PERUMAL
v.
JANAKI
(Criminal Appeal No.169 of 2014)

JANUARY 20, 2014.

[P. SATHASIVAM, CJI AND J. CHELAMESWAR, J.]

CODE OF CRIMINAL PROCEDURE, 1973:

ss.195, 340 – Private complaint – Maintainability – Private complaint against respondent-police officer by appellant praying for trial of the respondent u/s.193, IPC on the ground that the appellant was prosecuted in a criminal case on the basis of a palpably false statement made by the respondent – Magistrate dismissed the complaint on the ground that in view of ss.195 and 340, the complaint of the appellant was not maintainable – High Court affirmed the same – Held: In the light of the language of s.195, the conclusion of the Magistrate in dismissing the complaint for the reason that the complaint is not filed by the person contemplated u/s.195 is correct – As a matter of fact, the Court before whom the instant complaint was lodged was not the same Court before whom the appellant was prosecuted by the respondent – However, both s.195(1) and s.340(2) authorise the exercise of power conferred u/s.195(1) by any other court to which the court in respect of which the offence is committed is subordinate to – The High Court, being constitutional court, invested with the powers of superintendence over all courts within the territory over which it exercises its jurisdiction is certainly a Court which could have exercised the jurisdiction u/s.195(1) – High Courts not only have the authority to exercise such jurisdiction but also have an obligation to exercise such power in appropriate cases – Therefore, matter remitted to High Court for appropriate course of action to

initiate proceedings against respondent on the basis of the complaint of appellant in accordance with law – Penal Code, 1860 – ss.191, 193.

On a complaint of one 'N' that the appellant enticed her of marrying her and had sexual interaction and on account of that 'N' became pregnant, a case was registered against the appellant under Sections 417 and 506(i) IPC by the respondent-sub-inspector. The respondent thereafter filed a charge sheet with an assertion that the appellant was responsible for making 'N' pregnant. The Magistrate dismissed the complaint and appellant was acquitted of both the charges. The High Court affirmed the same. Thereafter, the appellant filed a complaint under Section 190, Cr.P.C. praying that the respondent be tried for an offence under Section 193 IPC. The complaint was dismissed on the ground that in view of Sections 195 and 340 Cr.P.C. the complaint of the appellant was not maintainable. The High Court affirmed the order of dismissal of complaint. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal and remitting the matter to the High Court, the Court

HELD: 1.1. The respondent had filed a charge-sheet with an assertion that the appellant was responsible for pregnancy of 'N', however, even before the filing of the charge-sheet, a definite medical opinion was available to the respondent (secured during the course of the investigation of the offence alleged against the appellant) to the effect that 'N' was not pregnant. Still the respondent chose to assert in the charge-sheet that 'N' was pregnant. Thus, at every stage of the matter, the enquiry was misdirected. The facts *prima facie* may not constitute an offence under section 193 IPC but may constitute an offence under section 211 IPC. This aspect was not examined at any stage in the case. The offence

under section 193 IPC is an act of giving false evidence or fabricating false evidence in a judicial proceeding. The act of giving false evidence is defined under section 191 IPC. To constitute an act of giving false evidence, a person must make a statement which is either false to the knowledge or belief of the maker or which the maker does not believe to be true. Further, it requires that such a statement is made by a person (1) who is legally bound by an oath; (2) by an express provision of law to state the truth; or (3) being bound by law to make a declaration upon any subject. [Paras 13, 14, 15 and 16] [600-C-H; 601-A-B, E-F; 602-A]

1.2. A police officer filing a charge-sheet does not make any statement on oath nor he is bound by any express provision of law to state the truth though being a public servant is obliged to act in good faith. Whether the statement made by the police officer in a charge-sheet amounts to a declaration upon any subject within the meaning of the clause "being bound by law to make a declaration upon any subject" occurring under section 191 of the IPC is a question which requires further examination. On the other hand, section 211 of the IPC deals with an offence of instituting or causing to be instituted any criminal proceeding or falsely charging any person of having committed an offence even when there is no just or lawful ground for such proceeding to the knowledge of the person instituting or causing the institution of the criminal proceedings. Irrespective of the fact whether the offence disclosed by the complaint of the appellant is an offence falling either under section 193 or 211 of the IPC, section 195 of the Cr.P.C. declares that no Court shall take cognizance of these two offences except in the manner specified under section 195 of the Cr.P.C. In the light of the language of section 195 Cr.P.C. the conclusion of the Magistrate in dismissing the complaint of the appellant for the reason that the

complaint is not filed by the person contemplated under section 195 Cr.P.C. is correct. As a matter of fact the Court before which the instant complaint was lodged is not the same Court before which the appellant was prosecuted by the respondent. [Paras 17-20] [602-C-F; 603-B-D]

2. Under section 340(1) of the Cr.P.C., it is stipulated that whenever it appears that any one of the offences mentioned in clause (b) of sub-section (1) of section 195 appears to have been committed in or in relation to a proceeding before a Court, that Court either on an application made to it or otherwise make a complaint thereof in writing to the competent Magistrate after following the procedure mentioned under section 340 of the Cr.P.C. Admittedly, the appellant did not make an application to the judicial magistrate No.1 under section 340 to 'make a complaint' against the respondent nor the said magistrate *suo moto* made a complaint. Therefore, magistrate No.2 before whom the private complaint is made by the appellant had no option but to dismiss the complaint. But the High Court, is not justified in confining itself to the examination of the correctness of the order of the magistrate dismissing the said private complaint. Both Section 195(1) and Section 340(2) Cr.P.C. authorise the exercise of the power conferred under Section 195(1) by any other court to which the court in respect of which the offence is committed is subordinate to. [Paras 21, 22 and 23] [603-D-E; 604-A-D]

3.1. Section 195(4), Cr.P.C. creates a legal fiction whereby it is declared that the original court is subordinate to that court to which appeals ordinarily lie from the judgments or orders of the original court ('the appellate court'). Such a fiction must be understood in the context of Article 227 of the Constitution of India and Section 10(1) and 15(1) of Cr.P.C. Article 227 confers the power of superintendence on a High Court over all courts

and tribunals functioning within the territories in relation to which a High Court exercises jurisdiction. Section 10(1) and 15(1) of Cr.P.C. declare that the Assistant Sessions Judges and Chief Judicial Magistrates are subordinate to the Session Judge and other Judicial Magistrates to be subordinate to the Chief Judicial Magistrate subject to the control of the Session Judge. Section 195(4) deals with the authority of the superior courts in the context of taking cognizance of various offences mentioned in Section 195(1). Such offences are relatable to civil, criminal and revenue courts etc. Each one of the streams of these courts may have their administrative hierarchy depending upon under the law by which such courts are brought into existence. It is also well known that certain courts have appellate jurisdiction while certain courts only have original jurisdiction. Appellate jurisdiction is the creature of statute and depending upon the scheme of a particular statute, the forum of appeal varies. Generally, the appellate fora are created on the basis of either subject matter of dispute or economic implications or nature of crime etc. Therefore, all that sub-section (4) of Section 195 says is that irrespective of the fact whether a particular court is subordinate to another court in the hierarchy of judicial administration, for the purpose of exercise of powers under Section 195(1), every appellate court competent to entertain the appeals either from decrees or sentence passed by the original court is treated to be a court concurrently competent to exercise the jurisdiction under Section 195(1). High Courts being constitutional courts invested with the powers of superintendence over all courts within the territory over which the High Court exercises its jurisdiction is certainly a Court which can exercise the jurisdiction under Section 195(1). In the absence of any specific constitutional limitation of prescription on the exercise of such powers, the High Courts may exercise such power either on an

application made to it or *suo moto* whenever the interests of justice demand. [Paras 24 and 25] [604-D-E; 605-A-C; 606-A-F]

3.2. The High Courts not only have the authority to exercise such jurisdiction but also have an obligation to exercise such power in appropriate cases. Such obligation flows from two factors – (1) the embargo created by Section 195 restricting the liberty of aggrieved persons to initiate criminal proceedings with respect to offences prescribed under Section 195; (2) such offences pertain to either the contempt of lawful authorities of public servants or offences against public justice. The power of superintendence like any other power impliedly carries an obligation to exercise powers in an appropriate case to maintain the majesty of the judicial process and the purity of the legal system. Such an obligation becomes more profound when these allegations of commission of offences pertain to public justice. In the case on hand, when the appellant alleged that he had been prosecuted on the basis of a palpably false statement coupled with the further allegation in his complaint that the respondent did so for extraneous considerations, it is an appropriate case where the High Court ought to have exercised the jurisdiction under Section 195 Cr.P.C. The allegation such as the one made by the complainant against the respondent is not uncommon. In a different context, it was held "there is no rule of law that common sense should be put in cold storage". Indian Constitution is designed on the theory of checks and balances. A theory which is the product of the belief that all power corrupts - such belief is based on experience. The matter is remitted to the High Court for further appropriate course of action to initiate proceedings against the respondent on the basis of the complaint of the appellant in accordance with law. [Para 26–29] [606-G; 607-A-B; 608-A-E]

Iqbal Singh Marwah & Anr. v. Meenakshi Marwah & Anr. **2005 (4) SCC 370 – relied on.**

Case Law Reference:

2005 (4) SCC 370	**relied on**	**Para 27**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 169 of 20014.

From the Judgment and Order dated 19.08.2011 of the High Court of Judicature at Madras in Crl. R.C. 1119 of 2011.

P.R. Kovilan Poongkuntran, V. Vasudevan, Geeta Kovilan, T. Harish Kumar for the Appellant.

Aishwarya Bhati for the Respondent.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. Leave granted.

2. Aggrieved by an order in Crl. R.C. No.1119 of 2011 of the High Court of Madras, the unsuccessful petitioner therein preferred the instant appeal.

3. A petition in C.M.P. No.4561 of 2010 (private complaint) under section 200 of the Code of Criminal Procedure, 1973 (hereinafter for short referred to as "the Cr.P.C.") filed by the appellant herein against the respondent came to be dismissed by the Judicial Magistrate No.2 at Pollachi by his judgment dated 31st August 2010. Challenging the same, the abovementioned Crl. R.C. was filed.

4. The factual background of the case is as follows:

5. The respondent was working as a Sub-Inspector in an All-Women Police Station, Pollachi at the relevant point of time. On 18th May 2008, one Nagal reported to the respondent that the appellant herein had cheated her. The respondent registered Crime No.18/08 under sections 417 and 506(i) of

the Indian Penal Code (hereinafter for short referred to as "the IPC"). Eventually, the respondent filed a charge-sheet, the relevant portion of which reads as follows:

> "On 26.12.07, that the accused called upon the de-facto complainant for an outing and while going in the night at around 10.00 via Vadugapalayam Ittori route the accused enticed the de-facto complainant of marrying her and had sexual interaction several times in the nearby jungle and on account of which the **complainant became pregnant** and when she asked the accused to marry him he threatened the complainant of killing her if she disclosed the above fact to anybody.
>
> Hence the accused committed an offence punishable u/s. 417, 506 (i) of IPC."
>
> [emphasis supplied]

6. The appellant was tried for the offences mentioned above by the learned Judicial Magistrate No.1, Pollachi. The learned Judicial Magistrate by his judgment dated 15th March 2010 acquitted the appellant of both the charges.

7. It appears that the said judgment has become final.

8. In the light of the acquittal, the appellant filed a complaint (C.M.P. No.4561 of 2010) under section 190 of the Cr.P.C. on the file of the Judicial Magistrate No.2 at Pollachi praying that the respondent be tried for an offence under section 193 of the IPC. The said complaint came to be dismissed by an order dated 31st August 2010 on the ground that in view of sections 195 and 340 of the Cr.P.C. the complaint of the appellant herein is not maintainable.

9. Aggrieved by the said dismissal, the appellant herein unsuccessfully carried the matter to the High Court. Hence the present appeal.

10. The case of the appellant herein in his complaint is that though Nagal alleged an offence of cheating against the appellant which led to the pregnancy of Nagal, such an offence was not proved against him. Upon the registration of Crime No.18/08, Nagal was subjected to medical examination. She was not found to be pregnant. Dr. Geetha, who examined Nagal, categorically opined that Nagal was not found to be pregnant on the date of examination which took place six days after the registration of the FIR. In spite of the definite medical opinion that Nagal was not pregnant, the respondent chose to file a charge-sheet with an allegation that Nagal became pregnant. Therefore, according to the appellant, the charge-sheet was filed with a deliberate false statement by the respondent herein. The appellant, therefore, prayed in his complaint as follows;

> "It is, therefore, prayed that this Hon'ble Court may be pleased to take this complaint on file, try the accused U/s. 193 IPC for deliberately giving false evidence in the Court as against the complainant, and punish the accused and pass such further or other orders as this Hon'ble court deems fit and proper."

11. The learned Magistrate dismissed the complaint on the ground that section 195 of the Cr.P.C. bars criminal courts to take cognizance of an offence under section 193 of the IPC except on the complaint in writing of that Court or an officer of that Court in relation to any proceeding in the Court where the offence under section 193 is said to have been committed and a private complaint such as the one on hand is not maintainable.

12. The High Court declined to interfere with the matter in exercise of its revisional jurisdiction. The operative portion of the order under challenge reads as follows:

> "3. … This court is in agreement with the conclusion of the court below in dismissing the complaint. The complaint provided very little to take action upon, particularly, where this court finds that the respondent had not in any manner

> tampered with the medical record so as to mulct the petitioner with criminal liability. The wording in the final report informing of the de facto complainant having been pregnant can in the facts and circumstances of the case, be seen only as a mistake.
>
> 4. In the result, the criminal revision stands dismissed."

13. We regret to place on record that at every stage of this matter the inquiry was misdirected.

14. The facts relevant for the issue on hand are that:-

(1) The appellant was prosecuted for the offences under sections 417 and 506 (i) IPC. (The factual allegations forming the basis of such a prosecution are already noted earlier).

(2) The respondent filed a charge-sheet with an assertion that the appellant was responsible for pregnancy of Nagal.

(3) Even before the filing of the charge-sheet, a definite medical opinion was available to the respondent (secured during the course of the investigation of the offence alleged against the appellant) to the effect that Nagal was not pregnant.

(4) Still the respondent chose to assert in the charge-sheet that Nagal was pregnant.

(5) The prosecution against the appellant ended in acquittal.

15. The abovementioned indisputable facts, in our opinion, *prima facie* may not constitute an offence under section 193 IPC but may constitute an offence under section 211 IPC. We say *prima facie* only for the reason this aspect has not been examined at any stage in the case nor any submission is made before us on either side but we cannot help taking notice of the basic facts and the legal position.

16. The offence under section 193[1] IPC is an act of giving false evidence or fabricating false evidence in a judicial proceeding. The act of giving false evidence is defined under section 191 IPC as follows:

> "191. Giving false evidence.— Whoever, being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.
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> *Explanation 1.*—A statement is within the meaning of this section, whether it is made verbally or otherwise.
>
> *Explanation 2.*—A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know."

It can be seen from the definition that to constitute an act of giving false evidence, a person must make a statement which is either false to the knowledge or belief of the maker or which the maker does not believe to be true. Further, it requires that such a statement is made by a person (1) who is legally

1. Section 193. Punishment for false evidence.—Whoever intentionally gives false evidence in any stage of a judicial proceedings, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extended to seven years, and shall also be liable to fine,

and whoever intentionally gives or fabricates fale evidence in any other case, shall be punished with imprisonment of either description for a term which may extended to three years, and shall also be liable to fine.

Explanation 1.—A trial before a Court-martial; is a judicial proceeding.

Explanation 2.—An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

bound by an oath; (2) by an express provision of law to state the truth; or (3) being bound by law to make a declaration upon any subject.

17. A police officer filing a charge-sheet does not make any statement on oath nor is bound by **any express provision** of law to state the truth though in our opinion being a public servant is obliged to act in good faith. Whether the statement made by the police officer in a charge-sheet amounts to a declaration upon any subject within the meaning of the clause "being bound by law to make a declaration upon any subject" occurring under section 191 of the IPC is a question which requires further examination.

18. On the other hand, section 211 of the IPC deals with an offence of instituting or causing to be instituted any criminal proceeding or falsely charging any person of having committed an offence even when there is no just or lawful ground for such proceeding to the knowledge of the person instituting or causing the institution of the criminal proceedings.

19. Irrespective of the fact whether the offence disclosed by the complaint of the appellant herein is an offence falling either under section 193 or 211 of the IPC, section 195 of the Cr.P.C. declares that no Court shall take cognizance of either of the abovementioned two offences except in the manner specified under section 195 of the Cr.P.C.:

> "195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.—(1) No Court shall take cognizance—
>
> x x x x x
>
> (b) (i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to

have been committed in, or in relation to, any proceeding in any Court, or

except on the complaint in writing of that Court or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that court is subordinate."

20. In the light of the language of section 195 Cr.P.C. we do not find fault with the conclusion of the learned Magistrate in dismissing the complaint of the appellant herein for the reason that the complaint is not filed by the person contemplated under section 195 Cr.P.C. It may be mentioned here that as a matter of fact the Court before which the instant complaint was lodged is not the same Court before which the appellant herein was prosecuted by the respondent.

21. Under section 340(1) of the Cr.P.C., it is stipulated that whenever it appears that any one of the offences mentioned in clause (b) of sub-section (1) of section 195 appears to have been committed in or in relation to a proceeding before a Court, that Court either on an application made to it **or otherwise** make a complaint thereof in writing to the competent Magistrate after following the procedure mentioned under section 340 of the Cr.P.C.[2]

2. Section 340. Procedure in cases mentioned in section 195.—(1) When upon an application made to it in this behalf or otherwise, any Court is of opinion that it is in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,-

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance for the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

22. Admittedly, the appellant herein did not make an application to the judicial magistrate No.1, Pollachi under section 340 to 'make a complaint' against the respondent herein nor the said magistrate *suo moto* made a complaint. Therefore, the learned judicial magistrate No.2 before whom the private complaint is made by the appellant had no option but to dismiss the complaint.

23. But the High Court, in our view, is not justified in confining itself to the examination of the correctness of the order of the magistrate dismissing the said private complaint. Both Section 195(1) and Section 340(2) Cr.P.C. authorise the exercise of the power conferred under Section 195(1) by any other court to which the court in respect of which the offence is committed is subordinate to. (hereinafter referred to for the sake of convenience as 'the original court')

24. It can be seen from the language of Section 195(4), Cr.P.C. that it creates a legal fiction whereby it is declared that the original court is subordinate to that court to which appeals ordinarily lie from the judgments or orders of the original court. (hereinafter referred to as 'the appellate court') In our view, such

(e) bind over any person to appear and give evidence befor such Magistrate.

(2) The power conferred on a Court by sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-section (4) of section 195.

3. A complaint made under this section shall be signed.-

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the Court or by such officer of the Court as the Court may authorise in writing in this behalf.

4. In this section, "Court" has the same meaning as in section 195."

a fiction must be understood in the context of Article 227[3] of the Constitution of India and Section 10(1) and 15(1) of Cr.P.C. Article 227[4] confers the power of superintendence on a High Court over all courts and tribunals functioning within the territories in relation to which a High Court exercises jurisdiction. Section 10(1) and 15(1) of Cr.P.C. declare that the Assistant Sessions Judges and Chief Judicial Magistrates are subordinate to the Session Judge and other Judicial Magistrates to be subordinate to the Chief Judicial Magistrate subject to the control of the Session Judge. It may be remembered that Section 195(4) deals with the authority of the superior courts in the context of taking cognizance of various

3. 227. Power of superintendence over all courts by the High Court-(1) Every High Court shall have superintendence over all courts and tribunals throughout the territories in relation to which it exercise jurisdiction.

(2) Without prejudice to the generality of the foregoing provisions, the High Court may-

(a) call for returns from such courts;

(b) make and issue general rules and prescribe forms for regulating the pratice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleader practicing therein;

Provided that any rules made, form prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the times being in forces, and shall require the previous approval of the Governor.

(4) Nothing in this articles shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces.

4. **10. Subordinate of Assistant Sessions Judges—**(1) All Assistant Session Judges shall be subrodinate to the Sessions Judge in whose Court they exercise jurisdiction.

15. Subordination of Judicial Magistrates-(1) Every Chief Judicial Magistrate shall be subordinate to the Session Judge and every other Judicial Magistrate shal, subject to the general control of the Session Judge, be subordinate to the Chief Judicial Magistrate.

offences mentioned in Section 195(1). Such offences are relatable to civil, criminal and revenue courts etc.[5] Each one of the streams of these courts may have their administrative hierarchy depending upon under the law by which such courts are brought into existence. It is also well known that certain courts have appellate jurisdiction while certain courts only have original jurisdiction. Appellate jurisdiction is the creature of statute and depending upon the scheme of a particular statute, the forum of appeal varies. Generally, the appellate for a are created on the basis of either subject matter of dispute or economic implications or nature of crime etc.

25. Therefore, all that sub-section (4) of Section 195 says is that irrespective of the fact whether a particular court is subordinate to another court in the hierarchy of judicial administration, for the purpose of exercise of powers under Section 195(1), every appellate court competent to entertain the appeals either from decrees or sentence passed by the original court is treated to be a court concurrently competent to exercise the jurisdiction under Section 195(1). High Courts being constitutional courts invested with the powers of superintendence over all courts within the territory over which the High Court exercises its jurisdiction, in our view, is certainly a Court which can exercise the jurisdiction under Section 195(1). In the absence of any specific constitutional limitation of prescription on the exercise of such powers, the High Courts may exercise such power either on an application made to it or *suo moto* whenever the interests of justice demand.

26. The High Courts not only have the authority to exercise such jurisdiction but also an obligation to exercise such power in appropriate cases. Such obligation, in our opinion, flows from two factors – (1) the embargo created by Section 195 restricting the liberty of aggrieved persons to initiate criminal

5. **195 (3)-**In clause (b) of sub-section (1), the term 'Court' means a Civil, Revenue or Criminal Court, and includes a tribunal constituted by a or under a Central, Provinical or State Act, if declared by that Act to be a Court for the purposes of this section.

proceedings with respect to offences prescribed under Section 195; (2) such offences pertain to either the contempt of lawful authorities of public servants or offences against public justice.

27. A constitution Bench of this Court in *Iqbal Singh Marwah & Anr. v. Meenakshi Marwah & Anr.,* (2005) 4 SCC 370, while interpreting Section 195 Cr.P.C., although in a different context, held that any interpretation which leads to a situation where a victim of crime is rendered remediless, has to be discarded[6]. The power of superintendence like any other

6. 23. In view of the language used in Section 340 Cr.P.C. the Court is not bound to make a complaint regarding commission of an offence referred to in Section referred to in Section 195(1)(b), as the Section is conditioned by the words "Court is of opinion that it is expedient in the interest of justice." This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the Court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to in Section 195(i)(b). This expediency will normally be judged by the Court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administrative injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in Court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such cricumstances, the Court may not consider it expedient in the interest of justice to make a complaint. The broad view of clause (b)(ii), as canvassed by learned counsel for the appellants, would render the victim of such forgery or forged document remedyless. Any interpretation which leads to a situation where a victim of a crime is rendered remedyless, has to be discarded.

25. An enlarged interpretation to Section 195(1)(b)(ii), whereby the bar created by the said provision would also operate where after commission of an act of forgery the doucment is subsequently produced in Court, is capable of great misuse. As pointed out in Sachida Nand Singh, after preparing a forged document or committing an act of forgery, a person may manage to get a proceeding instituted in any civil, criminal or revenue court, either by himself or though someone set up by him and simply file the document in the said proceeding. He would thus be protected from prosecution, either at it instance of a private party or the police until the Court, where the doucment has been filed, itself chooses to file a complaint. The litigation may be a prolonged one due to which the acutal trial of such a person may be delayed indefinitely. Such an interpretation would he highly detrimental to the interest of soceity at large.

power impliedly carries an obligation to exercise powers in an appropriate case to maintain the majesty of the judicial process and the purity of the legal system. Such an obligation becomes more profound when these allegations of commission of offences pertain to public justice.

28. In the case on hand, when the appellant alleges that he had been prosecuted on the basis of a palpably false statement coupled with the further allegation in his complaint that the respondent did so for extraneous considerations, we are of the opinion that it is an appropriate case where the High Court ought to have exercised the jurisdiction under Section 195 Cr.P.C.. The allegation such as the one made by the complainant against the respondent is not uncommon. As was pointed earlier by this Court in a different context "there is no rule of law that common sense should be put in cold storage"[7]. Our Constitution is designed on the theory of checks and balances. A theory which is the product of the belief that all power corrupts - such belief is based on experience.

29. The appeal is, therefore, allowed. The matter is remitted to the High Court for further appropriate course of action to initiate proceedings against the respondent on the basis of the complaint of the appellant in accordance with law.

D.G. Appeal allowed.

7. Para 63 of ***Prakash Chandra Mehta v. Commissioner and Secretary, Government of Kerala & Ors.,*** 1985 (Supp.) SCC 144.

SHATRUGHAN CHAUHAN & ANR.
v.
UNION OF INDIA & ORS.
(Writ Petition (Criminal) No. 55 of 2013)

JANUARY 21, 2014

[P. SATHASIVAM, CJI, RANJAN GOGOI AND SHIVA KIRTI SINGH, JJ.]

Mercy jurisprudence:

Constitution of India, 1950:

Articles 72/161 – Commutation of death sentence to life imprisonment – Effect of supervening circumstances – Held: Undue long delay in execution of sentence of death entitle the condemned prisoner to approach Supreme Court u/Article 32 – However, Supreme Court will only examine the circumstances surrounding the delay that has occurred and those that have ensued after sentence was finally confirmed by the judicial process – Supreme Court would not reopen the conclusion already reached but may consider the question of inordinate delay – Delay caused by circumstances beyond the prisoners' control mandates commutation of death sentence – Unexplained delay is a ground for commutation of death sentence into life imprisonment and the said supervening circumstance is applicable to all types of cases including the offences under TADA – The only aspect the courts have to satisfy is that the delay was unreasonable and unexplained or inordinate at the hands of the executive – Insanity is also one of the supervening circumstances that warrant for commutation of death sentence – In the instant writ petitions, in the light of principles and facts of each case, the death sentence of all the petitioners is commuted into imprisonment for life – Code of Criminal Procedure, 1973 – Prisons Act, 1894.

Articles 72/161 – Nature of power guaranteed under – Held: The power vested in the President u/Article 72 and the Governor u/Article 161 is a Constitutional duty – It is neither a matter of grace nor a matter of privilege but is an important constitutional responsibility reposed by the people in the highest authority – The power of pardon is essentially an executive action, which needs to be exercised in the aid of justice and not in defiance of it – The said power is to be exercised on the aid and advice of the Council of Ministers – Also, Articles 72/161 of the Constitution entail remedy to all the convicts and is not limited to only death sentence cases.

Articles 72/161 – Limited Judicial Review of the executive orders u/Article 72/161 – Held: Executive orders u/Articles 72/161 should be subject to limited judicial review based on the rationale that the power u/Articles 72/161 is per se above judicial review, however, the manner of exercise of power is certainly subject to judicial review – Administrative law.

Articles 72/161 – Processing the mercy petition – Procedure adopted u/Articles 72/161– Discussed.

Articles 72/161 – Mercy petition – Limitation period for adjudication – Held: After the completion of the judicial process, if the convict files a mercy petition to the Governor/President, it is incumbent on the authorities to dispose of the same expeditiously – Though no time limit can be fixed for the Governor and the President, it is the duty of the executive to expedite the matter at every stage, viz., calling for the records, orders and documents filed in the court, preparation of the note for approval of the Minister concerned, and the ultimate decision of the constitutional authorities – Limitation.

Articles 72/161 – Mercy petition – Procedural Lapses – Held: Ministry of Home Affairs, Government of India has detailed procedure regarding handling of petitions for mercy in death sentence cases – The Rules make it clear that at every stage the matter has to be expedited and there cannot

be any delay at the instance of the officers, particularly, the Superintendent of Jail, in view of the language used therein as "at once" – Apart from these Rules regarding presentation of mercy petitions and disposal thereof, necessary instructions have been issued for preparation of note to be approved by the Home Minister and for passing appropriate orders by the President of India.

Article 21 – Right to life – Rights of accused vis-a-vis right of victim – Held: While Article 21 is the paramount principle on which rights of the convicts are based, it must be considered along with the rights of the victims or the deceased's family as also societal consideration since these elements form part of the sentencing process as well.

Article 32 – Writ petition by death convict asserting violation of Article 21 on account of undue, unreasonable and prolonged delay in disposal of his mercy petition – Held: When Article 21 is violated, it is not a question of judicial review but of protection of fundamental rights and courts give substantial relief not merely procedural protection – The question of violation of Article 21, its effects and the appropriate relief is the domain of Supreme Court – There is no question of remanding the matter for consideration because Supreme Court is the custodian and enforcer of fundamental rights and the final interpreter of the Constitution – Further, Article 21 is the paramount principle on which rights of the convict are based, this must be considered along with the rights of the victims or the deceased's family as also societal consideration.

Guidelines:

Mercy petitions – Guidelines for effective governing of the procedure of filing mercy petitions and for the cause of the death convicts – Framed.

***Code of Criminal Procedure, 1973**:*

s.354(5) – Death sentence – Execution by hanging – Held: The method of hanging prescribed by s.354(5) is not violative of the guaranteed right u/Article 21 of the Constitution on the basis of scientific evidence and opinions of eminent medical persons which assured that hanging is the least painful way of ending the life.

***Prison Act, 1894**:*

s.30(2) – Solitary confinement – In case of prisoner under sentence of death – Held: Solitary confinement, even if mollified and modified marginally, is not sanctioned by s.30 of the Act for prisoners 'under sentence of death' – The crucial holding u/s.30(2) is that a person is not 'under sentence of death', even if the Sessions Court has sentenced him to death subject to confirmation by the High Court – He is not 'under sentence of death' even if the High Court imposes, by confirmation or fresh appellate infliction, death penalty, so long as an appeal to the Supreme Court is likely to be or has been moved or is pending – Even if Supreme Court has awarded capital sentence, s.30 does not cover him so long as his petition for mercy to the Governor and/or to the President permitted by the Constitution, has not been disposed of – Thus, only after rejection of mercy petition by the Governor and the President, and on further application, if there is no stay of execution by the authorities, the person is under sentence of death – During that interregnum, he attracts the custodial segregation specified in s.30(2), subject to the ameliorative meaning assigned to the provision – To be 'under sentence of death' means 'to be under a finally executable death sentence'.

The instant writ petitions, under Article 32 of the Constitution of India were filed either by the convicts, who were awarded death sentence or by their family members or by public-spirited bodies like People's Union for Democratic Rights (PUDR) based on the rejection of

mercy petitions by the Governor and the President of India. In these petitions, the petitioners sought relief against alleged infringement of certain fundamental rights on account of failure on the part of the executive to dispose of the mercy petitions filed under Article 72/161 of the Constitution within a reasonable time. It was the claim of the petitioners that the impugned executive orders of rejection of mercy petitions against 15 accused persons were passed without considering the supervening events which were crucial for deciding the same.

Disposing of the writ petitions, the Court

HELD:

1. Maintainability of the Petitions

The stand of the petitioners was that the exercise of the constitutional power vested in the executive specified under Article 72/161 has violated the fundamental rights of the petitioners. This Court, as in past, entertained the petitions of the given kind and issued appropriate orders. Accordingly, the petitions are held maintainable. [Para 9] [644-G-H; 645-A-B]

T.V. Vatheeswaran vs. State of Tamil Nadu **(1983) 2 SCC 68: 1983 (2) SCR 348,** *Sher Singh and Ors. vs. State of Punjab* **(1983) 2 SCC 344: 1983 AIR 465;** *Triveniben vs. State of Gujarat* **(1988) 4 SCC 574: 1989 AIR 142;** *R.D Shetty vs. International Airport Authority* **(1979) 3 SCC 489: 1979 (3) SCR 1014 – relied on.**

Minerva Mills Ltd. and Ors. vs. Union of India and Ors. **(1980) 2 SCC 625;** *A.R Antulay vs. Union of India* **(1988) 2 SCC 602: 1988 (1) Suppl. SCR 1 – referred to.**

2. Nature of power guaranteed under Article 72/161 of the Constitution

Both Articles 72 and 161 repose the power of the people in the highest dignitaries, i.e., the President or the Governor of a State, as the case may be, and there are no words of limitation indicated in either of the two Articles. The President or the Governor, as the case may be, in exercise of power under Article 72/161 respectively, may examine the evidence afresh and this exercise of power is clearly independent of the judiciary. Article 72/161 of the Constitution entail remedy to all the convicts and is not limited to only death sentence cases and must be understood accordingly. It contains the power of reprieve, remission, commutation and pardon for all offences, though death sentence cases invoke the strongest sentiment since it is the only sentence that cannot be undone once it is executed. The power vested in the President under Article 72 and the Governor under Article 161 of the Constitution is a Constitutional duty. As a result, it is neither a matter of grace nor a matter of privilege but is an important constitutional responsibility reposed by the people in the highest authority. The power of pardon is essentially an executive action, which needs to be exercised in the aid of justice and not in defiance of it. Further, it is well settled that the power under Article 72/161 of the Constitution of India is to be exercised on the aid and advice of the Council of Ministers. [Paras 12, 14, 17] [649-D-E; 650-D-E; 652-C-E]

Kehar Singh vs. Union of India & Anr., **(1989) 1 SCC 204: 1988 (3) Suppl. SCR 1102;** *Epuru Sudhakar & Anr. vs. Govt. of A.P. & Ors.,* **(2006) 8 SCC 161: 2006 (7) Suppl. SCR 81;** *Kuljeet Singh vs. Lt. Governor* **(1982) 1 SCC 417: 1982 (3) SCR 58– relied on.**

Biddle vs. Perovoch **274 US 480 – referred to.**

3. Limited Judicial Review of the executive orders under Article 72/161

3.1. The power of the executive to grant pardon under Article 72/161 is a Constitutional power and this Court, on numerous occasions, has declined to frame guidelines for the exercise of power under the said Articles for two reasons. Firstly, it is a settled proposition that there is always a presumption that the constitutional authority acts with application of mind. Secondly, this Court, over the span of years, unanimously took the view that considering the nature of power enshrined in Article 72/161, it is unnecessary to spell out specific guidelines. Nevertheless, the executive orders under Article 72/161 should be subject to limited judicial review based on the rationale that the power under Article 72/161 is *per se* above judicial review but the manner of exercise of power is certainly subject to judicial review. [paras 18, 19] [652-F-H; 654-B-C]

Bikas Chatterjee vs. UOI **(2004) 7 SCC 634: 1998 (2) SCR 206;** *Swaran Singh vs. State of U.P* **AIR 1998 SC 2026;** *Satpal and Anr. vs. State of Haryana and Ors.* **AIR 2000 SC 1702: 2000 (3) SCR 858 – relied on.**

3.2. Though the contours of power under Article 72/161 have not been defined, this Court, in ****Narayan Dutt* **case has held that the exercise of power is subject to challenge on the following grounds: If the Governor had been found to have exercised the power himself without being advised by the government; if the Governor transgressed his jurisdiction in exercising the said power; if the Governor had passed the order without applying his mind; the order of the Governor was *mala fide*; or The order of the Governor was passed on some extraneous considerations. [Para 20] [654-E-H]

Narayan Dutt vs. State of Punjab* **(2011) 4 SCC 353: 2011 (4) SCR 983 – relied on.

3.3. The President/Governor is not bound to hear a

petition for mercy before taking a decision on the petition. The manner of exercise of the power under the said articles is primarily a matter of discretion and ordinarily the courts would not interfere with the decision on merits. However, the courts retain the limited power of judicial review to ensure that the constitutional authorities consider all the relevant materials before arriving at a conclusion. The legal basis for taking supervening circumstances into account for deciding mercy petition is that Article 21 inheres a right in every prisoner till his last breath and this Court has to protect that right even if the noose is being tied on the condemned prisoner's neck. [Paras 21, 22] [656-D-G]

Jagdish vs. State of Madhya Pradesh **(2009) 9 SCC 495: 2009 (14) SCR 727 – relied on.**

Effect of Supervening Circumstances

The petitioners asserted the following events as the supervening circumstances, for commutation of death sentence to life imprisonment. Delay, Insanity, Solitary Confinement, Judgments declared per incuriam, Procedural Lapses. [Para 24] [657-B-D]

4.1.1. (i) Delay

The following is the procedure adopted under Article 72/161 for processing the mercy petition. The death row convicts invariably approach the Governor under Article 161 of the Constitution of India with a mercy petition after this Court finally decide the matter. During the pendency of the mercy petition, the execution of death sentence is stayed. As per the procedure, once the mercy petition is rejected by the Governor, the convict prefers mercy petition to the President. Thereafter, the mercy petition received in President's office is forwarded to the Ministry of Home Affairs. Normally, the mercy petition consists of one or two pages giving grounds for mercy. To examine

the mercy petition so received and to arrive at a conclusion, the documents like copy of the judgments of the trial Court, the High Court and the Supreme Court are requested from the State Government. The other documents required include details of the decision taken by the Governor under Article 161 of the Constitution, the recommendations of the State Government in regard to grant of mercy petition, copy of the records of the case, nominal role of the convict, health status of the prisoner and other related documents. All these details are gathered from the State/Prison authorities after the receipt of the mercy petition and, according to the Union of India, it takes a lot of time and involve protracted correspondence with prison authorities and State Government. It is also claimed by the Union of India that these documents are then extensively examined and in some sensitive cases, various *pros* and *cons* are weighed to arrive at a decision. Sometimes, person or at their instance some of their relatives, file mercy petitions repeatedly which cause undue delay. In other words, according to the Union of India, the time taken in examination of mercy petitions may depend upon the nature of the case and the scope of inquiry to be made. It may also depend upon the number of mercy petitions submitted by or on behalf of the accused. [Paras 26, 27] [657-F-H; 658-A-F]

4.1.2. The decision taken by the President under Article 72 is communicated to the State Government/ Union Territory concerned and to the prisoner through State Government/Union Territory. As per List II Entry 4 of the Seventh Schedule to the Constitution of India, "Prisons and persons detained therein" is a State subject. Therefore, all steps for execution of capital punishment including informing the convict and his/her family, etc. are required to be taken care of by the concerned State Governments/Union Territories in accordance with their

jail manual/rules etc. [Para 29] [659-B-D]

4.1.3. The right to life is the most fundamental of all rights. The right to life, as guaranteed under Article 21 of the Constitution of India, provides that no person shall be deprived of his life and liberty except in accordance with the procedure established by law. While Article 21 is the paramount principle on which rights of the convicts are based, it must be considered along with the rights of the victims or the deceased's family as also societal consideration since these elements form part of the sentencing process as well. [Paras 31, 32] [659-G-H; 660-E]

Smt. Triveniben vs. State of Gujarat **(1988) 4 SCC 574: 1989 AIR 142 ;** *Smt. Triveniben vs. State of Gujarat,* **(1989) 1 SCC 678: 1989 (1) SCR 509 – relied on.**

State of West Bengal vs. Committee for Democratic Rights, West Bengal, **(2010) 3 SCC 571: 2010 (2) SCR 979;** *Ediga Anamma vs. State of A.P.,* **1974(4) SCC 443: 1974 (3) SCR 329 – referred to.**

Earl Pratt vs. AG for Jamaica **[1994] 2 AC 1 – Privy Council– referred to.**

4.1.4. Undue long delay in execution of sentence of death will entitle the condemned prisoner to approach this Court under Article 32. However, this Court will only examine the circumstances surrounding the delay that has occurred and those that have ensued after sentence was finally confirmed by the judicial process. This Court cannot reopen the conclusion already reached but may consider the question of inordinate delay to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. Keeping a convict in suspense while consideration of his mercy petition by the President for many years is certainly an agony for him/her. It creates adverse physical conditions and psychological stresses on the convict under

sentence of death. Indisputably, this Court, while considering the rejection of the clemency petition by the President, under Article 32 read with Article 21 of the Constitution, cannot excuse the agonizing delay caused to the convict only on the basis of the gravity of the crime. [Paras 38, 39] [664-E-H; 665-A]

4.1.5. India has been a signatory to the Universal Declaration of Human Rights, 1948 as well as to the United Nations Covenant on Civil and Political Rights, 1966. Both these conventions contain provisions outlawing cruel and degrading treatment and/or punishment. Pursuant to the judgment of this Court in *****Vishaka***, international covenants to which India is a party are a part of domestic law unless they are contrary to a specific law in force. [Para 40] [665-B-C]**

***Vishaka vs. State of Rajasthan,* **(1997) 6 SCC 241: 1997 (3) Suppl. SCR 404 – relied on.**

Earl Pratt vs. AG for Jamaica **[1994] 2 AC 1 – Privy Council;** *Catholic Commission for Justice & Peace in Zimbabwe vs. Attorney General*, **1993 (4) S.A. 239 – Supreme Court of Zimbabwe;** *Soering vs. United Kingdom* **[App. No. 14038/88, 11 Eur. H.R. Rep. 439 (1989)] – European Court of Human Rights;** *Attorney General vs. Susan Kigula*, **Constitutional Appeal No. 3 of 2006 – Supreme Court of Uganda;** *Herman Mejia and Nicholas Guevara vs. Attorney General*, **A.D. 2000 Action No. 296 – Supreme Court of Belize – referred to.**

4.1.6. It is clear that after the completion of the judicial process, if the convict files a mercy petition to the Governor/President, it is incumbent on the authorities to dispose of the same expeditiously. Though no time limit can be fixed for the Governor and the President, it is the duty of the executive to expedite the matter at every stage, viz., calling for the records, orders and documents

filed in the court, preparation of the note for approval of the Minister concerned, and the ultimate decision of the constitutional authorities. Accordingly, if there is undue, unexplained amd inordinate delay in execution due to pendency of mercy petitions or the executive as well as the constitutional authorities have failed to take note of/ consider the relevant aspects, this Court is well within its powers under Article 32 to hear the grievance of the convict and commute the death sentence into life imprisonment on this ground alone however, only after satisfying that the delay was not caused at the instance of the accused himself. To this extent, the jurisprudence has developed in the light of the mandate given in our Constitution as well as various Universal Declarations and directions issued by the United Nations. [Paras 41, 42] [665-H; 666-A-E]

4.1.7. The procedure prescribed by law, which deprives a person of his life and liberty must be just, fair and reasonable and such procedure mandates humane conditions of detention preventive or punitive. In this line, although the petitioners were sentenced to death based on the procedure established by law, the inexplicable delay on account of executive is unexcusable. Since it is well established that Article 21 of the Constitution does not end with the pronouncement of sentence but extends to the stage of execution of that sentence, as already asserted, prolonged delay in execution of sentence of death has a dehumanizing effect on the accused. Delay caused by circumstances beyond the prisoners' control mandates commutation of death sentence. Under the ground of supervening events, when Article 21 is held to be violated, it is not a question of judicial review but of protection of fundamental rights and courts give substantial relief not merely procedural protection. The question of violation of Article 21, its effects and the appropriate relief is the domain of this

Court. There is no question of remanding the matter for consideration because this Court is the custodian and enforcer of fundamental rights and the final interpreter of the Constitution. Further, this Court is best equipped to adjudicate the content of those rights and their requirements in a particular fact situation. This Court has always granted relief for violation of fundamental rights and has never remanded the matter. For example, in cases of preventive detention, violation of free speech, externment, refusal of passport etc., the impugned action is quashed, declared illegal and violative of Article 21, but never remanded. It would not be appropriate to say at this point that this Court should not give relief for the violation of Article 21. [Paras 43, 44] [666-F-H; 667-F-H; 668-A-B]

Maneka Gandhi vs. Union of India **(1978) 1 SCC 248: 1978 (2) SCR 621;** *Noel Noel Riley vs. Attorney General*, **(1982) Crl.Law Review 679 – referred to.**

4.1.8. Obviously, the mercy petitions disposed of from 1989 to 1997 witnessed the impact of the observations in the disposal of mercy petitions. Since the average time taken for deciding the mercy petitions during this period was brought down to an average of 5 months from 4 years thereby paying due regard to the observations made in the decisions of this Court, but unfortunately, now the history seems to be repeating itself as now the delay of maximum 12 years is seen in disposing of the mercy petitions under Article 72/161 of the Constitution. The mercy petitions under Article 72/161 can be disposed of at a much faster pace than what is adopted now, if the due procedure prescribed by law is followed in verbatim. Though guidelines to define the contours of the power under Article 72/161 cannot be laid down, however, the Union Government, considering the nature of the power, set out certain criteria in the form of circular as under for deciding the mercy petitions.

