Tarafder* v. *Biraj Mohan Bardhan*[5]; as well as by this Court in the cases of *Shrikrishna Gupta* v. *Sitaram Mohanswaroop Nigam*[6] and *Mohd. Yakub* v. *Abdul Rauf and another*[7].

The Apex Court in the case of *Bhavan Vaja and others* v. *Solanki Hanuji Khodaji Mansang and another*[8] has laid down that even though the executing Court cannot go behind the decree under the execution but that does not mean that it has no duty to find out the true effect of the decree. For construing a decree it can and in appropriate cases it ought to take into consideration the pleadings as well as the proceedings leading upto the decree. In order to find out the meaning of the words employed in a decree, the court often has to ascertain the circumstances under which these words came to be used. As per the said judgment, it is the duty of the executing Court to find out the exact object of passing of the decree and giving effective relief to the decree-holder.

Shri Mangal, learned counsel for the petitioners tried to distinguish the judgments in the cases of *Babulal* (*supra*) and *Bata Shoe Co.* (*supra*) on the ground that in those cases the plaintiff had claimed possession and, therefore, in absence of a specific direction in the decree for handing over the possession the Court has granted the said relief. In the present case, according to him, the plaintiff himself has not specifically claimed possession and, therefore, is not entitled to the decree of possession.

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(1) 1983 J.L.J. 422.
(2) 1983 J.L.J. 234.
(3) A.I.R. 1948 Nag. 406.
(4) A.I.R. 1955 Cal. 267 (D.B.).
(5) A.I.R. 1983 Cal. 51.
(6) 1997 (2) M.P.L.J. 501.
(7) (2002) (1) M.P.H.T. 216.
(8) A.I.R. 1972 S.C. 1371.

Sunderlal v. Gopal Saran, 2002.

In the present case, it is true that in the plaint the plaintiff has alleged that he is in possession of the suit property but the Court has not given any finding about the possession of the land in the present case. Moreover, in the case of *Shrikrishna Gupta* (*supra*), the relief of possession was not claimed by the plaintiff in the plaint and in spite of the said fact this Court has held that the relief of possession can be given by the Court even in absence of prayer for the same, as the decree for specific performance itself implies the decree for possession.

In view of the said judgment, I am of the view that the executing Court has not committed any jurisdictional error in directing the defendants to hand over the possession in execution of the decree for specific performance.

Thus, this revision is devoid of any merit and is dismissed with no order as to costs.

Application is dismissed.

CIVIL REVISION

Before Mr. Justice S. K. Pandey
16 May, 2003.

SMT. SUDHARANI AGRAWAL ...Applicant*

v.

SURENDRA and others ...Non-applicants.

Civil Procedure Code (V of 1908), Sections 10, 115 and 151–Stay of suit–Revision–Dowry death–Suit for recovery of 'Streedhan' and damages–Written statement filed and issues already framed–Cannot be said that proceeding in Civil Suit would embarrass and prejudice the defendants in criminal appeal against their conviction and sentence–Stay of suit–Suffers from material irregularity–Order set aside.

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* C.R.No. 101/2003.

Smt. Sudharani Agrawal v. Surendra, 2003.

C.S. No. 1-B/01 has been instituted and the respondents have filed their written statement the issues were settled and at the stage of evidence application for stay of suit was filed.

The appeal against the conviction/sentence has already been preferred and is pending in High Court. It cannot be said that the proceeding in instant suit would embarrass and prejudice the respondents in effectively contesting the criminal case.

On facts and circumstances of the case, the proceedings in C.S.No. 1-B/01 ought not to have been stayed by allowing the application under Section 151 C.P.C.

Sheetal K. Bandi v. *Rishi*[1] and *Anand Bakshi* v. *Tanviruddin Raizvi*;[2] relied on.

S. K. Verma for the applicant.

R. P. Khare for the Non-applicants.

Cur. adv. vult.

ORDER

S. K. PANDEY, J. – Being aggrieved by the order dated 16.12.2002, passed by ADJ, Jabalpur in C. S.No. 1-B/01 allowing the application under Section 151 CPC for stay of suit, this revision under Section 115 CPC is preferred by the petitioners.

Madhu was married to respondent Surendra. Respondent Ashadevi, Basant Kumar, Ramkumar and Shiv Kumar are family members of respondent Surendra Kumar. As a result of harassment and demand of dowry, Madhu committed suicide on 19.4.2000. Therefore, on a complaint made to the police, criminal case was registered against the respondents. Respondents were tried in S.T.No. 194/2000, court of ASJ, Jabalpur for offence under Sections 498-A and 304-B of IPC. Vide judgment dated 27.8.01 respondents were acquitted of the charge under Section 304-B I.P.C. However, respondents Surendra and Smt. Ashadevi on conviction under Section 498 IPC, were sentenced to R.I. for a period of three years and pay fine of Rs. 5,000/-.

(1) (1998) 2 M.P.L.J. Note-6. (2) (2002) 4 M.P.H.T. 65 (C.G.).

Against the conviction and sentence, respondents Surendra, Ashadevi have preferred a criminal appeal pending in High Court. Plaintiff/petitioner Sudharani being mother of Madhu instituted C.S.No. 1-B/01 (Annexure-P-1) in the Court of 4th ADJ, Jabalpur for recovery of Rs. 13,21,000/- towards Stridhan of Madhu and damages etc. the suit has been resisted by the respondent by filing written statement (Annexure-P-2). After framing of issues when the trial was at the stage of evidence, respondent filed application (Annexure-P-4) under Section 151 CPC requesting to stay the proceedings of C.S. as the criminal appeal arising out of the judgment passed in S.T. No. 194/00 has been preferred by the respondents Surendra and Smt. Ashadevi and same is pending in the High Court. This petition was contested by the petitioner, however, vide impugned order dated 16.12.02 it was allowed and suit has been stayed under Section 10 of the CPC till the decision of criminal appeal arising out of the judgment passed in S.T.No. 194/00. Being aggrieved, this revision is preferred on the ground that the order impugned suffers form material irregularity.

Civil proceedings can be stayed under Section 151 CPC when criminal proceedings in respect of same subject matter is pending on the ground that the continuance of civil proceedings would embarrass and prejudice the accused in effectively contesting the criminal case. C.S. No. 1-B/01 (Ex.-P-1) has been instituted and the respondent has been filed their written statement (Annexure-P-2), the issues were settled and at the stage of evidence application for stay of suit (Annexure-P-4) was filed. Trial in S.T. No. 194/00 in the Court of ASJ, Jabalpur since has been concluded. Respondents Surendra, Ashadevi have been convicted under Section 498-A IPC. The appeal against the conviction/sentence has already been preferred and is pending in High Court. It cannot be said that the proceeding in instant suit would embarrass and prejudice the respondents in effectively contesting the criminal case i.e. appeals arising out of conviction the sentence/acquittal are in High Court. S.T.No. 194/2000 since has been disposed of vide judgment dated 27.8.01, no embarrassment, prejudice would be caused to the respondents. In the judgment reported in *Sheetal K. Bandi* v. *Rishi*[1] and *Anand Bakshi* v. *Tanviruddin Rizvi*,[2] it has been held that pendency of civil suit cannot be the impediment to proceed with the civil suit.

(1) 1998 (2) M.P.L.J. Note - 6. (2) 2002 (4) M.P.S.T. 65(C.G.).

Smt. Sudharani Agrawal v. Surendra, 2003.

On facts and circumstances of the case, the proceedings in C.S.No. 1-B/01 ought not to have been stayed by allowing the application under section 151 CPC. The impugned Order suffers from material irregularity and deserves to the set aside.

Revision is allowed. Order impugned is set aside. Instead, the court below is directed to proceed with the suit. Parties to bear their costs. Counsel fee as per rules or certificate (whichever is less).

Application is allowed.

CRIMINAL REVISION

Before Mr. Justice S. L. Jain
18 November, 2003.

NARAYAN VISHWAKARMA ...Applicant*

v.

STATE and another ...Non-applicants.

Criminal Procedure Code, 1973 (II of 1974)–Sections 319, 397 and 401–Revision–Application for impleading as accused–Witness stated that apart from the charge-sheeted accused N.A.-2 also participated in the crime–Name of N.A.-2 finds place in the F.I.R. as also in the PCD statement under Section 161–Array of the accused even at the cost of de novo *trial appears to be just–Trial Court erred in rejecting the application.*

During trial two eye-witnesses namely Narayan Vishwakarma and Ram Pratap were examined as PW-1 and PW-4. Both the witnesses have stated that in addition to accused Vishnu, Jaikaran, Rohini and Omprakash against whom challan was filed, Kailash Dwivedi had also participated in the commission of crime. The petitioner moved an application under Section 319 Cr.P.C. for impleading Kailash also as an accused on the ground that

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*Cr.R.No. 333/2003.

his name finds place not only in the F.I.R. but in the statements of the witnesses recorded under Section 161 Cr.P.C. The learned Sessions Judge though held that the name of Kailash has been mentioned in the FIR in the statements recorded in Section 161 Cr.P.C. alongwith other accused but he was not the active participant in the crime.

At the time of summoning the accused under Section 319 Cr.P.C. the same yardstick will not apply which is to being applied at the time when final decision regarding guilt is to be taken after conclusion of evidence. If *prima-facie* case is made out against the accused, he should be summoned. The present stage of the case cannot be said to be belated and the addition of Kailash to the array of accused even at the cost of *de novo* trial appears to be just and proper in the circumstances of the case. Hence the order of the trial Court rejecting the application under Section 319 Cr.P.C. has to be interfered with.

Micheal Machado and another v. *Central Bureau of Investigation and another*;[1] referred to.

Manish Awasthy for the applicant.

Prakash Gupta P. L. for the State.

Mohd. Ali for respondent No. 2.

Cur. adv. vult.

ORDER

S. L. JAIN, J. – Being aggrieved by the order dated 17.1.2003, passed by Sessions Judge, Chhatarpur in Sessions Trial No. 269/2001, whereby the trial Court rejected the application filed by the petitioner under Section 319 Cr.P.C. for arraying Kailash Dwivedi S/o. Shiv Das Dwivedi as an accused, applicant has filed this petition under Section 397/401, Cr.P.C.

The facts of the case which led to filing of this revision are that petitioner Narayan Vishwakarma lodged a report at police station, Gorhiar alleging that on 3.3.99 when he alongwith his brother Ramdas and Ram Pratap was going to his field to bring some wood, in the way, Vishnu Kumar, Jaikaran, Rohini Tiwari, Munna @ Om Prakash and Kailash were

(1) (2000) 3 S.C.C. 262.

standing armed with guns. Vishnu and Munna exhorted other persons to kill him and his brother. Ram Pratap was successful in running away but Ram Das could not escape. Om Prakash @ Munna and Jaikaran fired two gun shots which hit Ram Das as a result of which he died on the spot. It was also alleged in the first information report that Jaikaran, Vishnu, Rohini, Om Prakash @ Munna and Kailash committed murder of Ramdas.

After investigation challan was filed against Jaikaran, Vishnu and Rohini. The case was committed to the Court of Session and a trial proceeded against Jaikaran and Vishnu only as Rohini was absconding.

During trial two eye-witnesses namely Narayan Vishwakarma and Ram Pratap were examined as PW-1 an PW-4. Both the witnesses have stated that in addition to accused Vishnu, Jaikaran, Rohini and Om Prakash against whom challan was filed, Kailash Dwivedi had also participated in the commission of the crime. The petitioner moved an application under Section 319 Cr.P.C. for impleading Kailash also as an accused on the ground that his name finds place not only in the FIR but in the statements of the witnesses recorded under Section 161 Cr.P.C.

The learned Sessions Judge though held that the name of Kailash has been mentioned in the FIR and the statements recorded under Section 161 Cr.P.C. alongwith other accused but he was not the active participant in the crime. In the statement of the witnesses recorded in the Court also, it has although been stated that only Munna and Jaikaran fired the shot. Relying on *Micheal Machado and another* v. *Central Bureau of Investigation and another*,[1] the learned Sessions Judge held that if the application is allowed at this stage and Kailash is impleaded as an accused there will be a *de-novo* trial and thus dismissed the application. It is against this order of dismissal, the applicant has filed this revision.

I have heard Shri Manish Awasthy learned counsel for the petitioner and Shri Prakash Gupta PL for the State as also Shri Mohd. Ali learned counsel for respondent no. 2 and perused the copies of statement of witnesses namely Narayan and Ram Pratap recorded under Section 161 Cr.P.C. as also their statement recorded during trial.

The only reason assigned by the trial Court for rejecting the application is that Kailash Dwivedi was not the active participant in the crime. I have been gone through the evidence of applicant Narayan

(1) (2000) 3 S.C.C. 262.

Vishwakarama. He has stated that Vishnu Tiwari, Jaikaran Tiwari, Rohini Tiwari and Om Prakash were armed with guns and Kailash Dwivedi was simply standing. There appears to be some mistake in the language used by Narayan Vishwakarma but Ram Pratap (P.W.-4) who was examined during trial has stated that when he reached near the house of Vishnu Tiwari, he saw Vishnu, Jaikaran, Rohini, Munna and Kailash standing there armed with guns. In any case it cannot be said that Kailash played no role at all.

For the purpose of considering the application under Section 319 Cr.P.C. the evidence cannot be judged meticulously. In view of the material collected during investigation and statements of applicant Narayan Vishwakarma and Ram Pratap, it cannot be said that Kailash did not play any role in the commission of the offence. In any case, at this stage his liability under Section 149 IPC cannot be denied. The evidence taken as a whole indicates reasonable prospect of conviction of the person regarding whom application under Section 319 Cr.P.C. was filed. It is a not case of mere suspicion of involvement of Kailash in the offence. The learned Sessions Judge dismissed the application also on the ground that prosecution has already examined quite a large number of witnesses and they were cross-examined by the defence. The judgment relied on by the trial Court is distinguishable. In that case as many as 49 witnesses were examined and the Metropolitan Magistrate felt the need to start afresh only because the next three witnesses disclosed something against the appellant of that case. The evidence of these three witnesses was not found sufficient to hold that there is reasonable prospect of conviction of the appellant.

In the present case, only five witnesses have been examined so far. The evidence of the witnesses is sufficient to hold that there is reasonable prospect of conviction of respondent Kailash. At the time of summoning the accused under Section 319 Cr.P.C. the same yardstick will not apply which is to be applied at the time when final decision regarding guilt is to be taken after conclusion of evidence. If *prima-facie* case is made out against the accused, he should be summoned.

The present stage of the case cannot be said to be belated and the addition of Kailash to the array of accused even at the cost of *do novo* trial appears to be judged and proper in the circumstances of the case. Hence the order of the trial Court rejecting the application under Section 319 Cr.P.C.

has to be interfered with. Before parting with the case it is made clear that the learned learned trial judge will not be influenced in any way by any observation made in this order regarding the participation of respondent no. 2 Kailash.

In the result, the revision succeeds and is allowed. The impugned order of the Sessions Judge is set aside. I direct the trial Court to summon respondent no. 2 Kailash under Section 319 Cr.P.C. and proceed with the case in accordance with law.

Application is allowed

CRIMINAL REFERENCE

Before Mr. Justice Rajeev Gupta and Mr. Justice S. L. Jain
19 November, 2003.

STATE OF M. P. ...Applicant*

v.