Personality of the accused (such as age, sex or mental deficiency) or circumstances of the case (such as provocation or similar justification); Cases in which the appellate Court expressed doubt as to the reliability of evidence but has nevertheless decided on conviction; Cases where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified; Where the High Court on appeal reversed acquittal or on an appeal enhanced the sentence; Is there any difference of opinion in the Bench of High Court Judges necessitating reference to a larger Bench; Consideration of evidence in fixation of responsibility in gang murder case; Long delays in investigation and trial etc. These guidelines and the scope of the power set out above make it clear that it is an extraordinary power not limited by judicial determination of the case and is not to be exercised lightly or as a matter of course. In view of the jurisprudential development with regard to delay in execution, another criteria may be added so as to require consideration of the delay that may have occurred in disposal of a mercy petition. In this way, the constitutional authorities are made aware of the delay caused at their end which aspect has to be considered while arriving at a decision in the mercy petition. The obligation to do so can also be read from the fact that, as observed by the Constitution Bench in *Triveniben*, delays in the judicial process are accounted for in the final verdict of the Court terminating the judicial exercise. [Paras 46, 47, 48, 49] [669-B-H; 670-A-F]

4.1.10. Another vital aspect is that, Article 21 is the paramount principle on which rights of the convict are based, this must be considered along with the rights of the victims or the deceased's family as also societal consideration since these elements form part of the sentencing process as well. It is the stand of the respondents that the commutation of sentence of death

based on delay alone will be against the victim's interest. It is true that the question of sentence always poses a complex problem, which requires a working compromise between the competing views based on reformative, deterrent and retributive theories of punishments. As a consequence, a large number of factors fall for consideration in determining the appropriate sentence. [Paras 50, 51] [670-G-H; 671-A-B]

Ram Narain vs. State of Uttar Pradesh **(1973) 2 SCC 86 – relied on.**

4.1.11. The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims. The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration when sentences are being decided. All these aspects were emphatically considered by this Court while pronouncing the final verdict against the petitioners thereby upholding the sentence of death imposed by the High Court. Nevertheless, the same accused (petitioners) were before this court under Article 32 petition seeking commutation of sentence on the basis of undue delay caused in execution of their levied death sentence. There is distinction under both circumstances. Under the former scenario, the petitioners herein were the persons who were accused of the offence wherein the sentence of death was imposed but in later scenario, the petitioners herein approached this Court as a victim of violation of guaranteed fundamental rights under the Constitution seeking commutation of sentence. This distinction must be considered and appreciated. [Paras 52, 53] [671-E-F; 672-A-E]

Halsbury's Laws of England, **(4th Edition: Vol. II: para 482) – referred to.**

Rationality of Distinguishing between Indian Penal Code, 1860 And Terrorist and Disruptive Activities (Prevention) Act Offences for Sentencing Purpose

4.2.1. Only delay which could not have been avoided even if the matter was proceeded with a sense of urgency or was caused in essential preparations for execution of sentence may be the relevant factors under such petitions in Article 32. Considerations such as the gravity of the crime, extraordinary cruelty involved therein or some horrible consequences for society caused by the offence are not relevant after the Constitution Bench ruled in ******Bachan Singh* **case that the sentence of death can only be imposed in the rarest of rare cases. Meaning, of course, all death sentences imposed are impliedly the most heinous and barbaric and rarest of its kind. The legal effect of the extraordinary depravity of the offence exhausts itself when court sentences the person to death for that offence. Law does not prescribe an additional period of imprisonment in addition to the sentence of death for any such exceptional depravity involved in the offence. [Para 57] [673-G-H; 674-A-C]

Devender Pal Singh Bhullar vs. State ***(NCT) of Delhi*** **(2013) 6 SCC 195** ***per incuriam***

****Bachan Singh vs. State of Punjab* **(1980) 2 SCC 684 – referred to.**

4.2.2. It is open to the legislature in its wisdom to decide by enacting an appropriate law that a certain fixed period of imprisonment in addition to the sentence of death can be imposed in some well defined cases but the result cannot be accomplished by a judicial decision alone. The unconstitutionality of this additional incarceration is itself inexorable and must not be treated as dispensable through a judicial decision. [Para 58] [674-D-E]

Mahendra Nath Das vs. Union of India and Ors. **(2013) 6 SCC 253 – relied on.**

4.2.3. Section 303 IPC provides that "no person shall be deprived of his life or personal liberty except according to the procedure established by law". Since Section 303 IPC excludes judicial discretion, the Constitution Bench in *******Mithu case* **has concluded that such a law must necessarily be stigmatized as arbitrary and oppressive. It is further clear that no one should be deprived of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution regarding his life or personal liberty except according to the procedure established by law. Unexplained delay is one of the grounds for commutation of sentence of death into life imprisonment and the said supervening circumstance is applicable to all types of cases including the offences under TADA. The only aspect the courts have to satisfy is that the delay must be unreasonable and unexplained or inordinate at the hands of the executive. The argument that a distinction can be drawn between IPC and non-IPC offences since the nature of the offence is a relevant factor is liable to be rejected at the outset. [Paras 65, 69, 70] [678-D-E; 681-F-H; 682-A-B]

*****Mithu vs. State of Punjab* **(1983) 2 SCC 277: 1983 (2) SCR 690;** *Sunil Batra vs. Delhi Administration* **(1978) 4 SCC 494: 1979 (1) SCR 392 – relied on.**

4.3*. (ii) Insanity/Mental Illness/Schizophrenia*

India is a member of the United Nations and has ratified the International Covenant on Civil and Political Rights (ICCPR). A large number of United Nations international documents prohibit the execution of death sentence on an insane person. Clause 3(e) of the *Resolution 2000/65* dated 27.04.2000 of *the U.N. Commission on Human Rights titled "The Question of*

***Death Penalty*" urges *"all States that still maintain the death penalty...not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person".* Similarly, Clause 89 of *the Report of the Special Rapporteur on Extra-Judicial Summary or Arbitrary Executions* published on 24.12.1996 by the UN Commission on Human Rights under the caption *"Restrictions on the use of death penalty"* states that *"the imposition of capital punishment on mentally retarded or insane persons, pregnant women and recent mothers is prohibited".* Further, Clause 116 thereof under the caption "Capital punishment" urges that *"Governments that enforce such legislation with respect to minors and the mentally ill are particularly called upon to bring their domestic criminal laws into conformity with international legal standards".* India too has similar line of law and rules in the respective State Jail Manuals. Paras 386 and 387 of the U.P. Jail Manual applicable to the State of Uttarakhand. Similar provisions are available in Prison Manuals of other States in India. These materials, particularly, the directions of the United Nations International Conventions, of which India is a party, clearly show that insanity/mental illness/schizophrenia is a crucial supervening circumstance, which should be considered by this Court in deciding whether in the facts and circumstances of the case death sentence could be commuted to life imprisonment. In addition, after it is established that the death convict is insane and it is duly certified by the competent doctor, undoubtedly, Article 21 protects him and such person cannot be executed without further clarification from the competent authority about his mental problems. It is also highlighted by relying on commentaries from various countries that civilized countries have not executed death penalty on an insane person. In view of the well established laws both at national as well as international sphere, insanity is one**

of the supervening circumstances that warrants for commutation of death sentence to life imprisonment. [Paras 73, 74, 77, 78, 79] [682-G-H; 683-A; 685-A-C; 686-D; 687-A-F]

4.4. (iii) Solitary Confinement

The grievance of some of the petitioners was that they were confined in solitary confinement from the date of imposition of death sentence by the Sessions Court which was contrary to the provisions of the Indian Penal Code, 1860, the Code of Criminal Procedure, 1973, Prisons Act and Articles 14, 19 and 21 of the Constitution and it is certainly a form of torture. However, the respective States have outrightly denied having kept any of the petitioners in solitary confinement in violation of existing laws. It was submitted that they were kept separately from the other prisoners for safety purposes. In other words, they were kept in statutory segregation and not *per se* in solitary confinement. The solitary confinement, even if mollified and modified marginally, is not sanctioned by Section 30 of the Prisons Act for prisoners 'under sentence of death'. The crucial holding under Section 30(2) is that a person is not 'under sentence of death', even if the Sessions Court has sentenced him to death subject to confirmation by the High Court. He is not 'under sentence of death' even if the High Court imposes, by confirmation or fresh appellate infliction, death penalty, so long as an appeal to the Supreme Court is likely to be or has been moved or is pending. Even if this Court has awarded capital sentence, it was held that Section 30 does not cover him so long as his petition for mercy to the Governor and/or to the President permitted by the Constitution, has not been disposed of. Of course, once rejected by the Governor and the President, and on further application, there is no stay of execution by the authorities, the person is under

sentence of death. During that interregnum, he attracts the custodial segregation specified in Section 30(2), subject to the ameliorative meaning assigned to the provision. To be 'under sentence of death' means 'to be under a finally executable death sentence'. [Paras 80, 82] [687-G-H; 688-A-B; 692-E-H; 693-A]

Sunil Batra vs. Delhi Administration and Ors. etc. **(1978) 4 SCC 494: 1979 (1) SCR 392 – relied on.**

4.5. (iv) Judgments Declared Per Incuriam

The argument that the trial court or the High Court relied on/adverted to certain earlier decision which were elither doubted or held per incuriam is not relevant. [Paras 85] [693-D-E]

Machhi Singh vs. State of Punjab **(1983) 3 SCC 470: 1983 (3) SCR 413;** *Ravji alias Ramchandra vs. State of Rajasthan* **(1996) 2 SCC 175: 1995 (6) Suppl. SCR 195;** *Sushil Murmu vs. State of Jharkhand* **(2004) 2 SCC 338: 2003 (6) Suppl. SCR 702;** *Dhananjoy Chatterjee vs. State of W.B.* **(1994) 2 SCC 220: 1994 (1) SCR 37;** *State of U.P. vs. Dharmendra Singh* **(1999) 8 SCC 325: 1999 (3) Suppl. SCR 52;** *Surja Ram vs. State of Rajasthan* **(1996) 6 SCC 271: 1996 (6) Suppl. SCR 783;** *Swamy Shraddananda (2) vs. State of Karnataka* **(2008) 13 SCC 767: 2008 (11) SCR 93;** *Sangeet and Anr. vs. State of Haryana* **(2013) 2 SCC 452: 2012 (13) SCR 85;** *Gurvail Singh vs. State of Punjab* **(2013) 2 SCC 713: 2013 (1) SCR 783 – referred to.**

4.6. *(v) Procedural Lapses*

4.6.1. Ministry of Home Affairs, Government of India has detailed procedure regarding handling of petitions for mercy in death sentence cases. As per the said procedure, Rule I enables a convict under sentence of

death to submit a petition for mercy within seven days after and exclusive of the day on which the Superintendent of Jail informs him of the dismissal by the Supreme Court of his appeal or of his application for special leave to appeal to the Supreme Court. Rule II prescribes procedure for submission of petitions. As per this Rule, such petitions shall be addressed to, in the case of States, to the Governor of the State at the first instance and thereafter to the President of India and in the case of Union Territories directly to the President of India. As soon as mercy petition is received, the execution of sentence shall in all cases be postponed pending receipt of orders on the same. Rule III states that the petition shall in the first instance, in the case of States, be sent to the State concerned for consideration and orders of the Governor. If after consideration it is rejected, it shall be forwarded to the Secretary to the Government of India, Ministry of Home Affairs. If it is decided to commute the sentence of death, the petition addressed to the President of India shall be withheld and intimation to that effect shall be sent to the petitioner. Rule V states that in all cases in which a petition for mercy from a convict under sentence of death is to be forwarded to the Secretary to the Government of India, Ministry of Home Affairs, the Lt. Governor/Chief Commissioner/ Administrator or the Government of the State concerned, as the case may be, shall forward such petition, as expeditiously as possible, along with the records of the case and his or its observations in respect of any of the grounds urged in the petition. Rule VI mandates that upon receipt of the orders of the President, an acknowledgement shall be sent to the Secretary to the Government of India, Ministry of Home Affairs, immediately in the manner prescribed. In the case of Assam and Andaman and Nicobar Islands, all orders will be communicated by telegraph and the receipt thereof shall be acknowledged by telegraph. In the case of other

States and Union Territories, if the petition is rejected, the orders will be communicated by express letter and receipt thereof shall be acknowledged by express letter. Orders commuting the death sentence will be communicated by express letters, in the case of Delhi and by telegraph in all other cases and receipt thereof shall be acknowledged by express letter or telegraph, as the case may be. Rule VIII(a) enables the convict that if there is a change of circumstance or if any new material is available in respect of rejection of his earlier mercy petition, he is free to make fresh application to the President for reconsideration of the earlier order. [Para 91] [695-D-H; 696-A-F]

4.6.2. Specific instructions relating to the duties of Superintendents of Jail in connection with the petitions for mercy for or on behalf of the convicts under sentence of death have been issued. Rule I mandates that immediately on receipt of warrant of execution, consequent on the confirmation by the High Court of the sentence of death, the Jail Superintendent shall inform the convict concerned that if he wishes to appeal to the Supreme Court or to make an application for special leave to appeal to the Supreme Court under any of the relevant provisions of the Constitution of India, he/she should do so within the period prescribed in the Supreme Court Rules. Rule II makes it clear that, on receipt of the intimation of the dismissal by the Supreme Court of the appeal or the application for special leave to appeal filed by or on behalf of the convict, in case the convict concerned has made no previous petition for mercy, the Jail Superintendent shall forthwith inform him that if he desires to submit a petition for mercy, it should be submitted in writing within seven days of the date of such intimation. Rule III says that if the convict submits a petition within the period of seven days prescribed by Rule II, it should be addressed, in the case of States, to

the Governor of the State at the first instance and, thereafter, to the President of India and in the case of Union Territories, to the President of India. The Superintendent of Jail shall forthwith dispatch it to the Secretary to the State Government in the Department concerned or the Lt. Governor/Chief Commissioner/ Administrator, as the case may be, together with a covering letter reporting the date fixed for execution and shall certify that the execution has been stayed pending receipt of orders of the Government on the petition. Rule IV mandates that if the convict submits petition after the period prescribed by Rule II, the Superintendent of Jail shall, at once, forward it to the State Government and at the same time telegraphed the substance of it requesting orders whether execution should be postponed stating that pending reply sentence will not be carried out. The above Rules make it clear that at every stage the matter has to be expedited and there cannot be any delay at the instance of the officers, particularly, the Superintendent of Jail, in view of the language used therein as "at once". Apart from the above Rules regarding presentation of mercy petitions and disposal thereof, necessary instructions have been issued for preparation of note to be approved by the Home Minister and for passing appropriate orders by the President of India. [paras 92, 93, 94] [696-G-H; 697-A-H]

4.6.3. Every State has separate Prison Manual which speaks about detailed procedure, receipt placing required materials for approval of the Home Minister and the President for taking decision expeditiously. Rules also provide steps to be taken by the Superintendent of Jail after the receipt of mercy petition and subsequent action after disposal of the same by the President of India. Almost all the Rules prescribe how the death convicts are to be treated till final decision is taken by the President of India. The elaborate procedure clearly shows that even

death convicts have to be treated fairly in the light of Article 21 of the Constitution of India. Nevertheless, it is the claim of all the petitioners herein that all these rules were not adhered to strictly and that is the primary reason for the inordinate delay in disposal of mercy petitions. For illustration, on receipt of mercy petition, the Department concerned has to call for all the records/materials connected with the conviction. Calling for piece-meal records instead of all the materials connected with the conviction should be deprecated. When the matter is placed before the President, it is incumbent upon the part of the Home Ministry to place all the materials such as judgment of the Trial Court, High Court and the final Court, viz., Supreme Court as well as any other relevant material connected with the conviction at once and not call for the documents in piece meal. [Paras 95, 96] [698-A-F]

5. In the light of principles and facts of each case, the death sentence of all the petitioners is commuted into imprisonment for life. [para 265] [746-G-H]

Guidelines:

6. In W.P (Crl) No 56 of 2013, Peoples' Union for Democratic Rights have pleaded for guidelines for effective governing of the procedure of filing mercy petitions and for the cause of the death convicts. It is well settled law that executive action and the legal procedure adopted to deprive a person of his life or liberty must be fair, just and reasonable and the protection of Article 21 of the Constitution of India inheres in every person, even death-row prisoners, till the very last breath of their lives. In view of the disparities in implementing the already existing laws, the following guidelines for safeguarding the interest of the death row convicts are framed:

1. Solitary Confinement: This Court, in *Sunil Batra* held that solitary or single cell

confinement prior to rejection of the mercy petition by the President is unconstitutional. Almost all the prison Manuals of the States provide necessary rules governing the confinement of death convicts. The rules should not be interpreted to run counter to the above ruling and violate Article 21 of the Constitution.

2. Legal Aid: There is no provision in any of the Prison Manuals for providing legal aid, for preparing appeals or mercy petitions or for accessing judicial remedies after the mercy petition has been rejected. Various judgments of this Court have held that legal aid is a fundamental right under Article 21. Since this Court has also held that Article 21 rights inhere in a convict till his last breath, even after rejection of the mercy petition by the President, the convict can approach a writ court for commutation of the death sentence on the ground of supervening events, if available, and challenge the rejection of the mercy petition and legal aid should be provided to the convict at all stages. Accordingly, Superintendent of Jails are directed to intimate the rejection of mercy petitions to the nearest Legal Aid Centre apart from intimating the convicts.

3. Procedure in placing the mercy petition before the President: The Government of India has framed certain guidelines for disposal of mercy petitions filed by the death convicts after disposal of their appeal by the Supreme Court. As and when any such petition is received or

communicated by the State Government after the rejection by the Governor, necessary materials such as police records, judgment of the trial court, the High Court and the Supreme Court and all other connected documents should be called at once fixing a time limit for the authorities for forwarding the same to the Ministry of Home Affairs. Even here, though there are instructions, we have come across that in certain cases the Department calls for those records in piece-meal or one by one and in the same way, the forwarding Departments are also not adhering to the procedure/ instructions by sending all the required materials at one stroke. This should be strictly followed to minimize the delay. After getting all the details, it is for the Ministry of Home Affairs to send the recommendation/their views to the President within a reasonable and rational time. Even after sending the necessary particulars, if there is no response from the office of the President, it is the responsibility of the Ministry of Home Affairs to send periodical reminders and to provide required materials for early decision.

4. Communication of Rejection of Mercy Petition by the Governor: No prison manual has any provision for informing the prisoner or his family of the rejection of the mercy petition by the Governor. Since the convict has a constitutional right under Article 161 to make a mercy petition to the Governor, he is entitled to be informed in writing of the decision on that mercy petition. The rejection of the mercy petition by the Governor should forthwith be communicated to the convict and his family in

writing or through some other mode of communication available.

5. Communication of Rejection of the Mercy Petition by the President: Many, but not all, prison manuals have provision for informing the convict and his family members of the rejection of mercy petition by the President. All States should inform the prisoner and their family members of the rejection of the mercy petition by the President. Furthermore, even where prison manuals provide for informing the prisoner of the rejection of the mercy petition, we have seen that this information is always communicated orally, and never in writing. Since the convict has a constitutional right under Article 72 to make a mercy petition to the President, he is entitled to be informed in writing of the decision on that mercy petition. The rejection of the mercy petition by the President should forthwith be communicated to the convict and his family in writing.

6. Death convicts are entitled as a right to receive a copy of the rejection of the mercy petition by the President and the Governor.

7. Minimum 14 days notice for execution: Some prison manuals do not provide for any minimum period between the rejection of the mercy petition being communicated to the prisoner and his family and the scheduled date of execution. Some prison manuals have a minimum period of 1 day, others have a minimum period of 14 days. It is necessary that a minimum period of 14 days be stipulated between the receipt of communication of the

rejection of the mercy petition and the scheduled date of execution for the following reasons:-

(a) It allows the prisoner to prepare himself mentally for execution, to make his peace with god, prepare his will and settle other earthly affairs.

(b) It allows the prisoner to have a last and final meeting with his family members. It also allows the prisoners' family members to make arrangements to travel to the prison which may be located at a distant place and meet the prisoner for the last time. Without sufficient notice of the scheduled date of execution, the prisoners' right to avail of judicial remedies will be thwarted and they will be prevented from having a last and final meeting with their families.

It is the obligation of the Superintendent of Jail to see that the family members of the convict receive the message of communication of rejection of mercy petition in time.

8. Mental Health Evaluation: We have seen that in some cases, death-row prisoners lost their mental balance on account of prolonged anxiety and suffering experienced on death row. There should, therefore, be regular mental health evaluation of all death row convicts and appropriate medical care should be given to those in need.

9. Physical and Mental Health Reports: All prison

manuals give the Prison Superintendent the discretion to stop an execution on account of the convict's physical or mental ill health. It is, therefore, necessary that after the mercy petition is rejected and the execution warrant is issued, the Prison Superintendent should satisfy himself on the basis of medical reports by Government doctors and psychiatrists that the prisoner is in a fit physical and mental condition to be executed. If the Superintendent is of the opinion that the prisoner is not fit, he should forthwith stop the execution, and produce the prisoner before a Medical Board for a comprehensive evaluation and shall forward the report of the same to the State Government for further action.

10. Furnishing documents to the convict: Most of the death row prisoners are extremely poor and do not have copies of their court papers, judgments, etc. These documents are must for preparation of appeals, mercy petitions and accessing post-mercy judicial remedies which are available to the prisoner under Article 21 of the Constitution. Since the availability of these documents is a necessary pre-requisite to the accessing of these rights, it is necessary that copies of relevant documents should be furnished to the prisoner within a week by the prison authorities to assist in making mercy petition and petitioning the courts.

11. Final Meeting between Prisoner and his Family: While some prison manuals provide for a final meeting between a condemned prisoner and his family immediately prior to execution, many manuals do not. Such a procedure is

intrinsic to humanity and justice, and should be followed by all prison authorities. It is therefore, necessary for prison authorities to facilitate and allow a final meeting between the prisoner and his family and friends prior to his execution.

12. Post Mortem Reports: Although, none of the Jail Manuals provide for compulsory *post mortem* to be conducted on death convicts after the execution, we think in the light of the repeated arguments by the petitioners herein asserting that there is dearth of experienced hangman in the country, the same must be made obligatory. [Para 259] [738-C-H, A-H; 740-A-H; 741-A-H; 742-A-H; 743-A-D]

7. The method of hanging prescribed by Section 354(5) of the Code was held not violative of the guaranteed right under Article 21 of the Constitution on the basis of scientific evidence and opinions of eminent medical persons which assured that hanging is the least painful way of ending the life. By making the performance of *post mortem* obligatory, the cause of the death of the convict can be found out, which will reveal whether the person died as a result of the dislocation of the cervical vertebrate or by strangulation which results on account of too long a drop. Our Constitution permits the execution of death sentence only through procedure established by law and this procedure must be just, fair and reasonable. Making *post mortem* obligatory will ensure just, fair and reasonable procedure of execution of death sentence. [Para 259 & 260] [745-B-E]

Mohd Ajmal Kasab vs. State of Maharashtra **(2012) 9 SCC 1: 2012 (8) SCR 295;** *Deena alias Deen Dayal and Ors. vs. Union of India* **(1983) 4 SCC 645: 1984 (1) SCR 1 – Relied on.**

Conclusion:

Mercy jurisprudence is a part of evolving standard of decency, which is the hallmark of the society. Like the death sentence is passed lawfully, the execution of the sentence must also be in consonance with the Constitutional mandate and not in violation of the constitutional principles. It is well established that exercising of power under Article 72/161 by the President or the Governor is a constitutional obligation and not a mere prerogative. Considering the high status of office, the Constitutional framers did not stipulate any outer time limit for disposing the mercy petitions under the said Articles, which means it should be decided within reasonable time. However, when the delay caused in disposing the mercy petitions is seen to be unreasonable, unexplained and exorbitant, it is the duty of this Court to step in and consider this aspect. Right to seek for mercy under Article 72/161 of the Constitution is a constitutional right and not at the discretion or whims of the executive. Every Constitutional duty must be fulfilled with due care and diligence; otherwise judicial interference is the command of the Constitution for upholding its values. Retribution has no Constitutional value in our largest democratic country. In India, even an accused has a *de facto* protection under the Constitution and it is the Court's duty to shield and protect the same. Therefore, when the judiciary interferes in such matters, it does not really interfere with the power exercised under Article 72/ 161 but only to uphold the *de facto* protection provided by the Constitution to every convict including death convicts. [Paras 261 to 264] [745-F-G; 746-A-F]

Case Law Reference:

(1980) 2 SCC 625	**Referred to**	**Para 6**
1988 (1) Suppl. SCR 1	**Referred to**	**Para 6**

1979 (3) SCR 1014	**relied on**	**Para 10**
1988 (3) Suppl. SCR 1102	**Relied on**	**Para 11**
2006 (7) Suppl. SCR 81	**Relied on**	**Para 13**
274 US 480	**Referred to**	**Para 15**
1982 (3) SCR 58	**Relied on**	**Para 16**
1998 (2) SCR 206	**Relied on**	**Para 18**
AIR 1998 SC 2026	**Relied on**	**Para 19**
2000 (3) SCR 858	**Relied on**	**Para 19**
2011 (4) SCR 983	**Relied on**	**Para 20**
2009 (14) SCR 727	**Relied on**	**Para 22**
2010 (2) SCR 979	**Referred to**	**Para 32**
1974 (3) SCR 329	**Referred to**	**Para 33**
1989 AIR 142	**Relied on**	**Para 34**
1989 (1) SCR 509	**Relied on**	**Para 35**
1997 (3) Suppl. SCR 404	**Relied on**	**Para 40**
(1982) Crl.Law Review 679	**Referred to**	**Para 43**
(1973) 2 SCC 86	**Relied on**	**Para 51**
(2013) 6 SCC 195	**per incurium**	**Para 55**
(1980) 2 SCC 684	**Referred to**	**Para 57**
(2013) 6 SCC 253	**Relied on**	**Para 63**
1983 (2) SCR 690	**Relied on**	**Para 65**
1979 (1) SCR 392	**Relied on**	**Para 65,81**
1983 (3) SCR 413	**Referred to**	**Para 85**
1995 (6) Suppl. SCR 195	**Referred to**	**Para 85**

2003 (6) Suppl. SCR 702	**Referred to**	**Para 85**
1994 (1) SCR 37	**Referred to**	**Para 85**
1999 (3) Suppl. SCR 52	**Referred to**	**Para 85**
1996 (6) Suppl. SCR 783	**Referred to**	**Para 85**
2008 (11) SCR 93	**Referred to**	**Para 86**
2012 (13) SCR 85	**Referred to**	**Para 86**
2013 (1) SCR 783	**Referred to**	**Para 86**
2012 (8) SCR 295	**Relied on**	**Para 227**
1984 (1) SCR 1	**Relied on**	**Para 257**

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Criminal) No. 55 of 2013.

Under Article 32 of the Constitution of India.

WITH

W.P. (Crl.) Nos. 34, 56, 136, 139, 141, 132, 187, 188, 190, 191, 192 & 193 of 2013.

V.C. Mishra, AG, Mohan Prasaran, SG, L. Nageshwar Rao, Siddharth Luthra, ASG, T.R. Andhyarujina, Ram Jethmalani, Anand Grover, C.A. Sundaram, R. Basant, Colin Gonsalves, Mukul Gupta, Gaurav Bhatia, AAG, Jyoti Mendiratta, P.S. Sudheer, Dr. Yug Mohit Chaudhry, Siddhartha, Sharma, Prashanto Chandra Sen, S. Prabhu Ramasubramanian, K. Paari Vendhan, Jagadeesha B.N., Rishi Maheshwari, Raj Kumari Biju, Bushra Qoami, Anshul Gupta, Raj Kumar Kaushik, Puja Sharma, Rishabh Sancheti, Padma Priya, T. Mahipal, Tufail A. Khan, Sidharth Dave, Meenakshi Grover, Supriya Juneja, Anjali Chauhan, Vikas Bansal, Suvarna Kaushik, Ravindera Kr. Verma, B. Krishna Prasad, Pragati Neekhra, Pawan Shree Aggrawal, V. N. Raghupathy, Anitha Shenoy, Rajiv Nanda, Manjit Singh, Tarjit Singh, Sanjay Rathi, Kamal

Mohan Gupta, C.D. Singh, Sakshi Kakkar for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, CJI. 1. Our Constitution is highly valued for its articulation. One such astute drafting is Article 21 of the Constitution which postulates that every human being has inherent right to life and mandates that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Over the span of years, this Court has expanded the horizon of *'right to life'* guaranteed under the Constitution to balance with the progress of human life. This case provides yet another momentous occasion, where this Court is called upon to decide whether it will be in violation of Article 21, amongst other provisions, to execute the levied death sentence on the accused notwithstanding the existence of supervening circumstances. Let us examine the supervening circumstances of each individual case to arrive at a coherent decision.

2. All the above writ petitions, under Article 32 of the Constitution of India, have been filed either by the convicts, who were awarded death sentence or by their family members or by public-spirited bodies like People's Union for Democratic Rights (PUDR) based on the rejection of mercy petitions by the Governor and the President of India.

3. In all the writ petitions, the main prayer consistently relates to the issuance of a writ of declaration declaring that execution of sentence of death pursuant to the rejection of the mercy petitions by the President of India is unconstitutional and to set aside the death sentence imposed upon them by commuting the same to imprisonment for life. Further, it is also prayed for declaring the order passed by the Governor/ President of India rejecting their respective mercy petitions as illegal and unenforceable. In view of the similarity of the reliefs sought for in all the writ petitions, we are not reproducing every

prayer hereunder, however, while dealing with individual claims, we shall discuss factual details, the reliefs sought for and the grounds urged in support of their claim at the appropriate place. Besides, in the writ petition filed by PUDR, PUDR prayed for various directions in respect of procedure to be followed while considering the mercy petitions, and in general for protection of rights of the death row convicts. We shall discuss discretely the aforesaid prayers in the ensuing paragraphs.

4. Heard Mr. Ram Jethmalani, Mr. Anand Grover, Mr. R. Basant, Mr. Colin Gonsalves, learned senior counsel and Dr. Yug Mohit Chaudhary, learned counsel for the petitioners and Mr. Mohan Parasaran, learned Solicitor General, Mr. L.N. Rao, Mr. Siddharth Luthra, learned Additional Solicitor Generals, Mr. V.C. Mishra, learned Advocate General, Mr. V.N. Raghupathy, Ms. Anitha Shenoy, Ms. Pragati Neekhra, Mr. Rajiv Nanda, Mr. C.D. Singh, learned counsel and Mr. Manjit Singh, Additional Advocate General for the respondents. We also heard Mr. T.R. Andhyarujina, learned senior counsel as *amicus curiae*.

5. Before considering the merits of the claim of individual case, it is essential to deliberate on certain vital points of law that will be incidental and decisive for determining the case at hand.

Maintainability of the Petitions

6. Before we advert to the issue of maintainability of the petitions, it is pertinent to grasp the significance of Article 32 as foreseen by Dr. Ambedkar, the principal architect of the Indian Constitution. His words were appositely reiterated in *Minerva Mills Ltd. and Ors. vs. Union of India and Ors.* (1980) 2 SCC 625 as follows:-

> "**87**. ….If I was asked to name any particular Article in this Constitution as the most important – an Article without which this Constitution would be a nullity – I could not refer to any other Article except this one. It is the very soul of

> the Constitution and the very heart of it." (emphasis supplied)

The fundamental right to move this Court can, therefore, be appropriately described as the corner-stone of the democratic edifice raised by the Constitution. At the same time, this Court, in *A.R Antulay vs. Union of India* (1988) 2 SCC 602, clarified and pronounced that any writ petition under Article 32 of the Constitution challenging the validity of the order or judgment passed by this Court as nullity or otherwise incorrect cannot be entertained. In this light, let us examine the maintainability of these petitions.

7. The aforesaid petitions, under Article 32 of the Constitution, seek relief against alleged infringement of certain fundamental rights on account of failure on the part of the executive to dispose of the mercy petitions filed under Article 72/161 of the Constitution within a reasonable time.

8. At the outset, the petitioners herein justly elucidated that they are not challenging the final verdict of this Court wherein death sentence was imposed. In fact, they asserted in their respective petitions that if the sentence had been executed then and there, there would have been no grievance or cause of action. However, it wasn't and the supervening events that occurred after the final confirmation of the death sentence are the basis of filing these petitions.

9. It is a time-honored principle, as stipulated in *R.D Shetty vs. International Airport Authority* (1979) 3 SCC 489, that no matter, whether the violation of fundamental right arises out of an executive action/inaction or action of the legislature, Article 32 can be utilized to enforce the fundamental rights in either event. In the given case, the stand of the petitioners herein is that exercise of the constitutional power vested in the executive specified under Article 72/161 has violated the fundamental rights of the petitioners herein. This Court, as in past, entertained the petitions of the given kind and issued

appropriate orders as in *T.V. Vatheeswaran vs. State of Tamil Nadu* (1983) 2 SCC 68, *Sher Singh and Ors. vs. State of Punjab* (1983) 2 SCC 344 *Triveniben vs. State of Gujarat* (1988) 4 SCC 574 etc. Accordingly, we accede to the stand of the petitioners and hold that the petitions are maintainable.

Nature of power guaranteed under Article 72/161 of the Constitution

10. It is apposite to refer the relevant Articles which give power to the President of India and the Governor to grant pardons and to suspend, remit or commute sentences in certain cases. They are as follows:

"**Article 72. Power of President to grant pardons, etc. and to suspend, remit or commute sentences in certain cases** – (1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence –

(a) in all cases where the punishment or sentence is by a Court Martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court martial.

(3) Nothing in sub-clause of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State, under any law for the time being in force."

Article 161. Power of Governor to grant pardons, etc. and to suspend, remit or commute sentences in certain cases – The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends."

11. The memoir and scope of Article 72/161 of the Constitution was extensively considered in *Kehar Singh vs. Union of India & Anr.,* (1989) 1 SCC 204 in the following words:

"7. The Constitution of India, in keeping with modern constitutional practice, is a constitutive document, fundamental to the governance of the country, whereby, according to accepted political theory, the people of India have provided a constitutional polity consisting of certain primary organs, institutions and functionaries to exercise the powers provided in the Constitution. All power belongs to the people, and it is entrusted by them to specified institutions and functionaries with the intention of working out, maintaining and operating a constitutional order. The Preambular statement of the Constitution begins with the significant recital:

> We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic... do hereby adopt, enact and give to ourselves this Constitution.

To any civilized society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the courts to Article 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and

consequently, the Legislature, the Executive and the Judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilised societies regarded seriously and, recourse, either under express constitutional provision or through legislative enactment is provided to the judicial organ. But, the fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State. In England, the power is regarded as the royal prerogative of pardon exercised by the Sovereign, generally through the Home Secretary. It is a power which is capable of exercise on a variety of grounds, for reasons of State as well as the desire to safeguard against judicial error. It is an act of grace issuing from the Sovereign. In the United States, however, after the founding of the Republic, a pardon by the President has been regarded not as a private act of grace but as a part of the constitutional scheme. In an opinion, remarkable for its erudition and clarity, Mr Justice Holmes, speaking for the Court in W.I. Biddle v. Vuco Perovich 71 L Ed 1161) enunciated this view, and it has since been affirmed in other decisions. The power to pardon is a part of the constitutional scheme, and we have no doubt, in our mind, that it should be so treated also in the Indian Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context. It is not denied, and

indeed it has been repeatedly affirmed in the course of argument by learned Counsel, Shri Ram Jethmalani and Shri Shanti Bhushan, appearing for the Petitioner that the power to pardon rests on the advice tendered by the Executive to the President, who subject to the provisions of Article 74(1) of the Constitution, must act in accordance with such advice……" (Emphasis Supplied)

In that case, the Constitution Bench also considered whether the President can, in exercise of the power under Article 72 of the Constitution, scrutinize the evidence on record and come to a different conclusion than the one arrived at by the Court and held as under:

> **"10**. We are of the view that it is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the court in regard to the guilt of, and sentence imposed on, the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it. and this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him....
>
> The legal effect of a pardon is wholly different from a judicial supersession of the original sentence. It is the nature of the power which is determinative....
>
> It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one

deserving the grant of the relief falling within that power. We are of opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court.

16. ...the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. and it is of great significance that the function itself enjoys high status in the constitutional scheme."

12. Both Articles 72 and 161 repose the power of the people in the highest dignitaries, i.e., the President or the Governor of a State, as the case may be, and there are no words of limitation indicated in either of the two Articles. The President or the Governor, as the case may be, in exercise of power under Article 72/161 respectively, may examine the evidence afresh and this exercise of power is clearly independent of the judiciary. This Court, in numerous instances, clarified that the executive is not sitting as a court of appeal rather the power of President/Governor to grant remission of sentence is an act of grace and humanity in appropriate cases, i.e., distinct, absolute and unfettered in its nature.

13. In this context, the deliberations in *Epuru Sudhakar & Anr. vs. Govt. of A.P. & Ors.,* (2006) 8 SCC 161 are relevant which are as under:

"**16.** The philosophy underlying the pardon power is that "every civilized country recognizes, and has therefore provided for, the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency, to be exercised by some department or functionary of a government, a country would be most imperfect and deficient in its political

morality, and in that attribute of Deity whose judgments are always tempered with mercy. [See 59 American Jurisprudence 2d, page 5]

17. The rationale of the pardon power has been felicitously enunciated by the celebrated Justice Holmes of the United States Supreme Court in the case of Biddle v. Perovich in these words 71 L. Ed. 1161 at 1163: A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed." (emphasis added)

14. Article 72/161 of the Constitution entail remedy to all the convicts and not limited to only death sentence cases and must be understood accordingly. It contains the power of reprieve, remission, commutation and pardon for all offences, though death sentence cases invoke the strongest sentiment since it is the only sentence that cannot be undone once it is executed.

15. Shri Andhyarujina, learned senior counsel, who assisted the Court as *amicus* commenced his submissions by pointing out that the power reposed in the President under Article 72 and the Governor under Article 161 of the Constitution is not a matter of grace or mercy, but is a constitutional duty of great significance and the same has to be exercised with great care and circumspection keeping in view the larger public interest. He referred to the judgment of the U.S. Supreme Court in *Biddle vs. Perovoch* 274 US 480 as also the judgments of this Court in *Kehar Singh (supra)* and *Epuru Sudhakar (supra)*.

16. In this context, in *Kuljeet Singh vs. Lt. Governor* (1982) 1 SCC 417, this Court held:

"**1.** The question as regards the scope of the power of the President under Article 72 of the Constitution to commute

a sentence of death into a lesser sentence may have to await examination on an appropriate occasion. This clearly is not that occasion because insofar as this case is concerned, whatever be the guide-lines observed for the exercise of the power conferred by Article 72, the only sentence which can possibly be imposed upon the petitioner is that of death and no circumstances exist for interference with that sentence. Therefore we see no justification for saying that in refusing to commute the sentence of death imposed upon the petitioner into a lesser sentence, the President has in any manner transgressed his discretionary power under Article 72. Undoubtedly, the President has the power in an appropriate case to commute any sentence imposed by a court into a lesser sentence and as said by Chief Justice Taft in *James Shewan and Sons* v. *U.S.*, the "executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law" and that the administration of justice by the courts is not necessarily or certainly considerate of circumstances which may properly mitigate guilt. But the question as to whether the case is appropriate for the exercise of the power conferred by Article 72 depends upon the facts and circumstances of each particular case. The necessity or the justification for exercising that power has therefore to be judged from case to case. In fact, we do not see what useful purpose will be achieved by the petitioner by ensuring the imposition of any severe, judicially evolved constraints on the wholesome power of the President to use it as the justice of a case may require. After all, the power conferred by Article 72 can be used only for the purpose of reducing the sentence, not for enhancing it. We need not, however, go into that question elaborately because insofar as this case is concerned, we are quite clear that not even the most liberal use of his mercy jurisdiction could have persuaded the President to interfere with the sentence of death imposed upon the

petitioner, in view particularly of the considerations mentioned by us in our judgment in *Kuljeet Singh* v. *Union of India*. We may recall what we said in that judgment that "the death of the Chopra children was caused by the petitioner and his companion Billa after a savage planning which bears a professional stamp", that the "survival of an orderly society demands the extinction of the life of persons like Ranga and Billa who are a menace to social order and security", and that "they are professional murderers and deserve no sympathy even in terms of the evolving standards of decency of a mature society."

17. In concise, the power vested in the President under Article 72 and the Governor under Article 161 of the Constitution is a Constitutional duty. As a result, it is neither a matter of grace nor a matter of privilege but is an important constitutional responsibility reposed by the people in the highest authority. The power of pardon is essentially an executive action, which needs to be exercised in the aid of justice and not in defiance of it. Further, it is well settled that the power under Article 72/161 of the Constitution of India is to be exercised on the aid and advice of the Council of Ministers.

Limited Judicial Review of the executive orders under Article 72/161

18. As already emphasized, the power of the executive to grant pardon under Article 72/161 is a Constitutional power and this Court, on numerous occasions, has declined to frame guidelines for the exercise of power under the said Articles for two reasons. Firstly, it is a settled proposition that there is always a presumption that the constitutional authority acts with application of mind as has been reiterated in *Bikas Chatterjee vs. Union of India* (2004) 7 SCC 634. Secondly, this Court, over the span of years, unanimously took the view that considering the nature of power enshrined in Article 72/161, it is unnecessary to spell out specific guidelines. In this context, in *Epuru Sudhakar (supra)*, this Court held thus:

"36. So far as desirability to indicate guidelines is concerned in *Ashok Kumar case* it was held as follows: (SCC pp. 518-19, para 17)

> "*17*. In *Kehar Singh case* on the question of laying down guidelines for the exercise of power under Article 72 of the Constitution this Court observed in para 16 as under: (SCC pp. 217-18, para 16)

'It seems to us that there is sufficient indication in the terms of Article 72 and in the history of the power enshrined in that provision as well as existing case-law, and specific guidelines need not be spelled out. Indeed, it may not be possible to lay down any precise, clearly defined and sufficiently channelised guidelines, for we must remember that the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme.'

These observations do indicate that the Constitution Bench which decided *Kehar Singh case* was of the view that the language of Article 72 itself provided sufficient guidelines for the exercise of power and having regard to its wide amplitude and the status of the function to be discharged thereunder, it was perhaps unnecessary to spell out specific guidelines since such guidelines may not be able to conceive of all myriad kinds and categories of cases which may come up for the exercise of such power. No doubt in *Maru Ram case* the Constitution Bench did recommend the framing of guidelines for the exercise of power under Articles 72/161 of the Constitution. But that was a mere recommendation and not a ratio decidendi having a binding effect on the Constitution Bench which decided *Kehar Singh case.* Therefore, the observation

made by the Constitution Bench in *Kehar Singh case* does not upturn any ratio laid down in *Maru Ram case*. Nor has the Bench in *Kehar Singh case* said anything with regard to using the provisions of extant Remission Rules as guidelines for the exercise of the clemency powers."

19. Nevertheless, this Court has been of the consistent view that the executive orders under Article 72/161 should be subject to limited judicial review based on the rationale that the power under Article 72/161 is *per se* above judicial review but the manner of exercise of power is certainly subject to judicial review. Accordingly, there is no dispute as to the settled legal proposition that the power exercised under Article 72/161 could be the subject matter of limited judicial review. [vide *Kehar Singh (supra); Ashok Kumar (supra); Swaran Singh vs. State of U.P* AIR 1998 SC 2026; *Satpal and Anr*. *vs. State of Haryana and Ors.* AIR 2000 SC 1702; and *Bikas Chatterjee (supra)*]

20. Though the contours of power under Article 72/161 have not been defined, this Court, in *Narayan Dutt vs. State of Punjab* (2011) 4 SCC 353, para 24, has held that the exercise of power is subject to challenge on the following grounds:

(a) If the Governor had been found to have exercised the power himself without being advised by the government;

(b) If the Governor transgressed his jurisdiction in exercising the said power;

(c) If the Governor had passed the order without applying his mind;

(d) The order of the Governor was *mala fide*; or

(e) The order of the Governor was passed on some extraneous considerations.