NAND KISHORE ALIAS NANDU ...Non-applicant

Criminal Procedure Code, 1973 (II of 1974), Sections 161, 164, 366, 374(2)–Penal Code, Indian 1860, Sections 193, 201, 302,380, 411, 449 and Evidence Act, Indian, 1872, Sections 3, 9–Murder–Conviction and Death Sentence–References for confirmation of death sentence and Appeal by convict–Circumstantial evidence–Appreciation of–Identification–Articles shown to witnesses before identification–Witness not identifying the same in the Court–Identification is of no value–Cannot be construed as substantive evidence–Not subjected to cross-examination–Cannot be used against the accused–Statement recorded under Section 164 Cr. Procedure Code–Not a substantive piece of evidence–Can be used only to corroborate or contradict its maker–Seizure of blood stained dagger like knife and clothes at the instance of accused–

*Cri. Ref. 1/2003.

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Blood found on sweater was of blood group 'O'–Not proved to belong to the same blood group of deceased–An incriminating circumstance–But can only be used as corroborative evidence–House of accused searched–Seizure made–No evidence that those articles belonged to deceased–According to prosecution they were subject matter of some previous theft–There is a reasonable doubt about guilt of the accused–Benefit should go to him–Conviction and sentence set aside–Accused set at liberty.

The most essential requirement of the identification proceedings is that the witness should not have an opportunity of seeing the property after its recovery and before its identification. After recovery of the chain it was expected of the investigating machinery that the same was kept in a sealed condition and not shown to any body except during test identification by the person conducting such proceeding, which is not the case here. When the witness admits that the article was shown to him by the police prior to the identification parade, sanctity of identification looses its value altogether.

No doubt, presence of human blood on the knife which was recovered at the instance of appellant Nand Kishore is an incriminating circumstance but then this can be used only as a corroborative piece of evidence. Again presence of human blood on the recovered article is a weak piece of corroborative evidence. Human blood has also been found on the shirt, pant and sweater which have been recovered from the house of appellant Nand Kishore but again in absence of the evidence regarding same blood group with that of the blood group of the deceased is not clinching one and is a weak piece of corroborative evidence.

The courts are to take into consideration the recovery of blood stained articles not as a sufficient circumstance by itself. Thus, the circumstance of presence of human blood on knife and clothes recovered at the instance of accused Nand Kishore is a weak, corroborative incriminating circumstance and may not itself be sufficient to form the basis of conviction.

The impelling circumstance of presence of blood on the knife and clothes seized at the instance of appellant Nandu create a stray suspicion about his complicity in the crime, but the suspicion cannot take the place of proof. Any amount of suspicion cannot constitute legal evidence. It is well

said that the suspicion, howsoever, grave may be cannot take place of proof. The conviction cannot be based on the suspicion nor on the conscience of the Court being morally satisfied about the complicity of an accused person in the crime.

The least that can be said in this case is that at least there is a reasonable doubt about the guilt of the accused Nandu and benefit of the same should go to him when the main link of identification of chain as belonging to the deceased goes and circumstances get snapped and the other circumstance cannot in any manner establish the guilt of accused Nandu beyond all reasonable doubt.

In view of the above, the sole incriminating circumstance as above, may not lead us to infallible conclusion that it was appellant Nand Kishore and Nand Kishore alone who committed murder of deceased Vimla Agrawal and committed lurking house tress pass for committing theft and murder of Vimla Agrawal in the intervening night of 5/6the Jan, 1999. The charge regarding theft of cash and valuables from the house of deceased Vimla Agrawal also cannot be said to have been established nor it can be concluded that it was appellant Nandu alias Nand Kishore who put the house of Vimla Agrawal to fire with the intention of destroying the evidence related to the aforesaid offence and therefore, the conviction and sentence recorded by the trial Court on aforesaid counts under Sections 449, 302, 380 and 201, IPC cannot be sustained. It is really unfortunate that a heinous offence of this nature is going unpunished but in the absence of legal evidence against accused, Courts are helpless.

Birjbhushan Singh v. *Emperor*,[1] *State of Delhi* v. *Siyaram Lohiya*,[2] *Ravindra @ Ravi Banshi Gohar* v. *State of Maharashtra*,[3] *Laxmipat Choraria and others* v. *State of Maharashtra*,[4] *Vijayan alias Rajan* v. *State of Kerala*;[5] relied on.

Ramnath Mahto v. *State of Bihar*;[6] referred to.

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(1) A.I.R. (33) 1946 P.C. 31.
(2) A.I.R. 1960 S.C. 490.
(3) 1998 (3) Crimes 107.
(4) A.I.R. 1968 S.C. 938.
(5) 1999 S.C. 1086.
(6) A.I.R. 1996 S.C. 2511.

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Datar Singh v. *The State of Punjab*,[1] *Hanumant Govind Nargundkar* v. *State of M. P.*,[2] *Sudama Pandey* v. *State of Bihar*,[3] *Subhash Chand* v. *State of Rajasthan*,[4] *Ashish Batham* v. *State of M. P.*,[5] *Ratna Muda and anor.* v. *State*,[6] *Laxmi Jani* v. *State*,[7] Prabhu Babaji v. *State of Bombay*[8] *State of Punjab* v. *Ramji Das*,[9] and *Varkey Joseph* v. *State of Kerala*;[10] relied on.

S. C. Datt Sr.Adv. with *Manish Datt* for the applicant.

G. S. Ahulwalia Dy. Adv. General with *S. K. Gangrade* and *Dinesh Joshi* for the State.

Cur. adv. vult.

JUDGMENT

The Judgment of the Court was delivered by **S. L. JAIN, J.** – Accused/appellant Nand Kishore alias Nandu has been convicted for offences punishable under Sections 302, 449, 380 and 201, IPC and sentenced to death for offence punishable under Section 302, IPC for committing murder of Smt. Vimla Agrawal, vide impugned judgment and order dated 24.2.2003, passed by Additional Sessions Judge, Khandwa, in Sessions Trial No. 82/99. No separate sentences have been awarded for the other offences. Learned Additional Sessions Judge has sent the case to this Court under Section 366 of the Code of Criminal Procedure for confirmation of the death sentence and it is registered as Criminal Reference No. 1/2003.

Criminal Appeal No. 435/2003 is filed by accused/appellant Nand Kishore alias Nandu against his conviction and sentences for the aforesaid offences. Co-accused Raju alias Pandurang has also filed Criminal Appeal No. 415/2003 against his conviction and sentence of imprisonment for the period already undergone by him, for the offence punishable under Section 193 IPC, vide the same judgment and order dated 24.2.2003, passed in Sessions Trial No. 82/99.

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(1) A.I.R. 1974 S.C. 1193.
(2) A.I.R.1952 S.C. 343.
(3) (2002) 12 S.C.C. 679.
(4) (2002) 1 S.C.C. 702.
(5) A.I.R. 2002 S.C. 3206.
(6) 1986 Cri. L.J. 1363.
(7) 1986 Cri.L.J. 513.
(8) 1956 Cr. L. J. 149 & Para 12(2) at page 1089.
(9) A.I.R.1977 S.C. 1085.
(10) A.I.R. 1993 S.C. 1892.

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As the aforesaid criminal reference and both the criminal appeals arise out of one and the same judgment and order passed by trial Court, the same are being considered and decided together by this common judgment.

The story sought to be proved by the profession is that :

"4.1Deceased Smt. Vimla Agrawal, mother of complainant Anil Kumar Agrawal, (P.W.-35), was posted as Principal in Makhan Lal Chaturvedi Government Girls Degree College, Khandwa and on the date of incident was living alone in House No. B-108-A, MIG Colony, Kandwa. Accused Nand Kishore alias Nandu was working as driver on daily wages in the said college and used to drive the car of deceased Smt. Vimla Agrawal.

4.2 On 6.1.99 at around 6 A.M. residence of the locality including Gurmeet Singh (P.W.-7), found that smoke was emitting from the house of Smt. Vimla Agrawal. A number of persons of the locality reached there. Gurmeet Singh (P.W.-7) informed about it to the police of P.S. Moghtat Road, Khandwa as well as the fire brigade personnel at 7.40 A.M. In P. S. Moghat Road, the information was recorded in Rojnamacha Sanha No. 349, Ex.-P-5. Head Constable Shravan Kumar (P.W.-13) along with constable Prem Shankar proceeded to the spot. Station Incharge, Inspector Ashok Bhandari (P.W.-14) also followed them. Shravan Kumar (P.W.-13) on reaching the spot found that the main door of the house of deceased was bolted from inside. Shravan Kumar broke open door with the help of firebrigade personnels and entered the house which was filled with smoke. The body of Smt. Vimla Agrawal almost in flames was lying near bathroom. Shravan Kumar (P.W.-13) prepared Panchnama Ex.-P-11 in this respect.