These propositions are culmination of views settled by this Court that:

(i) Power should not be exercised malafidely. (Vide *Maru Ram vs. Union of India*, paras 62, 63 & 65).

(ii) No political considerations behind exercise of power. In this context, in *Epuru Sudhakar (supra),* this Court held thus:

"**34**. The position, therefore, is undeniable that judicial review of the order of the President or the Governor under Article 72 or Article 161, as the case may be, is available and their orders can be impugned on the following grounds:

(*a*) that the order has been passed without application of mind;

(*b*) that the order is mala fide;

(*c*) that the order has been passed on extraneous or wholly irrelevant considerations;

(*d*) that relevant materials have been kept out of consideration;

(*e*) that the order suffers from arbitrariness.

35. Two important aspects were also highlighted by learned amicus curiae; one relating to the desirability of indicating reasons in the order granting pardon/remission while the other was an equally more important question relating to power to withdraw the order of granting pardon/remission, if subsequently, materials are placed to show that certain relevant materials were not considered or certain materials of extensive value were kept out of consideration. According to learned amicus curiae, reasons are to be indicated, in the absence of which the exercise of judicial review will be affected.

37. In *Kehar Singh case* this Court held that: (SCC p. 216, para 13)

"There is also no question involved in this case of asking for the reasons for the President's order."

38. The same obviously means that the affected party need not be given the reasons. The question whether reasons can or cannot be disclosed to the Court when the same is challenged was not the subject-matter of consideration. In any event, the absence of any obligation to convey the reasons does not mean that there should not be legitimate or relevant reasons for passing the order."

21. A perusal of the above case-laws makes it clear that the President/Governor is not bound to hear a petition for mercy before taking a decision on the petition. The manner of exercise of the power under the said articles is primarily a matter of discretion and ordinarily the courts would not interfere with the decision on merits. However, the courts retain the limited power of judicial review to ensure that the constitutional authorities consider all the relevant materials before arriving at a conclusion.

22. It is the claim of the petitioners herein that the impugned executive orders of rejection of mercy petitions against 15 accused persons were passed without considering the supervening events which are crucial for deciding the same. The legal basis for taking supervening circumstances into account is that Article 21 inheres a right in every prisoner till his last breath and this Court will protect that right even if the noose is being tied on the condemned prisoner's neck. [vide *Sher Singh (supra), Triveniben (supra), Vatheeswaran (supra), Jagdish vs. State of Madhya Pradesh* (2009) 9 SCC 495].

23. Certainly, delay is one of the permitted grounds for limited judicial review as stipulated in the *stare decisis*. Henceforth, we shall scrutinize the claim of the petitioners herein

and find out the effect of supervening circumstances in the case on hand.

Supervening Circumstances

24. The petitioners herein have asserted the following events as the supervening circumstances, for commutation of death sentence to life imprisonment.

(i) *Delay*

(ii) Insanity

(iii) Solitary Confinement

(iv) Judgments declared per incuriam

(v) Procedural Lapses

25. All the petitioners have more or less asserted on the aforesaid grounds which, in their opinion, the executive had failed to take note of while rejecting the mercy petitions filed by them. Let us discuss them distinctively and come to a conclusion whether each of the circumstances exclusively or together warrants the commutation of death sentence into life imprisonment.

(i) Delay

26. It is pre-requisite to comprehend the procedure adopted under Article 72/161 for processing the mercy petition so that we may be in a position to appreciate the aspect of delay as one of the supervening circumstances.

27. The death row convicts invariably approached the Governor under Article 161 of the Constitution of India with a mercy petition after this Court finally decided the matter. During the pendency of the mercy petition, the execution of death sentence was stayed. As per the procedure, once the mercy petition is rejected by the Governor, the convict prefers mercy

petition to the President. Thereafter, the mercy petition received in President's office is forwarded to the Ministry of Home Affairs. Normally, the mercy petition consists of one or two pages giving grounds for mercy. To examine the mercy petition so received and to arrive at a conclusion, the documents like copy of the judgments of the trial Court, High Court and the Supreme Court are requested from the State Government. The other documents required include details of the decision taken by the Governor under Article 161 of the Constitution, recommendations of the State Government in regard to grant of mercy petition, copy of the records of the case, nominal role of the convict, health status of the prisoner and other related documents. All these details are gathered from the State/Prison authorities after the receipt of the mercy petition and, according to the Union of India, it takes a lot of time and involve protracted correspondence with prison authorities and State Government. It is also the claim of the Union of India that these documents are then extensively examined and in some sensitive cases, various *pros* and *cons* are weighed to arrive at a decision. Sometimes, person or at their instance some of their relatives, file mercy petitions repeatedly which cause undue delay. In other words, according to the Union of India, the time taken in examination of mercy petitions may depend upon the nature of the case and the scope of inquiry to be made. It may also depend upon the number of mercy petitions submitted by or on behalf of the accused. It is the claim of the respondents that there cannot be a specific time limit for examination of mercy petitions.

28. It is also the claim of the respondents that Article 72 envisages no limit as to time within which the mercy petition is to be disposed of by the President of India. Accordingly, it is contended that since no time limit is prescribed for the President under Article 72, the courts may not go into it or fix any outer limit. It is also contended that the power of the President under Article 72 is discretionary which cannot be taken away by any statutory provision and cannot be altered,

modified or interfered with, in any manner, whatsoever, by any statutory provision or authority. The powers conferred on the President are special powers overriding all other laws, rules and regulations in force. Delay by itself does not entail the person under sentence of death to request for commutation of sentence into life imprisonment.

29. It is also pointed out that the decision taken by the President under Article 72 is communicated to the State Government/Union Territory concerned and to the prisoner through State Government/Union Territory. It is also brought to our notice that as per List II Entry 4 of the Seventh Schedule to the Constitution of India, "Prisons and persons detained therein" is a State subject. Therefore, all steps for execution of capital punishment including informing the convict and his/her family, etc. are required to be taken care of by the concerned State Governments/Union Territories in accordance with their jail manual/rules etc.

30. On the contrary, it is the plea of the petitioners that after exhausting of the proceedings in the courts of law, the aggrieved convict gets right to make a mercy petition before the Governor and the President of India highlighting his grievance. If there is any undue, unreasonable and prolonged delay in disposal of his mercy petition, the convict is entitled to approach this Court by way of a writ petition under Article 32 of the Constitution. It is vehemently asserted that the execution of death penalty in the face of such an inordinate delay would infringe fundamental right to life under Article 21 of the Constitution, which would invite the exercise of the jurisdiction by this Court.

31. The right to life is the most fundamental of all rights. The right to life, as guaranteed under Article 21 of the Constitution of India, provides that no person shall be deprived of his life and liberty except in accordance with the procedure established by law. According to learned counsel for the Union of India, death sentence is imposed on a person found guilty

of an offence of heinous nature after adhering to the due procedure established by law which is subject to appeal and review. Therefore, delay in execution must not be a ground for commutation of sentence of such a heinous crime. On the other hand, the argument of learned counsel for the petitioners/death convicts is that human life is sacred and inviolable and every effort should be made to protect it. Therefore, inasmuch as Article 21 is available to all the persons including convicts and continues till last breath if they establish and prove the supervening circumstances, viz., undue delay in disposal of mercy petitions, undoubtedly, this Court, by virtue of power under Article 32, can commute the death sentence into imprisonment for life. As a matter of fact, it is the stand of the petitioners that in a petition filed under Article 32, even without a presidential order, if there is unexplained, long and inordinate delay in execution of death sentence, the grievance of the convict can be considered by this Court.

32. This Court is conscious of the fact, namely, while Article 21 is the paramount principle on which rights of the convicts are based, it must be considered along with the rights of the victims or the deceased's family as also societal consideration since these elements form part of the sentencing process as well. The right of a victim to a fair investigation under Article 21 has been recognized in *State of West Bengal vs. Committee for Democratic Rights, West Bengal,* (2010) 3 SCC 571, which is as under:

> **"68.** Thus, having examined the rival contentions in the context of the constitutional scheme, we conclude as follows:
>
> (*i*) The fundamental rights, enshrined in Part III of the Constitution, are inherent and cannot be extinguished by any constitutional or statutory provision. Any law that abrogates or abridges such rights would be violative of the basic structure doctrine. The actual effect and impact of the law on the rights guaranteed under Part III has to be

taken into account in determining whether or not it destroys the basic structure.

(*ii*) Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State…"

We do comprehend the critical facet involved in the arguments by both the sides and we will strive to strike a balance between the rights of the accused as well as of the victim while deciding the given case.

33. This is not the first time when the question of such a nature is raised before this Court. In *Ediga Anamma vs. State of A.P.,* 1974(4) SCC 443 Krishna Iyer, J. spoke of the *"brooding horror of haunting the prisoner in the condemned cell for years".* Chinnappa Reddy, J. in *Vatheeswaran (supra)* said that prolonged delay in execution of a sentence of death had a dehumanizing effect and this had the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way so as to offend the fundamental right under Article 21 of the Constitution. Chinnappa Reddy, J. quoted the Privy Council's observation in a case of such an inordinate delay in execution, viz., *"The anguish of alternating hope and despair the agony of uncertainty and the consequences of such suffering on the mental, emotional and physical integrity and health of the individual has to be seen."* Thereby, a Bench of two Judges of this Court held that the delay of two years in execution of the sentence after the judgment of

the trial court will entitle the condemned prisoner to plead for commutation of sentence of death to imprisonment for life. Subsequently, in *Sher Singh (supra)*, which was a decision of a Bench of three Judges, it was held that a condemned prisoner has a right of fair procedure at all stages, trial, sentence and incarceration but delay alone is not good enough for commutation and two years' rule could not be laid down in cases of delay.

34. Owing to the conflict in the two decisions, the matter was referred to a Constitution Bench of this Court for deciding the two questions of law viz., (i) whether the delay in execution itself will be a ground for commutation of sentence and (ii) whether two years' delay in execution will automatically entitle the condemned prisoner for commutation of sentence. In *Smt. Triveniben vs. State of Gujarat* (1988) 4 SCC 574, this Court held thus:

"**2**. …..Undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32 but this Court will only examine the nature of delay caused and circumstances that ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to re-open the conclusions reached by the court while finally maintaining the sentence of death. This Court, however, may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death inexecutable and to this extent the decision in Vatheeswaran case cannot be said to lay down the correct law and therefore to that extent stands overruled."

35. While giving full reasons which is reported in *Smt. Triveniben vs. State of Gujarat,* (1989) 1 SCC 678 this Court, in para 22, appreciated the aspect of delay in execution in the following words:-

"22. It was contended that the delay in execution of the sentence will entitle a prisoner to approach this Court as his right under Article 21 is being infringed. It is well settled now that a judgment of court can never be challenged under Article 14 or 21 and therefore the judgment of the court awarding the sentence of death is not open to challenge as violating Article 14 or Article 21 as has been laid down by this Court in *Naresh Shridhar Mirajkar v. State of Maharashtra* and also in *A.R. Antulay v. R.S. Nayak* the only jurisdiction which could be sought to be exercised by a prisoner for infringement of his rights can be to challenge the subsequent events after the final judicial verdict is pronounced and it is because of this that on the ground of long or inordinate delay a condemned prisoner could approach this Court and that is what has consistently been held by this Court. But it will not be open to this Court in exercise of jurisdiction under Article 32 to go behind or to examine the final verdict reached by a competent court convicting and sentencing the condemned prisoner and even while considering the circumstances in order to reach a conclusion as to whether the inordinate delay coupled with subsequent circumstances could be held to be sufficient for coming to a conclusion that execution of the sentence of death will not be just and proper. The nature of the offence, circumstances in which the offence was committed will have to be taken as found by the competent court while finally passing the verdict. It may also be open to the court to examine or consider any circumstances after the final verdict was pronounced if it is considered relevant. The question of improvement in the conduct of the prisoner after the final verdict also cannot be considered for coming to the conclusion whether the sentence could be altered on that ground also."

36. Though learned counsel appearing for the Union of India relied on certain observations of Shetty, J. who delivered concurring judgment, particularly, para 76, holding that "*the*

inordinate delay, may be a significant factor, but that by itself cannot render the execution unconstitutional", after careful reading of the majority judgment authored by Oza, J., particularly, para 2 of the order dated 11.10.1988 and para 22 of the subsequent order dated 07.02.1989, we reject the said stand taken by learned counsel for the Union of India.

37. In *Vatheeswaran (supra)*, the dissenting opinion of the two judges in the Privy Council case, relied upon by this Court, was subsequently accepted as the correct law by the Privy Council in *Earl Pratt vs. AG for Jamaica* [1994] 2 AC 1 – Privy Council, after 22 years. There is no doubt that judgments of the Privy Council have certainly received the same respectful consideration as the judgments of this Court. For clarity, we reiterate that except the ratio relating to delay exceeding two years in execution of sentence of death, all other propositions are acceptable, in fact, followed in subsequent decisions and should be considered sufficient to entitle the person under sentence of death to invoke Article 21 and plead for commutation of the sentence.

38. In view of the above, we hold that undue long delay in execution of sentence of death will entitle the condemned prisoner to approach this Court under Article 32. However, this Court will only examine the circumstances surrounding the delay that has occurred and those that have ensued after sentence was finally confirmed by the judicial process. This Court cannot reopen the conclusion already reached but may consider the question of inordinate delay to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life.

39. Keeping a convict in suspense while consideration of his mercy petition by the President for many years is certainly an agony for him/her. It creates adverse physical conditions and psychological stresses on the convict under sentence of death. Indisputably, this Court, while considering the rejection of the clemency petition by the President, under Article 32 read with

Article 21 of the Constitution, cannot excuse the agonizing delay caused to the convict only on the basis of the gravity of the crime.

40. India has been a signatory to the Universal Declaration of Human Rights, 1948 as well as to the United Nations Covenant on Civil and Political Rights, 1966. Both these conventions contain provisions outlawing cruel and degrading treatment and/or punishment. Pursuant to the judgment of this Court in *Vishaka vs. State of Rajasthan,* (1997) 6 SCC 241, international covenants to which India is a party are a part of domestic law unless they are contrary to a specific law in force. It is this expression ("cruel and degrading treatment and/or punishment") which has ignited the philosophy of *Vatheeswaran (supra)* and the cases which follow it. It is in this light, the Indian cases, particularly, the leading case of *Triveniben (supra)* has been followed in the Commonwealth countries. It is useful to refer the following foreign judgments which followed the proposition :

(i) *Earl Pratt vs. AG for Jamaica* [1994] 2 AC 1 – Privy Council

(ii) *Catholic Commission for Justice & Peace in Zimbabwe vs. Attorney General*, 1993 (4) S.A. 239 – Supreme Court of Zimbabwe

(iii) *Soering vs. United Kingdom* [App. No. 14038/88, 11 Eur. H.R. Rep. 439 (1989)] – European Court of Human Rights

(iv) *Attorney General vs. Susan Kigula*, Constitutional Appeal No. 3 of 2006 – Supreme Court of Uganda

(v) *Herman Mejia and Nicholas Guevara vs. Attorney General*, A.D. 2000 Action No. 296 – Supreme Court of Belize.

41. It is clear that after the completion of the judicial process, if the convict files a mercy petition to the Governor/

President, it is incumbent on the authorities to dispose of the same expeditiously. Though no time limit can be fixed for the Governor and the President, it is the duty of the executive to expedite the matter at every stage, viz., calling for the records, orders and documents filed in the court, preparation of the note for approval of the Minister concerned, and the ultimate decision of the constitutional authorities. This court, in *Triveniben (supra),* further held that in doing so, if it is established that there was prolonged delay in the execution of death sentence, it is an important and relevant consideration for determining whether the sentence should be allowed to be executed or not.

42. Accordingly, if there is undue, unexplained amd inordinate delay in execution due to pendency of mercy petitions or the executive as well as the constitutional authorities have failed to take note of/consider the relevant aspects, this Court is well within its powers under Article 32 to hear the grievance of the convict and commute the death sentence into life imprisonment on this ground alone however, only after satisfying that the delay was not caused at the instance of the accused himself. To this extent, the jurisprudence has developed in the light of the mandate given in our Constitution as well as various Universal Declarations and directions issued by the United Nations.

43. The procedure prescribed by law, which deprives a person of his life and liberty must be just, fair and reasonable and such procedure mandates humane conditions of detention preventive or punitive. In this line, although the petitioners were sentenced to death based on the procedure established by law, the inexplicable delay on account of executive is unexcusable. Since it is well established that Article 21 of the Constitution does not end with the pronouncement of sentence but extends to the stage of execution of that sentence, as already asserted, prolonged delay in execution of sentence of death has a dehumanizing effect on the accused. Delay caused by circumstances beyond the prisoners' control mandates commutation of death sentence. In fact, in *Vatheeswaran*

(supra), particularly, in para 10, it was elaborated where amongst other authorities, the minority view of Lords Scarman and Brightman in the 1972 Privy Council case of *Noel Noel Riley vs. Attorney General*, (1982) Crl.Law Review 679 by quoting *"sentence of death is one thing, sentence of death followed by lengthy imprisonment prior to execution is another".* The appropriate relief in cases where the execution of death sentence is delayed, the Court held, is to vacate the sentence of death. In para 13, the Court made it clear that Articles 14, 19 and 21 supplement one another and the right which was spelled out from the Constitution was a substantive right of the convict and not merely a matter of procedure established by law. This was the consequence of the judgment in *Maneka Gandhi vs. Union of India* (1978) 1 SCC 248 which made the content of Article 21 substantive as distinguished from merely procedural.

44. Another argument advanced by learned ASG is that even if the delay caused seems to be undue, the matter must be referred back to the executive and a decision must not be taken in the judicial side. Though we appreciate the contention argued by the learned ASG, we are not inclined to accept the argument. The concept of supervening events emerged from the jurisprudence set out in *Vatheeswaran (supra)* and *Triveniben (supra).* The word 'judicial review' is not even mentioned in these judgments and the death sentences have been commuted purely on the basis of supervening events such as delay. Under the ground of supervening events, when Article 21 is held to be violated, it is not a question of judicial review but of protection of fundamental rights and courts give substantial relief not merely procedural protection. The question of violation of Article 21, its effects and the appropriate relief is the domain of this Court. There is no question of remanding the matter for consideration because this Court is the custodian and enforcer of fundamental rights and the final interpreter of the Constitution. Further, this Court is best equipped to adjudicate the content of those rights and their requirements in a particular fact situation. This Court has always granted relief

for violation of fundamental rights and has never remanded the matter. For example, in cases of preventive detention, violation of free speech, externment, refusal of passport etc., the impugned action is quashed, declared illegal and violative of Article 21, but never remanded. It would not be appropriate to say at this point that this Court should not give relief for the violation of Article 21.

45. At this juncture, it is pertinent to refer the records of the disposal of mercy petitions compiled by Mr. Bikram Jeet Batra and others, which are attached as annexures in almost all the petitions herein. At the outset, this document reveals that the mercy petitions were disposed of more expeditiously in former days than in the present times. Mostly, until 1980, the mercy petitions were decided in minimum of 15 days and in maximum of 10-11 months. Thereafter, from 1980 to 1988, the time taken in disposal of mercy petitions was gradually increased to an average of 4 years. It is exactly at this point of time, the cases like *Vatheeswaran (supra)* and *Triveniben (supra)* were decided which gave way for developing the jurisprudence of commuting the death sentence based on undue delay. It is also pertinent to mention that this Court has observed in these cases that when such petitions under Article 72 or 161 are received by the authorities concerned, it is expected that these petitions shall be disposed of expeditiously. In *Sher Singh (supra)* their Lordships have also impressed the Government of India and all the State Governments for speedy disposal of petitions filed under Articles 72 and 161 and issued directions in the following manner:

> **"23.** We must take this opportunity to impress upon the Government of India and the State Governments that petitions filed under Articles 72 and 161 of the Constitution or under Sections 432 and 433 of the Criminal Procedure Code must be disposed of expeditiously***. A self-imposed rule should be followed by the executive authorities rigorously, that every such petition shall be disposed of within a period of three months from the date on***

which it is received. Long and interminable delays in the disposal of these petitions are a serious hurdle in the dispensation of justice and indeed, such delays tend to shake the confidence of the people in the very system of justice.

46. Obviously, the mercy petitions disposed of from 1989 to 1997 witnessed the impact of the observations in the disposal of mercy petitions. Since the average time taken for deciding the mercy petitions during this period was brought down to an average of 5 months from 4 years thereby paying due regard to the observations made in the decisions of this Court, but unfortunately, now the history seems to be repeating itself as now the delay of maximum 12 years is seen in disposing of the mercy petitions under Article 72/161 of the Constitution.

47. We sincerely hope and believe that the mercy petitions under Article 72/161 can be disposed of at a much faster pace than what is adopted now, if the due procedure prescribed by law is followed in verbatim. Although, no time frame can be set for the President for disposal of the mercy petition but we can certainly request the concerned Ministry to follow its own rules rigorously which can reduce, to a large extent, the delay caused.

48. Though guidelines to define the contours of the power under Article 72/161 cannot be laid down, however, the Union Government, considering the nature of the power, set out certain criteria in the form of circular as under for deciding the mercy petitions.

- Personality of the accused (such as age, sex or mental deficiency) or circumstances of the case (such as provocation or similar justification);
- Cases in which the appellate Court expressed doubt as to the reliability of evidence but has nevertheless decided on conviction;

- Cases where it is alleged that fresh evidence is obtainable mainly with a view to see whether fresh enquiry is justified;
- Where the High Court on appeal reversed acquittal or on an appeal enhanced the sentence;
- Is there any difference of opinion in the Bench of High Court Judges necessitating reference to a larger Bench;
- Consideration of evidence in fixation of responsibility in gang murder case;
- Long delays in investigation and trial etc.

49. These guidelines and the scope of the power set out above make it clear that it is an extraordinary power not limited by judicial determination of the case and is not to be exercised lightly or as a matter of course. We also suggest, in view of the jurisprudential development with regard to delay in execution, another criteria may be added so as to require consideration of the delay that may have occurred in disposal of a mercy petition. In this way, the constitutional authorities are made aware of the delay caused at their end which aspect has to be considered while arriving at a decision in the mercy petition. The obligation to do so can also be read from the fact that, as observed by the Constitution Bench in *Triveniben (supra)*, delays in the judicial process are accounted for in the final verdict of the Court terminating the judicial exercise.

50. Another vital aspect, without mention of which the present discussion will not be complete, is that, as aforesaid, Article 21 is the paramount principle on which rights of the convict are based, this must be considered along with the rights of the victims or the deceased's family as also societal consideration since these elements form part of the sentencing process as well. It is the stand of the respondents that the commutation of sentence of death based on delay alone will

be against the victim's interest.

51. It is true that the question of sentence always poses a complex problem, which requires a working compromise between the competing views based on reformative, deterrent and retributive theories of punishments. As a consequence, a large number of factors fall for consideration in determining the appropriate sentence. The object of punishment is lucidly elaborated in *Ram Narain vs. State of Uttar Pradesh* (1973) 2 SCC 86 in the following words:-

> "**8**. …the broad object of punishment of an accused found guilty in progressive civilized societies is to impress on the guilty party that commission of crimes does not pay and that it is both against his individual interest and also against the larger interest of the society to which he belongs. The sentence to be appropriate should, therefore, be neither too harsh nor too lenient...."

52. The object of punishment has been succinctly stated in *Halsbury's Laws of England,* (4th Edition: Vol. II: para 482) thus:

> "The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection and modern sentencing policy reflects a combination of several or all of these aims. The retributive element is intended to show public revulsion to the offence and to punish the offender for his wrong conduct. The concept of justice as an aim of punishment means both that the punishment should fit the offence and also that like offences should receive similar punishments. An increasingly important aspect of punishment is deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law. The importance of reformation of the offender is shown by the growing emphasis laid upon it by much modern legislation, but judicial opinion towards this particular aim is varied and rehabilitation will not usually be accorded precedence over deterrence. The main aim of punishment in judicial thought, however, is still the protection of society and the other objects frequently receive only secondary consideration when sentences are being decided."

53. All these aspects were emphatically considered by this Court while pronouncing the final verdict against the petitioners herein thereby upholding the sentence of death imposed by the High Court. Nevertheless, the same accused (petitioners herein) are before us now under Article 32 petition seeking commutation of sentence on the basis of undue delay caused in execution of their levied death sentence, which amounts to torture and henceforth violative of Article 21 of the Constitution. We must clearly see the distinction under both circumstances. Under the former scenario, the petitioners herein were the persons who were accused of the offence wherein the sentence of death was imposed but in later scenario, the petitioners herein approached this Court as a victim of violation of guaranteed fundamental rights under the Constitution seeking commutation of sentence. This distinction must be considered and appreciated.

54. As already asserted, this Court has no jurisdiction under Article 32 to reopen the case on merits. Therefore, in the light of the aforesaid elaborate discussion, we are of the cogent view that undue, inordinate and unreasonable delay in execution of death sentence does certainly attribute to torture which indeed is in violation of Article 21 and thereby entails as the ground for commutation of sentence. However, the nature of delay i.e. whether it is undue or unreasonable must be appreciated based on the facts of individual cases and no exhaustive guidelines can be framed in this regard.

Rationality of Distinguishing between Indian Penal Code, 1860 And Terrorist and Disruptive Activities (Prevention) Act Offences for Sentencing Purpose

55. In Writ Petition No. 34 of 2013 – the accused were mulcted with TADA charges which ultimately ended in death sentence. Mr. Ram Jethmalani, learned senior counsel for the petitioners in that writ petition argued against the ratio laid down in *Devender Pal Singh Bhullar vs. State (NCT) of Delhi* (2013) 6 SCC 195 which holds that when the accused are convicted under TADA, there is no question of showing any sympathy or considering supervening circumstances for commutation of sentence, and emphasized the need for reconsideration of the verdict. According to Mr. Ram Jethmalani, *Devender Pal Singh Bhullar (supra)* is *per incuriam* and is not a binding decision for other cases. He also prayed that inasmuch as the ratio laid down in *Devender Pal Singh Bhullar (supra)* is erroneous, this Court, being a larger Bench, must overrule the same.

56. He pointed out that delay in execution of sentence of death after it has become final at the end of the judicial process is wholly unconstitutional inasmuch it constitutes torture, deprivation of liberty and detention in custody not authorized by law within the meaning of Article 21 of the Constitution. He further pointed out that this involuntary detention of the convict is an action not authorized by any penal provision including Section 302 IPC or any other law including TADA. On the other hand, Mr. Luthra, learned ASG heavily relying on the reasonings in *Devender Pal Singh Bhullar (supra)* submitted that inasmuch as the crime involved is a serious and heinous and the accused were charged under TADA, there cannot be any sympathy or leniency even on the ground of delay in disposal of mercy petition. According to him, considering the gravity of the crime, death sentence is warranted and *Devender Pal Singh Bhullar (supra)* has correctly arrived at a conclusion and rejected the claim for commutation on the ground of delay.

57. From the analysis of the arguments of both the counsel, we are of the view that only delay which could not have been avoided even if the matter was proceeded with a sense of urgency or was caused in essential preparations for execution of sentence may be the relevant factors under such petitions

in Article 32. Considerations such as the gravity of the crime, extraordinary cruelty involved therein or some horrible consequences for society caused by the offence are not relevant after the Constitution Bench ruled in *Bachan Singh vs. State of Punjab* (1980) 2 SCC 684 that the sentence of death can only be imposed in the rarest of rare cases. Meaning, of course, all death sentences imposed are impliedly the most heinous and barbaric and rarest of its kind. The legal effect of the extraordinary depravity of the offence exhausts itself when court sentences the person to death for that offence. Law does not prescribe an additional period of imprisonment in addition to the sentence of death for any such exceptional depravity involved in the offence.

58. As rightly pointed out by Mr. Ram Jethmalani, it is open to the legislature in its wisdom to decide by enacting an appropriate law that a certain fixed period of imprisonment in addition to the sentence of death can be imposed in some well defined cases but the result cannot be accomplished by a judicial decision alone. The unconstitutionality of this additional incarceration is itself inexorable and must not be treated as dispensable through a judicial decision.

59. Now, in this background, let us consider the ratio laid down in *Devender Pal Singh Bhullar (supra)*.

60. The brief facts of that case were: Devender Pal Singh Bhullar, who was convicted by the Designated Court at Delhi for various offences under TADA, IPC and was found guilty and sentenced to death. The appeal as well as the review filed by him was dismissed by this Court. Soon after the dismissal of the review petition, Bhullar submitted a mercy petition dated 14.01.2003 to the President of India under Article 72 of the Constitution and prayed for commutation of his sentence. Various other associations including Delhi Sikh Gurdwara Management Committee sent letters in connection with commutation of the death sentence awarded to him. During the pendency of the petition filed under Article 72, he also filed

Curative Petition (Criminal) No. 5 of 2013 which was also dismissed by this Court on 12.03.2013. After prolonged correspondence and based on the advice of the Home Minister, the President rejected his mercy petition which was informed vide letter dated 13.06.2011 sent by the Deputy Secretary (Home) to the Jail Authorities. After rejection of his petition by the President, Bhullar filed a writ petition, under Article 32 of the Constitution, in this regard praying for quashing the communication dated 13.06.2011. While issuing notice in Writ Petition (Criminal) Diary No. 16039/2011, this Court directed the respondents to clarify as to why the petitions made by the petitioner had not been disposed of for the last 8 years. In compliance with the courts direction, the Deputy Secretary (Home) filed an affidavit giving reasons for the delay. This Court, after adverting to all the earlier decisions, instructions regarding procedure to be observed for dealing with the petitions for mercy, accepted that there was a delay of 8 years. Even after accepting that long delay may be one of the grounds for commutation of sentence of death into life imprisonment, this Court dismissed his writ petition on the ground that the same cannot be invoked in cases where a person is convicted for an offence under TADA or similar statutes. This Court also held that such cases stand on an altogether different footing and cannot be compared with murders committed due to personal animosity or over property and personal disputes. It is also relevant to point out that while arriving at such conclusion, the Bench heavily relied on opinion expressed by Shetty, J. in *Smt. Triveniben (supra)*. Though the Bench adverted to paras 73, 74, 75 and 76 of *Triveniben (supra)*, the Court very much emphasized para 76 which reads as under:-

> *"**76.*** … The court while examining the matter, for the reasons already stated, cannot take into account the time utilised in the judicial proceedings up to the final verdict. The court also cannot take into consideration the time taken for disposal of any petition filed by or on behalf of the accused either under Article 226 or under Article 32 of the Constitution after the final judgment affirming the conviction and sentence. The court may only consider whether there was undue long delay in disposing of mercy petition; whether the State was guilty of dilatory conduct and whether the delay was for no reason at all. ***The inordinate delay, may be a significant factor, but that by itself cannot render the execution unconstitutional. Nor it can be divorced from the dastardly and diabolical circumstances of the crime itself…"*** (emphasis supplied)

61. On going through the judgment of Oza, J. on his behalf and for M.M. Dutt, K.N. Singh and L.M. Sharma, JJ., we are of the view that the above quoted statement of Shetty, J. is not a majority view and at the most this is a view expressed by him alone. In this regard, at the cost of repetition it is relevant to refer once again the operative portion of the order dated 11.10.1988 in *Triveniben (supra)* which is as under:-

> "**2**. We are of the opinion that:
>
> Undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32 but this Court will only examine the nature of delay caused and circumstances that ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to re-open the conclusions reached by the court while finally maintaining the sentence of death. This Court, however, may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death inexecutable and to this extent the decision in Vatheeswaran case cannot be said to lay down the correct law and therefore to that extent stands overruled."

62. The same view was once again reiterated by all the Judges and the very same reasonings have been reiterated in Para 23 of the order dated 07.02.1989. In such circumstances and also in view of the categorical opinion of Oza, J. in para 22 of the judgment in *Triveniben (supra)* that "*it will not be open to this Court in exercise of jurisdiction under Article 32 to go behind or to examine the final verdict…the nature of the offence, circumstances in which the offence was committed will have to be taken as found by the competent court…*", it cannot be held, as urged, on behalf of the Union of India that the majority opinion in *Triveniben (supra)* is to the effect that delay is only one of the circumstances that may be considered along with "other circumstances of the case" to determine as to whether the death sentence should be commuted to one of life imprisonment. We are, therefore, of the view that the opinion rendered by Shetty, J. as quoted in para 76 of the judgment in *Triveniben (supra)* is a minority view and not a view consistent with what has been contended to be the majority opinion. We reiterate that as per the majority view, if there is undue long delay in execution of sentence of death, the condemned prisoner is entitled to approach this Court under Article 32 and the court is bound to examine the nature of delay caused and circumstances that ensued after sentence was finally confirmed by the judicial process and to take a decision whether execution of sentence should be carried out or should be altered into imprisonment for life. It is, however, true that the majority of the Judges have not approved the fixed period of two years enunciated in *Vatheeswaran (supra)* and only to that extent overruled the same.

63. Incidentally, it is relevant to point out *Mahendra Nath Das vs. Union of India and Ors.* (2013) 6 SCC 253, wherein the very same bench, taking note of the fact that there was a delay of 12 years in the disposal of the mercy petition and also considering the fact that the appellants therein were prosecuted and convicted under Section 302 IPC held the rejection of the appellants' mercy petition as illegal and consequently, the

sentence of death awarded to them by the trial Court which was confirmed by the High Court, commuted into life imprisonment.

64. In the light of the same, we are of the view that the ratio laid down in *Devender Pal Singh Bhullar (supra)* is *per incuriam*. There is no dispute that in the same decision this Court has accepted the ratio enunciated in *Triveniben (supra)* (Constitution Bench) and also noted some other judgments following the ratio laid down in those cases that unexplained long delay may be one of the grounds for commutation of sentence of death into life imprisonment. There is no good reason to disqualify all TADA cases as a class from relief on account of delay in execution of death sentence. Each case requires consideration on its own facts.

65. It is useful to refer a Constitution Bench decision of this Court in *Mithu vs. State of Punjab* (1983) 2 SCC 277, wherein this Court held Section 303 of the IPC as unconstitutional and declared it void. The question before the Constitution Bench was whether Section 303 of IPC infringes the guarantee contained in Article 21 of the Constitution, which provides that "no person shall be deprived of his life or personal liberty except according to the procedure established by law". Chandrachud, J. the then Hon'ble the Chief Justice, speaking for himself, Fazal Ali, Tulzapurkar and Varadarajan, JJ., struck down Section 303 IPC as unconstitutional and declared it void. The Bench also held that all the cases of murder will now fall under Section 302 IPC and there shall be no mandatory sentence of death for the offence of murder. The reasons given by this Court for striking down this aforesaid section will come in aid for this case. Section 303 IPC was as under:

> "**303. Punishment for murder by life convict.**—Whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death."

66. Before striking down Section 303 IPC, this Court made the following conclusion:

"**3**…The reason, or at least one of the reasons, why the discretion of the court to impose a lesser sentence was taken away and the sentence of death was made mandatory in cases which are covered by Section 303 seems to have been that if, even the sentence of life imprisonment was not sufficient to act as a deterrent and the convict was hardened enough to commit a murder while serving that sentence, the only punishment which he deserved was death. The severity of this legislative judgment accorded with the deterrent and retributive theories of punishment which then held sway. The reformative theory of punishment attracted the attention of criminologists later in the day…

5…The sum and substance of the argument is that the provision contained in Section 303 is wholly unreasonable and arbitrary and thereby, it violates Article 21 of the Constitution which affords the guarantee that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. Since the procedure by which Section 303 authorises the deprivation of life is unfair and unjust, the Section is unconstitutional. Having examined this argument with care and concern, we are of the opinion that it must be accepted and Section 303 of the Penal Code struck down."

67. After quoting *Maneka Gandhi (supra)*, *Sunil Batra vs. Delhi Administration* (1978) 4 SCC 494 and *Bachan Singh (supra)*, this Court opined:

"**19**…To prescribe a mandatory sentence of death for the second of such offences for the reason that the offender was under the sentence of life imprisonment for the first of such offences is arbitrary beyond the bounds of all reason. Assuming that Section 235(2) of the Criminal Procedure Code were applicable to the case and the court was under an obligation to hear the accused on the

question of sentence, it would have to put some such question to the accused:

"You were sentenced to life imprisonment for the offence of forgery. You have committed a murder while you were under that sentence of life imprisonment. Why should you not be sentenced to death"

The question carries its own refutation. It highlights how arbitrary and irrational it is to provide for a mandatory sentence of death in such circumstances…"

23. On a consideration of the various circumstances which we have mentioned in this judgment, we are of the opinion that Section 303 of the Penal Code violates the guarantee of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution that no person shall be deprived of his life or personal liberty except according to procedure established by law. The section was originally conceived to discourage assaults by life convicts on the prison staff, but the legislature chose language which far exceeded its intention. The Section also assumes that life convicts are a dangerous breed of humanity as a class. That assumption is not supported by any scientific data. As observed by the Royal Commission in its Report on "Capital Punishment"

"There is a popular belief that prisoners serving a life sentence after conviction of murder form a specially troublesome and dangerous class. That is not so. Most find themselves in prison because they have yielded to temptation under the pressure of a combination of circumstances unlikely to recur."

In *Dilip Kumar Sharma v. State of M.P.* this Court was not concerned with the question of the vires of Section 303, but Sarkaria, J., in his concurring judgment, described the vast sweep of that Section by saying that "the section is

Draconian in severity, relentless and inexorable in operation" [SCC para 22, p. 567: SCC (Cri) p. 92]. We strike down Section 303 of the Penal Code as unconstitutional and declare it void. It is needless to add that all cases of murder will now fall under Section 302 of the Penal Code and there shall be no mandatory sentence of death for the offence of murder."

68. Chinnappa Reddy, J., concurring with the above view, held thus:

"25. Judged in the light shed by Maneka Gandhi and Bachan Singh, it is impossible to uphold Section 303 as valid. **Section 303 excludes judicial discretion**. **The scales of justice are removed from the hands of the Judge so soon as he pronounces the accused guilty of the offence. So final, so irrevocable and so irrestitutable [sic irresuscitable] is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive. Section 303 is such a law and it must go the way of all bad laws. I agree with my Lord Chief Justice that Section 303, Indian Penal Code, must be struck down as unconstitutional."**

69. It is clear that since Section 303 IPC excludes judicial discretion, the Constitution Bench has concluded that such a law must necessarily be stigmatized as arbitrary and oppressive. It is further clear that no one should be deprived of equality contained in Article 14 as also the right conferred by Article 21 of the Constitution regarding his life or personal liberty except according to the procedure established by law.

70. Taking guidance from the above principles and in the light of the ratio enunciated in *Triveniben (supra)*, we are of the view that unexplained delay is one of the grounds for

commutation of sentence of death into life imprisonment and the said supervening circumstance is applicable to all types of cases including the offences under TADA. The only aspect the courts have to satisfy is that the delay must be unreasonable and unexplained or inordinate at the hands of the executive. The argument of Mr. Luthra, learned ASG that a distinction can be drawn between IPC and non-IPC offences since the nature of the offence is a relevant factor is liable to be rejected at the outset. In view of our conclusion, we are unable to share the views expressed in *Devender Pal Singh Bhullar (supra)*.

(ii) Insanity/Mental Illness/Schizophrenia

71. In this batch of cases, two convict prisoners prayed for commutation of death sentence into sentence of life imprisonment on the ground that the unconscionably long delay in deciding the mercy petition has caused the onset of chronic psychotic illness, and in view of this the execution of death sentence will be inhuman and against the well-established canons of human rights.

72. The principal question raised in those petitions is whether because of the aforementioned supervening events after the verdict of this Court confirming the death sentence, the infliction of the most extreme penalty in the circumstances of the case, violates the fundamental rights under Article 21. The petitioners have made it clear that they are not challenging the death sentence imposed by this Court. However, as on date, they are suffering from insanity/mental illness. In this background, let us consider whether the petitioners have made out a case for commutation to life sentence on the ground of insanity.

73. India is a member of the United Nations and has ratified the International Covenant on Civil and Political Rights (ICCPR). A large number of United Nations international documents prohibit the execution of death sentence on an insane person. Clause 3(e) of the *Resolution 2000/65* dated 27.04.2000 of *the U.N. Commission on Human Rights titled*

"The Question of Death Penalty" urges *"all States that still maintain the death penalty…not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person".* It further elaborates:

"**3**. Urges all States that still maintain the death penalty:

(a) To comply fully with their obligations under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, notably not to impose the death penalty for any but the most serious crimes and only pursuant to a final judgement rendered by an independent and impartial competent court, not to impose it for crimes committed by persons below 18 years of age, to exclude pregnant women from capital punishment and to ensure the right to a fair trial and the right to seek pardon or commutation of sentence;

(b) To ensure that the notion of "most serious crimes" does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent financial crimes or for non-violent religious practice or expression of conscience;

(c) Not to enter any new reservations under article 6 of the International Covenant on Civil and Political Rights which may be contrary to the object and the purpose of the Covenant and to withdraw any such existing reservations, given that article 6 of the Covenant enshrines the minimum rules for the protection of the right to life and the generally accepted standards in this area;

(d) To observe the Safeguards guaranteeing protection of the rights of those facing the death penalty and to comply fully with their international obligations, in particular with those under the Vienna Convention on Consular Relations;

(e) Not to impose the death penalty on a person suffering

from any form of mental disorder or to execute any such person;

(f) Not to execute any person as long as any related legal procedure, at the international or at the national level, is pending;

4. Calls upon all States that still maintain the death penalty:

(a) Progressively to restrict the number of offences for which the death penalty may be imposed;

(b) To establish a moratorium on executions, with a view to completely abolishing the death penalty;

(c) To make available to the public information with regard to the imposition of the death penalty;

5. Requests States that have received a request for extradition on a capital charge to reserve explicitly the right to refuse extradition in the absence of effective assurances from relevant authorities of the requesting State that capital punishment will not be carried out;

6. Requests the Secretary-General to continue to submit to the Commission on Human Rights, at its fifty-seventh session, in consultation with Governments, specialized agencies and intergovernmental and non-governmental organizations, a yearly supplement on changes in law and practice concerning the death penalty worldwide to his quinquennial report on capital punishment and implementation of the Safeguards guaranteeing protection of the rights of those facing the death penalty;

7. Decides to continue consideration of the matter at its fifty-seventh session under the same agenda item.

66th meeting
26 April 2000"

74. Similarly, Clause 89 of *the Report of the Special Rapporteur on Extra-Judicial Summary or Arbitrary Executions* published on 24.12.1996 by the UN Commission on Human Rights under the caption *"Restrictions on the use of death penalty"* states that *"the imposition of capital punishment on mentally retarded or insane persons, pregnant women and recent mothers is prohibited".* Further, Clause 116 thereof under the caption "Capital punishment" urges that *"Governments that enforce such legislation with respect to minors and the mentally ill are particularly called upon to bring their domestic criminal laws into conformity with international legal standards".*

75. United Nations General Assembly in its Sixty-second session, adopted a Resolution on 18.12.2007, which speaks about moratorium on the use of the death penalty. The following decisions are relevant:

"**1**. Expresses its deep concern about the continued application of the death penalty;

2. Calls upon all States that still maintain the death penalty:

(a) To respect international standards that provide safeguards guaranteeing protection of the rights of those facing the death penalty, in particular the minimum standards, as set out in the annex to Economic and Social Council resolution 1984/50 of 25 May 1984;

*** *** ***

76th plenary meeting
18 December 2007"

76. The following passage from the Commentary on the Laws of England by William Blackstone is relevant for our consideration:

"…In criminal cases therefore idiots and lunatics are not

chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself. Also, if a man in his sound memory commits a capital offense, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution."

77. India too has similar line of law and rules in the respective State Jail Manuals. Paras 386 and 387 of the U.P. Jail Manual applicable to the State of Uttarakhand are relevant for our purpose and are quoted hereinbelow:

"386. Condemned convicts developing insanity – **When a convict under sentence of death develops insanity after conviction, the Superintendent shall stay the execution of the sentence of death** and inform the District Magistrate, who shall submit immediately a report, through the Sessions Judge, for the orders of the State Government.

387. Postponement of execution in certain cases – The execution of a convict under sentence of death shall not be carried out on the date fixed if he is physically unfit to receive the punishment, but shall not be postponed unless the illness is both serious and acute (i.e. not chronic). A report giving full particulars of the illness necessitating postponement of execution should at once be made to the Secretary to the State Government, Judicial (A) Department for the orders of the Government."

Similar provisions are available in Prison Manuals of other States in India.

78. The above materials, particularly, the directions of the United Nations International Conventions, of which India is a party, clearly show that insanity/mental illness/schizophrenia is a crucial supervening circumstance, which should be considered by this Court in deciding whether in the facts and circumstances of the case death sentence could be commuted to life imprisonment. To put it clear, "insanity" is a relevant supervening factor for consideration by this Court.

79. In addition, after it is established that the death convict is insane and it is duly certified by the competent doctor, undoubtedly, Article 21 protects him and such person cannot be executed without further clarification from the competent authority about his mental problems. It is also highlighted by relying on commentaries from various countries that civilized countries have not executed death penalty on an insane person. Learned counsel also relied on United Nations Resolution against execution of death sentence, debate of the General Assembly, the decisions of International Court of Justice, Treaties, European Conventions, 8th amendment in the United States which prohibits execution of death sentence on an insane person. In view of the well established laws both at national as well as international sphere, we are inclined to consider insanity as one of the supervening circumstances that warrants for commutation of death sentence to life imprisonment.

(iii) Solitary Confinement

80. Another supervening circumstance, which most of the petitioners appealed in their petitions is the ground of solitary confinement. The grievance of some of the petitioners herein is that they were confined in solitary confinement from the date of imposition of death sentence by the Sessions Court which is contrary to the provisions of the Indian Penal Code, 1860,

the Code of Criminal Procedure, 1973, Prisons Act and Articles 14, 19 and 21 of the Constitution and it is certainly a form of torture. However, the respective States, in their counter affidavits and in oral submissions, have out rightly denied having kept any of the petitioners herein in solitary confinement in violation of existing laws. It was further submitted that they were kept separately from the other prisoners for safety purposes. In other words, they were kept in statutory segregation and not *per se* in solitary confinement.

81. Similar line of arguments were advanced in *Sunil Batra vs. Delhi Administration and Ors. etc.* (1978) 4 SCC 494, wherein this Court held as under:-

> "**87**. The propositions of law canvassed in Batra's case turn on what is solitary confinement as a punishment and what is non-punitive custodial isolation of a prisoner awaiting execution. And secondly, if what is inflicted is, in effect, 'solitary', does Section 30(2) of the Act authorise it, and, if it does, is such a rigorous regimen constitutional. In one sense, these questions are pushed to the background, because Batra's submission is that he is not 'under sentence of death' within the scope of Section 30 until the Supreme Court has affirmed and Presidential mercy has dried up by a final 'nay'. Batra has been sentenced to death by the Sessions Court. The sentence has since been confirmed, but the appeal for Presidential commutation are ordinarily precedent to the hangmen's lethal move, and remain to be gone through. His contention is that solitary confinement is a separate substantive punishment of maddening severity prescribed by Section 73 of the Indian Penal Code which can be imposed only by the Court; and so tormenting is this sentence that even the socially less sensitive Penal Code of 1860 has interposed, in its cruel tenderness, intervals, maxima and like softening features in both Sections 73 and 74. Such being the penal situation, it is argued that the incarceratory insulation inflicted by the

Prison Superintendent on the petitioner is virtual solitary confinement unauthorised by the Penal Code and, therefore, illegal. Admittedly, no solitary confinement has been awarded to Batra. So, if he is de facto so confined it is illegal. Nor does a sentence of death under Section 53, I.P.C. carry with it a supplementary secret clause of solitary confinement. What warrant then exists for solitary confinement on Batra? None. The answer offered is that he is not under solitary confinement. He is under 'statutory confinement' under the authority of Section 30(2) of the Prisons Act read with Section 366(2) Cr.P.C. It will be a stultification of judicial power if under guise of using Section 30(2) of the Prisons Act, the Superintendent inflicts what is substantially solitary confinement which is a species of punishment exclusively within the jurisdiction of the criminal court. We hold, without hesitation, that Sunil Batra shall not be solitarily confined. Can he be segregated from view and voice and visits and comingling, by resort to Section 30(2) of the Prisons Act and reach the same result ? To give the answer we must examine the essentials of solitary confinement to distinguish it from being 'confined in a cell apart from all other prisoners'.

88. If solitary confinement is a revolt against society's humane essence, there is no reason to permit the same punishment to be smuggled into the prison system by naming it differently. Law is not a formal label, nor logomachy but a working technique of justice. The Penal Code and the Criminal Procedure Code regard punitive solitude too harsh and the Legislature cannot be intended to permit preventive solitary confinement, released even from the restrictions of Section 73 and 74 I.P.C., Section 29 of the Prisons Act and the restrictive Prison Rules. It would be extraordinary that a far worse solitary confinement, masked as safe custody, sans maximum, sans intermission, sans judicial oversight or natural justice, would be sanctioned. Commonsense quarrels with such nonsense.

89. For a fuller comprehension of the legal provisions and their construction we may have to quote the relevant sections and thereafter make a laboratory dissection thereof to get an understanding of the components which make up the legislative sanction for semi-solitary detention of Shri Batra. Section 30 of the Prisons Act rules :

> 30. (1) Every prisoner under sentence of death shall, immediately on his arrival in the prison after sentence, be searched by, or by order of, the Deputy Superintendent, and all articles shall be taken from him which the Deputy Superintendent deems it dangerous or inexpedient to leave in his possession.
>
> (2) Every such prisoner, shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under charge of a guard.

This falls in Chapter V relating to discipline of prisoners and has to be read in that context. Any separate confinement contemplated in Section 30(2) has this disciplinary limitation as we will presently see. If we pull to pieces the whole provision it becomes clear that Section 30 can be applied only to a prisoner "under sentence of death". Section 30(2) which speaks of "such" prisoners necessarily relates to prisoners under sentence of death. We have to discover when we can designate a prisoner as one under sentence of death.

90. The next attempt is to discern the meaning of confinement "in a cell apart from all other prisoners". The purpose is to maintain discipline and discipline is to avoid disorder, fight and other untoward incidents, if apprehended.

91. Confinement inside a prison does not necessarily import cellular isolation. Segregation of one person all

alone in a single cell is solitary confinement. That is a separate punishment which the Court alone can impose. It would be a subversion of this statutory provision (Section 73 and 74 I.P.C.) to impart a meaning to Section 30(2) of the Prisons Act whereby a disciplinary variant of solitary confinement can be clamped down on a prisoner, although no court has awarded such a punishment, by a mere construction, which clothes an executive officer, who happens to be the governor of the jail, with harsh judicial powers to be exercised by punitive restrictions and unaccountable to anyone, the power being discretionary and disciplinary.

92. Indeed, in a jail, cells are ordinarily occupied by more than one inmate and community life inside dormitories and cells is common. Therefore, "to be confined in a cell" does not compel us to the conclusion that the confinement should be in a solitary cell.

93. "Apart from all other prisoners" used in Section 30(2) is also a phrase of flexible import. 'Apart' has the sense of 'To one side, aside,... apart from each other, separately in action or function' (Shorter Oxford English Dictionary). Segregation into an isolated cell is not warranted by the word. All that it connotes is that in a cell where there are a plurality of inmates the death sentencees will have to be kept separated from the rest in the same cell but not too close to the others. And this separation can be effectively achieved because the condemned prisoner will be placed under the charge of a guard by day and by night. The guard will thus stand in between the several inmates and the condemned prisoner. Such a meaning preserves the disciplinary purpose and avoids punitive harshness. Viewed functionally, the separation is authorised, not obligated. That is to say, if discipline needs it the authority shall be entitled to and the prisoner shall be liable to separate keeping within the same cell as explained above. "Shall" means, in this disciplinary context, "shall be liable

to". If the condemned prisoner is docile and needs the attention of fellow prisoners nothing forbids the jailor from giving him that facility.

96. Solitary confinement has the severest sting and is awardable only by Court. To island a human being, to keep him incommunicado from his fellows is the story of the Andamans under the British, of Napoleon in St. Helena ! The anguish of aloneness has already been dealt with by me and I hold that Section 30(2) provides no alibi for any form of solitary or separated cellular tenancy for the death sentence, save to the extent indicated.

111. In my judgment Section 30(2) does not validate the State's treatment of Batra. To argue that it is not solitary confinement since visitors are allowed, doctors and officials come and a guard stands by is not to take it out of the category."

82. It was, therefore, held that the solitary confinement, even if mollified and modified marginally, is not sanctioned by Section 30 of the Prisons Act for prisoners 'under sentence of death'. The crucial holding under Section 30(2) is that a person is not 'under sentence of death', even if the Sessions Court has sentenced him to death subject to confirmation by the High Court. He is not 'under sentence of death' even if the High Court imposes, by confirmation or fresh appellate infliction, death penalty, so long as an appeal to the Supreme Court is likely to be or has been moved or is pending. Even if this Court has awarded capital sentence, it was held that Section 30 does not cover him so long as his petition for mercy to the Governor and/or to the President permitted by the Constitution, has not been disposed of. Of course, once rejected by the Governor and the President, and on further application, there is no stay of execution by the authorities, the person is under sentence of death. During that interregnum, he attracts the custodial segregation specified in Section 30(2), subject to the ameliorative meaning assigned to the provision. To be 'under

sentence of death' means 'to be under a finally executable death sentence'.

83. Even in *Triveniben (supra),* this Court observed that keeping a prisoner in solitary confinement is contrary to the ruling in *Sunil Batra (supra)* and would amount to inflicting "additional and separate" punishment not authorized by law. It is completely unfortunate that despite enduring pronouncement on judicial side, the actual implementation of the provisions is far from reality. We take this occasion to urge to the jail authorities to comprehend and implement the actual intent of the verdict in *Sunil Batra (supra).*

84. As far as this batch of cases is concerned, we are not inclined to interfere on this ground.

(iv) Judgments Declared Per Incuriam

85. Many counsels, while adverting to the cause of the petitioners, complained that either the trial court or the High Court relied on/adverted to certain earlier decisions which were either doubted or held *per incuriam* such as *Machhi Singh vs. State of Punjab* (1983) 3 SCC 470, *Ravji alias Ramchandra vs. State of Rajasthan* (1996) 2 SCC 175, *Sushil Murmu vs. State of Jharkhand* (2004) 2 SCC 338, *Dhananjoy Chatterjee vs. State of W.B.* (1994) 2 SCC 220, *State of U.P. vs. Dharmendra Singh* (1999) 8 SCC 325 and *Surja Ram vs. State of Rajasthan* (1996) 6 SCC 271. Therefore, it is the claim of the petitioners herein that this aspect constitutes a supervening circumstance that warrants for commutation of sentence of death to life imprisonment.

86. It is the stand of few of the petitioners herein that the guidelines issued in *Machhi Singh (supra)* are contrary to the law laid down in *Bachan Singh (supra).* Therefore, in three decisions, viz., *Swamy Shraddananda (2) vs. State of Karnataka* (2008) 13 SCC 767, *Sangeet and Another vs. State of Haryana* (2013) 2 SCC 452 and *Gurvail Singh vs.*

State of Punjab (2013) 2 SCC 713 the verdict pronounced by *Machhi Singh (supra)* is held to be *per incuriam.*

87. In the light of the above stand, we carefully scrutinized those decisions. Even in *Machhi Singh (supra)*, paragraphs 33 to 37 included certain aspects, viz., I. manner of commission of murder; II. motive for commission of murder; III. anti-social or socially abhorrent nature of the crime; IV. magnitude of crime and V. personality of victim of murder. Ultimately, in paragraph 38, this Court referred to the guidelines prescribed in *Bachan Singh (supra)*. In other words, *Machhi Singh (supra),* after noting the propositions emerged from *Bachan Singh (supra),* considered the individual appeals and disposed of the same. In this regard, it is useful to refer a three-Judge Bench decision of this Court in *Swamy Shraddananda (2) (supra).* The Bench considered the principles enunciated in *Machhi Singh (supra)*, *Bachan Singh (supra)* and after analyzing the subsequent decisions, came to the conclusion in paragraph 48:

> "48…It is noted above that Bachan Singh laid down the principle of the rarest of rare cases. Machhi Singh, for practical application crystallised the principle into five definite categories of cases of murder and in doing so also considerably enlarged the scope for imposing death penalty. But the unfortunate reality is that in later decisions neither the rarest of rare cases principle nor the Machhi Singh categories were followed uniformly and consistently."

88. Except the above observations, the three-Judge Bench has nowhere discarded *Machhi Singh (supra)*. In other words, we are of the view that the three-Judge Bench considered and clarified the principles/guidelines in *Machhi Singh (supra)*. It is also relied by the majority in *Triveniben (supra)*. As regards other cases, in view of the factual position, they must be read in consonance with the three-Judge Bench and the Constitution Bench.

89. As pointed out by learned ASG for the Union of India,

no decision mentioned above was found to be erroneous or wrongly decided. However, due to various factual situations, certain decisions were clarified and not applied to the facts of the peculiar case. In these circumstances, we are of the view that there is no need to give importance to the arguments relating to *per incuriam.*

(v) Procedural Lapses

90. The last supervening circumstance averred by the petitioners herein is the ground of procedural lapses. It is the claim of the petitioners herein that the prescribed procedure for disposal of mercy petitions was not duly followed in these cases and the lapse in following the prescribed rules have caused serious injustice to both the accused (the petitioners herein) and their family members.

91. Ministry of Home Affairs, Government of India has detailed procedure regarding handling of petitions for mercy in death sentence cases. As per the said procedure, Rule I enables a convict under sentence of death to submit a petition for mercy within seven days after and exclusive of the day on which the Superintendent of Jail informs him of the dismissal by the Supreme Court of his appeal or of his application for special leave to appeal to the Supreme Court. Rule II prescribes procedure for submission of petitions. As per this Rule, such petitions shall be addressed to, in the case of States, to the Governor of the State at the first instance and thereafter to the President of India and in the case of Union Territories directly to the President of India. As soon as mercy petition is received, the execution of sentence shall in all cases be postponed pending receipt of orders on the same. Rule III states that the petition shall in the first instance, in the case of States, be sent to the State concerned for consideration and orders of the Governor. If after consideration it is rejected, it shall be forwarded to the Secretary to the Government of India, Ministry of Home Affairs. If it is decided to commute the sentence of death, the petition addressed to the President of India shall be

withheld and intimation to that effect shall be sent to the petitioner. Rule V states that in all cases in which a petition for mercy from a convict under sentence of death is to be forwarded to the Secretary to the Government of India, Ministry of Home Affairs, the Lt. Governor/Chief Commissioner/ Administrator or the Government of the State concerned, as the case may be, shall forward such petition, as expeditiously as possible, along with the records of the case and his or its observations in respect of any of the grounds urged in the petition. Rule VI mandates that upon receipt of the orders of the President, an acknowledgement shall be sent to the Secretary to the Government of India, Ministry of Home Affairs, immediately in the manner prescribed. In the case of Assam and Andaman and Nicobar Islands, all orders will be communicated by telegraph and the receipt thereof shall be acknowledged by telegraph. In the case of other States and Union Territories, if the petition is rejected, the orders will be communicated by express letter and receipt thereof shall be acknowledged by express letter. Orders commuting the death sentence will be communicated by express letters, in the case of Delhi and by telegraph in all other cases and receipt thereof shall be acknowledged by express letter or telegraph, as the case may be. Rule VIII(a) enables the convict that if there is a change of circumstance or if any new material is available in respect of rejection of his earlier mercy petition, he is free to make fresh application to the President for reconsideration of the earlier order.

92. Specific instructions relating to the duties of Superintendents of Jail in connection with the petitions for mercy for or on behalf of the convicts under sentence of death have been issued. Rule I mandates that immediately on receipt of warrant of execution, consequent on the confirmation by the High Court of the sentence of death, the Jail Superintendent shall inform the convict concerned that if he wishes to appeal to the Supreme Court or to make an application for special leave to appeal to the Supreme Court under any of the relevant

provisions of the Constitution of India, he/she should do so within the period prescribed in the Supreme Court Rules. Rule II makes it clear that, on receipt of the intimation of the dismissal by the Supreme Court of the appeal or the application for special leave to appeal filed by or on behalf of the convict, in case the convict concerned has made no previous petition for mercy, the Jail Superintendent shall forthwith inform him that if he desires to submit a petition for mercy, it should be submitted in writing within seven days of the date of such intimation. Rule III says that if the convict submits a petition within the period of seven days prescribed by Rule II, it should be addressed, in the case of States, to the Governor of the State at the first instance and, thereafter, to the President of India and in the case of Union Territories, to the President of India. The Superintendent of Jail shall forthwith dispatch it to the Secretary to the State Government in the Department concerned or the Lt. Governor/Chief Commissioner/Administrator, as the case may be, together with a covering letter reporting the date fixed for execution and shall certify that the execution has been stayed pending receipt of orders of the Government on the petition. Rule IV mandates that if the convict submits petition after the period prescribed by Rule II, the Superintendent of Jail shall, at once, forward it to the State Government and at the same time telegraphed the substance of it requesting orders whether execution should be postponed stating that pending reply sentence will not be carried out.

93. The above Rules make it clear that at every stage the matter has to be expedited and there cannot be any delay at the instance of the officers, particularly, the Superintendent of Jail, in view of the language used therein as "at once".

94. Apart from the above Rules regarding presentation of mercy petitions and disposal thereof, necessary instructions have been issued for preparation of note to be approved by the Home Minister and for passing appropriate orders by the President of India.

95. Extracts from Prison Manuals of various States applicable for the disposal of mercy petitions have been placed before us. Every State has separate Prison Manual which speaks about detailed procedure, receipt placing required materials for approval of the Home Minister and the President for taking decision expeditiously. Rules also provide steps to be taken by the Superintendent of Jail after the receipt of mercy petition and subsequent action after disposal of the same by the President of India. Almost all the Rules prescribe how the death convicts are to be treated till final decision is taken by the President of India.

96. The elaborate procedure clearly shows that even death convicts have to be treated fairly in the light of Article 21 of the Constitution of India. Nevertheless, it is the claim of all the petitioners herein that all these rules were not adhered to strictly and that is the primary reason for the inordinate delay in disposal of mercy petitions. For illustration, on receipt of mercy petition, the Department concerned has to call for all the records/ materials connected with the conviction. Calling for piece-meal records instead of all the materials connected with the conviction should be deprecated. When the matter is placed before the President, it is incumbent upon the part of the Home Ministry to place all the materials such as judgment of the Trial Court, High Court and the final Court, viz., Supreme Court as well as any other relevant material connected with the conviction at once and not call for the documents in piece meal.

97. At the time of considering individual cases, we will test whether those Rules have been strictly complied with or not on individual basis.

Analysis on Case-to-Case Basis

Writ Petition (Crl.) Nos. 55 and 132 of 2013

98. Mr. Shatrughan Chauhan and Mr. Mahinder Chauhan, family members of death convicts – Suresh and Ramji have

filed Writ Petition (Crl.) No. 55 of 2013. Subsequent to the filing of the Writ Petition (Crl.) No. 55 of 2013 by the family members, the death convicts themselves, viz., Suresh and Ramji, aged 60 years and 45 years respectively, belonging to the State of Uttar Pradesh, filed Writ Petition (Crl.) No. 132 of the 2013.

99. On 19.12.1997, the petitioners were convicted under Section 302 IPC for the murder of five family members of the first petitioner's brother for which they were awarded death sentence. On 23.02.2000, the Allahabad High Court confirmed their conviction and death sentence and, subsequently this Court dismissed their Criminal Appeal being No. 821 of 2000, vide judgment dated 02.03.2001.

100. On 09.03.2001 and 29.04.2001, the first and the second petitioners herein filed mercy petitions respectively addressed to the Governor/President of India. On 28.03.2001, Respondent No. 2–State of Uttar Pradesh wrote to the prison authorities seeking information *inter alia* on the conduct of the first petitioner in prison. On 05.04.2001, the prison authorities informed Respondent No. 2 about his good conduct.

101. On 18.04.2001, this Court dismissed the Review Petition (Crl.) being No. 416 of 2001 which was filed on 30.03.2001.

102. On 22.04.2001, Respondent No. 1–Union of India wrote to Respondent No. 2 asking for the record of the case and for information on whether mercy petition has been rejected by the Governor. Meanwhile, other mercy petitions were received by Respondent No. 1. There is no reference in the affidavit of Respondent No. 1 that the same were forwarded to Respondent No. 2 for consideration.

103. On 04.05.2001, Respondent No. 2 wrote to the Government Advocate, District Varanasi asking for a copy of the trial court judgment, which information is available from the counter affidavit filed by Respondent No. 2. On 23.05.2001,

Respondent No. 2 sent a reminder to the Government Advocate, District Varanasi to send a copy of the trial court judgment. On 04.09.2001, the District Magistrate, Varanasi informed Respondent No. 2 that it is not possible to get a copy of the trial court judgment as all the papers are lying in the Supreme Court.

104. On 13.12.2001, without obtaining a copy of the trial court judgment, Respondent No. 2 advised the Governor to reject the mercy petition. On 18.12.2001, the Governor rejected the mercy petition after taking nine months' time. On 22.01.2002, Respondent No. 2 informed Respondent No. 1 that the Governor has rejected the petitioners' mercy petition. It is the grievance of the petitioners that neither the petitioners nor their family members were informed about the rejection.

105. On 28.03.2002, Respondent No. 1 wrote to Respondent No. 2 seeking copy of the trial court judgment. On 12.06.2002, the judgment of the trial court was furnished by Respondent No. 2 to Respondent No. 1.

106. Rule V of the Mercy Petition Rules which exclusively provides that the mercy petition should be sent along with the judgments and related documents immediately, states as follows:

> "In all cases in which a petition for mercy from a convict under sentence of death is to be forwarded to the Secretary to the Government of India, Ministry of Home Affairs, the Lieut Governor/Chief Commissioner/ Administrator or the Government of the State concerned as the case may be shall forward such petition as expeditiously as possible along with the records of the case and his or its observations in respect of any of the grounds urged in the petition".

107. There is no explanation for the delay of about five months in sending the papers to Respondent No. 1. On 07.12.2002, Respondent No. 2 wrote to Respondent No. 1

seeking information about the status of the petitioners' mercy petition. Twelve reminders were sent between 17.01.2003 and 14.12.2005.

108. On 27.07.2003, Respondent No. 4-Superintendent of Jail, in accordance with the provisions of the U.P. Jail Manual, wrote to Respondent No. 2 seeking information about the petitioners' pending mercy petitions. Thereafter, twenty-seven reminders were sent by the prison authorities between 29.09.2003 and 29.05.2006.

109. On 08.04.2004, Respondent No. 1 advised the President to reject the mercy petition. On 21.07.2004, the President returned the petitioners' file (along with the files of ten other death-row convicts) to Respondent No. 1 for the advice of the new Home Minister. On 20.06.2005, Respondent No. 1 advised the President to reject the mercy petitions. On 24.12.2010, Respondent No. 1 recalled the files from the President. On 13.01.2011, the said files were received from the President. On 19.02.2011, Respondent No. 1 advised the President to reject the mercy petition.

110. On 14.11.2011, Respondent No. 2 wrote to Respondent No. 1 seeking information about the status of the petitioners' mercy petitions.

111. On 29.10.2012, the President returned the file for the advice of the new Home Minister. On 16.01.2013, Respondent No. 1 advised the President to reject the mercy petition. On 08.02.2013, the President rejected the mercy petitions.

112. On 05.04.2013, the petitioners heard the news reports that their mercy petitions have been rejected by the President of India. It is asserted that they have not received any written confirmation till this date.

113. On 06.04.2013, the petitioners authorized their family members, viz. Mr. Shatrughan Chauhan and Mr. Mahinder Chauhan, to file an urgent writ petition in this Court, which was ultimately numbered as Writ Petition (Crl.) No. 55 of 2013. By

order dated 06.04.2013, this Court stayed the execution of the petitioners. Only on 20.06.2013, the prison authorities informed vide letter dated 18.06.2013 that the petitioners' mercy petitions have been rejected by the President.

114. All the above details have been culled out from the writ petitions filed by the petitioners and the counter affidavit filed on behalf of the Union of India as well as the State of Uttar Pradesh. The following are the details relating to disposal of mercy petitions by the Governor and the President:

Custody suffered till date	6.10.1996 – 17.12.2013	17 years 2 months
Custody suffered under sentence of death	19.12.1997 – 17.12.2013	16 years
Total delay since filing of mercy petition till prisoner informed of rejection by the President	27.04.2001 – 20.06.2013	12 years 2 months
Delay in disposal of mercy petition by Governor		
First petitioner	9.3.2001 – 28.01.2002	10 months
Second petitioner	27.04.2001 – 28.01.2002	9 months
Delay in disposal of mercy petition by the President	28.01.2002 – 08.02.2013	11 years
Delay in communicating rejection by the President	8.02.2013 – 20.06.2013	4 months

115. There is no dispute that these petitioners killed five members of their family – two adults and three children over

property dispute. It is a heinous crime and they were awarded death sentence which was also confirmed by this Court. However, the details furnished in the form of affidavits by the petitioners, counter affidavit filed by Respondent Nos. 1 and 2 as well as the records produced by Mr. Luthra, learned Additional Solicitor General, clearly show that there was a delay of twelve years in disposal of their mercy petitions. To put it clear, the Governor of Uttar Pradesh took around ten months to reject the mercy petitions (09.03.2001 to 28.01.2002) and the President rejected the petitions with a delay of eleven years (28.01.2002 to 08.02.2013). We also verified the summary prepared by the Ministry of Home Affairs for the President and the connected papers placed by learned ASG wherein no discussion with regard to the same was attributed to.

116. On going through various details, stages and considerations and in the light of various principles discussed above and also of the fact that this Court has accepted in a series of decisions that undue and unexplained delay in execution is one of the supervening circumstances, we hold that in the absence of proper, plausible and acceptable reasons for the delay, the delay of twelve years in considering the mercy petitions is a relevant ground for the commutation of death sentence into life imprisonment. We are also satisfied that the summary prepared by the Ministry of Home Affairs for the President makes no mention of twelve years' delay much less any plausible reason. Accordingly, both the death convicts – Suresh and Ramji have made out a case for commutation of their death sentence into life imprisonment.

Writ Petition (Crl.) No. 34 of 2013

117. This writ petition is filed by Shamik Narain which relates to four death convicts, viz., Bilavendran, Simon, Gnanprakasam and Madiah aged 55 years, 50 years, 60 years and 64 years respectively.

118. The case emanates from the State of Karnataka. According to the petitioners, the accused persons are in

custody for nearly 19 years and 7 months. All the persons were charged under IPC as well as under the provisions of the TADA. By judgment dated 29.09.2001, the Designated TADA Court, Mysore convicted the accused persons for the offence punishable under TADA as well as IPC and the Arms Act and sentenced them *inter alia* to undergo rigorous imprisonment for life.

119. All the accused persons preferred Criminal Appeal being Nos. 149-150 of 2002 before this Court which were admitted by this Court. The State of Karnataka also filed a Criminal Appeal being No. 34 of 2003 against the judgment dated 29.09.2001 praying for enhancement of sentence from life imprisonment to death sentence. On 09.01.2003, this Court refused to accept the claim of the State of Karnataka and dismissed its appeal on the ground of limitation. However, this Court, by judgment and order dated 29.01.2004, *suo motu* enhanced the sentence of the accused persons from life imprisonment to death. In the same order, this Court confirmed the conviction and sentence imposed by the TADA Court and dismissed the appeals preferred by the accused.

120. On 12.02.2004, separate mercy petitions were filed by the petitioners and the Superintendent, Central Jail, Belgaum forwarded the same to Respondent No. 1.

121. On 29.04.2004, the review petitions filed by the petitioners were also dismissed by this Court.

122. On 29.07.2004, the Governor rejected the mercy petitions and, according to the petitioners, they were never informed about the same.

123. On 07.08.2004, Respondent No. 2 forwarded the mercy petitions to Respondent No. 1 which were received on 16.08.2004. Here again, there is no explanation for the delay of six months from 12.02.2004, when the mercy petitions were first forwarded to Respondent No. 1.

124. On 19.08.2004, Respondent No. 1 requested Respondent No. 2 for a copy of the trial court judgment. Here again, the trial court judgment and other relevant documents should have been sent to Respondent No. 1 along with the mercy petitions. We have already extracted Rule V of the Mercy Petition Rules relating to forwarding of the required materials as expeditiously as possible. On 30.08.2004, Respondent No. 2 sent a copy of the trial court judgment to Respondent No. 1 which was received on 09.09.2004.

125. On 18.10.2004, the petitioners' gang leader Veerappan was killed in an encounter by a Special Task Force and his gang disbanded.

126. On 29.04.2005, the Home Minister advised the President to reject the mercy petitions. There was no further progress in the petitions till the files were recalled from the President and received back in the Ministry of Home Affairs, i.e., six years later on 16.05.2011. Though separate counter affidavit has been filed by Respondent No. 1, there is no explanation whatsoever for the delay of six years. Learned counsel for the petitioners pointed out that it is pertinent to take note of the fact that two consecutive Presidents had deemed it fit not to act on the advice suggested. In any event, this procrastination violated the petitioners' right under Article 21 of the Constitution by inflicting six additional years of imprisonment under the constant fear of imminent death not authorized by judgment of any court.

127. On 28.02.2006, Curative Petition being No. 6 of 2006 was dismissed by this Court.

128. In the meanwhile, letters were sent by the petitioners to the President of India highlighting their grievance about their procrastination for about last twelve years. The information furnished by the Ministry of Home Affairs under the Right to Information Act shows that mercy petitions submitted after the petitions of the petitioners were given priority and decided

earlier while the mercy petitions of the petitioners were kept pending.

129. On 16.05.2011, the mercy petitions were recalled by Respondent No. 1 from the President. Here again, there is no explanation for the delay of six years. On 25.05.2011, the Home Minister advised the President for the second time to reject the mercy petition. On 19.11.2012, the President returned the file stating that the views of the new Home Minister may be ascertained. Here again, there is no explanation for the delay of 1 ½ years while the file was pending with the President. On 16.01.2013, the Home Minister advised the President for the third time to reject the mercy petitions. On 08.02.2013, the President rejected the mercy petitions and Respondent No. 2 was informed vide letter dated 09.02.2013.

130. It is the grievance of the petitioners that though they were informed orally and signatures were obtained, the prison authorities refused to hand over the copy of the rejection letter to them or to their advocate. The details regarding delay in this matter are as follows:

Custody suffered till date	14.07.1993 – 17.12.2013	20 years 5 months
Custody suffered under sentence of death	29.01.2004 – 17.12.2013	9 years 11 months
Total delay in disposal of the mercy petitions	12.02.2004 – 08.02.2013	9 years

131. The delay of six months (12.02.2004 – 07.08.2004) when the mercy petitions were being considered by the Governor is attributed to Respondent No. 1 because the mercy petition had been sent to Respondent No. 1 on 12.02.2004 and also because Respondent No. 2/Governor did not have jurisdiction to entertain the mercy petitions and even if clemency had been granted, it would have been null and void.

132. From the particulars furnished by the petitioners as well as the details mentioned in the counter affidavit of Respondent Nos. 1 and 2, we are satisfied that the delay of nine years in disposal of their mercy petitions is unreasonable and no proper explanation has been offered for the same. Apart from the delay in question, according to us, it is important to note that delay is undue and unexplained. Certain other aspects also support the case of the petitioners for commutation.

133. We have already mentioned that on 29.01.2004, this Court, by its judgment and order, *suo motu* enhanced the sentence from life imprisonment to death. It is relevant to point out that when the State preferred an appeal for enhancement of the sentence from life to death, this Court rejected the claim of the State, however, this Court *suo motu* enhanced the same and the fact remains that the appeal filed by the State for enhancement was rejected by this Court.

134. In the earlier part of our discussion, we have already held that the decision in *Devender Pal Singh Bhullar (supra)*, holding that the cases pertaining to offences under TADA have to be treated differently and on the ground of delay in disposal of mercy petition the death sentence cannot be commuted, is *per incuriam*. Further, this Court in *Yakub Memon vs. State of Maharashtra* (Criminal Appeal No. 1728 of 2007) delivered on 21.03.2013 and in subsequent cases commuted the death sentence passed in TADA case to imprisonment for life.

135. Taking note of these aspects, viz., their age, in custody for nearly twenty years, unexplained delay of nine years in disposal of mercy petitions coupled with other reasons and also of the fact that the summary prepared by the Ministry of Home Affairs for the President makes no mention of the delay of 9 ½ years and also in the light of the principles enunciated in the earlier paragraphs, we hold that the petitioners have made out a case for commutation of death sentence to imprisonment for life.

Writ Petition (Crl.)No. 187 of 2013

136. Praveen Kumar, aged about 55 years, hailing from Karnataka, has filed this petition. He was charged for murdering four members of a family and ultimately by judgment dated 05.02.2002, he was convicted under Sections 302, 392 and 397 IPC and sentenced to death. The petitioner was defended on legal aid.

137. By judgment dated 28.10.2002, death sentence was confirmed by the Division Bench of the High Court of Karnataka and by order dated 15.10.2003, this Court dismissed the appeal filed by the petitioner.

138. On 25.10.2003, the petitioner sent the mercy petition addressed to the President of India wherein he highlighted that he has been kept in solitary confinement since the judgment of the trial Court, i.e., 05.02.2002.

139. On 12.12.2003, Respondent No. 1 requested Respondent No. 2 to consider the petitioner's mercy petition under Article 161 of the Constitution and intimate the decision along with the copies of the judgment of the trial Court, High Court, police diary and court proceedings. Respondent No. 1 also received mercy petition signed by 260 persons. By order dated 15.09.2004, the Governor rejected the mercy petition. On 30.09.2004, Respondent No. 2 informed Respondent No. 1 that the petitioner's mercy petition has been rejected by the Governor.

140. On 18.10.2004, Respondent No. 1 requested Respondent No. 2 for the second time to send the judgment of the trial Court along with the police diary and court proceedings. On 20.12.2004, according to Respondent No. 1, Respondent No. 2 sent the requested documents to Respondent No. 1 but Respondent No. 1 claimed that the same were in Kannada. On 07.01.2005, Respondent No. 1 returned the documents sent by Respondent No. 2 with a request to provide English translation.

The State Government was again reminded in this regard on 05.04.2005, 20.04.2005, 04.06.2005 and 21.07.2005. Even after these reminders, the translated documents were not sent.

141. On 06.09.2005, the mercy petition of the petitioner-Praveen Kumar was processed and examined without waiting for the copy of the judgment of the trial Court and submitted for consideration of the Home Minister. The Home Minister approved the rejection of the mercy petition. On 07.09.2005, Respondent No. 1 advised the President to reject the petitioner's mercy petition. On 14.03.2006, Respondent No. 2 sent the translated documents to Respondent No. 1.

142. On 20.08.2006, the petitioner wrote to the President referring to his earlier mercy petition dated 25.10.2003 stating that for the last four years and seven months he has been languishing in solitary confinement under constant fear of death.

143. On 29.09.2006, the petitioner wrote to the Chief Minister of Karnataka referring to his earlier mercy petition dated 25.10.2003 highlighting the same grievance.

144. The information received under RTI Act shows that mercy petitions submitted after the petition of the petitioner were given priority and decided earlier while the mercy petition of the petitioner was kept pending.

145. On 01.07.2011, the petitioner's mercy petition was recalled from the President and received by Respondent No. 1 and thereafter it remained pending consideration of the President of India for five years and 10 months. There is no explanation for this inordinate delay.

146. On 14.07.2011, Respondent No. 1 advised the President to reject the petitioner's mercy petition. The file remained with the President till 29.10.2012, i.e. for 1 year 3 months and no explanation was offered for this delay.

147. On 29.10.2012, the President returned the petitioner's mercy petition to Respondent No. 1 ostensibly on the ground of an appeal made by 14 former Judges. However, this appeal, as is admitted in the counter affidavit filed by Respondent No. 1 itself, "had not indicated any plea in respect of Praveen Kumar". On 16.01.2013, Respondent No. 1 advised the President to reject the petitioner's mercy petition.

148. On 26.03.2013, the President rejected the petitioner's mercy petition. On 05.04.2013, the petitioner heard news reports that his mercy petition has been rejected by the President of India. He has not received any written confirmation of the same till date.

149. On 06.04.2013, this Court stayed the execution of the sentence in Writ Petition (Crl.) No. 56 of 2013 filed by PUDR. The following details show the delay in disposal of petitioner's mercy petition by the Governor and the President:

Custody suffered till date	2.3.94-19.2.95+1.2.99-17.12.13	15 years 9 months
Custody suffered under sentence of death	04.02.02-17.12.13	11 years 10 months
Total delay since filing of mercy petition till prisoner coming to know of rejection by President	25.10.2003-5.4.2013	9 years 5 months
Delay in disposal of mercy petition by Governor	25.10.03-30.09.04	11 months
Delay in disposal of mercy petition by President	30.09.04-26.03.2013	8 ½ years

150. Though learned counsel for the petitioner highlighted

that the trial Court relied on certain decisions which were later held to be *per incuriam, i*n view of the fact that there is a delay of 9½ years in disposal of the mercy petition, there is no need to go into the aspect relating to the merits of the judicial decision. On the other hand, we are satisfied that even though the Union of India has filed counter affidavit, there is no explanation for the huge delay. Accordingly, we hold that the delay in disposal of the mercy petition is one of the relevant circumstances for commutation of death sentence. Further, we perused the notes prepared by the Ministry of Home Affairs as well as the decision taken by the President. The summary prepared by the Ministry of Home Affairs for the President makes no mention of the unexplained and undue delay of 9 ½ years in considering the mercy petition. The petitioner has rightly made out a case for commutation of death sentence into life imprisonment.

Writ Petition (Crl.)No. 193 of 2013

151. Gurmeet Singh, aged about 56 years, hailing from U.P. has filed this petition. According to him, he is in custody for 26 years.

152. The allegation against the petitioner is that he murdered 13 members of his family on 17.08.1986. By order dated 20.07.1992, the trial Court convicted the petitioner under Sections 302, 307 read with Section 34 IPC and awarded death sentence.

153. On 28.04.1994, the Division Bench of the Allahabad High Court pronounced the judgment in the petitioner's Criminal Appeal No. 1333 of 1992. The two Hon'ble Judges disagreed with each other on the question of guilt, Malviya, J. upheld the petitioner's conviction and death sentence and dismissed his appeal, while Prasad, J. acquitted the petitioner herein and allowed his appeal.

154. On 29.02.1996, in terms of Section 392 of the Code,

the papers were placed before a third Judge (Singh, J.), who agreed with Malviya, J. and upheld the petitioner's conviction and sentence.

155. On 08.03.1996, the Division Bench dismissed the appeal of the petitioner herein and confirmed his death sentence.

156. On 28.09.2005, this Court dismissed the petitioner's appeal and upheld the death sentence passed on him. The petitioner was represented on legal aid.

157. On 06.10.2005, the petitioner sent separate mercy petitions through jail addressed to the President of India and the Governor of Uttar Pradesh.

158. On 24.12.2005, the Prison Superintendent sent a radiogram to Respondent No. 2 reminding about the pendency of the mercy petition. Thereafter, 10 radiograms/letters were sent till 16.05.2006. These 11 reminders are itself testimony of the unreasonable delay by the State Government in deciding the petitioner's mercy petition.

159. On 04.04.2006, the Governor rejected the petitioner's mercy petition.

160. On 26.05.2006, the fact of the rejection by the Governor was communicated to Respondent No. 1 and to the Prison authorities after a delay of more than 1½ months.

161. On 16.06.2006, the President forwarded to Respondent No. 1 letter dated 02.06.2006 of the Additional District & Sessions Judge, Shahjahanpur, addressed to Respondent No. 2 requesting to intimate the status of the petitioner's mercy petition pending before the President.

162. On 07.07.2006, Respondent No. 1 forwarded the letter of the Additional District and Sessions Judge to

Respondent No. 2 with a request to forward the petitioner's mercy petition as the same has not been received along with the judgment of the courts, police diary etc.

163. On 09.02.2007, Respondent No. 2 sent the mercy petition and other related documents to Respondent No. 1, i.e., 10 months after the mercy petition was rejected by the Governor. The Mercy Petition Rules, which we have already extracted in the earlier part, explicitly provide that the mercy petition and the related documents should be sent immediately. There is no explanation for the delay of 10 months in sending the papers to Respondent No. 1.

164. On 18.05.2007, Respondent No. 1 advised the President to reject the petitioner's mercy petition.

165. On 04.11.2009, the petitioner's mercy petition file was received from the President's office by Respondent No. 1.

166. Again on 09.12.2009, Respondent No. 1 advised the President to reject the petitioner's mercy petition. There was no progress in the petitioner's case for the next 2 years and 11 months, i.e., till 29.10.2012.

167. On 29.10.2012, the President returned the petitioner's mercy petition to Respondent No. 1, ostensibly on the pretext of an appeal made by 14 former judges, even though, as is admitted in the counter affidavit filed by Respondent No. 1, this appeal does not in any way relate to the case of the petitioner.

168. On 16.01.2013, Respondent No. 1 advised the President to reject the petitioner's mercy petition.

169. On 01.03.2013, the President of India rejected the petitioner's mercy petition.

170. On 05.04.2013, the petitioner heard the news reports

that his mercy petition has been rejected by the President of India. However, till date the petitioner has not received any official written communication that his mercy petition has been rejected either by the Governor or by the President.

171. On 06.04.2013, this Court stayed the execution of the death sentence of the petitioner in W.P. (Crl.) No. 56 of 2013 filed by the Peoples' Union for Democratic Rights (PUDR).

172. On 20.06.2013, 3 ½ months after the actual rejection of the petitioner's mercy petition, the news was communicated to the prison authorities. The following are the details regarding the delay in disposal of mercy petition by the Governor and the President:

Custody suffered till date	16.10.1986-17.12.2013 less 1 year of under-trial bail	26 years 2 months
Custody suffered under sentence of death	20.07.1992-17.12.2013	21 years 5 months
Total delay since filing of mercy petition till prisoner coming to know of rejection by President	6.10.2005-20.06.2013	7 years 8 months
Delay in disposal of mercy petition by Governor	6.10.2005-4.4.2006	6 months
Delay in disposal of mercy petition by President	4.4.2006-1.3.2013	6 years 11 months
Delay in communicating rejection to petitioner	1.3.2013-20.06.2013	3 ½ months

The above details clearly show that there is a delay of 7 years 8 months in disposal of mercy petition by the Governor and the

President.

173. Though Respondent No. 1 has filed a separate counter affidavit, there is no acceptable reason for the delay of 7 years 8 months. In the absence of adequate materials for such a huge delay, we hold that the delay is undue and unexplained.

174. In the file of the Home Ministry placed before us, at pages 31 & 32, the following recommendations have been made for commutation of death sentence to life imprisonment which are as under:

> "I think that in this case too, we can recommend commutation of death sentence to life imprisonment for two reasons:
>
> (1) There was a disagreement amongst the Hon. Judges of the High Court implying thereby that there was some doubt in the mind of at least one Hon. Judge that this might not be the 'rarest of the rare cases'.
>
> (2) Unusual long delay in investigation and trial is another reason. This kind of submission was also made by the learned amicus curiae but was disregarded by the Court. I think the submission should have been accepted.
>
> Accordingly, I suggest that we may recommend that the death sentence of Sh. Gurmeet Singh be commuted to that of life imprisonment but he would not be allowed to come out of prison till he lives.
>
> Sd/-"

However, this was not agreed to by the Home Minister.