4.3 The fire was extinguished with the help of firebrigade personnels. Meanwhile, Inspector Ashok Bhandari also reached there around 9.30 A.M. Rajendra Prasad Gautam, who was Scientist Incharge of Scene of Crimes, Mobile Unit, Khandwa, also reached the spot at around 10.30 A.M. He inspected the spot and on that basis prepared report Ex.-P-1 along with spot map Ex-P-2. Inquest on the dead body was conducted on that very day by Inspector Ashok

Bhandari (P.W.-14) vide Panchnama, Ex.-P-13. The dead body was almost in a charred state. Only few parts of the body like head, right forearm, right and left legs, two bones and some other pieces of bones were found as remains of the dead body which were collected and sent for medical examination to District Hospital, Khandwa. A penal of doctors comprising Dr. A. K. Shukla (P.W.-5), Dr. N. K. Jain and Dr. S. S. Chouhan conducted the examination of aforesaid remains and vide their report, Ex.-P-10, opined that the deceased died due to 6th degree burns. It was further opined that the death was homicidal. The said remains were then sent to Medicolegal Institute, Bhopal for further examination. Inspector Bhandari (P.W.-14) prepared spot map, Ex.-P-66. The house of the deceased was sealed, however, it was reopened on the same day at about 2.45 P.M. for being inspected by officials of M.P. Electricity Board and, thereafter, it was again sealed.

4.4 Complainant Anil Kumar (P.W.-35) received telephonic information about the incident in the morning of January 6,1999 itself at Faizabad, where he was posted as S.S.P. He proceeded to Kandwa and reached there on that very day. An application, Ex.-P-66 was submitted by him to S. O., P. S. Moghat Road stating therein that his mother has been murdered and put to fire after commission of robbery of the valuable. On the basis of this application a case was registered in this respect at P. S. Moghat Road, at Crime No. 5/99.

4.5 On January 7, 1999 at about 1 P.M. Finger Print Expert, R. D. Ram (P.W.-28) alongwith DIG, Indore inspected the spot. He found some finger prints on various articles inside the house including almirahs, box, gas cylinder, regulator, telephone, suitcase, steel glass, photo album etc., however, finger prints were not found sufficient for detailed examination. FSL, incharge Shri Renda also visited the spot and vide Ex.-P-31, crust of some yellow power and ashes from inside the bathroom were recovered.

4.6 Dr. Ashok Sharma, Junion Forensice Science Expert of Medico-legal Institute, Bhopal along with his Director Dr. D. K. Satpathi, conducted the examination of remains of the dead body as well as other articles sent by the police for examination and opined that the death appears to be homicidal. In the report Ex.-P-60 it was also stated that carbon particles were found in the lungs. At this stage, at the instructions of CID Police, HQ. Bhopal, DSP, CID, K. S. Bawa, (P.W.-41) under the supervision of Vijay Shukla, DIG Khandwa, started further investigation in the matter. He inspected the spot on 8.1.99 and as per Ex.-P-63, seized scrap of carbon from the walls of the house.

4.7 On 30.1.99, K. S. Bawa, interrogated accused Nand Kishore and at his instance recovered a wall clock and currency notes of Rs. 4,664.00, four silver coins, one pocket telephone diary, one folding electronic calculator, a blue shirt, a grey pant, one half sweater, one pair of slippers, one torch, one pencil torch, one nylon puff and a bottle of blue ink from his house. At the instance of Nand Kishore, a knife which was in the shape of dagger was also recovered at per Ex.-P-23 on the same day. At the instance of appellant two ring, two Jumkis, one gold chain, one pendant and eight white pearls were recovered from Sunita (P.W.-31) as per Ex.-P-22. At the instance of appellant Nand Kishore four keys in a ring, two keys in another ring, two loose keys, one plate, and three saw blades were recovered from a dried well, as per Ex.-P-24. On 31.1.99 K. S. Bawa recovered 10-12 hair of appellant Nand Kishore vide Ex.-P-18. On 6.2.99, one keyhole cover of Godrej almirah was recovered from a well vide Ex.P.38.

4.8 During investigation a register was seized from Anil Soni, who is the brother of appellant Raju Soni. The standard writing of Anil Soni was obtained and sent for comparison by hand writing expert. Viscera of deceased, the ashes recovered from the bathroom and other rooms of the house, crust seized from the kitchen, carbon seized from walls, powder seized from bowl, chappals and other articles recovered from the house were sent for chemical examination to FSL, Sagar. Knife, shirt, pant,

sweater, one pair of chappal, semi burnt hair and hair recovered from accused Nand Kishore were also sent for chemical examination. Ex.-P-85, 88, 89, 90, 92, 93 and 94 are the reports of FSL. As per report, Ex.-P-93, human blood was found on the knife, shirt, pant and sweater seized from appellant Nandu. As per report, Ex.-P-94, the hair sample seized from appellant Nandu were found inadequate for comparison."

After completion of investigation, a challan was filed in the Court of CJM., Khandwa. The case was committed to the Court of Session. The report of hand writing expert Ex.-P-47 and 48 were filed during pendency of trial according to which the writing in the register Ex.P-35, was found to be that of Anil Kumar Soni. During trial the reports of FSL, Sagar, Ex-P-92, 93 and 94 were also filed. As per Ex.P-92, blood was found on the knife, pant, shirt, sweater, and semi burnt hair. No blood was found on the Chappal and hair seized from the appellant Nandu.

During trial, prosecution filed an application for further investigation by Special Police Establishment, Delhi and with the permission of the Court, SPE, registered a case on 19.10.2000 as per Ex.P-97 and investigation was commenced by Narendra Singh Khadayat, Dy. S. P. (P.W.-43). The knife, pant, shirt and sweater recovered at the instance of appellant Nand Kishore were sent for examination by Central FSL, New Delhi. In the report of CFSL, human blood was found on the knife and shirt recovered from appellant Nand Kishore.

With the permission of the Court, Narendra Singh Khadayat interrogated accused Nand Kishore. On the request of Khadayat Shri T. D. Dongra, head of the Forensic Medicines and Technology, Department of Indian Medical Institute, inspected the spot. The report of investigation conducted by Shri Khadayat, Ex.-P-99 was filed in the Court.

Learned Additional Sessions Judge, framed charges for the offences punishable under Sections 449, 302, 380 and 201 IPC against accused Nand Kishore and for the offence punishable under Sections 411 and 193 IPC against accused Raju Soni who is appellant in Criminal Appeal No. 415/ 2003. Both the accused abjured the guilt and pleaded that they have been falsely implicated in the case.

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After concluding the trial, learned Addl. Sessions Judge, Khandwa, convicted accused Nand Kishore of the offence punishable under sections 449, 302, 380 and 201 of the IPC and accused Raju of the offence punishable under Section 193 IPC, acquitting him of offence punishable under Section 411, IPC. Accused Raju was sentenced to the imprisonment for the period already undergone by him. However, accused Nand Kishore was sentenced with capital punishment for the offence punishable under Section 302 IPC, no separate sentence was passed against him for the offences other than that of Section 302 IPC. As the death sentence was awarded, Additional Sessions Judge, Khandwa, referred this case under Section 366 of the Code, for confirmation of the death sentence awarded to appellant Nand Kishore.

Aggrieved by the aforesaid conviction and sentences, appellants Nand Kishore alias Nandu and Raj alias Pandurang Soni have filed these appeals before this Court being Criminal Appeals No. 435/2003 and 415/2003, respectively.