175. In view of the reasons and discussion in the earlier part of our order, the petitioner-convict is entitled to commutation of death sentence into life imprisonment. Even in

the summary prepared by the Ministry of Home Affairs for the President makes no mention of the delay of 7 years 8 months. We are satisfied that the petitioner has made out a case for commutation of death sentence into life imprisonment.

Writ Petition (Crl.) No. 188 of 2013

176. Sonia and Sanjeev Kumar, aged about 30 and 38 years respectively, hailing from Haryana, have filed this petition. According to them, they are in custody for about 12 years.

177. On 27.05.2004, both of them were convicted for the offence punishable under Section 302 and sentenced to death by the trial Court. By order dated 12.04.2005, the High Court confirmed their conviction but modified their sentence of death into life imprisonment. The order of the High Court was challenged before this Court in Criminal Appeal No. 142 of 2005 and Criminal Appeal No. 894 of 2005 and Criminal Appeal No. 895 of 2006. By order dated 15.02.2007, this Court upheld their conviction and enhanced the imprisonment for life to death sentence.

178. In February, 2007, the petitioners filed a mercy petition before the Governor of Haryana. Similar mercy petitions were sent to the President.

179. On 23.08.2007, the Review Petitions being Nos. 260-262 of 2007 filed by the petitioners were dismissed.

180. On 31.10.2007, Respondent No. 2 informed Respondent No. 1 that the mercy petitions filed by the petitioners have been rejected by the Governor of Haryana and forwarded the relevant documents.

181. On 08.02.2008, Respondent No. 1 advised the President to reject the petitioner's mercy petitions. The mercy petitions remained pending with the President till 16.04.2009.

182. On 16.04.2009, the President sent the petitioners' file along with the first petitioner's letter dated 17.02.2009 to reject their petitions conveying their difficult position to continue with their life to Respondent No. 1.

183. On 20.05.2009, Respondent No. 1 advised the President for the second time to reject the petitioners' mercy petitions.

184. On 04.02.2010, the President returned the petitioners' file to Respondent No. 1 seeking clarification whether the first petitioner's request to reject the mercy petition amounts to withdrawal of original mercy petition and if so, is there further need to reject the petition? On 17.02.2010, Respondent No. 1 referred the President's query to the Law Department. On 05.03.2010, Respondent No. 1 advised the President for the 3rd time to reject the petitioners' mercy petitions. On 03.01.2012, upon the request of Respondent No. 1, the President returned the petitioners' file to Respondent No. 1. On 18.01.2012, Respondent No. 1 advised the President for the 4th time to reject the petitioners' mercy petitions.

185. On 29.10.2012, the President returned the petitioners' file back to Respondent No. 1 in the light of the appeal made by 14 former judges. It is pointed out by learned counsel that admittedly the appeal was made for other prisoners and not for the petitioners and so there was no need to return the files.

186. On 29.01.2013, since it was found that the judges' appeal did not pertain to the petitioners, Respondent No. 1 advised the President for the 5th time to reject the petitioners' mercy petitions. On 21.02.2013, the petitioners, anxious for a decision on their mercy petitions, wrote to the President again reiterating their plea for mercy.

187. On 28.03.2013, the President returned the petitioners' file to Respondent No. 1, supposedly on account

of the petitioners' letter dated 21.02.2013. On 06.06.2013, Respondent No. 1 advised the President for the 6th time to reject the petitioners' mercy petitions "as no mitigating circumstance was found". Finally, on 29.06.2013, the President rejected the petitioners' mercy petitions.

188. On 13.07.2013, the petitioners' family members received a letter dated 11.07.2013 from the prison authorities informing that the petitioners' mercy petitions have been rejected by the President of India. The following are the details regarding the delay in disposal of the mercy petition by the Governor and the President:

Custody suffered till date	26.08.2001/ 19.09.2001- 17.12.2013	12 years 3 months
Total delay since filing of mercy petition till prisoner coming to know of rejection by President	Feb.2007- 13.07.2013	6 years 5 months
Delay in disposal of mercy petition by Governor	Feb. 2007- 31.10.2007	8 months
Delay in disposal of mercy petition by President	31.10.2007- 29.06.2013	5 years 8 months

189. In view of the above details as well as the explanation offered in the counter affidavit filed by Respondent No. 1, we hold that the delay in disposal of mercy petitions is undue and unexplained and in the light of our conclusion in the earlier part of our order, the unexplained and undue delay is one of the circumstances for commutation of death sentence into life imprisonment.

190. In addition, due to unbearable mental agony after confirmation of death sentence, petitioner No.1 attempted

suicide. In view of our conclusion that the delay in disposal of mercy petitions is undue and unexplained, we hold that the petitioners have made out a case for commutation of death sentence into life imprisonment.

Writ Petition(Crl.)No. 192 of 2013

191. PUDR has filed this petition for Sundar Singh, who is hailing from Uttarkhand. On 30.06.2004, Sundar Singh was convicted by the Sessions Court under Sections 302, 307 and 436 IPC and sentenced to death. On 20.07.2005, the High Court confirmed the death sentence passed by the trial Court. On 16.09.2010, this Court dismissed the appeal filed by Sundar Singh through legal aid.

192. On 29.09.2010, Sundar Singh sent a mercy petition through jail authorities addressed to the President of India stating therein that he had committed the offence due to insanity and that he repented for the same each day and shall continue to do for the rest of his life.

193. On 29.09.2010, the prison authorities filled in a nominal roll for Sundar Singh in which they stated that Sundar Singh's mental condition is abnormal. The said form was sent to Respondent Nos. 1 and 2. The prison authorities noticed that Sundar Singh's behaviour had become extremely abnormal. He was initially treated for mental illness by the prison doctor and, thereafter, he was examined by doctors from the HMM District Hospital, Haridwar. Thereafter, when he continued to show signs of insanity, the prison authorities called a team of psychiatrists from the State Mental Institute, Dehradun to examine him. The psychiatrists found him to be suffering from schizophrenia and recommended that he be sent to Benaras Mental Hospital. On 15.10.2010, Sundar Singh was admitted to Benaras Mental Hospital and he remained there for 1 ½ years till his discharge on 28.07.2012 with further prescriptions and advice for follow up treatment.

194. On 19.10.2010, Respondent No. 1 informed Respondent No. 2 in writing that Sundar Singh's mercy petition should be first sent to the Governor.

195. Based on the direction of Respondent No. 1, on 20.10.2010, the prison authorities forwarded the mercy petition of Sundar Singh to the Governor. On 21.01.2011, the Governor rejected the mercy petition of Sundar Singh and Respondent No. 2 forwarded the same to the President.

196. On 24.05.2011, Respondent No. 1 wrote to Respondent No. 2 asking for a copy of Sundar Singh's nominal roll, medical record and crime record. On 01.06.2011, Respondent No. 2 sent Sundar Singh's nominal roll and medical report to Respondent No. 1. In the covering letter, Respondent No. 2 informed Respondent No. 1 that Sundar Singh had been declared to be a mental patient by medical experts and was admitted to Varanasi Mental Hospital for treatment on 11.12.2010.

197. On 03.02.2012, Respondent No. 1 advised the President to reject the mercy petition filed by Sundar Singh. On 30.10.2012, the President returned the mercy petition of Sundar Singh ostensibly because of the petition sent by 14 former judges wherein there was a specific reference to the case of Sundar Singh.

198. On 28.12.2012, Sundar Singh was examined by a doctor in prison who noted that he was "suicidally inclined" and prescribed him very strong anti psychotic medicines. Despite that, on 01.02.2013, Respondent No. 1 advised the President to reject the mercy petition of Sundar Singh.

199. On 16.02.2013, the prison authorities again called a team of three psychiatrists from the State Mental Hospital, Dehradun, who examined Sundar Singh. In their report, they mentioned that Sundar Singh had already been diagnosed as suffering from undifferentiated schizophrenia. They noted that

he was "unkempt and untidy, cooperative but not very much communicative" and his "speech is decreased in flow and content" and "at times is inappropriate and illogical to the question asked." They concluded as follows:

> "he is suffering from chronic psychotic illness and he needs long term management".
>
> The prison authorities sent this report to Respondent No. 1.

200. On 31.03.2013, the President rejected the mercy petition of Sundar Singh. On 02.04.2013, Respondent No. 1 informed Respondent No. 2 that the President has rejected the mercy petition of Sundar Singh. On 05.04.2013, Sundar Singh was orally informed by the prison authorities that his mercy petition had been rejected by the President but he did not appear to understand and did not react.

201. On 06.04.2013, this Court stayed the execution of death sentence of Sundar Singh in W.P.(Crl.) No. 56 of 2013 filed by PUDR.

202. On 31.10.2013, at the instance of the prison authorities, Dr. Arun Kumar, Neuro Psychiatrist from the State Mental Institute, Dehradun was brought to the prison to examine Sundar Singh. He opined as follows:

> "Sundar Singh is suffering from schizophrenia (undifferentiated) and requires long term bed rest. He is not mentally fit to be awarded for death penalty."

203. We have carefully perused all the details. Though there is a delay of only 2 ½ years in considering the mercy petition of Sundar Singh, the counter affidavit as well as various communications sent by the jail authorities clearly show that Sundar Singh was suffering from mental illness, i.e., Schizophrenia.

204. In the earlier part of our order, while considering "mental illness", we have noted Rules 386 and 387 of the U.P. Jail Manual which are applicable to the State of Uttarakhand also, which clearly show that when condemned convict develops insanity, it is incumbent on the part of the Superintendent to stay the execution of sentence of death and inform the same to the District Magistrate. In the reply affidavit filed on behalf of Respondent Nos. 2-4 insofar as mental illness of the convict – Sundar Singh is concerned, it is stated as under:

> "16. As far as illness of the convict Sunder Singh is concerned, he has been regularly medically examined as per the provisions of the jail manual, he was examined by Medical Officers of HMM District Hospital, Haridwar and thereafter on the recommendation of the Doctors of State Mental Health Institute, Dehradun, the Prisoner was sent to Mental Hospital, Varanasi on 15.10.2010 for examination and treatment.
>
> 17. Convict Sunder Singh was admitted in the Mental Hospital, Varansai for treatment and after his treatment, Board of Visitors under Chairpersonship of District Judge, Varansai, convict Sunder Singh was found fit and, therefore, they discharged the convict Sunder Singh along with certain prescription and advice on 28.7.2012 from Mental Hospital, Varanasi…
>
> 18. In pursuance of above advice of the Doctors of Mental Hospital, Varansai, on the request of the Jail Administration to State Mental Hospital, Selaqui, Dehradun, a panel of three Doctors visited on 16.2.2013 and examined the Convict Sunder Singh and opined that on the basis of information and present assessment, he is suffering from chronic psychiatric illness and he need long term treatment…
>
> 19. Convict has thereafter been regularly provided due

medical assistance in the form of medicine and examination. On 31.10.2013, Dr. Arun Kumar, neuro psychiatric from State Mental Health Institute, Selaqui, Dehradun visited to the District Jail for examination of the Convict Sunder Singh and opined: Impression: Sunder Singh is suffering from Schizophrenia (undifferentiated) and require long term bed rest. He is not mentally fit to be awarded for death penalty…

20. On 5.11.2013, on the aforesaid report dated 31.10.2013, Chief Medical Superintendent, State Medical Health Institute Selaqui Dehradun, has been requested to send a panel of Doctors for thorough examination of the mental state of the said Prisoner Sunder Singh. Upon medical examination by a board of Doctors and receipt of the examination report the State and Jail Authorities shall act in accordance with law.

In view of the above submission, this Hon'ble Court may kindly pass appropriate orders disposing of the present petition. The answering respondent is duty bound to comply the orders passed by the Hon'ble Court."

Along with the reply affidavit, the State has fairly enclosed the medical reports, various correspondence/intimation about the Schizophrenia of lunatic nature/mental illness of the petitioner suffering from Schizophrenia. Further, even on 24.05.2011, the Government of India, Ministry of Home Affairs, after receipt of mercy petition of the condemned prisoner – Sundar Singh requested the Principal Secretary, Government of Uttarakhand, Secretariat, Dehradun to furnish the following documents/ information at the earliest:

(i) Present age of the prisoner along with nominal roll.

(ii) Medical report of the prisoner

(iii) Previous crime record, if any, of the prisoner.

205. Pursuant to the same, Shri Rajeev Gupta, Principal Secretary, Government of Uttarakhand furnished all the details to the Joint Secretary (Judicial), Ministry of Home Affairs, Government of India, Jaisalmer House, New Delhi enclosing various medical reports. Learned counsel for the State has also placed mental status of Sundar Singh duly certified by the State Mental Health Institute, Dehradun which is as under:

"MENTAL STATUS EXAMINATION REPORT

Prisoner Name: Mr. Sunder Singh, age about 40 yrs/male, S/o Mr. Har Singh with mark of identification – Black mole over left side lower part of neck, has been assessed by following experts on 16/2/2013 at District Jail, Haridwar.

Dr. J.S. Bisht, Psychiatrist

Dr. Arun Kumar, Psychiatrist

Dr. Pratibha Sharma, Psychiatrist

As per information by jail staff and fellow prisoners above mentioned prisoner is not interacting with others, not concerned about personal hygiene and would like to stay alone.

Previous record show that he was referred to Banaras Mental Hospital on 11/12/2010 for Management after being diagnosed as Undifferentiated Schizophrenia by previous psychiatrist.

Current mental status examination shows that he is unkempt and untidy, cooperative but not very much communicative. Speech is decreased in flow and content. At time it was inappropriate and illogical to the question asked. Affect is blunted. Thought flow is decreased and there is poor awareness…

OPINION

On the basis of information and present assessments he is suffering from chronic Psychotic illness and he needs long term treatment.

(Signature of Dr. illegible) (Signature of Dr. illegible)

(Signature of Dr. illegible)

Date 16/2/2013

Dr. J.S. Bisht Dr. Arun Kumar Dr. B. Pratibha Sharma

Psychiatrist

Thumb Date 16/2/13 Distt. Jail Haridwar"

MENTAL STATUS EXAMINATION REPORT

Prisoner Name: Mr. Sunder Singh, age about 41 years/ male, S/o Mr. Har Singh

Identification Mark: Black mole over left side lower part of neck.

Index prisoner is examined by me at District Jail, Haridwar.

As per information by jail staff, prisoner records and current mental status examination, the sufferings from undifferentiated Schizophrenia which is chronic illness. The patient/prisoner require long term treatment to remain in remission period. Person with mentioned diagnose remain in remission and cannot be said as cured.

Impression: Sunder Singh is suffering from Schizophrenia (Undifferentiated) and required long term treatment.

He is not mentally fit to be awarded for death penalty.

(Signature of Dr. Arun Kumar)
Date 31/10/13
Dr. Arun Kumar
(MBBS, DPM, DNB)
Neuropsychiatries
State Mental Health Institute
Salequi Dehradun
Thumb Attested LTI of Sunder Singh

(Signature of Dr. Arun Kumar)
Date 31/10/13
Dr. Arun Kumar
(MBBS, DPM, DNB)
Neuropsychiatries
State Mental Health Institute
Salequi Dehradun"

206. Even if we agree that there is no undue delay in disposal of the mercy petition by the President, we are satisfied that Sundar Singh is suffering from mental illness, i.e., Schizophrenia as noted by 3 doctors, viz., Dr. J.S. Bisht, Dr. Arun Kumar, and Dr. Pratibha Sharma, Psychiatrists attached to the State Mental Health Institute, Salequi, Dehradun.

207. In the earlier part of our discussion, we have highlighted various Rules from the U.P. Jail Manual which are applicable to the State of Uttarakhand also, various international conventions to which India is a party and the decisions by the U.N.O. regarding award of death sentence and execution of persons suffering from mental illness. Though all the details were furnished by the persons concerned to Respondent No. 1, Ministry of Home Affairs, unfortunately, those aspects were neither adverted to by the Home Minister nor the summary prepared by the Ministry of Home Affairs for the President makes any reference to the mental condition as certified by the competent doctors.

208. We are satisfied that in view of the mental illness, he

cannot be executed. On this ground, the death sentence has to be commuted to life imprisonment. If the condition of Sundar Sigh requires further treatment, we direct the jail authorities to provide all such medical facilities to him.

Writ Petition (Crl.)No. 190 of 2013

209. The death convict Jafar Ali, aged about 48 years, hailing from U.P., has filed the above writ petition. According to him, he is in custody for more than 11 years (single cell confinement).

210. On 14.07.2003, the petitioner was convicted under Section 302 IPC for the murder of his wife and five daughters and was sentenced to death. On 27.01.2004, the Division Bench of the Allahabad High Court confirmed the death sentence passed on the petitioner. On 05.04.2004, the petitioner through legal aid filed SLP (Crl.) No. 1129 of 2004. This Court did not grant special leave and dismissed the SLP *in limine*.

211. On 19.04.2004, the petitioner sent a mercy petition through jail superintendent to the President of India and the Governor of Uttar Pradesh. On 22.04.2004, Respondent No. 4 sent a radiogram to Respondent No. 2 to enquire about the status of the petitioner's mercy petition. Thereafter, between 24.04.2004 and 16.05.2005, 14 more such radiograms/letters were sent by Respondent No. 4 to Respondent No. 2 enquiring about the status of the petitioner's mercy petition. These 15 reminders testify to the unreasonable delay caused by the State Government in deciding the petitioner's mercy petition.

212. On 20.05.2005, one year after the receipt of the mercy petition, Respondent No. 2 wrote to the District Magistrate and the Government Advocate, Allahabad High Court for the trial court as well as the High Court judgments relating to the petitioner's case. Here again, there is no explanation for the delay of 11 months.

213. On 30.09.2005, the Government Advocate, Allahabad High Court sent the High Court judgment in the petitioner's case to Respondent No. 2. Here again, there is no explanation for the delay of four months in sending the judgment.

214. On 28.11.2005, the Governor rejected petitioner's mercy petition. It took one year and seven months in rejecting the petitioner's mercy petition in spite of 15 reminders. On 30.12.2005, the Special Secretary, UP Government informed the Home Ministry, Government of India about the rejection of mercy petition by the Governor.

215. On 22.12.2005, information about the rejection of the mercy petition by the Governor was communicated to the prison authorities one month after its rejection. On 18.01.2006, Respondent No. 1 requested Respondent No. 2 to furnish the petitioner's mercy petition along with the recommendation of the Governor, judgments of the courts and other records of the case.

216. On 17.07.2006, Respondent No. 2 sent the documents to Respondent No. 1 which were requested vide letter dated 18.01.2006 along with a request for an early intimation of the decision on the mercy petition. Here again, there is no explanation for the delay of seven months in sending those documents.

217. As pointed out earlier, Rule V of the Mercy Petition Rules explicitly provides that the mercy petition should be sent along with the judgments and related documents immediately. There is no explanation for this inordinate delay of seven months in sending the papers to Respondent No. 1.

218. On 17.08.2006, Respondent No. 1 advised the President to reject the mercy petition. On 16.01.2007, Respondent No. 2 sent another reminder to Respondent No. 1 regarding the pendency of the petitioner's mercy petition. Thereafter, further 15 reminders were sent on various dates i.e.,

on 06.09.2007, 10.07.2008, 19.02.2009, 17.03.2009, 29.05.2009, 27.07.2009, 10.09.2009, 29.09.2009, 10.11.2009, 14.01.2010, 20.04.2010, 26.07.2010, 30.08.2010, 15.07.2011 and 22.11.2011. These 16 reminders testify the unreasonable delay caused in deciding the petitioner's mercy petition.

219. On 30.09.2011, Respondent No. 1 recalled the files from the President. There is no explanation for this inordinate delay of 5 years and 1 month. On 01.11.2011, Respondent No. 1 advised the President to reject the mercy petition.

220. On 30.10.2012, the President returned the mercy petition to Respondent No. 1 ostensibly on the ground of a petition sent by 14 retired judges to the President. There was no reference of the plea of Jafar Ali in the representation made by 14 retired judges. On 24.01.2013, Respondent No. 1 advised the President to reject the mercy petition. On 14.03.2013, the President rejected the mercy petition, viz., 7 years and 4 months after rejection by the Governor and after 16 reminders sent by the State Government.

221. On 19.03.2013, Respondent No. 1 informed Respondent No. 2 of the rejection of the mercy petition. On 05.04.2013, the petitioner heard the news reports that his mercy petition has been rejected by the President of India.

222. On 06.04.2013, this Court stayed the execution of the petitioner in Writ Petition (Crl.) No. 56 of 2013 filed by PUDR.

223. On 22.06.2013, the prison authorities were informed vide letter dated 18.06.2013 that the President rejected the petitioner's mercy petition. There is no explanation for this delay of three months in informing the prison authorities and the petitioner about the rejection of the mercy petition.

224. On 08.07.2013, Respondent No. 4 informed the petitioner that his mercy petition had been rejected by the President.

225. The details regarding delay in disposal of mercy petitions by the Governor and the President are as follows:

Custody suffered till date	27.07.2002 – 17.12.2013	11 years, 5 months
Custody suffered under sentence of death	14.07.2003 – 17.12.2013	10 years, 5 months
Total delay in disposal of mercy petition	19.04.2004 – 22.06.2013	9 years, 2 months
Delay in disposal of mercy petition by Governor	19.04.2004 – 29.09.2005	1 year, 5 months
Delay in disposal of mercy petition by the President	29.09.2005 – 14.03.2013	7 years, 5 months
Delay in intimating prisoner of rejection of mercy petition by President	14.03.2013 – 22.06.2013	3 months

226. A perusal of the details furnished by the petitioner, counter affidavit filed by the Union of India as well as the State clearly shows that the delay was to the extent of 9 years. Though in the counter affidavit Respondent No. 1 has discussed various aspects including the decision taken by the Home Ministry and the note which was prepared for the approval of the President, the fact remains that there is no explanation at all for taking seven years and five months for disposal of a mercy petition by the President. It is for the executive, viz., the Home Ministry, to explain the reason for keeping the mercy petition for such a long time. To that extent, everyday, after the confirmation of death sentence by this Court is painful for the convict awaiting the date of execution.

227. Accordingly, in view of the unexplained and undue delay of nine years in disposal of mercy petition by the Governor

and the President, we hold that the petitioner is entitled to commutation of death sentence to life.

228. Apart from undue and unexplained delay in disposal of mercy petition, another relevant aspect has not been noted by the Ministry while preparing the notes for the President, viz., when the petitioner preferred special leave to appeal against the decision of the High Court confirming the death sentence, this Court did not grant special leave and dismissed the SLP *in limine*. Though such recourse is permissible inasmuch as since it is a case of death sentence, it is desirable to examine the materials on record first hand in view of time-honoured practice of this Court and to arrive at an independent conclusion on all issues of facts and law, unbound by the findings of the trial court and the High Court. This principle has been highlighted in various decisions including the recent one in *Mohd. Ajmal Kasab vs. State of Maharashtra* (2012) 9 SCC 1.

229. In addition, we also perused the notes prepared by the Ministry of Home Affairs, the decision taken by the Home Ministry and the notes placed for the approval of the President. It is not in dispute that the summary prepared by the Ministry of Home Affairs for the President failed to consider the undue delay and there is no explanation for the same at all.

230. We are satisfied that all these grounds enable this court to commute death sentence into life.

Writ Petition (Crl.) Nos. 191 and 136 of 2013

231. Writ Petition (Crl.) No. 191 of 2013 has been filed by Maganlal Barela, death convict, aged about 40 years, hailing from the State of M.P. and on his behalf, PUDR has filed Writ Petition (Crl.) No. 136 of 2013 for similar relief.

232. The petitioner claims that he is in custody for more than three years (single cell confinement). On 03.02.2011, the petitioner, who is a tribal, was convicted by the Sessions Court

under Section 302 IPC for the murder of his five daughters and under Section 309 IPC and was imposed a sentence of death. On 12.09.2011, the Division Bench of the Madhya Pradesh High Court confirmed the death sentence passed on the petitioner who was represented on legal aid. On 09.01.2012, the petitioner, through legal aid, filed SLP (Crl.) Nos. 329-330 of 2012. This Court did not grant special leave and dismissed the SLP *in limine*.

233. On 02.02.2012, the petitioner sent a mercy petition through jail addressed to the President of India and the Governor of Madhya Pradesh. The mercy petition, which was verified by the prison authorities, stated *inter alia* that the petitioner was suffering from mental illness and was continuously undergoing treatment through Central Jail, Bhopal.

234. On 20.02.2012, the Prison Superintendent, in accordance with Rule 377 of the Madhya Pradesh Prison Manual, submitted a form to the State Government. In column 18, it was stated that his conduct in prison was good. Against column 19, which was for the Prison Superintendent to opine on alteration of the petitioner's sentence, the Superintendent opined as follows:

"Commutation of sentence is recommended".

235. On 20.02.2012, the Prison Superintendent, in accordance with the Government Law and Judiciary Department Circular No. 4837/21 dated 13.12.1982 submitted to the State Government a form entitled "Required Information". The entries made by the Superintendent in the said form stated *inter alia* that the petitioner is not a habitual criminal, he belongs to the weaker section of the society and he is of mental disorder and at present under treatment of Psychiatry Department Hamidia Hospital, Bhopal. Against Column No. 11 which seeks the Superintendent's recommendations, it was stated that, "Commutation of Sentence is recommended".

236. On 07.08.2012, Respondent No. 1 received the petitioner's mercy petition forwarded by Respondent No. 2. There was a delay of six months in forwarding the mercy petition to Respondent No. 1 and no explanation was given by Respondent No. 2 in the counter affidavit.

237. On 31.08.2012, Respondent No. 1 wrote to Respondent No. 2 requesting the petitioner's medical report since in the mercy petition, it was stated that the petitioner is suffering from mental illness. Respondent No. 1 also requested Respondent No. 2 to confirm whether the petitioner had filed a review petition in this Court against the dismissal of his SLP.

238. On 19.10.2012, Respondent No. 1 sent a reminder to Respondent No. 2 about the queries vide letter dated 31.08.2012. On 29.11.2012, Respondent No. 1 sent the second reminder to Respondent No. 2 about the queries. On 26.02.2013, Respondent No. 1 sent a third reminder to Respondent No. 2 about the same.

239. On 25.03.2013, the Jail Superintendent, Central Jail, Indore forwarded the medical report to Respondent No. 1 and it was also informed that the petitioner has not filed a review petition in this Court against the dismissal of his SLP.

240. On 06.06.2013, the Home Minister advised the President to reject the mercy petition. On 16.07.2013, the President rejected the petitioner's mercy petition. There was no reference to the petitioner's mental health report in the note prepared for approval of the President. Likewise, there was no reference to the fact that this Court had rejected the petitioner's SLP *in limine* in a death case.

241. On 27.07.2013, the petitioner was orally informed by the prison authorities that his mercy petition has been rejected by the President of India. The petitioner was neither furnished with any official written communication regarding the rejection of his mercy petition by the President of India nor the petitioner

was informed that his mercy petition has been rejected by the Governor.

242. On 27.07.2013, the Superintendent of the Central Prison, Jabalpur sent a letter to the Icchawar Police Station asking them to inform the petitioner's family to meet the petitioner urgently.

243. On 07.08.2013, this Court stayed the execution of the petitioner in Writ Petition (Crl.) No. 136 of 2013 filed by PUDR. The details regarding delay in disposal of mercy petition are as follows:

Delay by State to send mercy petition to MHA	2.02.2012 – 07.08.2012	6 months
Total delay since mercy petition was filed	2.02.2012 – 27.07.2013	1 year 6 months
Delay by State to send medical report to MHA	31.08.2012 – 25.03.2012	7 months
Delay by President	7.08.2012 – 27.07.2013	1 year

Insofar as the delay is concerned, it cannot be claimed that the same is excessive though there is a delay of one year in disposal of mercy petition by the President. However, during the period of trial before the Sessions court and even after conviction, the petitioner was suffering from mental illness. This is clear from the note made by the Prison Superintendent who opined for alteration of petitioner's sentence from death to life. This important aspect was not noted by the Home Ministry.

244. Another relevant event which was not noticed by the Home Ministry while considering the notes for approval of the President was that the petitioner filed SLP through legal aid and this Court did not grant special leave and dismissed the SLP *in limine*. As highlighted in the previous case, we reiterate that

in case of death sentence, it is desirable to examine all the materials on record first hand in accordance with the time-bound practice of this Court and arrive at an independent conclusion on all the issues of fact and law irrespective of the findings of the trial court and the High Court. Such recourse was not adopted in this case. This was not highlighted in the notes prepared for the approval of the President. As stated earlier, the summary prepared by the Ministry of Home Affairs for the President fails to consider the mental illness as well as the opinion offered by the Prison Superintendent in terms of the M.P. Prison Manual as a ground for commutation of sentence. For all these reasons, more particularly, with regard to his mental illness, we feel that ends of justice would be met by commuting the sentence of death into life imprisonment.

Writ Petition (Crl.) Nos. 139 and 141 of 2013

245. Shivu – death convict, aged about 31 years, hailing from Karnataka, has filed Writ Petition (Crl.) No. 139 of 2013. Jadeswamy, aged about 25 years, also hailing from Karnataka, has filed Writ Petition (Crl.) No. 141 of 2013. Both are challenging the rejection of their mercy petitions on various grounds. According to them, they are in custody for 11 years and 10 months.

246. Both the petitioners were convicted for an offence under Sections 302, 376 read with Section 34 IPC and were sentenced to death. On 07.11.2005, the Karnataka High Court confirmed the petitioners' death sentence. On 13.02.2007, this Court dismissed their appeal and upheld the death sentence awarded to them.

247. On 27.02.2007, both the petitioners filed separate mercy petitions addressed to the Governor of Karnataka and the President of India through the Prison Superintendent.

248. On 21.03.2007, Respondent No. 1 wrote to Respondent No. 2 requesting to consider petitioners' mercy

petitions under Article 161 of the Constitution and, in the event of rejection, to send the mercy petition along with the recommendations, copies of the judgments, copies of the records of the case, etc. to Respondent No. 1 for consideration under Article 72 of the Constitution.

249. On 05.04.2007 and 09.05.2007, review petitions filed by the petitioners were dismissed.

250. On 10.08.2007, Respondent No. 2 informed Respondent No. 1 that the Governor has rejected the mercy petitions and forwarded the copy of the trial court judgment, the Supreme Court judgment and mercy petitions.

251. On 09.10.2007, Respondent No. 1 wrote to Respondent No. 2 requesting him to provide the judgment of the High Court, the police diary, the court proceedings and the English translation of the trial court judgment. Respondent No. 2 sent some of these documents on 26.07.2012, i.e., after 4 years and 9 ½ months and the rest of the documents were sent on 03.12.2012, i.e., after 5 years and 2 months. There was also no explanation as to why Respondent No. 1 did not take steps to expedite the matter for such a long period.

252. On 03.04.2013, Respondent No. 1 advised the President to reject the mercy petitions. There was a delay of 5 years and 8 months after the Governor rejected the mercy petitions.

253. On 27.05.2013, the President returned the file along with the mercy petitions sent by Shivu's mother and the members of the Badrayyanhalli Gram Panchayat.

254. On 24.06.2013, Respondent No. 1 advised the President to reject the mercy petitions. On 27.07.2013, the President rejected the petitioners' mercy petitions.

255. On 13.08.2013, the petitioners were informed by the prison authorities that their mercy petitions have been rejected

by the President. On 16.08.2013, the local police visited the petitioners' family members and informed that they would be executed at 6 a.m. on 22.08.2013 at Belgaum Central Prison. The said procedure was contrary to the Prison Manual. As per the present Rules, the execution can only be scheduled after 14 days of informing the prisoner of rejection of mercy petition and in this case the same was not being followed. The following are the details regarding delay in disposal of mercy petitions by the Governor and the President:

Total custody period till date	15.10.2001 – 17.12.2013	12 years 2 months
Period under sentence of death	29.07.2005 – 17.12.2013	8 years 5 months
Total delay in deciding mercy petitions	27.02.2007 – 13.08.2013	6 ½ years
Delay by the Governor	27.02.2007 – 10.08.2007	6 months
Delay by the President	10.08.2007 – 13.08.2013	6 years

256. It is true that there is some explanation in the affidavit filed on behalf of the State in respect of the time taken by the Governor for rejection of their mercy petitions, however, there is no acceptable/adequate reason for delay of six years at the hands of the Ministry of Home Affairs followed by the rejection order by the President.

257. Though learned counsel has referred to the fact that the trial court and the High Court followed certain decisions which were later held as *per incuriam*, in view of the fact that there is undue delay of six years which is one of the circumstances for commutation of sentence from death to life, we are not adverting to all other aspects.

258. We also perused the records of the Ministry of Home Affairs produced by learned ASG and the summary prepared for approval of the President. There is no specific explanation in the summary prepared by the Ministry of Home Affairs for the President for the delay of six years. In view of the same and in the light of the principles enunciated in various decisions which we have adverted to in the earlier part of our judgment, we hold that the petitioners have made out a case for commutation of sentence.

Guidelines:

259. In W.P (Crl) No 56 of 2013, Peoples' Union for Democratic Rights have pleaded for guidelines for effective governing of the procedure of filing mercy petitions and for the cause of the death convicts. It is well settled law that executive action and the legal procedure adopted to deprive a person of his life or liberty must be fair, just and reasonable and the protection of Article 21 of the Constitution of India inheres in every person, even death-row prisoners, till the very last breath of their lives. We have already seen the provisions of various State Prison Manuals and the actual procedure to be followed in dealing with mercy petitions and execution of convicts. In view of the disparities in implementing the already existing laws, we intend to frame the following guidelines for safeguarding the interest of the death row convicts.

1. **Solitary Confinement**: This Court, in ***Sunil Batra (supra),*** held that solitary or single cell confinement prior to rejection of the mercy petition by the President is unconstitutional. Almost all the prison Manuals of the States provide necessary rules governing the confinement of death convicts. The rules should not be interpreted to run counter to the above ruling and violate Article 21 of the Constitution.

2. **Legal Aid:** There is no provision in any of the

Prison Manuals for providing legal aid, for preparing appeals or mercy petitions or for accessing judicial remedies after the mercy petition has been rejected. Various judgments of this Court have held that legal aid is a fundamental right under Article 21. Since this Court has also held that Article 21 rights inhere in a convict till his last breath, even after rejection of the mercy petition by the President, the convict can approach a writ court for commutation of the death sentence on the ground of supervening events, if available, and challenge the rejection of the mercy petition and legal aid should be provided to the convict at all stages. Accordingly, Superintendent of Jails are directed to intimate the rejection of mercy petitions to the nearest Legal Aid Centre apart from intimating the convicts.

3. **Procedure in placing the mercy petition before the President:** The Government of India has framed certain guidelines for disposal of mercy petitions filed by the death convicts after disposal of their appeal by the Supreme Court. As and when any such petition is received or communicated by the State Government after the rejection by the Governor, necessary materials such as police records, judgment of the trial court, the High Court and the Supreme Court and all other connected documents should be called at once fixing a time limit for the authorities for forwarding the same to the Ministry of Home Affairs. Even here, though there are instructions, we have come across that in certain cases the Department calls for those records in piece-meal or one by one and in the same way, the forwarding Departments are also not adhering to the procedure/instructions by sending all the required materials at one stroke. This should be strictly followed to minimize the delay. After

getting all the details, it is for the Ministry of Home Affairs to send the recommendation/their views to the President within a reasonable and rational time. Even after sending the necessary particulars, if there is no response from the office of the President, it is the responsibility of the Ministry of Home Affairs to send periodical reminders and to provide required materials for early decision.

4. **Communication of Rejection of Mercy Petition by the Governor:** No prison manual has any provision for informing the prisoner or his family of the rejection of the mercy petition by the Governor. Since the convict has a constitutional right under Article 161 to make a mercy petition to the Governor, he is entitled to be informed in writing of the decision on that mercy petition. The rejection of the mercy petition by the Governor should forthwith be communicated to the convict and his family in writing or through some other mode of communication available.

5. **Communication of Rejection of the Mercy Petition by the President:** Many, but not all, prison manuals have provision for informing the convict and his family members of the rejection of mercy petition by the President. All States should inform the prisoner and their family members of the rejection of the mercy petition by the President. Furthermore, even where prison manuals provide for informing the prisoner of the rejection of the mercy petition, we have seen that this information is always communicated orally, and never in writing. Since the convict has a constitutional right under Article 72 to make a mercy petition to the President, he is entitled to be informed in writing of the decision on that mercy petition. The rejection of the

mercy petition by the President should forthwith be communicated to the convict and his family in writing.

6. **Death convicts are entitled as a right to receive a copy of the rejection of the mercy petition by the President and the Governor.**

7. **Minimum 14 days notice for execution:** Some prison manuals do not provide for any minimum period between the rejection of the mercy petition being communicated to the prisoner and his family and the scheduled date of execution. Some prison manuals have a minimum period of 1 day, others have a minimum period of 14 days. It is necessary that a minimum period of 14 days be stipulated between the receipt of communication of the rejection of the mercy petition and the scheduled date of execution for the following reasons:-

(a) It allows the prisoner to prepare himself mentally for execution, to make his peace with god, prepare his will and settle other earthly affairs.

(b) It allows the prisoner to have a last and final meeting with his family members. It also allows the prisoners' family members to make arrangements to travel to the prison which may be located at a distant place and meet the prisoner for the last time. Without sufficient notice of the scheduled date of execution, the prisoners' right to avail of judicial remedies will be thwarted and they will be prevented from having a last and final meeting with their families.

It is the obligation of the Superintendent of Jail to see that the family members of the convict receive the message of communication of rejection of

mercy petition in time.

8. **Mental Health Evaluation:** We have seen that in some cases, death-row prisoners lost their mental balance on account of prolonged anxiety and suffering experienced on death row. There should, therefore, be regular mental health evaluation of all death row convicts and appropriate medical care should be given to those in need.

9. **Physical and Mental Health Reports:** All prison manuals give the Prison Superintendent the discretion to stop an execution on account of the convict's physical or mental ill health. It is, therefore, necessary that after the mercy petition is rejected and the execution warrant is issued, the Prison Superintendent should satisfy himself on the basis of medical reports by Government doctors and psychiatrists that the prisoner is in a fit physical and mental condition to be executed. If the Superintendent is of the opinion that the prisoner is not fit, he should forthwith stop the execution, and produce the prisoner before a Medical Board for a comprehensive evaluation and shall forward the report of the same to the State Government for further action.

10. **Furnishing documents to the convict:** Most of the death row prisoners are extremely poor and do not have copies of their court papers, judgments, etc. These documents are must for preparation of appeals, mercy petitions and accessing post-mercy judicial remedies which are available to the prisoner under Article 21 of the Constitution. Since the availability of these documents is a necessary pre-requisite to the accessing of these rights, it is necessary that copies of relevant documents should be furnished to the prisoner within a week by the

prison authorities to assist in making mercy petition and petitioning the courts.

11. **Final Meeting between Prisoner and his Family**: While some prison manuals provide for a final meeting between a condemned prisoner and his family immediately prior to execution, many manuals do not. Such a procedure is intrinsic to humanity and justice, and should be followed by all prison authorities. It is therefore, necessary for prison authorities to facilitate and allow a final meeting between the prisoner and his family and friends prior to his execution.

12. **Post Mortem Reports**: Although, none of the Jail Manuals provide for compulsory *post mortem* to be conducted on death convicts after the execution, we think in the light of the repeated arguments by the petitioners herein asserting that there is dearth of experienced hangman in the country, the same must be made obligatory.

In ***Deena alias Deen Dayal and Ors.*** *vs.* ***Union of India*** (1983) 4 SCC 645, the petitioners therein challenged the constitutional validity of Section 354(5) on the ground that hanging a convict by rope is a cruel and barbarous method of executing death sentence, which is violative of Article 21 of the Constitution. This court held as follows:-

"7. …After making this observation Bhagwati, J., proceeds thus :

The physical pain and suffering which the execution of the sentence of death involves is also no less cruel and inhuman. In India, the method of execution followed is hanging by the rope. Electrocution or application of lethal gas has not yet taken its place as in some of the western countries. It is therefore with reference to execution by hanging that I must consider whether the sentence of death is barbaric and inhuman as entailing physical pain and

agony. It is no doubt true that the Royal Commission on Capital Punishment 1949-53 found that hanging is the most humane method of execution and so also in Ichikawa v. Japan, the Japanese Supreme Court held that execution by hanging does not correspond to cruel punishment inhibited by Article 36 of the Japanese Constitution. But whether amongst all the methods of execution, hanging is the most humane or in view of the Japanese Supreme Court, hanging is not cruel punishment within the meaning of Article 36, one thing is clear that hanging is undoubtedly unaccompanied by intense physical torture and pain." (emphasis supplied).

81. Having given our most anxious consideration to the central point of inquiry, we have come to the conclusion that, on the basis of the material to which we have referred extensively, the State has discharged the heavy burden which lies upon it to prove that the method of hanging prescribed by Section 354(5) of the CrPC does not violate the guarantee right contained in Article 21 of the Constitution. **The material before us shows that the system of hanging which is now in vogue consists of a mechanism which is easy to assemble. The preliminaries to the act of hanging are quick and simple and they are free from anything that would unnecessarily sharpen the poignancy of the prisoner's apprehension. The chances of an accident during the course of hanging can safely be excluded. The method is a quick and certain means of executing the extreme penalty of law. It eliminates the possibility of a lingering death. Unconsciousness supervenes almost instantaneously after the process is set in motion and the death of the prisoner follows as a result of the dislocation of the cervical vertebrae. The system of hanging, as now used, avoids to the full extent "the chances of strangulation which results on account of too short a drop or of**

decapitation which results on account of too long a drop. The system is consistent,with the obligation of the State to ensure that the process of execution is conducted with decency and decorum without involving degradation of brutality of any kind."

It is obvious from a reading of the aforesaid decision that the method of hanging prescribed by Section 354(5) of the Code was held not violative of the guaranteed right under Article 21 of the Constitution on the basis of scientific evidence and opinions of eminent medical persons which assured that hanging is the least painful way of ending the life. However, it is the contention of learned counsel for the respondents that owing to dearth of experienced hangman, the accused are being hanged in violation of the due procedure.

260. By making the performance of *post mortem* obligatory, the cause of the death of the convict can be found out, which will reveal whether the person died as a result of the dislocation of the cervical vertebrate or by strangulation which results on account of too long a drop. Our Constitution permits the execution of death sentence only through procedure established by law and this procedure must be just, fair and reasonable. In our considered view, making *post mortem* obligatory will ensure just, fair and reasonable procedure of execution of death sentence.

Conclusion:

261. In the aforesaid batch of cases, we are called upon to decide on an evolving jurisprudence, which India has to its credit for being at the forefront of the global legal arena. Mercy jurisprudence is a part of evolving standard of decency, which is the hallmark of the society.

262. Certainly, a series of Constitution Benches of this Court have upheld the Constitutional validity of the death sentence in India over the span of decades but these judgments in no way take away the duty to follow the due

procedure established by law in the execution of sentence. Like the death sentence is passed lawfully, the execution of the sentence must also be in consonance with the Constitutional mandate and not in violation of the constitutional principles.

263. It is well established that exercising of power under Article 72/161 by the President or the Governor is a constitutional obligation and not a mere prerogative. Considering the high status of office, the Constitutional framers did not stipulate any outer time limit for disposing the mercy petitions under the said Articles, which means it should be decided within reasonable time. However, when the delay caused in disposing the mercy petitions is seen to be unreasonable, unexplained and exorbitant, it is the duty of this Court to step in and consider this aspect. Right to seek for mercy under Article 72/161 of the Constitution is a constitutional right and not at the discretion or whims of the executive. Every Constitutional duty must be fulfilled with due care and diligence; otherwise judicial interference is the command of the Constitution for upholding its values.

264. Remember, retribution has no Constitutional value in our largest democratic country. In India, even an accused has a *de facto* protection under the Constitution and it is the Court's duty to shield and protect the same. Therefore, we make it clear that when the judiciary interferes in such matters, it does not really interfere with the power exercised under Article 72/161 but only to uphold the *de facto* protection provided by the Constitution to every convict including death convicts.

265. In the light of the above discussion and observations, we dispose of the writ petitions. In the cases of Suresh, Ramji, Bilavendran, Simon, Gnanprakasam, Madiah, Praveen Kumar, Gurmeet Singh, Sonia, Sanjeev, Sundar Singh, Jafar Ali, Magan Lal Berala, Shivu and Jadeswamy, we commute the death sentence into imprisonment for life. All the writ petitions are, accordingly, allowed on the above terms.

D.G. Writ Petitions allowed.

JANATHA DAL PARTY
v.
THE INDIAN NATIONAL CONGRESS & OTHERS
(Special Leave Petition (Civil) No. 38991 of 2013)

JANUARY 21, 2014

[K.S. RADHAKRISHNAN, AND VIKRAMAJIT SEN, JJ.]

Suit:

Suit by Indian National Congress for declaration of title to and for possession of Congress Bhavan in City of Bangalore after split in Congress – Held: The order of ECI and Supreme Court in Sadiq Ali's case clearly indicate that the Congress then led by Indira Gandhi had established rights on the properties in question — On facts, it is clearly found that Congress (O) or Janata Dal had no right in the suit property and as such the various lease deeds executed by them also cannot stand in the eye of law – Time granted to respondents to vacate the premises.

The plaintiffs-respondents nos. 1 to 4 filed a suit for declaration of plaintiffs nos. 1 and 2 over the suit property and for its possession, stating that suit land was donated by its owner for construction of a Congress House. A registered Gift Deed dated 22.4.1949 in respect of the suit land was executed by its owner in favour of the Bangalore City Congress Committee. The All India Congress Party constructed the Congress Bhavan on the suit land. Subsequently, as a result of split in the party, Congress (J) was declared by the Election Commission of India as the Indian National Congress and the said decision was upheld by the Supreme Court in *Sadiq Ali's* case. However, when the suit property came in possession of Congress (O) and Janata Party, lease deeds were executed in favour of defendants 3 and 4 and

defendants 9 to 12 claimed themselves as tenants. The plaintiffs' case was that Janata Party and /or Congress (O) had no right, title or interest for granting the lease deeds. The case of the appellant-defendant no. 1 was that the judgment in *Sadiq Ali* would not confer any title, ownership or possession of the suit property on the plaintiffs. Further, it was also pleaded that the suit itself was barred by the law of limitation. The trial court decreed the suit. RFA filed by Janata Party was dismissed by the Division Bench of the High Court.

Dismissing the petition, the Court

HELD: 1.1. It cannot be accepted that the decision of the ECI or the judgment of this Court in *Sadiq Ali* would have no bearing, so far as the facts of the instant case are concerned. ECI, after applying the test of majority at the organizational level and the legislative wings, took the view that Congress (J) group of Congress came to be recognized as the Congress for all purposes. The order of ECI and this Court clearly indicate that the Congress then led by Indira Gandhi had established rights on the properties in question. Since, on facts, it has found that the defendants have no right over the property in question, the various lease deeds executed by them also cannot stand in the eye of law. [para 10] [755-D-H; 756-A]

Shri Sadiq Ali and another v. The Election Commission of India, New Delhi and others **1972 (2) SCR 318 = (1972) 4 SCC 664 – relied on.**

1.2. The suit property was gifted by registered gift deed dated 22.4.1949 by its owner in favour of Bangalore City Congress Committee. Plaintiffs could successfully trace their title and interest over the suit property towards that gift deed executed in the year 1949, coupled with the various declarations by the ECI recognizing the plaintiff

as the real Congress and the Judgment of this Court affirming the same. [para 11] [756-A-C]

1.3. Janata Party came into picture only in the year 1977. On facts, it is clearly found that Congress (O) had no right in the suit property. In the instant case, Janata Dal (Secular) was impleaded as defendant only on 14.10.2003 and the disputed property was known as the Congress Bhavan till the formation of Janta Dal in the year 1977. It is relevant to note that the defendants had never accepted plaintiffs as the owner of the property. On the contrary, their specific case was that the 1st defendant was the owner of the property. On facts, it was found that the 1st defendant had no title over the suit property. Further, the entire burden of proving that the possession is adverse to that of the plaintiffs, is on the defendant. On the other hand, the possession of the suit property was throughout of Congress and its successor parties and not that of the petitioner. It was after the split in Janata Party and, subsequently before the filing of the suit, that Janata Dal continued to be in possession of the suit property. The plea of limitation and adverse possession was elaborately considered by the courts below and there is no error in the findings recorded by them on that ground as well. Further, no substantive question of law arises in the case. [para 12] [756-C-G]

1.4. Considering the facts that the petitioner is in possession of the property for a considerable long period, time up to 31.12.2014 is granted to vacate the premises subject to furnishing the undertaking. [para 13] [757-A]

Case Law Reference:

1972 (2) SCR 318 relied on para 2

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 38991 of 2013.

From the Judgment and Order dated 11.10.2013 of the High Court Karnataka at Bangalore in R.F.A. No. 2011 of 2005.

Gopal Subramanium, Prashant Kumar, Triveni Poteker, Shyam Nanda, Chandra Bhushan Prasad for the Petitioner.

P.P. Rao, S.S. Naganand, Venkita Subramonium, Raghavendra S. Srivatsa, Rahat Bansal, Akshat Kulshrestha, Surajit Bhadhuri, Swarnendu Chatterjee, K.C. Mittal, R.K. Rathore for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. We are, in this case, concerned with the ownership and possession of Premises No. 3, Race Course Road, Bangalore, 'A' scheduled property, wherein, at present, the political party Office of Janata Dal (Secular) is situated. The suit property originally belonged to one Sri C. Rangaswamy, who was the resident of Property No. 54, Hospital Road, Baleput, Bangalore City, executed a registered Gift Deed dated 22.4.1949 in favour of Bangalore City Congress Committee which was having its office at No. 142, Cottonpet, Bangalore City, which measured 5330 sq. yards. The land was donated by the donor for the purpose of construction of Congress House, wherein the All India Congress Party constructed a building, by name, 'Congress Bhavan', in a portion of the suit property. In the year 1969, there was split within the Indian National Congress giving rise to two groups, one led by late Smt. Indira Gandhi, under the Presidentship of late Sri Jagajivan Ram and the other group led by late Sri S. Nijalingappa. The group led by Jagajivan Ram was then called the 'Indian National Congress (J)', whereas the other group led by Nijalingappa was called as 'Indian National Congress (O)'. The split in the party at the centre had its own effect in the State of Karnataka as well. The then Mysore Pradesh Congress Party broke up into Congress (J) and Congress (O) corresponding to those groups in the All Indian Congress Committee at the Centre. Each group claimed itself to be the

real Indian National Congress. That dispute came up before the Election Commission of India (ECI).

2. The ECI, applying the test of majority at the organizational level and the legislative wings, by its order 11.1.1971 held that the Congress (J) was the Indian National Congress. The decision of the ECI was upheld by this Court in *Shri Sadiq Ali and another v. The Election Commission of India, New Delhi and others* (1972) 4 SCC 664. Consequently, Congress (J) group, formed as the Indian National Congress, came to be recognized as the Indian National Congress for all purposes.

3. The General Elections to the Lok Sabha were held in the year 1977. The opposition parties consisting of Congress (O) Group - led by Nijalingappa, Lok Dal headed by late Sri Charan Singh, Jana Sangha – led by Sri A.B. Vajapayee and Congress for Democracy - led by Sri Jagjivan Ram, fought elections together as one front under the name of Janata Party. Congress was defeated in that election. Janata Party formed the Government at the Centre, but did not last long. In the year 1978, there was a further split within the Congress. National Convention of the Congress was held at New Delhi on 1.1.1978 and 2.1.1978, in which members of the All India Congress Committee, Members of Parliament, members of the State Legislatures and Congress candidates participated and they unanimously elected Smt. Indira Gandhi as the President, though Sri K. Brahmananda Reddy was also in the fray. ECI was called upon to examine that dispute as well. Later, Sri D. Devaraj Urs succeeded Sri Brahmananda Reddy as the President of that group, which came to be known as Congress (U). However, Indira Gandhi continued to be the leader of the main body which was identified as the Congress (I). The Election Commission allotted separate symbols to the Congress (U) and (I) groups. The election to the Lok Sabha took place in December 1979 and Congress (I) was voted back to the Lok Sabha.

4. The Election Commission, in the meantime, resolved the dispute pending before it and recognized Indira Gandhi as the President of the Party, known by the name of Congress (I). It was also held that the group led by D. Devaraj Urs, known by the name of Congress (U), was not the Congress, leaving liberty to that group to approach the Commission for its recognition as a party, taking a different name for itself. D. Devaraj Urs, purporting to be the President of Congress (U), filed a petition for special leave to appeal to this Court against the order of the ECI dated 23.7.1981. This Court, after issuing notices to all the parties and hearing counsel on either side, dismissed the Special Leave Petition on 14.8.1981.

5. We have narrated the above facts to indicate that the suit property, all other properties and funds belonging to or referred to as belonging to the Congress are thus the properties and funds of the 1st Plaintiff herein. Similarly, all properties and funds belonging to or referred to as belonging to the erstwhile Mysore Pradesh Congress Committee or the KPCC thus belong to the 2nd Plaintiff herein. The 'A' Schedule property is owned by 2nd and 1st plaintiffs herein. The land comprised therein was acquired by the erstwhile Mysore Pradesh Congress Committee, as it was then called, and it constructed the buildings standing in the suit property, which was earlier known as Congress Bhavan.

6. We have already indicated that Janata Party came into possession of the schedule property in question in the year 1977. During the period, the above mentioned property was under the control of Congress (O) group. Two lease deeds were executed in respect of two portions of the vacant land, vide lease deeds dated 22.1.1971 and 10.4.1971, in favour of 3rd respondent. After the Janata Party came in possession in the year 1977, the previous Janata Party, a unit of 1st defendant, granted lease of a portion of the plaint 'A', schedule property in favour of 4th defendant on 04.08.1981, of which defendants 5 to 8 are partners, the portion leased is described in the plaint

'C' schedule. The Janata Party or the previous Janata Party had no right, title or interest for granting lease of the plaint 'C'. Defendants 9-12 are stated to be the tenants in portions of the building constructed in 'A' schedule property, having taken the same on lease from the 1st defendant.

7. We have indicated that the plaintiffs instituted the present suit seeking a declaration of their title and for possession of the suit property and also sought to recover Rs.36,000/- towards past mesne profits. Defendant 1 and 2 filed their written statements on 10.11.1983 contesting the suit, but the factual details were not disputed as such. But, it was pleaded that the decision taken by the ECI or the judgment of this Court in *Sadiq Ali* (supra) would not confer any title, ownership or possession of the suit property on the plaintiffs. According to the defendants, throughout, the above mentioned property was in the possession of Congress (O), and after its merger, it was in the possession of Janata Party and, at no point of time, the plaintiffs were in possession. Further, it was also pleaded that the suit itself was barred by the law of limitation. Defendants 4 to 6 filed a written statement on 31.7.1984 disputing the plaintiffs' right to bring the suit on behalf of Indian National Congress. They pleaded that the Congress (O) continued to be in possession as the absolute owner of the suit property. Further, it is also stated that Congress (O) and some other political parties joined together and constituted Janata Party and Congress (O) was one of the constituents of Janata Party, and the property in question became the property of Janata Party and, since 1977, Janata Party has been enjoying the suit property and they were having their rights to lease out the property to other contesting defendants.

8. On the basis of the pleadings of the parties, the trial Court framed 24 issues. On behalf of the plaintiffs, 5 witnesses were examined and 17 documents were exhibited. On behalf of defendants, 2 witnesses were examined and 18 documents were exhibited. The trial Court, after examining the rival

contentions, and, on facts, came to the conclusion that Congress (O), which was led by Nijalingappa, lost its identity as Indian National Congress by virtue of the decision of the Election Commission and as pointed out by this Court in *Sadiq Ali* case. The trial Court also held that this Court recognized the group led by Jagjivan Ram and Indira Gandhi as the Indian National Congress. Consequently, the properties and funds of Indian National Congress, before its split in 1969, would be of Congress (J) lead by Jagjivan Ram and Indira Gandhi and it would not be the property of the dissident group which was identified as Congress (O). On facts, it was noticed that Congress (O) was subsequently merged with Janata Party and, on account of said merger, Janata Party would not acquire ownership of the suit schedule property. It was held that since Janata Party was not the owner of the suit property, it had no right to grant lease in favour of 4th defendant and grant of such lease by Janata Party would not bind the plaintiffs. Similarly, it was also held that the grant of lease in 'C' schedule property in favour of 3rd defendant by the President of Mysore Pradesh Congress Committee, a unit of Congress (O) party, was illegal and was not preceded by approval or permission of Indian National Congress. The trial Court also rejected the plea of adverse possession and limitation and held that the plaintiffs have succeeded in establishing their title over the properties in question and, consequently, held that the plaintiff is entitled to recovery of possession and also mesne profits. Aggrieved by the same, Janata Party filed RFA No. 2011 of 2005 which was heard by a Division Bench of the High Court. The High Court concurred with the findings recorded by the trial Court and dismissed the appeal by its judgment dated 11.10.2013, against which this SLP has been preferred.

9. Shri Gopal Subramanium, learned senior counsel appearing for the petitioner, reiterated all the factual contentions raised before the trial Court as well as the High Court based on the basis of the written statements filed by the contesting respondents and submitted that neither the decision of the ECI

nor the judgment of this Court in *Sadiq Ali* (supra), would confer any title or possession on the plaintiffs over the suit property. Learned senior counsel submitted that the plaintiff could succeed in establishing their title and possession only on the basis of independent documents and not on the basis of the decision of the ECI or the judgment of this Court in *Sadiq Ali.* Learned senior counsel also submitted that the High Court has erred in noticing that Article 65 of the Limitation Act, 1963, specifies that the limitation for possession of immovable property or any interest therein based on title is 12 years and the time from which the period begins to run is when the possession of the defendant became adverse to the plaintiff. Learned senior counsel pointed out that, in the instant case, possession of the defendant and their predecessor in title became adverse to that of the plaintiff more than 12 years prior to the filing of the suit and, therefore, the suit was liable to be dismissed solely on the ground of limitation.

10. We have heard the arguments at length and have also gone through the pleadings of the parties as well as the judgments of the Courts below. We find it difficult to accept the contention raised by the learned senior counsel that the decision of the ECI dated 11.1.1971 or the judgment of this Court in *Sadiq Ali* (supra) would have no bearing, so far as the facts of this case are concerned. The question as to which of the two groups, Congress (J) or Congress (O) (the then Congress Party) should be recognized as the Congress, as already indicated, came before the ECI. ECI, after applying the test of majority at the organizational level and the legislative wings, took the view that Congress (J) group of Congress came to be recognized as the Congress for all purposes. The order of ECI and this Court clearly indicate that the Congress then led by Indira Gandhi had established rights on the properties in question. The Courts below have narrated in detail how the suit property came into the hands of the plaintiffs and how the Congress (O) followed by Janata Party ceased to have any right over the suit property in question. Since, on facts, it was

found that the defendants have no right over the property in question, the various lease deeds executed by them also cannot stand in the eye of law.

11. We have noticed that the property in question was gifted vide registered gift deed dated 22.4.1949 by Rangaswamy in favour of Bangalore City Congress Committee. Plaintiffs could successfully trace their title and interest over the suit property towards that gift deed executed in the year 1949, coupled with the various declarations by the ECI recognizing the petitioner as the real Congress and the Judgment of this Court affirming the same.

12. We are also not impressed by the arguments raised by the learned senior counsel on the plea of limitation. So far as Janata Party is concerned, it came into picture only in the year 1977. On facts, it is clearly found that Congress (O) had no right in the suit property. In the instant case, Janata Dal (Secular) was impleaded as defendant only on 14.10.2003 and the disputed property was known as the Congress Bhavan till the formation of Janta Dal in the year 1977. It is relevant to note that the defendants had never accepted plaintiffs as the owner of the property. On the contrary, their specific case was that the 1st defendant was the owner of the property. On facts, it was found that the 1st defendant had no title over the property in question. Further, the entire burden of proving that the possession is adverse to that of the plaintiffs, is on the defendant. On the other hand, the possession of the suit property was throughout of Congress (O) and its successor parties and not that of the petitioner herein. It was after the split in Janata Party and, subsequently before the filing of the suit, Janata Dal continued to be in possession of the suit property. The plea of limitation and adverse possession was elaborately considered by the Courts below and we find no error in the findings recorded by the Courts below on that ground as well. Further, no substantive question of law arises for our consideration. The SLP, therefore, lacks merits and is dismissed.

13. Considering the facts that the petitioner is in possession of the property for a considerable long period, we are inclined to grant time up to 31.12.2014 to vacate the premises, for which the petitioner has to prefer an undertaking before this Court within one month from today stating that the petitioner would vacate the premises within the stipulated time and that the petitioner would pay the entire arrears of rent within a period of three months and will continue to pay the rent without any default. If the petitioner commits two consecutive defaults in payment of monthly rent or fails to file the undertaking, the time granted by this Court would not be available and it will be open to the respondents to get the judgment/decree executed.

R.P. SLP dismissed.

M/S STANZEN TOYOTETSU INDIA P. LTD.
v.
GIRISH V & ORS.
(Civil Appeal Nos. 763-768 of 2014)

JANUARY 21, 2014

[T.S. THAKUR AND VIKRAMAJIT SEN, JJ.]

***Service law**: Disciplinary proceedings – Stay of disciplinary proceedings pending the decision of criminal case in respect of same incident – Vacation of stay – Propriety of – Held: The disciplinary proceedings and proceedings in a criminal case can proceed simultaneously in the absence of any legal bar to such simultaneity – While seriousness of the charge leveled against the employee is a consideration for stay of disciplinary proceedings, the same is not by itself sufficient unless the case also involves complicated questions of law and fact – Even when the charge is found to be serious and complicated questions of fact and law that arise for consideration, the court has to keep in mind the fact that departmental proceedings cannot be suspended indefinitely or delayed unduly especially where the number of accused arraigned for trial is large as is the case at hand and so are the number of witnesses cited by the prosecution.*

The question that arose for consideration in these appeals was whether the High Court so also the courts below were right in holding that the disciplinary proceedings initiated by the appellant-company against its employees (respondents) ought to remain stayed pending conclusion of the criminal case instituted against the respondents in respect of the very same incident.

Partly allowing the appeals, the Court

HELD: 1. While there is no legal bar to the holding

of the disciplinary proceedings and the criminal trial simultaneously, stay of disciplinary proceedings may be an advisable course in cases where the criminal charge against the employee is grave and continuance of the disciplinary proceedings is likely to prejudice their defense before the criminal Court. Gravity of the charge is, however, not by itself enough to determine the question unless the charge involves complicated question of law and fact. The Court examining the question must also keep in mind that criminal trials get prolonged indefinitely especially where the number of accused arraigned for trial is large as is the case at hand and so are the number of witnesses cited by the prosecution. The Court, therefore, has to draw a balance between the need for a fair trial to the accused on the one hand and the competing demand for an expeditious conclusion of the on-going disciplinary proceedings on the other. An early conclusion of the disciplinary proceedings has itself been seen by this Court to be in the interest of the employees. [Para 13] [770-C-G]

2. The charges leveled against the respondents in the instant case were under Sections 143, 147, 323, 324, 356, 427, 504, 506, 114 read with Section 149 I.P.C. These are no ordinary offences being punishable with imprisonment which may extend upto 3 years besides fine. At the same time seriousness of the charge alone is not the test. What is also required to be demonstrated by the respondents is that the case involves complicated questions of law and fact. That requirement does not appear to be satisfied in an adequate measure to call for an unconditional and complete stay of the disciplinary proceedings pending conclusion of the trial. The incident as reported in the first information report or as projected by the respondents in the suits filed by them did not suggest any complication or complexity either on facts or law. That apart the respondents had already disclosed

the defense in the explanation submitted by them before the commencement of the departmental enquiry in which one witness has been examined by each of the Enquiry Officers. The charge sheet was filed on 20th August, 2011. The charges were framed on 20th December, 2011. The trial court has ever since then examined only three witnesses so far out of a total of 23 witnesses cited in the charge-sheet. Going by the pace at which the trial court is examining the witnesses it would take another five years before the trial may be concluded. The High Court has in the judgment under appeal given five months to the trial court to conclude the trial. More than fifteen months has rolled by ever since that order, without the trial going anywhere near completion. Disciplinary proceedings cannot remain stayed for an indefinitely long period. Such inordinate delay is neither in the interest of the appellant-company nor the respondents who are under suspension and surviving on subsistence allowance. The number of accused implicated in the case is also very large. It is not that the incident must be taken to be false only because such a large number could not participate in the incident. But there is a general tendency to spread the net wider and even implicate those who were not concerned with the commission of the offences or who even though present, committed no overt act to show that they shared the common object of the assembly or be responsible for the riotous behaviour of other accused persons. Interest of such accused as may be innocent also cannot be ignored nor can they be made to suffer indefinitely just because some others have committed an offence or offences. [Paras 14, 15] [770-H; 771-A-H; 772-A]

3. In the circumstances and taking into consideration all aspects as also keeping in view the fact that all the three courts below have exercised their discretion in favour of staying the on-going disciplinary proceedings,

the said order cannot be vacated straightaway. Interests of justice would be sufficiently served if the Court dealing with the criminal charges against the respondents is directed to conclude the proceedings as expeditiously as possible but in any case within a period of one year from the date of this order. The trial court will take effective steps to ensure that the witnesses are served, appear and are examined. The Court may for that purpose adjourn the case for no more than a fortnight every time an adjournment is necessary. The accused in the criminal case should co-operate with the trial Court for an early completion of the proceedings. This is so because experience has shown that trials often linger on for a long time on account of non-availability of the defense lawyers to cross-examine the witnesses or on account of adjournments sought by them on the flimsiest of the grounds. All that needs to be avoided. In case, however, the trial is not completed within the period of one year from the date of this order, despite the steps which the trial court has been directed to take the disciplinary proceedings initiated against the respondents shall be resumed and concluded by the Inquiry Officer concerned. The impugned orders shall in that case stand vacated upon expiry of the period of one year from the date of the order. [Para 16] [772-B-G]

Depot Manager, Andhra Pradesh State Road Transport Corporation vs. Mohd. Yousuf Miyan **(1997) 2 SCC 699: 1996 (8) Suppl. SCR 941;** *Divisional Controller, Karnataka State Road Transport Corporation v. M.G. Vittal Rao* **(2012) 1 SCC 442: 2011 (14) SCR 1089;** *Capt. M Paul Anthony v. Bharat Gold Mines Ltd* **(1999) 3 SCC 679: 1999 (2) SCR 257;** *HPCL v. Sarvesh Berry* **(2005) 10 SCC 471: 2004 (6) Suppl. SCR 834;** *State of Rajasthan v. B.K.Meena* **1996(6) SCC 417: 1996 (7) Suppl. SCR 68 – relied on.**

Case Law Reference:

1996 (8) Suppl. SCR 941	**relied on**	**Para 9**
2011 (14) SCR 1089	**relied on**	**Para 9**
1999 (2) SCR 257	**relied on**	**Para 10**
2004 (6) Suppl. SCR 834	**relied on**	**Para 11**
996 (7) Suppl. SCR 68	**relied on**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 763-768 of 2014.

From the Judgment & Order dated 15.06.2012 of the High Court of Karnataka at Bangalore in Writ Petition Nos. 8487-8491 of 2012 and Writ Petition No. 9381 of 2012.

S.S. Ramdas, Shanta Kumar Mahale, Rajesh Mahale, Pradip Sawakar, Kanakraj for the Appellant.

E.C. Vidya Sagar, Kheyali Sarkar, Ananthram for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

2. The short question that falls for determination in these appeals is whether the High Court so also the Courts below were right in holding that the disciplinary proceedings initiated by the appellant-company against its employees (respondents herein) ought to remain stayed pending conclusion of the criminal case instituted against the respondents in respect of the very same incident.

3. The appellant-company is engaged in the manufacture of automobile parts in the name and style of M/s Stanzen Toyotetsu India Pvt. Ltd. while the respondents are workmen engaged by the appellant in connection with the said business.

It is not in dispute that the employees of the appellant-company including the respondents are governed by Standing Orders certified under Industrial Employees (Standing Orders) Act, 1946.

4. The appellant's case is that on 19th March, 2011 at about 10.30 p.m. the respondents with the help of other Trade Union functionaries stage managed an accident making it appear as if an employee by the name of Mr. Kusumadhara had slipped and fallen in the press area. The incident was, it is alleged, used as a ruse by the respondents who rushed to the place of alleged fall only to create a ruckus. Appellant's further case is that although Mr. Kusumadhara had not sustained any injury, he was sent to the hospital in the ambulance of the appellant-company and that instead of resuming the work after the alleged incident, the respondents stopped the production activity and started abusing their superiors, damaged property of the company and even assaulted senior managerial personnel. These acts of indiscipline created an atmosphere of fear and tension in the factory and brought the production activity to a grinding halt. Senior managerial personnel injured in the incident were, according to the appellant, unable to report for work for about 15 days on account of assault on them.

5. Taking note of the incident and the acts of indiscipline which amounted to misconduct under several provisions of the Standing Order, the competent authority placed the respondents under suspension and issued charge-sheets to them. The explanation submitted by the respondents having been found unsatisfactory, a disciplinary enquiry was initiated and Enquiry Officers appointed to enquire into the allegations against the respondents. The Presenting Officers have examined one witness in each one of the enquiries.

6. The incident in question was it appears reported even to the police by one of the employees of the appellant-company who was a witness to the same, leading to the registration of

Crime No.173/2011 in Ramanagara Rural Police Station for offences punishable under Sections 143, 147, 323, 324, 356, 427, 504, 506, 114 read with Section 149 I.P.C. A charge-sheet was filed pursuant to the said report and investigation is pending in which the respondents are accused of committing the offences mentioned above.

7. While the disciplinary enquiry and the criminal case were both pending, the respondents filed Original Suits No.326-331 of 2011 in which they prayed for a permanent injunction against the appellant and the Enquiry Officers restraining them from proceeding with the enquiry pending conclusion of the criminal case. Interlocutory Applications seeking temporary injunctions in each one of the suits against the on-going enquiry were also filed in the said suits. The applications though opposed by the appellant-company were allowed by the Principal Civil Judge and JMFC Ramanagara by an order dated 13th October, 2011 staying the domestic enquiry pending against the respondents till the disposal of criminal case in C.C. No.1005 of 2011.

8. Misc. Appeals No.56/2011 and 61/2011 filed by the appellant against the said order before the Principal Senior Civil Judge and CJM Ramanagara having failed, the appellant filed Writ Petitions No.8487-8491 of 2012 (GM-CPC) and W.P. No.9381 of 2012 (GM-CPC) before the High Court of Karnataka which petitions too failed and have been dismissed by the High Court in terms of a common order dated 15th June, 2012 impugned in the present appeals. In the result the disciplinary enquiry pending against the respondents remained stayed pending conclusion of the criminal trial. The present appeals, as noticed earlier, assailed the correctness of the said judgment and orders.

9. We have heard learned counsel for the parties at some length. The only question that falls for determination in the above backdrop is whether the Courts below were justified in staying the on-going disciplinary proceedings pending

conclusion of the trial in the criminal case registered and filed against the respondents. The answer to that question would primarily depend upon whether there is any legal bar to the continuance of the disciplinary proceedings against the employees based on an incident which is also the subject matter of criminal case against such employees. It would also depend upon the nature of the charges in the criminal case filed against the employees and whether the case involves complicated questions of law and fact. The possibility of prejudice to the employees accused in the criminal case on account of the parallel disciplinary enquiry going ahead is another dimension which will have to be addressed while permitting or staying such disciplinary enquiry proceedings. The law on the subject is fairly well- settled for similar issues and has often engaged the attention of this Court in varied fact situations. Although the pronouncements of this Court have stopped short of prescribing any strait-jacket formula for application to all cases the decisions of this Court have identified the broad approach to be adopted in such matters leaving it for the Courts concerned to take an appropriate view in the peculiar facts and circumstances of each case that comes up before them. Suffice it to say that there is no short cut solution to the problem. What is, however, fairly well settled and was not disputed even before us is that there is no legal bar to the conduct of the disciplinary proceedings and a criminal trial simultaneously. In *Depot Manager, Andhra Pradesh State Road Transport Corporation vs. Mohd. Yousuf Miyan (1997) 2 SCC 699*, this Court declared that the purpose underlying departmental proceedings is distinctly different from the purpose behind prosecution of offenders for commission of offences by them. While criminal prosecution for an offence is launched for violation of a duty that the offender owes to the society, departmental enquiry is aimed at maintaining discipline and efficiency in service. The difference in the standard of proof and the application of the rules of evidence to one and inapplicability to the other was also explained and highlighted only to explain that conceptually the two operate in different

spheres and are intended to serve distinctly different purposes. The relatively recent decision of this Court in *Divisional Controller, Karnataka State Road Transport Corporation v. M.G. Vittal Rao (2012) 1 SCC 442*, is a timely reminder of the principles that are applicable in such situations succinctly summed up in the following words:

> *"(i) There is no legal bar for both proceedings to go on simultaneously.*
>
> *(ii) The only valid ground for claiming that the disciplinary proceedings may be stayed would be to ensure that the defence of the employee in the criminal case may not be prejudiced. But even such grounds would be available only in cases involving complex questions of facts and law.*
>
> *(iii) Such defence ought not to be permitted to unnecessarily delay the departmental proceedings. The interest of the delinquent officer as well as the employer clearly lies in a prompt conclusion of the disciplinary proceedings.*
>
> *(iv) Departmental Proceedings can go on simultaneously to the criminal trial, except where both the proceedings are based on the same set of facts and the evidence in both the proceedings is common."*

10. We may also refer to the decision of this Court in *Capt. M Paul Anthony v. Bharat Gold Mines Ltd,* (1999) 3 SCC 679 where this Court reviewed the case law on the subject to identify the following broad principles for application in the facts and circumstances of a given case:

> *"(i) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though separately.*

(ii) If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature which involves complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.

(iii) Whether the nature of a charge in a criminal case is grave and whether complicated questions of fact and law are involved in that case, will depend upon the nature of offence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge sheet.

(iv) The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the Departmental proceedings but due regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.

(v) If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is found not guilty his honor may be vindicated and in case he is found guilty, administration may get rid of him at the earliest."

11. In *HPCL v. Sarvesh Berry* (2005) 10 SCC 471 the respondent was charged with possessing assets disproportionate to his known sources of income. The question was whether disciplinary proceedings should remain stayed pending a criminal charge being examined by the competent criminal Court. Allowing the appeal of the employer-corporation this Court held:

"A crime is an act of commission in violation of law or of omission of public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service. It would, therefore, be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible. It is not, therefore, desirable to lay down any guidelines as inflexible rules in which the departmental proceedings may or may not be stayed pending trial in criminal case against the delinquent officer. Each case requires to be considered in the backdrop of its own facts and circumstances. There would be no bar to proceed simultaneously with departmental enquiry and trial of a criminal case unless the charge in the criminal trial is of a grave nature involving complicated questions of fact and law..... Under these circumstances, what is required to be seen is whether the departmental enquiry would seriously prejudice the delinquent in his defense at the trial in a criminal case. It is always a question of fact to be considered in each case depending on its own facts and circumstances."

(emphasis supplied)

12. It is unnecessary to multiply decisions on the subject for the legal position as emerging from the above pronouncements and the earlier pronouncements of this Court in a large number of similar cases is well settled that disciplinary proceedings and proceedings in a criminal case can proceed simultaneously in the absence of any legal bar to such simultaneity. It is also evident that while seriousness of the charge leveled against the employees is a consideration, the same is not by itself sufficient unless the case also involves complicated questions of law and fact. Even when the charge is found to be serious and complicated questions of fact and law that arise for consideration, the Court will have to keep in mind the fact that departmental proceedings cannot be suspended indefinitely or delayed unduly. In *Paul Anthony*

(supra) this Court went a step further to hold that departmental proceedings can be resumed and proceeded even when they may have been stayed earlier in cases where the criminal trial does not make any headway. To the same effect is the decision of this Court in *State of Rajasthan v. B.K.Meena* 1996(6) SCC 417, where this Court reiterated that there was no legal bar for both proceedings to go on simultaneously unless there is a likelihood of the employee suffering prejudice in the criminal trial. What is significant is that the likelihood of prejudice itself is hedged by providing that not only should the charge be grave but even the case must involve complicated questions of law and fact. Stay of proceedings at any rate cannot and should not be a matter of course. The following passage is in this regard apposite:

> "*there is no legal bar for both proceedings to go on simultaneously and then say that in certain situations, it may not be 'desirable', 'advisable' or 'appropriate' to proceed with the disciplinary enquiry when a criminal case is pending on identical charges. The staying of disciplinary proceedings, is a matter to be determined having regard to the facts and circumstances of a given case and that no hard and fast rules can enunciated in that behalf. The only ground suggested in the above questions as constitution a valid ground for staying the disciplinary proceedings is that the defence of the employee in the criminal case may not be prejudiced. This ground has, however, been hedged in by providing further that this may be done in cases of grave nature involving questions of fact and law. In our respectful opinion, it means that not only the charges must be grave but that the case must involve complicated questions of law and fact. Moreover, 'advisability', 'desirability' or 'propriety', as the case may be, has to be determined in each case taking into consideration all the facts and circumstances of the case. While it is not possible to enumerate the various factors, for and against the stay*

> *of disciplinary proceedings, we found it necessary to emphasize some of the important considerations in view of the fact that very often the disciplinary proceedings are being stayed for long periods pending criminal proceedings. Stay of disciplinary proceedings cannot be, and should not be, a matter of course. All the relevant factors, for and against, should be weighed and a decision taken keeping in view the various principles laid down in the decisions referred to above. … Indeed, in such cases, it is all the more in the interest of the charged officer that the proceedings are expeditiously concluded. Delay in such cases really works against him*."
>
> *(emphasis supplied)*

13. Suffice it to say that while there is no legal bar to the holding of the disciplinary proceedings and the criminal trial simultaneously, stay of disciplinary proceedings may be an advisable course in cases where the criminal charge against the employee is grave and continuance of the disciplinary proceedings is likely to prejudice their defense before the criminal Court. Gravity of the charge is, however, not by itself enough to determine the question unless the charge involves complicated question of law and fact. The Court examining the question must also keep in mind that criminal trials get prolonged indefinitely especially where the number of accused arraigned for trial is large as is the case at hand and so are the number of witnesses cited by the prosecution. The Court, therefore, has to draw a balance between the need for a fair trial to the accused on the one hand and the competing demand for an expeditious conclusion of the on-going disciplinary proceedings on the other. An early conclusion of the disciplinary proceedings has itself been seen by this Court to be in the interest of the employees.

14. The charges leveled against the respondents in the instant case are under Sections 143, 147, 323, 324, 356, 427, 504, 506, 114 read with Section 149 I.P.C. These are no

ordinary offences being punishable with imprisonment which may extend upto 3 years besides fine. At the same time seriousness of the charge alone is not the test. What is also required to be demonstrated by the respondents is that the case involves complicated questions of law and fact. That requirement does not appear to be satisfied in an adequate measure to call for an unconditional and complete stay of the disciplinary proceedings pending conclusion of the trial. The incident as reported in the first information report or as projected by the respondents in the suits filed by them does not suggest any complication or complexity either on facts or law.

15. That apart the respondents have already disclosed the defense in the explanation submitted by them before the commencement of the departmental enquiry in which one witness has been examined by each of the Enquiry Officers. The charge sheet, it is evident from the record, was filed on 20th August, 2011. The charges were framed on 20th December, 2011. The Trial Court has ever since then examined only three witnesses so far out of a total of 23 witnesses cited in the charge-sheet. Going by the pace at which the Trial Court is examining the witnesses it would take another five years before the trial may be concluded. The High Court has in the judgment under appeal given five months to the Trial Court to conclude the trial. More than fifteen months has rolled by ever since that order, without the trial going anywhere near completion. Disciplinary proceedings cannot remain stayed for an indefinitely long period. Such inordinate delay is neither in the interest of the appellant-company nor the respondents who are under suspension and surviving on subsistence allowance. The number of accused implicated in the case is also very large. We are not suggesting that the incident must be taken to be false only because such a large number could not participate in the incident. But there is a general tendency to spread the net wider and even implicate those who were not concerned with the commission of the offences or who even though present committed no overt act to show that they shared

the common object of the assembly or be responsible for the riotous behaviour of other accused persons. Interest of such accused as may be innocent also cannot be ignored nor can they be made to suffer indefinitely just because some others have committed an offence or offences.

16. In the circumstances and taking into consideration all aspects mentioned above as also keeping in view the fact that all the three Courts below have exercised their discretion in favour of staying the on-going disciplinary proceedings, we do not consider it fit to vacate the said order straightaway. Interests of justice would, in our opinion, be sufficiently served if we direct the Court dealing with the criminal charges against the respondents to conclude the proceedings as expeditiously as possible but in any case within a period of one year from the date of this order. We hope and trust that the Trial Court will take effective steps to ensure that the witnesses are served, appear and are examined. The Court may for that purpose adjourn the case for no more than a fortnight every time an adjournment is necessary. We also expect the accused in the criminal case to co-operate with the trial Court for an early completion of the proceedings. We say so because experience has shown that trials often linger on for a long time on account of non-availability of the defense lawyers to cross-examine the witnesses or on account of adjournments sought by them on the flimsiest of the grounds. All that needs to be avoided. In case, however, the trial is not completed within the period of one year from the date of this order, despite the steps which the Trial Court has been directed to take the disciplinary proceedings initiated against the respondents shall be resumed and concluded by the Inquiry Officer concerned. The impugned orders shall in that case stand vacated upon expiry of the period of one year from the date of the order.

17. In the result, we allow these appeals but only in part and to the extent indicated above. The parties are left to bear their own costs.

D.G. Appeals partly allowed.

J.H. PATEL (D) BY LRS. AND ORS.
v.
NUBOARD MANUFACTURING CO. LTD. & ORS.
(Civil Appeal No. 1762 of 2007)

JANUARY 22, 2014.

[H.L. GOKHALE AND KURIAN JOSEPH, JJ.]

Labour Law:

Uttar Pradesh Industrial Disputes Act, 1947:

s.6-E(2)(b) – Misconduct – Dismissal – Prior approval from Labour Court during pendency of proceedings – Held: Since earlier proceedings were pending, Management was required to obtain prior approval from Labour Court – However, failure to do so will not disentitle the Management from proving the misconduct in court – Industrial Disputes Act, 1947 – s.32(2)(b).

Dismissal from service – Misconduct – Complaint by workmen against officers of company – Officers acquitted – Charge-sheet against workmen that they filed false case against officers of company – Workmen dismissed from service – Held: There is no discussion whatsoever about the evidence as to why Labour Court came to conclusion that the misconduct is established — In the circumstances, finding of Labour Court that management had proved the misconduct cannot be sustained — Therefore, workmen were entitled to declaration that termination of their services was bad in law and for consequential relief — Workmen are entitled to award of compensation towards back-wages quantified at 50%, with interest at 6% per annum, from the date of dismissal until the date of superannuation/death, whichever is earlier – Principles of natural justice.

Three appellants-workmen on being elected as the

General Secretary, the Organizing Secretary, and the Vice President of the Karmachari Sangh were declared as "protected workmen" of the respondent-employer. On 10.4.1977, when the General Secretary was collecting subscription from the members of the Union, the subscription which he had collected and the Receipt Book were snatched away from him. He went to the Police Station to lodge a complaint, but his complaint was not recorded. He then filed a criminal complaint before the Magistrate concerned. In that complaint, there were four accused, including the Director and the Administrative Manager. However, the complaint was not proved, and the Magistrate by his judgment and order dated 29.6.1978 acquitted all the four accused. Thereafter, the management served a charge-sheet dated 15.7.1978 on the three workmen stating that they had lodged a report to the Superintendent of Police containing false allegations against four officers of the management. The workmen filed an explanation. However, no inquiry was held and an order of dismissal was passed on 17.7.1978 stating that no further inquiry in the matter was called for and the copy of the judgment of the Special Judicial Magistrate "speaks for itself." The workmen challenged their dismissal before the Labour Court, which accepted the case of the management with respect to the misconduct of the workmen, but held that no inquiry was held at the departmental level prior to the order of dismissal, and, thus, there was denial of the principles of natural justice and fairness. However, it declined reinstatement, and passed the order granting 50% of the back-wages from the date of dismissal until the date of judgment and order passed by the Labour Court i.e. 31.3.1981. The single Judge of the High Court held the removal of the workmen as justified, and set aside the order of the Labour Court granting back wages.

Allowing the appeal in part, the Court

HELD: 1. As far as the issue of non obtaining prior approval is concerned, inasmuch as s.6(E)(2)(b) of the Uttar Pradesh Industrial Disputes Act is pari passu to s. 33(2)(b) of the Industrial Disputes Act, 1947, and since the earlier proceedings were pending, the management was required to obtain the prior approval from the Labour Court. However, the consequence thereof cannot be that the management will be disentitled to prove the misconduct in court. [para 10] [780-D-F]

Rajasthan State Road Transport Corporation & Anr. Vs. Satya Prakash **2013(2) SCR 939 = (2013) 9 SCC 232,** *Jaipur Zila Sahkari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Ors.* **2002(1) SCR 284 = (2002) 2 SCC 244 – relied on.**

2.1. The judgment of the Labour Court does not contain any reason in support of the conclusion arrived at by it that the misconduct was proved on the basis of the evidence which was led before it. The management chose to proceed departmentally against the workmen after the acquittal of its officers in the criminal court. It did not afford any opportunity to the workmen at the departmental level. Afterwards, when the dispute was taken to the Labour Court, it was the responsibility of the management to prove the misconduct in court, and that ought to be done by leading evidence of the witnesses which, of course, they did. There is no discussion whatsoever about the evidence as to why the Labour Court came to the conclusion that the misconduct is established. In the circumstances, the finding of the Labour Court cannot be sustained that the management had proved the misconduct. Therefore, the workmen were entitled to the declaration that termination of their services was bad in law and the consequential relief. [para 11] [781-B-F]

2.2. This Court holds that termination of services of workmen was unjustified on merits. The orders of the

High Court and the Labour Court are set aside. The workmen are entitled to award of compensation towards back-wages quantified at 50%, with interest at 6% per annum, from the date of dismissal until the date of superannuation/death, whichever is earlier. [para 12-13] [781-G; 782-B]

Case Law Reference:

2013(2) SCR 939	**relied on**	**para 10**
2002(1) SCR 284	**relied on**	**para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1762 of 2007.

From the the Judgment & Order dated 23.05.2003 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition Nos. 9498 and 10321 of 1981.

R.D. Upadhyay for the Appellants.

Sunny Chaudhary (for C.D. Singh), V.N. Raghupathy for the Respondents.

The Judgment of the Court was delivered by

H.L. GOKHALE, J. 1. This appeal seeks to challenge the common judgment and order dated 23.5.2003 rendered by the High Court of Allahabad in Writ Petition No.9498 of 1981 which was filed by the first respondent management, and Writ Petition No.10321 of 1981 which was filed by the appellants workmen. The writ petition which was filed by the management has been allowed whereas the one filed by the workmen has been dismissed. Both these writ petitions sought to challenge the award dated 31.3.1981 passed by the Labour Court at Bareilly in Adjudication Case No. 95 of 1979. Heard Mr. R.D. Upadhyay, learned counsel in support of this appeal and Mr. Sunny Chaudhary, learned counsel appearing for the respondents.