We have heard Shri S. C. Datt, learned senior counsel with Shri Manish Datt, learned counsel for the appellant and Shri G. S. Ahluwalia, Dy. Advocate General for the State with Shri S. K. Gangrade and Shri Dinesh Joshi, learned State counsel.

Shri Datt, learned counsel, appearing for the appellants led us through the record and contended that the learned Additional Sessions Judge has committed an error in holding the appellants guilty for the charges levelled against them. He submitted that the conviction and sentence of the appellants are illegal and incorrect.

On the other hand, learned State counsel have supported the impugned judgment rendered by the trial Court convicting and sentencing the appellants as indicated above and submitted that the reference may be accepted, death sentence be confirmed and both the appeals filed by respective appellants be dismissed.

As regards the finding of homicidal death as recorded by the Trial Court, we have gone through the record. Dr. A. K. Shukla (P.W.-5) who, as a member of the team, conducted examination of the remains of the dead body 6.1.99, vide report Ex.-P-10 and Dr. Ashok Sharma (P.W.-29), Junior Forensic Science Expert of Medicolegal Institute, Bhopal, who lateron

examined the remains, have opined that the death was homicidal. This finding remained unchallenged as far as defence is concerned, therefore, it has been conceded before this Court by the learned senior counsel appearing for the appellant and rightly so. We do not see any infirmity in the aforesaid finding as recorded by the trial Court.

Now, the only question that remains to be determined is : as to whether the death of deceased Smt. Vimla Agrawal was caused by the appellant Nand Kishore ?

There is no eye witness account available in the case. The learned trial Judge adverted to the following circumstances sought to have been shown against appellant Nand Kishore to established his guilt -

(i) The appellant Nand Kishore was a driver on daily wages in the college where the deceased Smt. Vimla Agrawal was Principal and used to drive the vehicle of deceased,

(ii) Appellant Nand Kishore was in need of money,

(iii)Appellant Nand Kishore got certain duplicate keys prepared,

(iv) in the fateful night, appellant Nandu Kishore left his house and returned back in the mid night and at the time because the smell of kerosene was emitting from his clothes, he washed his clothes in the night itself,

(v) one dagger like knife was seized at the instance of appellant Nand Kishore,

(vi) appellant Nand Kishore got prepared two bracelets, two Jhumkis and one ring all of gold,

(vii) at the instance of appellant Nand Kishore the aforesaid ornaments, 8 while pearls and a chain were seized from Sunita, the neighbour of appellant Nand Kishore,

(viii) the above chain was identified as belonging to the deceased.

(ix) blood was found on knife, shirt, pant and sweater recovered from appellant Nand Kishore; and

(x) money and silver coins were seized from the house of appellant Nand Kishore.

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As regards the first circumstance that the appellant Nand Kishore was a driver on daily wages in the college of deceased Smt. Vimla Agrawal and he used to drive her car, there is clinching and unchallenged testimony of Dr. Sudha Mishra (P.W.-6) and Vaman Rao (P.W.-18), who are professor and peon of that very college, respectively and, therefore, it can well be inferred that they must be knowing about this fact. Again, this evidence has not been challenged by appellant Nand Kishore in his examination under Section 313 of the Code. In view of this, the finding recorded by the Trial Court on this point in affirmative is confirmed.

Regarding second circumstance no doubt it has come in paragraph 16 of the statement of Manju (P.W.-2) who is the sister-in-law of accused Nand Kishore, that marriage of Nand Kishore was settled and was to be solemnised soon, therefore, Nandu was required to arrange for some ornaments for his marriage. In view of this it cannot be disputed that accused Nand Kishore was in need of some ornaments for his proposed marriage which is quite customery. No doubt for ornaments one may need money but then it is not always so because in our social set up in marriages very often old ornaments of the family are made use of by giving new and improvised look. In the above context to prove that the accused was in need of money to arrange for ornaments and that he was not having family resources in this respect and the family of the accused was not in a position to arrange for the ornaments some evidence was necessary but the prosecution has not tendered any evidence in this regard. Therefore, simply because the accused was required to arrange for some ornaments for marriage, it cannot lead us to the infallible inference that he was in need of money, therefore, the finding recorded by the learned trial Court on this point without adverting to the aforesaid aspect is without any basis and therefore, cannot be sustained.

Regarding third circumstance that accused Nandu got certain duplicate keys prepared, prosecution examined Sheikh Aslam (P.W.-11) who has stated that Nandu had come to his shop with an open lock and requested him to prepared a duplicate key thereof. Accordingly, he prepared the key. After few days, accused Nandu again came with a key and requested him to prepare a similar key, but he had told the appellant that without lock it is not possible to prepare a duplicate key. Thereafter, the appellant requested him to prepare a duplicate key of a lock of bicycle, which he had prepared.

True, certain keys are alleged to have been recovered at the instance of the appellant Nandu from a dried well, but none of those has been identified to be one prepared by this witness. Moreover, there is no evidence that the keys which have been recovered at the instance of the appellant were of the locks of the house or almirah of the deceased. Therefore, though it is established that two duplicate keys were prepared by Sheikh Aslam on the request of the appellant but the prosecution has failed to connect the keys with the offence.

The next and foremost circumstance against the appellant Nandu is said to be that on the fateful night he left his room in the early hours and returned back in the mid night and thereafter, he washed his clothes and left them outside the room for drying which were seen in the morning by his neighbours Sunita (P.W.-31) and Manju (P.W.-2) regarding which they also enquired from each other as to who was washing the clothes in the night. Alongwith this circumstance it is also the case of the prosecution that Akash (P.W.-8) who is son of Manju (P.W.-2) and used to sleep in night in the room of appellant Nand Kishore, also witnessed that Nand Kishore left room on the fateful night and returned after some time and at that time smell of kerosene was emitting from the apparels of appellant Nand Kishore.

Regarding the aforesaid circumstance, evidence of Manju (P.W.-2), Sunita Singh (P.W.-31) and Akash (P.W.-8) is worth noticing whose statements were also recorded during investigation under Section 164 of the Code. These witnesses have virtually not supported the prosecution as far as aforesaid circumstance is concerned and, therefore, these witnesses have been declared hostile by the prosecution.

Manju (P.W.-2), in paragraph 8 of her statement, has denied that in the morning of 6th January, she and Sunita (P.W.-31) enquired from each other as to who was washing the clothes in the previous night or that some body washed the clothes in the early morning on 6th January. Similarly, Sunita (P.W.-31), in paragraph 7 of her statement, has stated that she had to exchange of words with Manju (P.W.-2) as to who washed the clothes in the previous night.

Manju (P.W.-2) has no doubt, admitted that her statement was recorded before the Magistrate and she deposed as per Ex.-P-1 statement marked as 'B' to 'B'. She has further added that she deposed it falsely due to

the fear of police though she never divulged about this fear to the Court at any previous stage. Likewise, Sunita Singh (P.W.-31) has also stated that her statement was recorded and as per Ex.-P-62 she deposed statement marked 'A' to 'A'. However, this was at the instance of the police though she did not disclose it to the Magistrate that she was deposing at the instance of police. The learned trial Judge, in paragraph 38 of judgment had made use of the statements under Section 164 of the Code and has recorded the finding that Nandu washed his clothes in the intervening night of 5th and 6th January and Manju (P.W.-2) and Sunita Singh (P.W.-31) found the washed clothes hanging outside the room of Nand Kishore.

It is apparent that the aforesaid finding recorded by the learned trial Judge is based on the statements of Manju (P.W.-2) and Sunita Singh (P.W.-31) which were recorded under Section 164 of the Code. The approach of the learned Judge in this respect is quite erroneous and against the settled principles of law regarding the use of statement recorded under Section 164 of the Code. In *Brijbhushan Singh* v. *Emperor*,[1] it was laid down a statement made under Section 164 of the Code cannot be used as a substantive piece of evidence. The statement can be used to cross examine the person who made it and the result may be that the evidence of the witness is false but that does not establish that what he stated out of the Court under Section 164 is true. In *State of Delhi* v. *Siyaram Lohiya*,[2] the Apex Court examined the legal position regarding the use of statement recorded under Section 164 of the Code and laid down as under :-

> "Statements recorded under Section 164 of the Code are not substantive evidence in a case and cannot be made use of except to corroborate or contradict the witness. An admission by the witness that a statement of his was recorded under Section 164 of the Code and what he had stated that was true would not make the entire statement admissible much less could any part of it be used as substantive evidence in the case."

In view of the aforesaid, settled legal position of law regarding evidentiary value of statement recorded under Section 164 of the Code what emerges is that it is not a substantive piece of evidence and can be used

(1) A.I.R. (33) 1946 P.C. 31. (2) A.I.R. 1960S.C. 490.

only to corroborate or contradict its maker. In the case at hand, the statements of Manju (P.W.-2) and Sunita Singh (P.W.-31) as recorded under Section 164 of the Code could not have been used for corroboration because there was nothing to be corroborated. It could have been used to contradict them so as to discredit them that what they are stating is not correct, however, these statements could not have been used as substantive piece of evidence. Therefore, the learned trial Judge has erred in using the statements recorded under Section 164 of the Code as substantive piece of evidence to reach the conclusion that accused Nand Kishore washed his clothes in the intervening night of 5th and 6th January.

Akash (P.W.-8), a boy of about seven years, though has not supported the prosecution on the point that on the fateful night he slept in the room of Nand Kishore but his statement on this point which stands contradicted by his police statement. Ex.-P-14, appears to be false because his mother Manju (P.W.-2) has clearly deposed in paragraph 4 of the her statement that on the fateful night Akash (P.W.-8) slept in the rooms of Nandu (Nand Kishore). Thus, it cannot be denied that on the fateful night Akash (P.W.-8) slept in the room of Nand Kishore.

Akash (P.W.-8) has not supported the prosecution version to the effect that he saw accused Nand Kishore going away and returning back on the fateful night and found smell of kerosene emitting from the clothes of Nand Kishore and in the night he saw him washing the clothes. Manju (P.W.-2) has also denied that anything in this respect was stated by Akash (P.W.-8) to her in the morning, therefore, despite there being a positive statement on this point in her statement Ex.-P-4, recorded under Section 164 of the Code, the aforesaid alleged fact situation cannot be found established. Therefore, the finding on this point as recorded by the learned trial Judge being not based on any legal evidence cannot be sustained.

This brings us to the fifth circumstances, i.e. a dagger like knife was seized at the instance of appellant Nand Kishore alias Nandu. K. S. Bawa (P.W.-41) has stated that on being interrogated, accused Nandu informed him that he has hidden a knife in the lumber room of his house. On the basis of this information he accompanied accused to his house from where at the instance of accused, a dagger like knife which was wrapped in a polythene bag, was recovered as per Ex.-P-23. The evidence of K. S. Bawa in this

regard is corroborated by Surendra (P.W.-12) and Govind Chandel (P.W.-14). According to reports of F.S.L., Sagar, Ex.-P-92 and Ex.-P-93, human blood was found on this knife. Therefore, this circumstance has rightly been found proved by the learned trial Judge.

Now, we come to discuss the sixth circumstance i.e. the appellant Nandu gave two bracelets of gold to Raju Soni, the co-accused, through Narendra for preparing two Jhumkis and a ring. Narendra (P.W.-17) has stated that appellant Nandu told him that he has two bracelets and after getting them melted he wants to get prepared certain new ornaments, therefore, he may recommend some goldsmith for the purpose. Therefore, he took accused Nandu to Raju Soni. He further stated that the appellant Nandu handed over two bracelets to Raju Soni and asked him to prepares two Jhumkis and two rings. Raju Soni has also submitted this fact, but there is no evidence to the effect that these bracelets were among the property stolen from the house of the deceased. Therefore, this circumstance though proved, being quite innocuous and benign, cannot be said to be in incriminating one.

The seventh and eight circumstances relate to the recovery of alleged stolen articles at the instance of appellant Nand Kishore. In this respect, K. S. Bawa (P.W.-41) has stated that on 30.1.99 Nand Kishore, on being interrogated, disclosed vide Ex.-P-21, that he gave two Jhumkis, two rings, one chain, all of gold, eight white pearls and one locket to Manju (P.W.-2). K. S. Bawa (P.W.-41) has stated that Manju (P.W.-2) told him that she has given all the ornaments received by her from Nand Kishore, to Sunita Singh (P.W.-31) and in consequence, on that very day, he recovered the ornaments from Sunita Singh (P.W.-31) vide seizure memo Ex.-P-22 in presence of Surendra Kumar (P.W.-12) and Govind Chandel (P.W.-14). Surendra Kumar (P.W.-12) and Govind Chandel (P.W.-14) have supported K. S. Bawa (P.W.-41) regarding seizure of ornaments as per Ex.-P-22. Manju (P.W.-2) in this respect has stated that Nandu placed with her the gold ornaments and she, in turn, gave them to Sunita (P.W.-31) because she had to leave for Netangaon on 19th January in connection with tonsure ceremony of her daughter. Sunita (P.W.-31) who has also corroborated Manju (P.W.-2) on this point, however, has not supported the prosecution regarding recovery of the same vide Ex.-P-22 from her and has stated that she handed over the ornaments to Manju, which were recovered by Police from Manju, but Manju (P.W.-2) has not

stated anything like this in her statement, therefore, to this extent statement of Sunita Singh (P.W.-31) is sheer embellishment and statement of K. S. Bawa (P.W.-41) in this respect deserves to be accepted.

Learned Counsel for the appellant has strenuously argued before us that the alleged recovery of ornaments was not made on the basis of disclosure statement of Nand Kishore but it was on the basis of information given by Manju (P.W.-2), therefore, the aforesaid recovery cannot be used as evidence against appellant Nand Kishore under Section 27 of Evidence Act. This argument though superficially attractive, is fallacious and cannot be accepted because it was the disclosure made by Nand Kishore which ultimately led to the recovery of ornaments/pearls, though through Manju (P.W.-2). Therefore, the same can well be used as a piece of evidence being relevant under Section 27 of the Evidence Act.

In view of the aforesaid, the finding of recovery of ornaments and pearls vide Ex.-P-2 at the instance of accused Nand Kishore, as recorded by the learned trial Judge cannot be interfered.

However, there is not an iota of evidence on record to indicate even in a far away manner, that out of the seized ornaments, the Jhumkis, rings, locket and pearls were stolen by appellant Nand Kishore from the house of the deceased on the night of the incident.

The prosecution has attempted to show that the aforesaid ornaments were got prepared from gold bracelets and appellant Nand Kishore for this purpose approached appellant Raju Soni, with whom he was introduced by Narendra alias Naru (P.W.-17). No doubt, Narendra alias Naru (P.W.-17) has stated that appellant Nand Kishore gave two bracelets to appellant Raju Soni for being melted and converted into Jhumkis, rings etc. and appellant Raju Soni has also not disputed it in his examination under Section 313 of the Code, but then again there is nothing to establish that the gold bracelets were stolen by appellant Nand Kishore from the house of deceased. To be more specific, there is nothing on record to indicate in any manner that the said bracelets belonged to the deceased. Therefore, recovery of Jhumkis, rings, locket and pearls vide Ex.-P-22 at the instance of appellant Nand Kishore though proved, does not incriminate him in any manner.

According to the prosecution the chain, as recovered vide Ex.-P-22 at the instance of appellant Nand Kishore belonged to the deceased and, therefore, was stolen property. In this connection, prosecution has heavily relied on the evidence of Chandrakant Atulkar (P.W.-10) and Suresh Kumar Tiwari (P.W.-15), the employees of the college where the deceased was Principal, who have identified the chain (Article-A) in identification proceedings conducted by Naib Tahsildar Om Prakash Lead (P.W.-9) as belonging to the deceased. The learned trial Judge has discussed the evidence on record on this point in paragraph 51 of his judgment, however, he has totally overlooked the various infirmities which were apparent in the evidence relating to identification test.