2. The facts leading to this appeal are this wise. One Mr. J.H. Patel, was elected on 8.5.1996 as the General Secretary of the Nuboard Karmachari Sangh, a Trade Union registered under the provisions of the Trade Unions Act. The said Karmachari Sangh was affiliated to Hind Majdoor Panchayat. One Mr. Ram Kishan was the Organizing Secretary and Mr. Asha Ram was the Vice President of the said Karnachari Sangh. It is the further case of the workmen that on 20.8.1977 they wrote to the Registrar of the Trade Unions, U.P. at Kanpur to declare their office bearers, including the above three persons, as the "protected workmen", and they were so declared by the Registrar of Trade Unions by his letter dated 15.2.1978.

3. It is the case of the workmen that on 10.4.1977, after the formation of the Trade Union, when the aforesaid J.H. Patel was collecting subscription from the members of the Union, he was called to the office of the employer, and was told to refrain from conducting the Trade Union activities, and the Receipt Book and the subscription which he had collected, was snatched away from him. The said Mr. Patel went to the Police Station to lodge a complaint, but the complaint was not recorded, and therefore he was constrained to file a criminal complaint before the concerned Magistrate. There was no dispute that in that complaint, officers of the respondent Company including A.H. Shah, Director and J.B. Dalal, Administrative Manager, were arraigned as accused. The complaint was taken up by the Magistrate but inasmuch as the evidence was found insufficient, the learned Magistrate held that the complaint was not proved, and therefore by his judgment and order dated 29.6.1978 acquitted all the four accused including the aforesaid two officers of the respondent Company.

4. Thereafter, the management of the respondent Company chose to serve a charge-sheet dated 15.7.1978 on the concerned workmen. In the said charge-sheet, essentially the charge was that the workmen concerned had lodged a

report to the Superintendent of Police, Rampur, containing false allegations against four officers of the management, and that was done with an intent that the police officer should use the lawful power against the said persons. There is no dispute that the workmen filed an explanation and that despite the explanation, no inquiry was held and an order of dismissal was passed on 17.7.1978. In fact the order dated 17.7.1978 in terms states: "In view of the self evident fact no further inquiry in the matter is called for, a copy of the judgment of the Special Judicial Magistrate, Rampur speaks for itself." Therefore, on that basis the dismissal order was passed.

5. The appellants workmen challenged their dismissal from service leading to the aforesaid Adjudication Case No.95 of 1979 before the Labour Court. In the proceeding before the Labour Court, essentially three issues were raised by the workmen. Firstly, that they were "protected workmen" and action against them was not justified. Secondly, that another proceeding was pending before the Labour Court and in view of the provision of Section 6E(2)(b) of the Uttar Pradesh Industrial Disputes Act which is in pari passu to Section 32(2)(b) of the Industrial Disputes Act, 1947, an approval application was required to be filed and inasmuch as the said application was not filed, the termination was bad in law. Thirdly, that the misconduct as alleged was not proved, and that lodging a criminal case against the officers of the respondent Company was not a misconduct.

6. In the adjudication case before the Labour Court, the workmen examined themselves and the management examined, amongst others, Mr. A.H. Shah, Director (EW-1) and Mr. J.B. Dalal, Administrative Officer (E-2). The Labour Court accepted the contention of the management with respect to the misconduct, but held that no inquiry was held at the departmental level prior to the order of dismissal. Thus, there was denial of the principles of natural justice and fairness. Hence, although it declined reinstatement, it passed the order

granting 50% of the back-wages from the date of dismissal until the date of judgment and order passed by the Labour Court i.e. 31.3.1981. Being aggrieved by that judgment and order of the Labour Court, the management filed the earlier referred writ petition to dispute the award of this compensation and the workmen filed the other writ petition to challenge that part of the order which denied them reinstatement.

7. The learned Single Judge of the High Court heard both the writ petitions together and formed an opinion that the removal was justified in view of the earlier decision of the Criminal Court and therefore, held that the award of back-wages was not contemplated. He therefore set aside that part of the order of the Labour Court by his judgment and order dated 23.5.2003. Being aggrieved by this judgment and order the appellants have filed this appeal by special leave.

8. Mr. R.D. Upadhyay, learned counsel for the appellants pointed out that although the Complaint before the Magistrate had been dismissed, the management chose to hold an independent inquiry at their level, and it was their responsibility to prove the misconduct, firstly at the departmental level and if not there, later on in the Labour Court. Admittedly, no departmental inquiry was held. As far as the order of the Labour Court is concerned, if one peruses that order, it is clearly seen that there is no discussion with respect to the evidence by the management before the Labour Court on the basis of which it could be said that the Labour Court arrived at the conclusion that the misconduct was proved. That apart, it was also the submission on behalf of the workmen that they were "protected workmen" and that no prior approval was obtained to conduct any inquiry.

9. Mr. Sunny Chaudhary, learned counsel appearing for the respondents submitted that undoubtedly the workmen had lodged the Complaint against the senior officers of the respondent Company in the Magistrate's Court. This damaged the reputation of the Company, and this amounted to

defamation and therefore the management was entitled to proceed at the departmental level. According to him, the conduct on the part of the workmen amounted to 'disorderly behaviour' and although the management had passed the dismissal order merely on receiving the explanation from the workmen (and without holding an inquiry), evidence had been led before the Labour Court and after considering the evidence, the learned Judge had come to the conclusion that misconduct had been established. He submitted that therefore the Labour Court was wrong in awarding 50% compensation from the date of dismissal until the date of its judgment and the High Court was fully justified in passing the order that it had passed deleting the order of compensation which was awarded to the workmen.

10. We have noted the submissions of both the learned counsel. As far as the issue of the workmen being "protected workmen" is concerned, presently we are not required to go into that aspect. Similarly, as far as the issue of non obtaining prior approval is concerned, inasmuch as Section 6(E)(2)(b) of the Uttar Pradesh Industrial Disputes Act is pari passu to Section 32(2)(b) of the Industrial Disputes Act, 1947, undoubtedly the management was required to obtain the prior approval from the Labour Court inasmuch as an earlier proceeding was pending in the Labour Court. However, the consequence thereof cannot be that the management will be disentitled to prove the misconduct in Court. This has been the view taken by this Court in *Rajasthan State Road Transport Corporation & Anr. Vs. Satya Prakash,* (2013) 9 SCC 232, which explains the law laid down earlier by a Constitution Bench of this Court in *Jaipur Zila Sahkari Bhoomi Vikas Bank Ltd. Vs. Ram Gopal Sharma and Ors.,* (2002) 2 SCC 244. Therefore, the management cannot be faulted merely on that ground.

11. The fact, however, remains that the opportunity to prove the misconduct was made available to the management in the Labour Court in the present case. The employer examined two

of their witnesses, namely Mr. A.H. Shah, Director (EW-1) and Mr. J.B. Dalal, Administrative Officer (E-2). However, from the judgment rendered by the Labour Court what we find is that there is no discussion, whatsoever, with respect to the evidence led by these two witnesses. The judgment does not contain any reason in support of the conclusion arrived at by the Labour Court that misconduct was proved before the Labour Court on the basis of the evidence which was led before it. The management chose to proceed departmentally against the workmen after the acquittal of its officers in the Criminal Court. It did not afford any opportunity to the workmen at the departmental level. Afterwards, when the dispute was taken to the Labour Court, it was the responsibility of the management to prove the misconduct in Court, and that ought to be done by leading evidence of the witnesses which, of course, they did. However, the evidence has to be discussed by the Labour Court. In the present case, there is no discussion whatsoever about the evidence as to why the Labour Court came to the conclusion that the misconduct is established. In the circumstances, the findings of the Labour Court cannot be sustained that the management had proved the misconduct. Inasmuch as the misconduct was not proved, the workmen were entitled to get the relief that they were seeking, namely the declaration that the termination of their services was bad in law and then the consequential relief. When the matter was carried to the High Court, the High Court also lost sight of that fact and, on the other hand, it deleted whatever compensation was awarded to the workmen by the Labour Court. In our view, the order of the High Court is erroneous on the very ground.

12. In the circumstances, this appeal will have to be allowed which we hereby allow, set aside the order of the High Court as well as that of the Labour Court and decide the dispute raised by the workmen in their favour, namely that the termination of their services was unjustified on merits.

13. Then we come to the aspect of relief. Out of three

appellants before this Court, J.H. Patel has expired and his heirs are on record. Mr. Upadhyay does not dispute that as far as the other two workmen Mr. Asharam and Ram Kishan are concerned, they must have reached the age of superannuation. In the circumstances, we award compensation to these workmen towards back-wages quantified at 50%, with interest at 6% per annum, from the date of dismissal until the date of superannuation/death, whichever is earlier.

14. At this stage, on instructions, Mr. Chaudhary, learned counsel appearing for the respondents states that the first respondent Company is no longer functioning, and a proceeding is pending before the BIFR. He therefore makes a request that the back-wages be reduced to 40% and no interest be awarded thereon. Mr. Upadhyay learned counsel for the appellants submits that the appellants are agreeable to this suggestion provided the said amount is paid within a period of three months hereafter. In the circumstances, we give this option to the first respondent viz to pay 40% of the back-wages from the date of dismissal until the date of superannuation/ death, whichever is earlier provided the amount is so paid within three months. If the compensation is so paid, the amount of interest will stand waived. In the event, however, the amount of 40% is not paid within a period of three months hereafter, the earlier part of the order, namely that respondent No.1 should pay 50% of the back-wages with 6% interest will be operative.

15. Appeal allowed in the above terms, though without any order as to costs.

R.P. Appeal partly allowed.

PUNE MUNICIPAL CORPORATION & ANR.
v.
HARAKCHAND MISIRIMAL SOLANKI & ORS.
(Civil Appeal No. 877 of 2014)

JANUARY 24, 2014.

[R.M. LODHA, MADAN B. LOKUR AND KURIAN JOSEPH, JJ.]

RIGHT TO FAIR COMPENSATION AND TRANSPARENCY IN LAND ACQUISITION, REHABILITATION AND RESETTLEMENT ACT, 2013:

s. 24(2) – Proceedings deemed to have lapsed – Award made 5 years prior to coming into force of 2013 Act – Compensation neither paid to land owners/claimants nor deposited in court – Held: Subject land acquisition proceedings shall be deemed to have lapsed u/s 24(2) of the 2013 Act — Deposit of the amount of compensation in the government treasury is not equivalent to the amount of compensation paid to the landowners/persons interested and liability of State to pay interest subsists till the amount has not been deposited in court – Land Acquisition Act, 1894 – s.11 – Interpretation of statute.

s.114(2) – Repeal and savings – Held: Sub-s. (2) of s. 114 makes s. 6 of the General Clauses Act, 1897 applicable with regard to the effect of repeal but this is subject to the provisions in the 2013 Act — Under s.24(2) land acquisition proceedings initiated under the 1894 Act, by legal fiction, are deemed to have lapsed where award has been made five years or more prior to the commencement of 2013 Act and possession of the land is not taken or compensation has not been paid — The legal fiction u/s 24(2) comes into operation as soon as conditions stated therein are satisfied – General Clauses Act, 1897 – s.6.

A notification u/s 4 of the Land Acquisition Act, 1894 in respect of the lands of the respondents was published on 30.09.2004. On 26.12.2005, the declaration u/s 6 was published in the official gazette. On 31.01.2008 the Special Land Acquisition Officer made the award u/s 11 of the 1894 Act. In the instant appeals filed by the Municipal Corporation, it was contended for the respondents-landowners that by virtue of s. 24(2) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, the subject acquisition would be deemed to have lapsed because the award u/s 11 of the 1894 Act was made more than five years prior to the commencement of 2013 Act and no compensation was paid to the land owners nor the amount of compensation was deposited in the court by the Special Land Acquisition Officer.

Dismissing the appeals, the Court

HELD: 1.1. Section 24(2) of 2013 Act, which begins with *non obstante* clause and has overriding effect over s.24(1), enacts that in relation to the land acquisition proceedings initiated under 1894 Act, where an award has been made five years or more prior to the commencement of the 2013 Act and either of the two contingencies is satisfied, viz; (i) physical possession of the land has not been taken or (ii) the *"compensation has not been paid"*, such acquisition proceedings shall be deemed to have lapsed. [Para 11] [791-A-C]

1.2. The expression, "*compensation has not been paid*" has to be construed in terms of s. 31 of the 1894 Act, which enjoins upon the Collector to tender payment of compensation to the person interested or *deposit of the same in the court*. The mandatory nature of the provision in s. 31(2) with regard to deposit of the compensation in the court is further fortified by the provisions contained in ss. 32, 33 and 34. For the

purposes of s. 24(2), the compensation shall be regarded as "paid" if the compensation has been offered to the person interested and such compensation has been deposited in the court where reference u/s 18 can be made on happening of any of the contingencies contemplated u/s 31(2) of the 1894 Act. [Para 12, 14, 16 and 17] [791-E; 792-C; 793-A-B, F-H]

1.3. The *deposit of the amount of compensation in the government treasury is not equivalent to the amount of compensation paid to the landowners/persons interested,* as the deposit of the amount of the compensation in the state's revenue account is of no avail and the liability of the State to pay interest subsists till the amount has not been deposited in court. The1894 Act being an expropriatory legislation has to be strictly followed. The procedure, mode and manner for payment of compensation are prescribed in Part V (ss. 31-34) of the 1894 Act. The Collector, with regard to the payment of compensation, can only act in the manner so provided. It is settled proposition of law that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. [para 18-19] [794-B-C, E-F]

Ivo Agnelo Santimano Fernandes and Others v. State of Goa and Another **2011 (2) SCR 1142 = (2011) 11 SCC 506;** *Prem Nath Kapur v. National Fertilizers Corpn. of India Ltd* **1995 (5) Suppl. SCR 790 = (1996) 2 SCC 71 – relied on.**

Nazir Ahmad v. King Emperor **A.I.R. 1936 PC 253(2) – referred to**

1.4. In the instant case, the award pertaining to the subject land has been made by the Special Land Acquisition Officer more than five years prior to the commencement of the 2013 Act. Admittedly, the compensation so awarded has neither been paid to the landowners/persons interested nor deposited in the court. This Court, therefore, holds that the subject land acquisition proceedings shall be deemed to have lapsed u/s 24(2) of the 2013 Act. [para 20] [794-G; 795-A-C]

2. It cannot be said that the proceedings in the instant case are not affected at all in view of s.114(2) of the 2013 Act. Section 114(1) of the 2013 Act repeals 1894 Act. Sub-s. (2) of s. 114, however, makes s. 6 of the General Clauses Act, 1897 applicable with regard to the effect of repeal but this is subject to the provisions in the 2013 Act. Under s.24(2) land acquisition proceedings initiated under the 1894 Act, by legal fiction, are deemed to have lapsed where award has been made five years or more prior to the commencement of 2013 Act and possession of the land is not taken or compensation has not been paid. The legal fiction u/s 24(2) comes into operation as soon as conditions stated therein are satisfied. [para 21] [795-C-F]

Case Law Reference:

2011 (2) SCR 1142	**relied on**	**para 19**
1995 (5) Suppl. SCR 790	**relied on**	**para 19**
A.I.R. 1936 PC 253(2)	**referred to**	**para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 877 of 2014.

From the Judgment & Order dated 24.10.2008 of the High Court of Bombay in WP No. 1296 of 2008.

WITH

C.A. Nos. 878, 879, 880, 881, 882, 883, 884, 885 and 886-894 of 2014.

R.P. Bhat, Indu Malhotra, Jayashree Wad, Ashish Wad (for J.S. Wad & Co.), Madhavi Divan, Asha Gopalan Nair, Kush Chaturvedi, Vivek Jain, Nishtha Kumar, Suman Yadav, Apporva Bhumsesh, Rajat Sehgal (for Vikas Mehta), Brijesh Kalappa, Gopal Singh, Divya Nari (for N. Ganpathy), Anriuddha P. Mayee for the appearing parties.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Delay condoned in S.L.P. (C) Nos.15847-15855 of 2010. Leave granted.

2. In these 18 appeals, by special leave, it is argued on behalf of the respondents-landowners that in view of Section 24(2) of The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short, '2013 Act') which has come into effect on 01.01.2014, the subject land acquisition proceedings initiated under the Land Acquisition Act, 1894 (for short, '1894 Act') have lapsed. The question for decision relates to true meaning of the expression: "compensation has not been paid" occurring in Section 24(2) of the 2013 Act.

3. It may not be necessary at all to go into the legality and correctness of the impugned judgment, if the subject land acquisition proceedings are held to have lapsed. We, therefore, deal with this aspect first.

4. The brief facts necessary for consideration of the above question are these. On 06.08.2002, the proposal of the Municipal Commissioner, Pune Municipal Corporation (for short, "Corporation") duly approved by the Standing Committee for acquisition of lands admeasuring 43.94 acres for development of "Forest Garden" was sent to the Collector, Pune. The Collector sanctioned the proposal and on 20.02.2003 forwarded the same to Special Land Acquisition Officer (15), Pune for further action. On 30.09.2004, the notification under Section 4 of the 1894 Act was published in

the official gazette. Then notices under Section 4(1) were served upon the landowners/interested persons. On 26.12.2005, the declaration under Section 6 was published in the official gazette and on 02.02.2006, it was also published at the site and on the notice board of the Office of Talaltti. Following the notices under Section 9, on 31.01.2008 the Special Land Acquisition Officer made the award under Section 11 of the 1894 Act.

5. The landowners challenged the above acquisition proceedings before the Bombay High Court in 9 writ petitions. Of them, 2 were filed before making award and 7 after the award. The challenge to the acquisition proceedings and the validity of the award was laid on diverse grounds including (i) absence of resolution of the General Body of the Corporation; (ii) non-compliance with the provisions of Section 5A, (iii) non-compliance with the provisions of Section 7, and (iv) lapsing of acquisition proceedings under Section 11A. The High Court on consideration of the arguments advanced before it by the parties has held that the acquisition proceedings for the development of "Forest Garden" could not be initiated by the Commissioner with the mere approval of the Standing Committee without resolution of the General Body of the Corporation. The acquisition proceedings were also held bad in law for non-compliance of Section 7 and other statutory breaches. *Inter alia*, the High Court has quashed the acquisition proceedings and gave certain directions including restoration of possession.

6. It is argued on behalf of the landowners that by virtue of Section 24(2) of the 2013 Act, the subject acquisition shall be deemed to have been lapsed because the award under Section 11 of the 1894 Act is made more than five years prior to the commencement of 2013 Act and no compensation has been paid to the owners nor the amount of compensation has been deposited in the court by the Special Land Acquisition Officer.

7. On the other hand, on behalf of the Corporation and so also for the Collector, it is argued that the award was made by the Special Land Acquisition Officer on 31.01.2008 strictly in terms of 1894 Act and on the very day the landowners were informed regarding the quantum of compensation for their respective lands. Notices were also issued to the landowners to reach the office of the Special Land Acquisition Officer and receive the amount of compensation and since they neither received the compensation nor any request came from them to make reference to the District Court under Section 18, the compensation amounting to Rs.27 crores was deposited in the government treasury. It is, thus, submitted that there was no default on the part of the Special Land Acquisition Officer or the government and, hence, the acquisition proceedings have not lapsed. Moreover, reliance is also placed on Section 114 of the 2013 Act and it is argued that the concluded land acquisition proceedings are not at all affected by Section 24(2) and the only right that survives to the landowners is to receive compensation.

8. 2013 Act puts in place entirely new regime for compulsory acquisition of land and provides for new scheme for compensation, rehabilitation and resettlement to the affected families whose land has been acquired or proposed to be acquired or affected by such acquisition.

9. To turn, now, to the meaning of the expression "compensation has not been paid" in Section 24(2) of the 2013 Act and its effect on the subject acquisition, it is necessary to refer to Section 24 which reads as follows:

> "24. (1) Notwithstanding anything contained in this Act, in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894, -
>
> (a) Where no award under section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply; or
>
> (b) Where an award under said section 11 has been made, then such proceedings shall continue under the provisions of the said Land Acquisition Act, as if the said Act has not been repealed.
>
> (2) Notwithstanding anything contained in sub-section (1), in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894, where an award under the said section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act:
>
> Provided that where an award has been made and compensation in respect of a majority of land holding has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition under section 4 of the said Land Acquisition Act, shall be entitled to compensation in accordance with the provisions of this Act."

10. Insofar as sub-section (1) of Section 24 is concerned, it begins with *non obstante* clause. By this, Parliament has given overriding effect to this provision over all other provisions of 2013 Act. It is provided in clause (a) that where the land acquisition proceedings have been initiated under the 1894 Act but no award under Section 11 is made, then the provisions of 2013 Act shall apply relating to the determination of compensation. Clause (b) of Section 24(1) makes provision that where land acquisition proceedings have been initiated under the 1894 Act and award has been made under Section

11, then such proceedings shall continue under the provisions of the 1894 Act as if that Act has not been repealed.

11. Section 24(2) also begins with *non obstante* clause. This provision has overriding effect over Section 24(1). Section 24(2) enacts that in relation to the land acquisition proceedings initiated under 1894 Act, where an award has been made five years or more prior to the commencement of the 2013 Act and either of the two contingencies is satisfied, viz; (i) physical possession of the land has not been taken or (ii) the compensation has not been paid, such acquisition proceedings shall be deemed to have lapsed. On the lapse of such acquisition proceedings, if the appropriate government still chooses to acquire the land which was the subject matter of acquisition under the 1894 Act then it has to initiate the proceedings afresh under the 2013 Act. The proviso appended to Section 24(2) deals with a situation where in respect of the acquisition initiated under the 1894 Act an award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries then all the beneficiaries specified in Section 4 notification become entitled to compensation under 2013 Act.

12. To find out the meaning of the expression, "compensation has not been paid", it is necessary to have a look at Section 31 of the 1894 Act. The said Section, to the extent it is relevant, reads as follows:

> "31. Payment of compensation or deposit of same in Court. – (1) On making an award under section 11, the Collector shall tender payment of the compensation awarded by him to the persons interested entitled thereto according to the award, and shall pay it to them unless prevented by some one or more of the contingencies mentioned in the next sub-section.
>
> (2) If they shall not consent to receive it, or if there be no person competent to alienate the land, or if there be any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector shall deposit the amount of the compensation in the Court to which a reference under section 18 would be submitted:
>
> xxxx xxxx xxxx xxxx"

13. There is amendment in Maharashtra—Nagpur (City) in Section 31 whereby in sub-section (1), after the words "compensation" and in sub-section (2), after the words, "the amount of compensation", the words "and costs if any" have been inserted.

14. Section 31(1) of the 1894 Act enjoins upon the Collector, on making an award under Section 11, to tender payment of compensation to persons interested entitled thereto according to award. It further mandates the Collector to make payment of compensation to them unless prevented by one of the contingencies contemplated in sub-section (2). The contingencies contemplated in Section 31(2) are: (i) the persons interested entitled to compensation do not consent to receive it (ii) there is no person competent to alienate the land and (iii) there is dispute as to the title to receive compensation or as to the apportionment of it. If due to any of the contingencies contemplated in Section 31(2), the Collector is prevented from making payment of compensation to the persons interested who are entitled to compensation, then the Collector is required to deposit the compensation in the court to which reference under Section 18 may be made.

15. Simply put, Section 31 of the 1894 Act makes provision for payment of compensation or deposit of the same in the court. This provision requires that the Collector should tender payment of compensation as awarded by him to the persons interested who are entitled to compensation. If due to happening of any contingency as contemplated in Section 31(2), the compensation has not been paid, the Collector

should deposit the amount of compensation in the court to which reference can be made under Section 18.

16. The mandatory nature of the provision in Section 31(2) with regard to deposit of the compensation in the court is further fortified by the provisions contained in Sections 32, 33 and 34. As a matter of fact, Section 33 gives power to the court, on an application by a person interested or claiming an interest in such money, to pass an order to invest the amount so deposited in such government or other approved securities and may direct the interest or other proceeds of any such investment to be accumulated and paid in such manner as it may consider proper so that the parties interested therein may have the benefit therefrom as they might have had from the land in respect whereof such money shall have been deposited or as near thereto as may be.

17. While enacting Section 24(2), Parliament definitely had in its view Section 31 of the 1894 Act. From that one thing is clear that it did not intend to equate the word "paid" to "offered" or "tendered". But at the same time, we do not think that by use of the word "paid", Parliament intended receipt of compensation by the landowners/persons interested. In our view, it is not appropriate to give a literal construction to the expression "paid" used in this sub-section (sub-section (2) of Section 24). If a literal construction were to be given, then it would amount to ignoring procedure, mode and manner of deposit provided in Section 31(2) of the 1894 Act in the event of happening of any of the contingencies contemplated therein which may prevent the Collector from making actual payment of compensation. We are of the view, therefore, that for the purposes of Section 24(2), the compensation shall be regarded as "paid" if the compensation has been offered to the person interested and such compensation has been deposited in the court where reference under Section 18 can be made on happening of any of the contingencies contemplated under Section 31(2) of the 1894 Act. In other words, the compensation may be said to have been "paid" within the meaning of Section

24(2) when the Collector (or for that matter Land Acquisition Officer) has discharged his obligation and deposited the amount of compensation in court and made that amount available to the interested person to be dealt with as provided in Sections 32 and 33.

18. 1894 Act being an expropriatory legislation has to be strictly followed. The procedure, mode and manner for payment of compensation are prescribed in Part V (Sections 31-34) of the 1894 Act. The Collector, with regard to the payment of compensation, can only act in the manner so provided. It is settled proposition of law (classic statement of Lord Roche in *Nazir Ahmad*[1]*)* that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.

19. Now, this is admitted position that award was made on 31.01.2008. Notices were issued to the landowners to receive the compensation and since they did not receive the compensation, the amount (Rs.27 crores) was deposited in the government treasury. Can it be said that deposit of the amount of compensation in the government treasury is equivalent to the amount of compensation paid to the landowners/persons interested? We do not think so. In a comparatively recent decision, this Court in *Agnelo Santimano Fernandes,*[2] relying upon the earlier decision in *Prem Nath Kapur,*[3] has held that the deposit of the amount of the compensation in the state's revenue account is of no avail and the liability of the state to pay interest subsists till the amount has not been deposited in court.

20. From the above, it is clear that the award pertaining

1. Nazir Ahmad v. King Emperor; [A.I.R. 1936 Privy Council 253 (2)]
2. Ivo Agnelo Santimano Fernandes and Others v. State of Goa and Another; [2011] 11 SCC 506.
3. Prem Nath Kapur v. National Fertilizers Corpn. of India Ltd; [(1996) 2 SCC 71]

to the subject land has been made by the Special Land Acquisition Officer more than five years prior to the commencement of the 2013 Act. It is also admitted position that compensation so awarded has neither been paid to the landowners/persons interested nor deposited in the court. The deposit of compensation amount in the government treasury is of no avail and cannot be held to be equivalent to compensation paid to the landowners/persons interested. We have, therefore, no hesitation in holding that the subject land acquisition proceedings shall be deemed to have lapsed under Section 24(2) of the 2013 Act.

21. The argument on behalf of the Corporation that the subject land acquisition proceedings have been concluded in all respects under the 1894 Act and that they are not affected at all in view of Section 114(2) of the 2013 Act, has no merit at all, and is noted to be rejected. Section 114(1) of the 2013 Act repeals 1894 Act. Sub-section (2) of Section 114, however, makes Section 6 of the General Clauses Act, 1897 applicable with regard to the effect of repeal but this is subject to the provisions in the 2013 Act. Under Section 24(2) land acquisition proceedings initiated under the 1894 Act, by legal fiction, are deemed to have lapsed where award has been made five years or more prior to the commencement of 2013 Act and possession of the land is not taken or compensation has not been paid. The legal fiction under Section 24(2) comes into operation as soon as conditions stated therein are satisfied. The applicability of Section 6 of the General Clauses Act being subject to Section 24(2), there is no merit in the contention of the Corporation.

22. In view of the foregoing discussion, it is not necessary to consider the correctness of the impugned judgment on merits.

23. The appeals fail and are dismissed with no order as to costs.

R.P. Appeals dismissed.

WORLD SPORT GROUP (MAURITIUS) LTD.
v.
MSM SATELLITE (SINGAPORE) PTE. LTD.
(Civil Appeal No. 895 of 2014)

JANUARY 24, 2014

[A.K. PATNAIK AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Arbitration and Conciliation Act, 1996:

ss.44 and 45 – Foreign seated arbitration – Jurisdiction of High Court to pass an order of injunction restraining a foreign seated international arbitration at Singapore between the parties – Plea of respondent that the main agreement which contains the arbitration agreement is void because of fraud and misrepresentation by the appellant and therefore court cannot refer the parties to arbitration – Held: s.45 of the Act postulates that even where request of arbitration is made by a party, it will not refer the parties to arbitration, if it finds that the agreement is null and void, inoperative or incapable of being performed – The words "inoperative or incapable of being performed" in s.45 have been taken from Article II (3) of the New York Convention – In the case of such arbitrations covered by the New York Convention, the Court can decline to make a reference of a dispute covered by the arbitration agreement only if it comes to conclusion that the arbitration agreement is null and void, inoperative or incapable of being performed, and not on the ground that allegations of fraud or misrepresentation have to be inquired into while deciding the disputes between the parties – In the instant case, the allegation of fraudulent misrepresentation in the main agreement did not impact the validity of the arbitration agreement which was separable from the rest of the contract – Therefore, applying principle of separability parties were wrongly refused to refer arbitration on the ground that

arbitration agreement was also void along with main agreement – Principle of separability.

Arbitration restricting the right of the parties to move the courts for appropriate relief and also barring the right to trial by a jury – Whether void for being opposed to public policy as provided in s.23 of the Indian Contract Act, 1872 and void for being an agreement in restraint of the legal proceedings in view of s.28 of the said Act – Held: Parliament has made the Arbitration and Conciliation Act, 1996 providing domestic arbitration and international arbitration as a mode of resolution of disputes between the parties and Exception 1 to s.28 of the Contract Act, 1872 clearly states that s.28 shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred – The right to jury trial is not available under Indian laws – In the instant case, the finding of the Division Bench of the High Court that arbitration clause of the Facilitation Deed is opposed to public policy and is void u/ss.23 and 28 of the Contract Act, 1872 is clearly erroneous – Contract Act, 1872 – ss.23, 28.

Doctrines/Principles: Principle of Comity of Courts – Applicability of – Plea of appellant that on principle of comity of courts, the Bombay High Court should have refused to interfere in the matter and should have allowed the parties to resolve their dispute through ICC arbitration subject to the jurisdiction of the Singapore Courts in accordance with the arbitration clause of the Facilitation Deed – Held: Not applicable in the instant case, no decision of a court of foreign country or no law of a foreign country was cited on behalf of the appellant to contend that the courts in India out of deference to such decision of the foreign court or foreign law must not assume jurisdiction to restrain arbitration proceedings at Singapore – On the other hand, u/s.9 of the

CPC, the courts in India have jurisdiction to try all suits of a civil nature excepting suits of which cognizance is either expressly or impliedly barred – Thus, the appropriate civil court in India has jurisdiction to entertain the suit and pass appropriate orders in the suit by virtue of s.9 of the CPC – Code of Civil Procedure, 1908 – s.9.

The BCCI invited tenders for IPL Media Rights on a worldwide basis. Amongst the tenders submitted, the bid of WSG (India) was accepted by BCCI. By a pre-bid arrangement, however, the respondent was to get the media rights for the sub-continent for the period from 2008 to 2010. On 21.01.2008, the BCCI and the respondent entered into a Media rights Licence Agreement for the period from 2008 to 2010. After the first IPL season, the BCCI terminated the agreement dated 21.01.2008 and entered into a new agreement with the WSG (India).

Pursuant to the negotiations between BCCI and WSG (India), the BCCI entered into an agreement with the appellant whereunder the media rights for the Indian sub-continent was awarded to the appellant. To operate the media rights in India, the appellant was required to get a sub-licensee which it could not get within stipulated time. Thereafter, the appellant claimed to have allowed media rights in India to have lapsed and then facilitated on 25.03.2009, a new Media Rights License Agreement between the BCCI and the respondent for the Indian sub-continent for the same contract value of Rs.4,791.08 crores. BCCI and WSG India, however, continued with the Rest of the World media rights.

Thereafter the appellant entered into an agreement with the respondent called the Facilitation Deed whereunder the respondent was to pay a sum of Rs.425 crores to the appellant as Facilitation fees. The respondent made three payments totaling Rs.125 crores

to the appellant under the Facilitation Deed during 2009 but did not make the balance payment. Instead, on 25.06.2010, the respondent wrote to the appellant rescinding the Facilitation Deed on the ground that it was voidable on account of misrepresentation and fraud. The respondent also filed suit for a declaration that the Facilitation Deed was void and for recovery of Rs.125 crores already paid to the appellant.

On 28.6.2010, the appellant acting under Clause 9 of the Facilitation Deed sent a request for arbitration to ICC Singapore and ICC issued a notice to the respondent to file its answer for arbitration.

On 30.06.2010, the respondent filed a second suit before the High Court against the appellant for a declaration that as the Facilitation Deed stood rescinded, the appellant was not entitled to invoke the arbitration clause in the Facilitation Deed. The respondent also filed an application for temporary injunction against the appellant from continuing with the arbitration proceedings commenced by the appellant under the aegis of ICC.

The Single Judge of the High Court dismissed the application for temporary injunction of the respondent saying that it would be for the arbitrator to consider whether the Facilitation Deed was void on account of fraud and misrepresentation and that the arbitration must, therefore, proceed and the Court could not intervene in matters governed by the arbitration clause. The Division Bench of the High Court allowed the appeal and passed an order of temporary injunction restraining the arbitration by ICC. Aggrieved, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1. The first plea of the appellant is not accepted that as Clause 9 of the Facilitation Deed provides that any party may seek equitable relief in a court of competent jurisdiction in Singapore, or such other court that may have jurisdiction over the parties and that the Bombay High Court had no jurisdiction to entertain the suit and restrain the arbitration proceedings at Singapore because of the principle of Comity of Courts. What is meant by the principle of "comity" is that courts of one state or jurisdiction will give effect to the laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect. In the instant case no decision of a court of foreign country or no law of a foreign country has been cited on behalf of the appellant to contend that the courts in India out of deference to such decision of the foreign court or foreign law must not assume jurisdiction to restrain arbitration proceedings at Singapore. On the other hand, it was rightly submitted by the respondent that under Section 9 of the CPC, the courts in India have jurisdiction to try all suits of a civil nature excepting suits of which cognizance is either expressly or impliedly barred. Thus, the appropriate civil court in India has jurisdiction to entertain the suit and pass appropriate orders in the suit by virtue of Section 9 of the CPC and Clause 9 of the Facilitation Deed providing that courts in Singapore or any other court having jurisdiction over the parties can be approached for equitable relief could not oust the jurisdiction of the appropriate civil court conferred by Section 9 of the CPC. In the plaint in second suit, it was stated that the Facilitation Deed in which the arbitration clause is incorporated came to be executed by the defendant at Mumbai and the fraudulent inducement on the part of the defendant resulting in the plaintiff entering into the Facilitation Deed took place in Mumbai and the rescission of the Facilitation Deed on the ground that it

was induced by fraud of defendant has also been issued from Mumbai. Thus, the cause of action for filing the suit arose within the jurisdiction of the Bombay High Court and the Bombay High Court had territorial jurisdiction to entertain the suit under Section 20 of the CPC. [Para 20] [820-B-H; 821-A-D]

Black's Law Dictionary, **5th Edition – referred to.**

1.2. Any civil court in India which entertains a suit, however, has to follow the mandate of the legislature in Sections 44 and 45 in Chapter I of Part II of the Arbitration and Conciliation Act. As per Section 45 of the Act, notwithstanding anything contained in Part I or in the Code of Civil Procedure, a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. Thus, even if, under Section 9 read with Section 20 of the CPC, the Bombay High Court had the jurisdiction to entertain the suit, once a request is made by one of the parties or any person claiming through or under him to refer the parties to arbitration, the Bombay High Court was obliged to refer the parties to arbitration unless it found that the agreement referred to in Section 44 of the Act was null and void, inoperative or incapable of being performed. In the instant case, the appellant may not have made an application to refer the parties to arbitration, but Section 45 of the Act does not refer to any application as such. Instead, it refers to the request of one of the parties or any person claiming through or under him to refer the parties to arbitration. In this case, the appellant has filed an affidavit in reply to the notice of motion and has stated therein that the defendant had already invoked the

arbitration agreement in the Facilitation Deed and the arbitration proceedings have commenced and that the suit was an abuse of the process of court. The appellant had thus made a request to refer the parties to arbitration at Singapore which had already commenced. [para 21] [821-E; 822-D-H; 823-A-B]

2. Section 45 of the Act also makes it clear that even where such request is made by a party, it will not refer the parties to arbitration, if it finds that the agreement is null and void, inoperative or incapable of being performed. As per Section 45 of the Act the word "agreement" would mean the agreement referred to in Section 44 of the Act. Clause (a) of Section 44 of the Act refers to "*an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies.*" The First Schedule of the Act sets out the different Articles of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. It will be clear from clauses 1, 2 and 3 of the New York Convention as set out in the First Schedule of the Act that the agreement referred to in Section 44 of the Act is an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them. Thus, the court will decline to refer the parties to arbitration only if it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. [para 22] [823-B-E; 824-B-C]

3. Applying the principle of separability to the facts of this case, the respondent rescinded the Facilitation Deed on the grounds that the appellant did not have any right to relinquish and/or to facilitate the procurement of Indian subcontinent media rights for the IPL from BCCI and no facilitation services could have been provided by the appellant and therefore the representation by the appellant that the appellant relinquished its Indian

subcontinent media rights for the IPL in favour of the respondent for which the appellant had to be paid the facilitation fee under the deed was false and accordingly the Facilitation Deed was voidable at the option of the respondent on account of false representation and fraud. This ground of challenge to the Facilitation Deed does not in any manner affect the arbitration agreement contained in Clause 9 of the Facilitation Deed, which is independent of and separate from the main Facilitation Deed and does not get rescinded as void by the letter dated 25.06.2010 of the respondent. The Division Bench of the Bombay High Court, therefore, could not have refused to refer the parties to arbitration on the ground that the arbitration agreement was also void along with the main agreement. [Para 25] [826-H; 827-A; 828-E-H; 829-A]

4. The plea of the respondent was that the arbitration agreement was inoperative or incapable of being performed as allegations of fraud could be enquired into by the court and not by the arbitrator. However, the authorities on the meaning of the words *"inoperative or incapable of being performed"* do not support such plea. The words *"inoperative or incapable of being performed"* in Section 45 of the Act have been taken from Article II (3) of the New York Convention. Thus, the arbitration agreement does not become "inoperative or incapable of being performed" where allegations of fraud have to be inquired into and the court cannot refuse to refer the parties to arbitration as provided in Section 45 of the Act on the ground that allegations of fraud have been made by the party which can only be inquired into by the court and not by the arbitrator. In the case of such arbitrations covered by the New York Convention, the Court can decline to make a reference of a dispute covered by the arbitration agreement only if it comes to the conclusion that the arbitration agreement is null and void, inoperative

or incapable of being performed, and not on the ground that allegations of fraud or misrepresentation have to be inquired into while deciding the disputes between the parties. [paras 26, 29] [829-A-C; 831-D-G]

N. Radhakrishnan v. Maestro Engineers & Ors. **(2010) 1 SCC 72: 2009 (15) SCR 371;** *Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak* **AIR 1962 SC 406:1962 Suppl. SCR 702 – Distinguished.**

Redfern and Hunter on International Arbitration (Fifth Edition); Albert Jan Van Den Berg in an article titled "The New York Convention, 1958 – An Overview" published in the website of ICCA [www.arbitration-icca.org/media/0/12125884227980/new york convention of 1958 overview .pdf]; 'Recognition and Conferment of Foreign Arbitral Awards: A Global Commentary on the New York Convention' by Kronke, Nacimiento, et al.(ed.) (2010) – referred to.

5.1. The Division Bench of the High Court has held that the Facilitation Deed was part of several agreements entered into amongst different parties commencing from 25.03.2009 and, therefore, cannot be considered as stand apart agreement between the appellant and the respondent and so considered the Facilitation Deed as contrary to public policy of India because it is linked with the finances, funds and rights of the BCCI, which is a public body. This approach of the Division Bench of the High Court is not in consonance with the provisions of Section 45 of the Act, which mandates that in the case of arbitration agreements covered by the New York Convention, the Court which is seized of the matter will refer the parties to arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed. In view of the provisions of Section 45 of the Act, the Division Bench of the High Court was required to only consider in this case whether Clause 9

of the Facilitation Deed which contained the arbitration agreement was null and void, inoperative or incapable of being performed. The Division Bench of the High Court has further held that Clause 9 of the Facilitation Deed insofar as it restricted the right of the parties to move the courts for appropriate relief and also barred the right to trial by a jury was void for being opposed to public policy as provided in Section 23 of the Indian Contract Act, 1872 and was also void for being an agreement in restraint of the legal proceedings in view of Section 28 of the said Act. Parliament has made the Arbitration and Conciliation Act, 1996 providing domestic arbitration and international arbitration as a mode of resolution of disputes between the parties and Exception 1 to Section 28 of the Indian Contract Act, 1872 clearly states that Section 28 shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred. Clause 9 of the Facilitation Deed is consistent with this policy of the legislature as reflected in the Arbitration and Conciliation Act, 1996 and is saved by Exception 1 to Section 28 of the Indian Contract Act, 1872. The right to jury trial is not available under Indian laws. The finding of the Division Bench of the High Court, therefore, that Clause 9 of the Facilitation Deed is opposed to public policy and is void under Sections 23 and 28 of the Indian Contract Act, 1872 is clearly erroneous. [Paras 30, 31] [831-H; 832-A-H; 833-A-B]

5.2. The Division Bench of the High Court has also held that as allegations of fraud and serious malpractices on the part of the appellant are in issue, it is only the court which can decide these issues through furtherance of judicial evidence by either party and these issues cannot be properly gone into by the arbitrator. Section 45 of the

Act does not provide that the court will not refer the parties to arbitration if the allegations of fraud have to be inquired into. Section 45 provides that only if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed, it will decline to refer the parties to arbitration. The Division Bench of the High court has further held that since the earlier suit was pending in court since 25.06.2010 and that suit was inter-connected and inter-related with the second suit, the court could not allow splitting of the matters and disputes to be decided by the court in India in the first suit and by arbitration abroad in regard to the second suit and invite conflicting verdicts on the issues which are inter-related. This reasoning adopted by the Division Bench of the Bombay High Court in the impugned judgment is alien to the provisions of Section 45 of the Act which does not empower the court to decline a reference to arbitration on the ground that another suit on the same issue is pending in the Indian court. Hence, it has been rightly held by the Single Judge of the Bombay High Court that it is for the arbitrator to decide this dispute in accordance with the arbitration agreement. [Paras 32, 33, 34] [833-B-G; 834-D]

Chloro Controls India Private Limited v. Seven Trent Water Purification Inc. & Ors. **(2013) 1 SCC 641;** *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd*. **(2009) 1 SCC 267: 2008 (13) SCR 638;** *Reva Electric Car Company Private Ltd. v. Green Mobil* **(2012) 2 SCC 9: 2011 (13) SCR 359;** *Branch Manager*, *Magma Leasing and Finance Ltd. & Anr. v. Potluri Madhavilata & Anr.* **(2009) 10 SCC 103: 2009 (14) SCR 815;** *V.O. Tractoroexport, Moscow v. Tarapore & Company and Anr*. **(1969) 3 SCC 562:1970 (3) SCR 53;** *Oil and Natural Gas Commission v. Western Company of North America* **(1987) 1 SCC 496: 1987 (1) SCR 1024;** *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.* **(2011) 14 SCC 66: 2011 (9) SCR 382;** *Haryana Telecom Ltd. v. Sterlite*

Industries (India) Ltd. **(1999) 5 SCC 688: 1999 (3) SCR 861;** *M/s Zee Tele Films Ltd. & Anr. v. Union of India & Ors*. **AIR 2005 SC 2677:2005 (1) SCR 913;** *Booz Allen & Hamilton v. SBI Home Finance* **(2011) 5 SCC 532: 2011 (7) SCR 310;** *India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd.* **(2007) 5 SCC 510: 2007 (3) SCR 726 – referred to.**

Premium Nafta Products Ltd. v. Fili Shipping Company Ltd. & Ors. **2007 UKHL 40;** *United States in Buckeye Check Cashing, Inc. v. John Cardegna* **et al 546 US 440 (2006);** *Russel on Arbitration,* **para 7-056, 7-058, and** *Claxton Engineering v. Txm olaj – es gaz Kutao Ktf* **[2011] EWHC 345 (COMM.) – referred to.**

Redfern And Hunter On International Arbitration **(Fifth Edition page 134 para 2.141) – referred to.**

Case Law Reference:

(2013) 1 SCC 641	**Referred to**	**Para 8**
2008 (13) SCR 638	**Referred to**	**Para 9**
2011 (13) SCR 359	**Referred to**	**Para 9**
2007 UKHL 40	**Referred to**	**Para 9**
546 US 440 (2006)	**Referred to**	**Para 9**
2009 (15) SCR 371	**Distinguished**	**Para 10**
1962 Suppl. SCR 702	**Distinguished**	**Para 10**
1970 (3) SCR 53	**Referred to**	**Para 15**
1987 (1) SCR 1024	**Referred to**	**Para 15**
2011 (9) SCR 382	**Referred to**	**Para 16**
1999 (3) SCR 861	**Referred to**	**Para 17**
2005 (1) SCR 913	**Referred to**	**Para 18**
2011 (7) SCR 310	**Referred to**	**Para 18**
2007 (3) SCR 726	**Referred to**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 895 of 2014.