First of all it may be pointed out that Chandrakant Atulkar (P.W.-10) and Suresh Kumar Tiwari (P.W.-15) who are said to have identified the chain as belonging to the deceased are serving in the same college of which the deceased was the Principal. The chain has not been identified by any family member of the deceased. It may not be a ground to subject the evidence of Chandrakant Atulkar and Suresh Kumar Tiwari, however, serious infirmities in their testimony compell us not to act upon their evidence.

Chandrakant (P.W.-10) and Suresh Kumar Tiwari (P.W.-15) both have deposed that the chain they identified was similar to the one which the deceased used to wear. It is not like that the chain was the same which the deceased used to wear. There is a wide gap between 'same' and 'similar'. To fasten the criminal liability that too in a case like murder, the evidence must be certain excluding any other probable inference except the one which prosecution wants to draw. Simply because the chain Article-A, was similar to one which the deceased used to wear may not reasonably and safely lead us to conclude that it was the same. This aspect has totally been overlooked by the learned trial Judge.

Again it is found that Chandrakant Atulkar (P.W.-10) and Suresh Kumar Tiwari (P.W.-15) both have stated that the chain which they had identified was looking almost new. Suresh Kumar Tiwari (P.W.-15) had admitted in cross examination that the chain which the deceased used to wear, was an old one. This creates a dent in the prosecution case on the point that the chain belonged to the deceased.

The third and the most important aspect which has been totally skipped by the learned trial Judge relates to that part of statement of Chandrakant Atulkar (P.W.-10) wherein he has admitted that police showed him the chain Article A, and enquired as to whether the deceased used to wear similar chain. This ultimately goes to rob the sanctity of identification test proceedings because it clearly indicates that the chain was shown to one of the identifying witnesses by the police prior to test identification.

The most essential requirement of the identification proceedings is that the witness should not have an opportunity of seeing the property after its recovery and before its identification. After recovery of the chain it was expected of the investigating machinery that the same was kept in a sealed condition and not shown to anybody except during that identification by the person conducting such proceeding, which is not the case here. When the witness admits that the article was shown to him by the police prior to the identification parade, sanctity of identification looses its value altogether. In this connection pronouncements made by the Apex Court in *Ravindra @ Ravi Banshi Gohar* v. *State of Maharashtra and others*,[1] *Laxmipat Choraria and others* v. *State of Maharashtra*,[2] and *Vijayan alias Rajan* v. *State of Kerala*,[3] may usefully be referred which deal with the same point though relating to identification of person. It may not make any difference so far as principle therein is concerned. It is clear from the statement of Chandrakant Atulkar (P.W.-10) and Suresh Kumar Tiwari (P.W.-15) that the chain, Article-A was not of any particular design and such type of chains are available in the market.

Though Suresh Kumar Tiwari has identified the chain, Article-A in the Test Identification Parade, he has not identified the same in the Court. In the absence of identification of the article in the Court its identification by the witness only in the Test Identification Parade would be of no value as it cannot be construed as substantive evidence. What the witness identified and stated to the Magistrate who conducted the identification parade, is evidence which could only be used to corroborate his testimony when he is examined in the Court during trial. What he stated to the Magistrate at the time of Test Identification Parade

(1) 1998 (3) Cri. 107 (S.C.). (2) A.I.R. 1968 S.C. 938.
(3) A.I.R. 1999 S.C. 1086.

is not subjected to cross-examination and was at the back of the accused and hence could not be used as the evidence against the accused. Relying on *Ramnath Mahto* v. *State of Bihar*,[1] it has been submitted by the learned counsel for the state that the evidence of Omprakash Laad (P.W.-9) who conducted test identification, can be used as substantive evidence. The ratio of this case is not applicable to the facts of the present case. Here is not a case in which Suresh Kumar Tiwari (P.W.-15) did not identify the article in the Court due to the fear of the accused. No attempt was made to get the chain identified in the Court during trial by Suresh Kumar Tiwari (P.W.-15).

Under aforesaid circumstances we are of the opinion that there was no proper and legal identification of the chain and, therefore, it cannot be held that the chain Article-A belonged to the deceased and was stolen property. Hence the finding recorded by the learned trial Judge on this point cannot be sustained.

This brings us to the ninth circumstance i.e. the presence of blood on the dagger like knife, shirt, pant and sweater recovered at the instance of the appellant. From the statement of K. S. Bawa (P.W.-41), Investigating Officer, it is established that a dagger like knife, shirt, pant and sweater were seized from the house of the appellant Nand Kishore and all these articles along with some other articles were sent to F.S.L., Sagar for chemical examination vide Ex.-P-91. Dr. P. N. Bhuwadia, (P.W.-41), a Senior Scientific Officer, F.S.L. Sagar has stated that the same were examined by him and vide report Ex.-P-92 blood was found on knife, shirt, pant and sweater. The blood was of human origin and the blood found on sweater was of 'O' group while blood group of remaining articles could not be determined. The report of Dr. Bhuwadia is Ex.-P-93. The aforesaid evidence has remained totally unchallenged, therefore, the finding recorded by the trial Court that human blood was found on the knife, pant, shirt and sweater needs no interference.

This brings us to the last circumstance i.e. recovery of money and silver coins from the house of appellant Nand Kishore. K. S. Bawa (P.W.-41) has stated that house of Nand Kishore was searched on 30.1.99 and currency notes of Rs. 4,664.00 and five silver coins were recovered from

(1) A.I.R. 1996 S.C. 2511.

the wall clock along with electronic calculator and a telephone pocket diary. There is not even an iota of evidence to establish that these articles belonged to the deceased and are stolen property. According to the prosecution case itself, these articles were subject-matter of some previous theft.

The appellant Nandu has been awarded the exteme penalty of law only on the above circumstances. We have to scrutinize the above circumstances carefully and in meticulous way and have to see whether these circumstances can be accepted and acted upon to mullet the appellant with this distortedly crime. There is no doubt that the deceased was done to death in a brutal manner but the fact that the murder which is cruel and revolting had been perpetrated in a very shocking manner should not be allowed in any way to influence the mind of the Court while examining the involvement of the accused. It is worthwhile to recall the observation of the Apex Court in *Datar Singh* v. *The State of Punjab*,[1] wherein while articulating the Courts, it was observed : "justice cannot be swayed by sentiments of prejudice against certain person accused of very reprehensible crime."

The principles which should guide and weight with the Courts administrating criminal justice in dealing with a case based on circumstantial evidence, have been succinctly laid down by the Supreme Court as early as in *Hanumant Govind Nargundkar* v. *State of Madhya Pradesh*[2] and reiterated time and again. In *Hanumant Govind Nargundkar's Case* (*supra*) it has been held as follows :-

> "In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind, to such cases there is always the danger that conjecture or suspicion may take the place of legal proof and, therefore, it is right to recall the warning addressed by Boran Alderson to the jury in *Reg.* v. *Hodge*[3] where he said :
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> > "The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more

(1) A.I.R. 1974 S.C. 1193. (2) A.I.R. 1952 S.C. 343.
(3) (1838) 2 Lewin 227.

ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting to take for granted some fact consistent with its previous theories and necessary to render them complete."

It is well to remember that to cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

These principles were restarted in a series of cases even as late as in the decision reported in *Sudama Pandey* v. *State of Bihar*[1] and *Subhash Chand* v. *State of Rajasthan*,[2] The Apex Court in *Ashish Batham* v. *State of Madhya Pradesh*,[3] observed that :-

"Realities or Truth apart, the fundamental and basis presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely carried away by heinous nature of the crime or the gruesome manner in which it was found to have been committed. Mere suspicion, however, strong or probable it may be is no effective substitute for the legal proof required to substantiate the charge of commission of a crime and grave the charge is greater should be the standard of proof required. Courts dealing with criminal cases at least should constantly remember that there is a long mental

(1) (2002) 12 S.C.C. 679. (2) (2002) 1 S.C.C. 702.
(3) A.I.R. 2002 S.C. 3206.

distance between may be true and must be true and this basic and golden rule only helps to maintain the vital distinction between conjectures and sure conclusions to be arrived at on the touch stone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record."

Therefore, in the background of aforesaid legal position it is to be seen as to whether from the various circumstances as relied upon by the prosecution and found proved the conclusion of guilt can be drawn against appellant Nand Kishore regarding various charges levelled.

To give a quick recap :-

"(i) no doubt, it is proved that appellant Nand Kishore was a driver on daily wages in the college of deceased and used to drive her car but this cannot be treated as an incriminating circumstance and at the most it can be said that it provided the appellant with an opportunity to know about the deceased,

(ii) that appellant Nand Kishore was in need of money has not been found established,

(iii)that prosecution has not tendered any evidence to establish that the keys which were got prepared by accused Nand Kishore from Shaif Aslam (P.W.-11) were related in any manner with locks of house or almirah of the deceased. Therefore, this circumstance in the aforesaid factual scenario cannot be taken to be incriminating one against appellant Nand Kishore,

(iv)it is not proved that appellant Nand Kishore left his house returned back to his room on the fateful night and smell of kerosene was emitting from his clothes and he washed his clothes in the night,

(v) seizure of dagger like knife at the instance of appellant Nand Kishore and presence of human blood on the same though has been found established but there is nothing to show that blood found on the knife was of the blood group of the deceased,

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(vi) nothing can be gathered against accused Nand Kishore from the circumstance that Jhumkis, rings, and locket were recovered at his instance as the same have not been established to be stolen property belonging to the deceased. So also, recovery of money and silver coins from the house of appellant is not at all an incriminating circumstance; and

(vii) the chain alleged to have been seized at the instance of accused Nand Kishore has not been proved to be stolen property.

From the above,it can well be gathered that sole incriminating circumstance against appellant Nand Kishore is that human blood was found on the dagger like knife which was recovered at his instance and that human blood was also found on shirt, pant and sweater which were recovered from his house.

No doubt, presence of human blood on the knife which was recovered at the instance of appellant Nand Kishore is an incriminating circumstance but then this can be used only as a corroborative piece of evidence. Again presence of human blood on the recovered article is a weak piece of corroborative evidence. Human blood has also been found on the shirt, pant and sweater which have been recovered from the house of appellant Nand Kishore but again in absence of the evidence regarding same blood group with that of the blood group of the deceased is not clinching one and is a weak piece of corroborative evidence.

In *Ratna Munda and another* v. *State*,[1] a Division Bench of Orissa High Court while dealing with the circumstance relating to recovery of blood stained weapon observed thus :-

> "The recovery of blood stained Bahungi on production by appellant No. 2 before P.W.-2 cannot by itself form the basis for conviction. On consideration, we hold that prosecution has failed to bring home the charge under Section 302, IPC against the two appellants."

Another Division Bench of the same High Court while dealing with circumstance regarding seizure of some articles from the house of the accused stained with human blood, in *Laxmi Jani* v. *State*,[2] observed thus :-

(1) 1986 Cr.L. J. 1363. (2) 1986 Cr. L. J. 513.

"Finding of some articles from the person or possession of an accused or from the house stained with human blood by itself cannot lead one to a reasonable conclusion that the accused was the author of crime of murder. Such a circumstance can lend assurance to the other evidence in respect of the charge of murder (See : (1985) 1 Crimes, 455: (1985) 59, Cuttack Law Times 180 : *Manju* v. *State*.[1]"

In this regard para 18, of the judgment in *Prabhu Babaji* v. *State of Bombay*,[2] of the judgment in *State of Punjab* v. *Ramji Das*[3] may be read with advantage which buttress our view that the courts are to take into consideration the recovery of blood stained articles not as a sufficient circumstance by itself. Thus, the circumstance of presence of human blood on knife and clothes recovered at the instance of accused Nand Kishore is a weak, corroborative incriminating circumstance and may not itself be sufficient to form the basis of conviction.

The impelling circumstance of presence of blood on the knife and clothes seized at the instance of appellant Nandu create a stray suspicion about his complicity in the crime, but the suspicion cannot take the place of proof. Any amount of suspicion cannot constitute legal evidence. It is well said that the suspicion, howsoever, grave may be cannot take place of proof. The conviction cannot be based on the suspicion nor on the conscience of the Court being morally satisfied about the complicity of an accused person in the crime. In *Varkey Joseph* v. *State of Kerala*,[4] the Apex Court has aptly observed as follows :-

> "Suspicion is not the substitute for proof. There is a long distance between may be true and must be true and the prosecution has to travel all the way to prove its case beyond all reasonable doubt."

The least that can be said in this case is that at least there is a reasonable doubt about the guilt of the accused Nandu and benefit of the same should go to him when the main link of identification of chain as belonging to the deceased goes and circumstances get snapped and the other circumstance cannot in any manner establish the guilt of accused Nandu beyond all reasonable doubt.

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(1) (1985) (1) Orri. L..R. 194.
(2) 1956 Cr. L. J. 149 para 12 (2) page 1089.
(3) A.I.R. 1977 S.C. 1085.
(4) A.I.R. 1993 S.C. 1892.

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In view of the above, the sole incriminating circumstance as above, may not lead us to infallible conclusion that it was appellant Nand Kishore and Nand Kishore alone who committed murder of deceased Vimla Agrawal and committed lurking house tress pass for committing theft and murder of Vimla Agrawal in the intervening night of 5/6th Jan., 1999. The charge regarding theft of cash and valuable from the house of deceased Vimla Agrawal also cannot be said to have been established nor it can be concluded that it was appellant Nandu alias Nand Kishore who put the house of Vimla Agrawal to fire with the intention of destroying the evidence related to the aforesaid offence and therefore, the conviction and sentence recorded by the trial Court on aforesaid counts under Sections 449, 302, 380 and 201, IPC cannot be sustained. It is really unfortunate that a heinous offence of this nature is going unpunished but in the absence of legal evidence against accused, Courts are helpless.

Appellant Raju has been found guilty under Section 193 IPC for making false entries in his book to show that appellant Nand Kishore purchased ornaments from his shop in between 28.12.98 to 4.1.99 with the intention of using the same in court proceedings. The discussion on this point is found on para 56 of the judgment of the trial Court.

We are constrained to observed that analysis of evidence on this point is not in depth and various important aspects have not at all been adverted to by the learned trial Judge. Entries made on page 35-A in Register Ex.-P-35 are said to be made by Anil Soni brother of appellant Raju as can be gathered from the statement made in para 16 by K. S. Bawa (P.W.-41). Ex.-P-47 and Ex.-P-48 respectively are the opinion and report of Additional State Examiner of Questioned Documents wherein it has been opined that entries in the register and the specimen writing as obtained during investigation from Anil Soni were of the same person. Thus, what is apparent from his evidence is that the entries in Register Ex.-P-35 which are basis of charge against accused Raju Soni were not made by him but were made by his brother Anil Soni.

No evidence has been tendered by the prosecution to establish that entries in the register were made by Anil Soni at the instance or on the directions of Raju Soni. There is nothing to show that these entries were to be used by accused Raju Soni in court proceedings. Therefore, criminal

liability in respect of these entries cannot be fastened on appellant Raju Soni and, therefore, finding of guilt as recorded by the trial Court cannot be sustained and is liable to be set aside.

The upshot of the above discussion is that there is no satisfactory evidence to hold the appellants guilty for the offences levelled against them.

In result, Criminal Appeals No. 435/2003 and 415/2003 are hereby allowed and setting aside the order of conviction and sentence of appellants Nand Kishore alias Nandu and Raju alias Pandurang Soni, they are acquitted. In view of acquittal of appellant Nand Kishore alias Nandu, Criminal Reference No. 1/2003 stands rejected.

Appeal allowed and Reference rejected.

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