From the Judgment and Order dated 17.09.2010 of the High Court of Judicature at Bombay in Appeal (L) No. 534 of 2010 in Notice of Motion No. 1809 of 2010 in Suit No. 1828 of 2010.

K.K. Venugopal, V.K. Misra, Pojat T., Tine A., Swapnil Jain, Madhav Misra, Devendra Singh for the Appellant.

Gopal Subramonium, Devansh Mohta, Vijay K. Sondhi, Sanjay Kumar, Ashish Prasad, Soham Kumar, Samir Ali Khan, Mayank Grover for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. Leave granted.

2. This is an appeal against the order dated 17.09.2010 of the Division Bench of the Bombay High Court in Appeal (Lodging) No.534 of 2010.

Facts:

3. The facts very briefly are that on 30.11.2007 the Board of Control for Cricket in India (for short 'BCCI') invited tenders for IPL (Indian Premier League) Media Rights for a period of ten years from 2008 to 2017 on a worldwide basis. Amongst the tenders submitted, the bid of World Sports Group India (for short 'WSG India') was accepted by BCCI. By a pre-bid arrangement, however, the respondent was to get the media rights for the sub-continent for the period from 2008 to 2010. Accordingly, on 21.01.2008 BCCI and the respondent entered

into a Media Rights License Agreement for the period from 2008 to 2012 for a sum of US$274.50 million. After the first IPL season, the BCCI terminated the agreement dated 21.01.2008 between BCCI and the respondent for the Indian sub-continent and commenced negotiations with WSG India. On 14.03.2009, the respondent filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') against the BCCI before the Bombay High Court praying for injunction against the BCCI from acting on the termination letter dated 14.03.2009 and for preventing BCCI from granting the rights under the agreement dated 21.01.2008 to any third party. Pursuant to the negotiations between BCCI and WSG India, BCCI entered into an agreement with the appellant whereunder the media rights for the Indian sub-continent for the period 2009 to 2017 was awarded to the appellant for a value of Rs.4,791.08 crores. To operate the media rights in India, the appellant was required to seek a sub-licensee within seventy two hours. Though, this time period was extended twice, the appellant was not able to get a sub-licensee. Thereafter, the appellant claimed to have allowed media rights in India to have lapsed and then facilitated on 25.03.2009, a new Media Rights License Agreement between the BCCI and the respondent for the Indian sub-continent for the same contract value of Rs.4,791.08 crores. BCCI and WSG India, however, were to continue with the Rest of the World media rights.

4. On 25.03.2009, the appellant and the respondent also executed the Deed for Provision of Facilitation Services (hereinafter referred to as 'the Facilitation Deed') whereunder the respondent was to pay a sum of Rs.425 crores to the appellant as facilitation fees. Clause 9 of the Facilitation Deed dated 25.03.2009 between the appellant and the respondent was titled 'Governing Law' and read as follows:

"**9. GOVERNING LAW**

This Deed shall be governed by and construed in accordance with the laws of England and Wales, without

regard to choice of law principles. All actions or proceedings arising in connection with, touching upon or relating to this Deed, the breach thereof and/or the scope of the provisions of this Section shall be submitted to the International Chamber of Commerce (the "Chamber") for final and binding arbitration under its Rules of Arbitration, to be held in Singapore, in the English language before a single arbitrator who shall be a retired judge with at least ten years of commercial experience. The arbitrator shall be selected by mutual agreement of the Parties, or, if the Parties cannot agree, then by striking from a list of arbitrators supplied by the Chamber. If the Parties are unable to agree on the arbitrator, the Chamber shall choose one for them. The arbitration shall be a confidential proceeding, closed to the general public. The arbitrator shall assess the cost of the arbitration against the losing party. In addition, the prevailing party in any arbitration or legal proceeding relating to this Deed shall be entitled to all reasonable expenses (including, without limitation, reasonable attorney's fees). Notwithstanding the foregoing, the arbitrator may require that such fees be borne in such other manner as the arbitrator determines is required in order for this arbitration provision to be enforceable under applicable law. The arbitrator shall issue a written opinion stating the essential findings and conclusions upon which the arbitrator's award is based. The arbitrator shall have the power to enter temporary restraining orders and preliminary and permanent injunctions. No party shall be entitled or permitted to commence or maintain any action in a court of law with respect to any matter in dispute until such matter shall have been submitted to arbitration as herein provided and then only for the enforcement of the arbitrator's award; provided, however, that prior to the appointment of the arbitrator or for remedies beyond the jurisdiction of an arbitrator, at any time, any party may seek equitable relief in a court of competent jurisdiction in Singapore, or such other court that may have jurisdiction

over the Parties, without thereby waiving its right to arbitration of the dispute or controversy under this section. THE PARTIES HEREBY WAIVE THEIR RIGHT TO JURY TRIAL WITH RESPECT TO ALL CLAIMS AND ISSUES ARISING UNDER, IN CONNECTION WITH, TOUCHING UPON OR RELATING TO THIS DEED, THE BREACH THEREOF AND/OR THE SCOPE OF THE PROVISIONS OF THIS SECTION, WHETHER SOUNDING IN CONTRACT OR TORT, AND INCLUDING ANY CLAIM FOR FRAUDULENT INDUCEMENT THEREOF."

5. The respondent made three payments totaling Rs.125 crores to the appellant under the Facilitation Deed during 2009 and did not make the balance payment. Instead, on 25.06.2010, the respondent wrote to the appellant rescinding the Facilitation Deed on the ground that it was voidable on account of misrepresentation and fraud. On 25.06.2010, the respondent also filed Suit No.1869 of 2010 for *inter alia* a declaration that the Facilitation Deed was void and for recovery of Rs.125 crores already paid to the appellant. On 28.06.2010, the appellant acting under Clause 9 of the Facilitation Deed sent a request for arbitration to ICC Singapore and the ICC issued a notice to the respondent to file its answer to the request for arbitration. In the meanwhile, on 30.06.2010, the respondent filed a second suit, Suit No.1828 of 2010, before the Bombay High Court against the appellant for *inter alia* a declaration that as the Facilitation Deed stood rescinded, the appellant was not entitled to invoke the arbitration clause in the Facilitation Deed. The respondent also filed an application for temporary injunction against the appellant from continuing with the arbitration proceedings commenced by the appellant under the aegis of ICC.

6. On 09.08.2010, the learned Single Judge of the Bombay High Court dismissed the application for temporary injunction of the respondent saying that it would be for the arbitrator to consider whether the Facilitation Deed was void

on account of fraud and misrepresentation and that the arbitration must, therefore, proceed and the Court could not intervene in matters governed by the arbitration clause. The respondent challenged the order of the learned Single Judge before the Division Bench of the Bombay High Court and by the impugned order, the Division Bench of the Bombay High Court allowed the appeal, set aside the order of the learned Single Judge and passed an order of temporary injunction restraining the arbitration by ICC. Aggrieved, the appellant has filed this appeal.

Contentions on behalf of the appellant:

7. Mr. K.K. Venugopal, learned senior counsel for the appellant, submitted that the Division Bench of the High Court failed to appreciate that the Bombay High Court had no jurisdiction to pass an order of injunction restraining a foreign seated international arbitration at Singapore between the parties, who were not residents of India. In this context, he referred to Clause 9 of the Facilitation Deed which stipulated that any party may seek equitable relief in a court of competent jurisdiction in Singapore, or such other court that may have jurisdiction over the parties. He submitted that on the principle of Comity of Courts, the Bombay High Court should have refused to interfere in the matter and should have allowed the parties to resolve their dispute through ICC arbitration, subject to the jurisdiction of the Singapore courts in accordance with Clause 9 of the Facilitation Deed.

8. Mr. Venugopal next submitted that the Division Bench of the High Court failed to appreciate that under Section 45 of the Act, the Court seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44 has to refer the parties to arbitration, unless it finds that the agreement referred to in Section 44 is null and void, inoperative or incapable of being performed. He submitted that the agreement referred to in Section 44 of the Act is 'an agreement in writing for arbitration' and, therefore, unless the

Court finds that the agreement in writing for arbitration is null and void, inoperative or incapable of being performed, the Court will not entertain a dispute covered by the arbitration agreement and refer the parties to the arbitration. In support of this submission, he relied on the decision of this Court in *Chloro Controls India Private Limited v. Seven Trent Water Purification Inc. & Ors.* [(2013) 1 SCC 641].

9. Mr. Venugopal submitted that the Division Bench of the High Court, instead of examining whether the agreement in writing for arbitration was null and void, inoperative or incapable of being performed, has held that the entire Facilitation Deed was vitiated by fraud and misrepresentation and was, therefore, void. He vehemently submitted that it was for the arbitrator to decide whether the Facilitation Deed was void on account of fraud and misrepresentation as has been rightly held by the learned Single Judge and it was not for the Court to pronounce on whether the Facilitation Deed was void on account of fraud and misrepresentation. He referred to Article 6(4) of the ICC Rules of Arbitration which permits the Arbitral Tribunal to continue to exercise jurisdiction and adjudicate the claims even if the main contract is alleged to be null and void or non-existent because the arbitration clause is an independent and distinct agreement. He submitted that this principle of *Kompetenz Kompetenz* has been recognized in Section 16 of the Act under which the Arbitral Tribunal has the competence to rule on its own jurisdiction and on this point relied on *National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd*. [(2009) 1 SCC 267] and *Reva Electric Car Company Private Ltd. v. Green Mobil* [(2012) 2 SCC 93]. He submitted that as a corollary to this principle, Courts have also held that unless the arbitration clause itself, apart from the underlying contract, is assailed as vitiated by fraud or misrepresentation, the Arbitral Tribunal will have jurisdiction to decide all issues including the validity and scope of the arbitration agreement. He submitted that in the present case, the arbitration clause itself was not assailed as vitiated by fraud or misrepresentation.

In support of this argument, he relied on the decision of the House of Lords in *Premium Nafta Products Ltd. v. Fili Shipping Company Ltd. & Ors.* [2007] UKHL 40], the decision of the Supreme Court of United States in *Buckeye Check Cashing, Inc. v. John Cardegna et al* [546 US 440 (2006)] and the decision of this Court in *Branch Manager*, *Magma Leasing and Finance Ltd. & Anr. v. Potluri Madhavilata & Anr.* [(2009) 10 SCC 103].

10. Mr. Venugopal submitted that the Division Bench of the High Court relied on the decision in *N. Radhakrishnan v. Maestro Engineers & Ors.* [(2010) 1 SCC 72] to hold that serious allegations of fraud can only be enquired by a Court and not by an arbitrator, but the Division Bench failed to appreciate that in *N. Radhakrishnan v. Maestro Engineers & Ors.* (supra) this Court relied on *Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak* [AIR 1962 SC 406] in which it was observed that it is only a party against whom a fraud is alleged who can request the Court to inquire into the allegations of fraud instead of allowing the arbitrator to decide on the allegations of fraud. In the present case, the respondent has alleged fraud against the appellant and thus it was for the appellant to make a request to the Court to decide on the allegations of fraud instead of referring the same to the arbitrator, and no such request has been made by the appellant. He further submitted that in any case the judgment of this Court in *N. Radhakrishnan v. Maestro Engineers & Ors.* (supra) was rendered in the context of domestic arbitration in reference to the provisions of Section 8 of the Act. He submitted that the language of Section 45 of the Act, which applies to an international arbitration, is substantially different from the language of Section 8 of the Act and it will be clear from the language of Section 45 of the Act that unless the arbitration agreement is null and void, inoperative or incapable of being performed, the parties will have to be referred to arbitration by the Court. In the present case, the respondent has not made

out that the arbitration agreement is null and void, inoperative or incapable of being performed.

11. Mr. Venugopal submitted that the High Court has taken a view that Clause 9 forecloses an open trial in a court of law except to the extent permitted therein and the parties have to necessarily submit themselves to a confidential proceeding which is closed to the general public. He submitted that the Bombay High Court thus appears to have held that Clause 9 is opposed to public policy and, in particular, Sections 23 and 28 of the Indian Contract Act, 1872. He submitted that in any case the arbitration agreement contained in Clause 9 of the Facilitation Deed cannot be held to be opposed to public policy and void under Sections 23 and 28 of the Indian Contract Act, 1872. This will be clear from Exception 1 of Section 28 of the Indian Contract Act, 1872, which says that the section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred. He explained that under the American Law, in a suit for common law where the value of claim is more than US$20, the right to jury trial is preserved and this applies even in relation to claims for breach of contract and for this reason, the parties made a provision in Clause 9 of the Facilitation Deed waiving their right to jury trial with respect to all claims and issues arising under, in connection with, touching upon or relating to the Facilitation Deed. He submitted that this provision in Clause 9 of the Facilitation Deed cannot, therefore, be held to be opposed to public policy.

12. Mr. Venugopal next submitted that the crux of the case of the respondent is set out in its letter dated 25.06.2010 to the appellant in which it was alleged that *'in view of the false misrepresentations and fraud played by WSGM the deed is voidable at the option of our client and thus our client rescinds*

the deed with immediate effect'. In other words, the respondent's case is that it was induced to enter into the Facilitation Deed on account of the misrepresentation by the appellant and was led to believe that it was paying the facilitation fees to the appellant to allow the rights of the appellant under an alleged agreement dated 23.03.2009 to lapse, but the respondent subsequently discovered that there was no agreement dated 23.03.2009 and the rights of the appellant had come to an end on 24.03.2009. He submitted that the appellant has denied these allegations of the respondent in its affidavit-in-reply filed before the Bombay High Court and that there was no false representation and fraud as alleged by the respondent. He submitted that the Facilitation Deed was executed by the senior executives of the parties and in the case of respondent, it was signed by Michael Grindon, President, International, Sony Picture Television, and the appellant and the respondent had entered into the Facilitation Deed after consulting their sports media experts and after a lot of negotiations. He submitted that in fact a Press Release was issued by the respondent on 23.04.2010, which will go to show that there was no misrepresentation and fraud by the appellant before the Facilitation Deed was signed by the parties, and thus the entire case of the respondent that the Facilitation Deed was vitiated by misrepresentation and fraud is false.

13. Mr. Venugopal finally submitted that it will be clear from the language of the letter dated 25.06.2010 of the respondent to the appellant that according to the respondent the Facilitation Deed was voidable at the option of the respondent. He submitted that under Section 45 of the Act, the Court will have to refer the parties to the arbitration unless it finds that the arbitration agreement is 'null and void'. He argued that an agreement which is voidable at the option of one of the parties is not the same as the agreement which is void and, therefore, the Division Bench of the High Court should have referred the parties to arbitration instead of restraining the arbitration.

According to Mr. Venugopal, this is a fit case in which this Court should set aside the impugned order of the Division bench of the High Court and restore the order of the learned Single Judge of the High Court.

Contentions on behalf of the respondent:

14. In reply, Mr. Gopal Subramanium, learned senior counsel appearing for the respondent, submitted that the Division Bench of the Bombay High Court has rightly restrained the arbitration proceedings under the aegis of ICC as the Facilitation Deed, which also contains the arbitration agreement in Clause 9, is void because of fraud and misrepresentation by the appellant. He submitted that Section 45 of the Act makes it clear that the Court will not refer the parties to arbitration if the arbitration agreement is null and void, inoperative or incapable of being performed and as the respondent has taken the plea that the Facilitation Deed, which contained the arbitration agreement, is null and void on account of misrepresentation and fraud, the Court will have to decide whether the Facilitation Deed including the arbitration agreement in Clause 9 was void on account of fraud and misrepresentation by the appellant. He submitted that the respondent filed the first suit in the Bombay High Court (Suit No.1869 of 2010) for declaring the Facilitation Deed as null and void but in the said suit, the appellant did not file a written statement and instead issued the notice for arbitration only to frustrate the first suit and in the circumstances the respondent was compelled to file the second suit (Suit No.1828 of 2010) for an injunction restraining the arbitration.

15. Mr. Subramanium submitted that Section 9 of the Code of Civil Procedure, 1908 (for short 'the CPC') confers upon the court jurisdiction to try all civil suits except suits which are either expressly or impliedly barred. He submitted that the Bombay High Court, therefore, had the jurisdiction to try both the first suit and the second suit and there was no express or implied bar in Section 45 of the Act restraining the Bombay

High Court to try the first suit and the second suit. He submitted that in India as well as in England, Courts have power to issue injunctions to restrain parties from proceeding with arbitration proceedings in foreign countries. In support of this submission, he relied on *V.O. Tractoroexport, Moscow v. Tarapore & Company and Anr*. [(1969) 3 SCC 562] and *Oil and Natural Gas Commission v. Western Company of North America* [(1987) 1 SCC 496]. He also relied on Russel on Arbitration, para 7-056, 7-058, and *Claxton Engineering v. Txm olaj – es gaz Kutao Ktf* [2011] EWHC 345 (COMM.).

16. Mr. Subramanium relying on the decision of this Court in *Chloro Controls India Private Limited v. Seven Trent Water Purification Inc. & Ors.* (supra) submitted that Section 45 of the Act casts an obligation on the court to determine the validity of the agreement at the threshold itself because this is an issue which goes to the root of the matter and a decision on this issue will prevent a futile exercise of proceedings before the arbitrator. He submitted that under Section 45 of the Act the Court is required to consider not only a challenge to the arbitration agreement but also a serious challenge to the substantive contract containing the arbitration agreement. He cited the decision of this Court in *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.* [(2011) 14 SCC 66] in support of this argument. He submitted that the contention on behalf of the appellant that the Court has to determine only whether the arbitration agreement contained in the main agreement is void is, therefore, not correct.

17. Mr. Subramanium next submitted that in cases where allegations of fraud are prima facie made out, the judicial trend in India has been to have them adjudicated by the Court. In this context, he referred to the decisions of this Court in *Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak* (supra), *Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd*. [(1999) 5 SCC 688] and *N. Radhakrishnan v. Maestro Engineers & Ors.* (supra). In reply to the submission of Mr. Venugopal that it

was only the parties against whom the allegations are made who can insist on the allegations being decided by the Court, Mr. Subramanium submitted that in the decision of the Madras High Court in *H.G. Oomor Sait v. O Aslam Sait* [(2001) 3 CTC 269 (Mad)] referred to in *N. Radhakrishnan v. Maestro Engineers & Ors.* (supra) the situation was reverse.

18. Mr. Subramanium next submitted that the facts in this case prima facie establish that a grave fraud was played by the appellant not only upon the respondent but also on the BCCI. He argued that the Facilitation Deed ultimately deals with media rights belonging to the BCCI and it has been held by this Court in *M/s Zee Tele Films Ltd. & Anr. v. Union of India & Ors*. [AIR 2005 SC 2677] that BCCI is a public body. He submitted that the Division Bench of the Bombay High Court has, therefore, rightly taken the view that the disputes in this case cannot be kept outside the purview of the Indian Courts and if arbitration is allowed to go on without BCCI, the interest of BCCI will be adversely affected. He submitted that having regard to the magnitude of fraud alleged in the present case, the disputes were incapable of being arbitrated. Relying on *Booz Allen & Hamilton v. SBI Home Finance* [(2011) 5 SCC 532], *Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd*. (Supra), *India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd.* [(2007) 5 SCC 510] and *N. Radhakrishnan v. Maestro Engineers & Ors.* (supra), he submitted that such allegations of fraud can only be inquired into by the court and not by the arbitrator.

Findings of the Court:

19. The question that we have to decide is whether the Division Bench of the Bombay High Court could have passed the order of injunction restraining the arbitration at Singapore between the parties. As various contentions have been raised by Mr. Venugopal, learned counsel for the appellant, in support of the case of the appellant that the Division Bench of the Bombay High Court could not have passed the order of

injunction restraining the arbitration at Singapore, we may deal with each of these contentions separately and record our findings. While recording our findings, we will also deal with the submissions made by Mr. Gopal Subramanium on behalf of respondent in reply to the contentions of Mr. Venugopal. We will also consider the correctness of the findings of the Division Bench of the Bombay High Court separately.

20. We are unable to accept the first contention of Mr. Venugopal that as Clause 9 of the Facilitation Deed provides that any party may seek equitable relief in a court of competent jurisdiction in Singapore, or such other court that may have jurisdiction over the parties, the Bombay High Court had no jurisdiction to entertain the suit and restrain the arbitration proceedings at Singapore because of the principle of Comity of Courts. In Black's Law Dictionary, 5th Edition, Judicial Comity, has been explained in the following words:

> "Judicial comity. The principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect."

Thus, what is meant by the principle of "comity" is that courts of one state or jurisdiction will give effect to the laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect. In the present case no decision of a court of foreign country or no law of a foreign country has been cited on behalf of the appellant to contend that the courts in India out of deference to such decision of the foreign court or foreign law must not assume jurisdiction to restrain arbitration proceedings at Singapore. On the other hand, as has been rightly submitted by Mr. Subramanium, under Section 9 of the CPC, the courts in India have jurisdiction to try all suits of a civil nature excepting suits of which cognizance is either expressly or impliedly barred. Thus, the appropriate civil court in India has jurisdiction to entertain the suit and pass appropriate orders in the suit by

virtue of Section 9 of the CPC and Clause 9 of the Facilitation Deed providing that courts in Singapore or any other court having jurisdiction over the parties can be approached for equitable relief could not oust the jurisdiction of the appropriate civil court conferred by Section 9 of the CPC. We find that in para 64 of the plaint in Suit No.1828 of 2010 filed before the Bombay High Court by the respondent, it is stated that the Facilitation Deed in which the arbitration clause is incorporated came to be executed by the defendant at Mumbai and the fraudulent inducement on the part of the defendant resulting in the plaintiff entering into the Facilitation Deed took place in Mumbai and the rescission of the Facilitation Deed on the ground that it was induced by fraud of defendant has also been issued from Mumbai. Thus, the cause of action for filing the suit arose within the jurisdiction of the Bombay High Court and the Bombay High Court had territorial jurisdiction to entertain the suit under Section 20 of the CPC.

21. Any civil court in India which entertains a suit, however, has to follow the mandate of the legislature in Sections 44 and 45 in Chapter I of Part II of the Act, which are quoted hereinbelow:

"CHAPTER I

NEW YORK CONVENTION AWARDS

44. **Definition**. In this Chapter, unless the context otherwise requires, "foreign award" means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960 -

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.

45. **Power of judicial authority to refer parties to arbitration**.- Notwithstanding anything contained in Part I or in the Code of Civil Procedure, a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

The language of Section 45 of the Act quoted above makes it clear that notwithstanding anything contained in Part I or in the Code of Civil Procedure, a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. Thus, even if, under Section 9 read with Section 20 of the CPC, the Bombay High Court had the jurisdiction to entertain the suit, once a request is made by one of the parties or any person claiming through or under him to refer the parties to arbitration, the Bombay High Court was obliged to refer the parties to arbitration unless it found that the agreement referred to in Section 44 of the Act was null and void, inoperative or incapable of being performed. In the present case, the appellant may not have made an application to refer the parties to arbitration, but Section 45 of the Act does not refer to any application as such. Instead, it refers to the request of one of the parties or any person claiming through or under him to refer the parties to arbitration. In this case, the appellant may not have

made an application to refer the parties to arbitration at Singapore but has filed an affidavit in reply to the notice of motion and has stated in paragraphs 3, 4 and 5 of this affidavit that the defendant had already invoked the arbitration agreement in the Facilitation Deed and the arbitration proceedings have commenced and that the suit was an abuse of the process of court. The appellant had thus made a request to refer the parties to arbitration at Singapore which had already commenced.

22. Section 45 of the Act quoted above also makes it clear that even where such request is made by a party, it will not refer the parties to arbitration, if it finds that the agreement is null and void, inoperative or incapable of being performed. As the very language of Section 45 of the Act clarifies the word "agreement" would mean the agreement referred to in Section 44 of the Act. Clause (a) of Section 44 of the Act refers to "*an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies.*" The First Schedule of the Act sets out the different Articles of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. Article II of the New York Convention is extracted hereinbelow:

> "1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

It will be clear from clauses 1, 2 and 3 of the New York Convention as set out in the First Schedule of the Act that the agreement referred to in Section 44 of the Act is an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them. Thus, the court will decline to refer the parties to arbitration only if it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

23. According to Mr. Subramanium, however, as the main agreement is voidable on account of fraud and misrepresentation by the appellant, clause 9 of the main agreement which contains the arbitration agreement in writing is also null and void. In support of his submission, he cited the decision of this Court in *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.* (supra). Paragraphs 12 and 13 of the judgment of this Court in *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.* (supra) are quoted hereinbelow:

> "12. When a contract contains an arbitration agreement, it is a collateral term relating to the resolution of disputes, unrelated to the performance of the contract. It is as if two contracts—one in regard to the substantive terms of the main contract and the other relating to resolution of disputes—had been rolled into one, for purposes of convenience. An arbitration clause is therefore an agreement independent of the other terms of the contract or the instrument. Resultantly, even if the contract or its performance is terminated or comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract.

13. Similarly, when an instrument or deed of transfer (or a document affecting immovable property) contains an arbitration agreement, it is a collateral term relating to resolution of disputes, unrelated to the transfer or transaction affecting the immovable property. It is as if two documents—one affecting the immovable property requiring registration and the other relating to resolution of disputes which is not compulsorily registerable—are rolled into a single instrument. Therefore, even if a deed of transfer of immovable property is challenged as not valid or enforceable, the arbitration agreement would remain unaffected for the purpose of resolution of disputes arising with reference to the deed of transfer."

In the aforesaid case, this Court has held that if the document containing the main agreement is not found to be duly stamped, even if it contains arbitration clause, it cannot be acted upon because Section 35 of the Stamp Act bars the said document from being acted upon, but if the document is found to be duly stamped but not registered though required to be compulsorily registered, the court can act upon the arbitration agreement which is a collateral term of the main agreement and is saved by the proviso to Section 49 of the Registration Act. Thus, as per the aforesaid decision of this Court in *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.* (supra), the court will have to see in each case whether the arbitration agreement is also void, unenforceable or inoperative along with the main agreement or whether the arbitration agreement stands apart from the main agreement and is not null and void.

24. The House of Lords has explained this principle of separability in *Premium Nafta Products Ltd. v. Fili Shipping Company Ltd. & Ors.* (supra) thus:

"17. The principle of separability enacted in section 7 means that the invalidity or rescission of the main contract does not necessarily entail the invalidity or rescission of the arbitration agreement. The arbitration agreement must

be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement. Of course there may be cases in which the ground upon which the main agreement is invalid is identical with the ground upon which the arbitration agreement is invalid. For example, if the main agreement and the arbitration agreement are contained in the same document and one of the parties claims that he never agreed to anything in the document and that his signature was forged, that will be an attack on the validity of the arbitration agreement. But the ground of attack is not that the main agreement was invalid. It is that the signature to the arbitration agreement, as a "distinct agreement", was forged. Similarly, if a party alleges that someone who purported to sign as agent on his behalf had no authority whatever to conclude any agreement on his behalf, that is an attack on both the main agreement and the arbitration agreement.

18. On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorized or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the patties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration."

25. Applying the principle of separability to the facts of this case, the respondent rescinded the Facilitation Deed by notice

dated 25.06.2010 to the appellant on the following grounds stated in the said notice by its lawyers:

"1. Reference is made to the Deed for the Provison of Facilitation Services dated March 25, 2009 (the "Deed") between World Sport Group (Mauritius) Limited ("WSGM") and our client. Under the Deed, which is styled as a facilitation agreement, our client agreed to pay WSGM "facilitation" fees for the "facilitation" services stated thereunder to have been provided by WSGM. The underlying consideration for the payments by our client to WSGM, in fact were the representation made by WSGM that : (a) WSGM, had executed in India ("BCCI") whereunder WSGM had been unfettered Global Media Rights ("the said rights"), including the Indian Subcontinent (implying thereby as natural corollary that the earlier Media Rights agreement dated March 15, 2009 between WSGM and BCCI along with its restrictive conditions had been mutually terminated); (b) WSGM could thereafter relinquish the Media Rights for the Indian Subcontinent in favour of our client for said valuable consideration to enable our client to enter into a direct agreement with BCCI; (c) the said rights were subsisting with WSGM at the time of execution of the Deed, i.e, March 25, 2009; and (d) WSGM had relinquished those rights in favour of BCCI to enable BCCI and our client to execute a direct Media Rights License Agreement for the Indian Subcontinent.

2. BCCI has recently brought to the attention of our client that the Global Media Rights agreement between WSGM and BCCI dated March 23, 2009 does not exist and in terms of Clause 13.5 of the agreement dated March 15, 2009, after expiry of the 2nd extension the media rights had automatically reverted to BCCI at 3 a.m. on March 24, 2009 and thus at the time of execution of the Deed, WSGM did not have any rights to relinquish and/or to facilitate the procurement of India Subcontinent media rights for the IPL from BCCI and thus no facilitation services could have been provided by WSGM.

3. In view of the above, it is evident that the representation by WSGM that WSGM relinquished its Indian Subcontinent media rights for the IPL in favour of our client to pay the "facilitation" fees under the Deed.

4. Taking cognizance of the same, BCCI's Governing council at its meeting held at Mumbai, India on June 25, 2010 appropriately executed an amendment to Media Rights License Agreement dated March 25, 2009 between BCCI and our client by deleting, inter alia, clause 10.4 thereof.

5. On its part, and in view of the false representations and fraud played by WSGM, the Deed is voidable at the option of our client and thus our client rescinds the Deed with immediate effect."

The ground taken by respondent to rescind the Facilitation Deed thus is that the appellant did not have any right to relinquish and/or to facilitate the procurement of Indian subcontinent media rights for the IPL from BCCI and no facilitation services could have been provided by the appellant and therefore the representation by the appellant that the appellant relinquished its Indian subcontinent media rights for the IPL in favour of the respondent for which the appellant had to be paid the facilitation fee under the deed was false and accordingly the Facilitation Deed was voidable at the option of the respondent on account of false representation and fraud. This ground of challenge to the Facilitation Deed does not in any manner affect the arbitration agreement contained in Clause 9 of the Facilitation Deed, which is independent of and separate from the main Facilitation Deed and does not get rescinded as void by the letter dated 25.06.2010 of the respondent. The Division Bench of the Bombay High Court, therefore, could not have refused to refer the parties to arbitration on the ground that the

arbitration agreement was also void along with the main agreement.

26. Mr. Gopal Subramanium's contention, however, is also that the arbitration agreement was inoperative or incapable of being performed as allegations of fraud could be enquired into by the court and not by the arbitrator. The authorities on the meaning of the words *"inoperative or incapable of being performed"* do not support this contention of Mr. Subramanium. The words *"inoperative or incapable of being performed"* in Section 45 of the Act have been taken from Article II (3) of the New York Convention as set out in para 22 of this judgment. Redfern and Hunter on International Arbitration (Fifth Edition) published by the Oxford University Press has explained the meaning of these words *"inoperative or incapable of being performed"* used in the New York Convention at page 148, thus:

> "At first sight it is difficult to see a distinction between the terms 'inoperative' and 'incapable of being performed'. However, an arbitration clause is inoperative where it has ceased to have effect as a result, for example, of a failure by the parties to comply with a time limit, or where the parties have by their conduct impliedly revoked the arbitration agreement. By contrast, the expression 'incapable of being performed' appears to refer to more practical aspects of the prospective arbitration proceedings. It applies, for example, if for some reason it is impossible to establish the arbitral tribunal."

27. Albert Jan Van Den Berg in an article titled "The New York Convention, 1958 – An Overview" published in the website of ICCA [www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of-1958_overview.pdf], referring to Article II(3) of the New York Convention, states:

> "The words "*null and void*" may be interpreted as referring to those cases where the arbitration agreement is affected by some invalidity right from the beginning, such as lack of consent due to misrepresentation, duress, fraud or undue influence.
>
> The word "*inoperative*" can be said to cover those cases where the arbitration agreement has ceased to have effect, such as revocation by the parties.
>
> The words "*incapable of being performed*" would seem to apply to those cases where the arbitration cannot be effectively set into motion. This may happen where the arbitration clause is too vaguely worded, or other terms of the contract contradict the parties' intention to arbitrate, as in the case of the so-called co-equal forum selection clauses. Even in these cases, the courts interpret the contract provisions in favour of arbitration."

28. The book *'Recognition and Conferment of Foreign Arbitral Awards: A Global Commentary on the New York Convention'* by Kronke, Nacimiento, et al.(ed.) (2010) at page 82 says:

> "Most authorities hold that the same schools of thought and approaches regarding the term *null and void* also apply to the terms *inoperative* and *incapable of being performed*. Consequently, the majority of authorities do not interpret these terms uniformly, resulting in an unfortunate lack of uniformity. With that caveat, we shall give an overview of typical examples where arbitration agreements were held to be (or not to be) inoperative or incapable of being performed.
>
> The terms *inoperative* refers to cases where the arbitration agreement has ceased to have effect by the time the court is asked to refer the parties to arbitration. For example, the arbitration agreement ceases to have effect if there has already been an arbitral award or a court decision with *res judicata* effect concerning the same subject matter and parties. However, the mere existence of multiple

proceedings is not sufficient to render the arbitration agreement inoperative. Additionally, the arbitration agreement can cease to have effect if the time limit for initiating the arbitration or rendering the award has expired, provided that it was the parties' intent no longer to be bound by the arbitration agreement due to the expiration of this time limit.

Finally, several authorities have held that the arbitration agreement ceases to have effect if the parties waive arbitration. There are many possible ways of waiving a right to arbitrate. Most commonly, a party will waive the right to arbitrate if, in a court proceeding, it fails to properly invoke the arbitration agreement or if it actively pursues claims covered by the arbitration agreement."

29. Thus, the arbitration agreement does not become "inoperative or incapable of being performed" where allegations of fraud have to be inquired into and the court cannot refuse to refer the parties to arbitration as provided in Section 45 of the Act on the ground that allegations of fraud have been made by the party which can only be inquired into by the court and not by the arbitrator. *N. Radhakrishnan v. Maestro Engineers & Ors.* (supra) and *Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak* (supra) were decisions rendered in the context of domestic arbitration and not in the context of arbitrations under the New York Convention to which Section 45 of the Act applies. In the case of such arbitrations covered by the New York Convention, the Court can decline to make a reference of a dispute covered by the arbitration agreement only if it comes to the conclusion that the arbitration agreement is null and void, inoperative or incapable of being performed, and not on the ground that allegations of fraud or misrepresentation have to be inquired into while deciding the disputes between the parties.

30. We may now consider the correctness of the findings of the Division Bench of the High Court in the impugned

judgment. The Division Bench of the High Court has held that the Facilitation Deed was part of several agreements entered into amongst different parties commencing from 25.03.2009 and, therefore, cannot be considered as stand apart agreement between the appellant and the respondent and so considered the Facilitation Deed as contrary to public policy of India because it is linked with the finances, funds and rights of the BCCI, which is a public body. This approach of the Division Bench of the High Court is not in consonance with the provisions of Section 45 of the Act, which mandates that in the case of arbitration agreements covered by the New York Convention, the Court which is seized of the matter will refer the parties to arbitration unless the arbitration agreement is null and void, inoperative or incapable of being performed. In view of the provisions of Section 45 of the Act, the Division Bench of the High Court was required to only consider in this case whether Clause 9 of the Facilitation Deed which contained the arbitration agreement was null and void, inoperative or incapable of being performed.

31. The Division Bench of the High Court has further held that Clause 9 of the Facilitation Deed insofar as it restricted the right of the parties to move the courts for appropriate relief and also barred the right to trial by a jury was void for being opposed to public policy as provided in Section 23 of the Indian Contract Act, 1872 and was also void for being an agreement in restraint of the legal proceedings in view of Section 28 of the said Act. Parliament has made the Arbitration and Conciliation Act, 1996 providing domestic arbitration and international arbitration as a mode of resolution of disputes between the parties and Exception 1 to Section 28 of the Indian Contract Act, 1872 clearly states that Section 28 shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Clause 9 of the Facilitation Deed is consistent with this policy of the legislature as reflected in the Arbitration and Conciliation Act, 1996 and is saved by Exception 1 to Section 28 of the Indian Contract Act, 1872. The right to jury trial is not available under Indian laws. The finding of the Division Bench of the High Court, therefore, that Clause 9 of the Facilitation Deed is opposed to public policy and is void under Sections 23 and 28 of the Indian Contract Act, 1872 is clearly erroneous.

32. The Division Bench of the High Court has also held that as allegations of fraud and serious malpractices on the part of the appellant are in issue, it is only the court which can decide these issues through furtherance of judicial evidence by either party and these issues cannot be properly gone into by the arbitrator. As we have already held, Section 45 of the Act does not provide that the court will not refer the parties to arbitration if the allegations of fraud have to be inquired into. Section 45 provides that only if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed, it will decline to refer the parties to arbitration.

33. The Division Bench of the High court has further held that since the earlier suit (Suit No.1869 of 2010) was pending in court since 25.06.2010 and that suit was inter-connected and inter-related with the second suit (Suit No.1828 of 2010), the court could not allow splitting of the matters and disputes to be decided by the court in India in the first suit and by arbitration abroad in regard to the second suit and invite conflicting verdicts on the issues which are inter-related. This reasoning adopted by the Division Bench of the Bombay High Court in the impugned judgment is alien to the provisions of Section 45 of the Act which does not empower the court to decline a reference to arbitration on the ground that another suit on the same issue is pending in the Indian court.

34. We make it clear that we have not expressed any opinion on the dispute between the appellant and the respondent as to whether the Facilitation Deed was voidable

or not on account of fraud and misrepresentation. Clause 9 of the Facilitation Deed states *inter alia* that all actions or proceedings arising in connection with, touching upon or relating to the Facilitation Deed, the breach thereof and/or the scope of the provisions of the Section shall be submitted to the ICC for final and binding arbitration under its Rules of Arbitration. This arbitration agreement in Clause 9 is wide enough to bring this dispute within the scope of arbitration. To quote *Redfern And Hunter On International Arbitration* (Fifth Edition page 134 para 2.141)

> "Where allegations of fraud in the procurement or performance of a contract are alleged, there appears to be no reason for the arbitral tribunal to decline jurisdiction."

Hence, it has been rightly held by the learned Single Judge of the Bombay High Court that it is for the arbitrator to decide this dispute in accordance with the arbitration agreement.

35. For the aforesaid reasons, we allow the appeal, set aside the impugned judgment of the Division Bench of the High Court and restore the order of the learned Single Judge. The parties shall bear their own costs.

D.G. Appeal allowed.

MONTFORD BROTHERS OF ST. GABRIEL & ANR.
v.
UNITED INDIA INSURANCE & ANR. ETC.
(Civil Appeal No. 3269-3270 of 2007)

JANUARY 28, 2014

[P. SATHASIVAM, CJI, RANJAN GOGOI AND SHIVA KIRTI SINGH, JJ.]

MOTOR VEHICLES ACT, 1988:

s.166 – Legal representative – Appellant no.1 is a Catholic Society and its members are called 'Brothers' who on joining Society abandon all their worldly rights in favour of the Society which includes the insurance claim – One 'Brother' of the Society died in a motor accident – Claim petition by appellant no.1-Society –Tribunal allowed the claim petition – On writ petition, High Court set aside order of Tribunal on the ground that claimants were not competent to claim compensation – Held: The Motor Vehicles Act does not define the term "legal representative" but the Tribunal noted in its judgment that clause (C) of Rule 2 of the Mizoram Motor Accident Claims Tribunal Rules, 1988, defines the term 'legal representative' as having the same meaning as assigned to it in clause (11) of s.2, CPC – As per s.2, CPC, in case of death of a person in a motor vehicle accident, right is available to a legal representative of the deceased or the agent of the legal representative to lodge a claim for compensation under the provisions of the Act – Therefore, a person claiming to be a legal representative has the locus to maintain an application for compensation u/s.166 of the Act, either directly or through any agent, subject to result of a dispute raised by the other side on this issue – High Court erred in law in setting aside the judgment of the Tribunal by ignoring the fact that the respondent-Insurance Company had

not pressed issue of maintainability before the Tribunal nor it had pleaded and led evidence in respect to the said issue – Whether or not appellant is legal representative of the deceased is an issue of fact which could not be decided by the High Court for the first time in a writ petition which could only be entertained under Article 227 of the Constitution for limited purpose – The order of the Tribunal is restored – Constitution of India, 1950 – Articles 226, 227 – Code of Civil Procedure, 1908 – s.2(11) – Mizoram Motor Accident Claims Tribunal Rules, 1988 – r.2(C) – Fatal Accidents Act, 1855 – s.1A.

Appellant no.1 is a Catholic Society and its members are called 'Brothers' who on joining Society abandon all their worldly rights in favour of the Society which includes the insurance claim. One 'Brother' of the Society died in a motor accident. Appellant no.2 filed a claim petition before the MACT on behalf of appellant no.1-Society. The Tribunal allowed the claim petition and passed award. The respondent-Insurance company instead of filing appeal filed a writ petition before the High Court. The High Court allowed the writ petition on ground that order of tribunal was invalid being in favour of person(n) who were not competent to claim compensation under the Motor Vehicles Act. The review petition was rejected by the High Court.

In the instant appeals, the dispute related to the competency of the appellants to claim compensation under the Motor Vehicles Act for accidental death of 'Brother' of the appellant society. The plea of the respondent-Insurance Company was that since the term 'legal representative' has not been defined under the Motor Vehicles Act, the provision of Section 1-A of the Fatal Accidents Act, 1855 should be taken as guiding principle and the claim should be confined only for the

benefit of wife, husband, parent and child, if any, of the person whose death was caused by the accident.

Allowing the appeals, the Court

HELD: 1. The Motor Vehicles Act does not define the term "legal representative" but the Tribunal noted in its judgment that clause (C) of Rule 2 of the Mizoram Motor Accident Claims Tribunal Rules, 1988, defines the term 'legal representative' as having the same meaning as assigned to it in clause (11) of Section 2 of the Code of Civil Procedure, 1908. As per Section 2, CPC, in case of death of a person in a motor vehicle accident, right is available to a legal representative of the deceased or the agent of the legal representative to lodge a claim for compensation under the provisions of the Act. The issue as to who is a legal representative or its agent is basically an issue of fact and may be decided one way or the other dependent upon the facts of a particular case. But as a legal proposition it is undeniable that a person claiming to be a legal representative has the locus to maintain an application for compensation under Section 166 of the Act, either directly or through any agent, subject to result of a dispute raised by the other side on this issue. [Paras 9, 10] [842-H; 843-A, C-E]

2. It is only if there is a justification in consonance with principles of justice, equity and good conscience, a dependant of the deceased may be denied right to claim compensation. Therefore, there is no merit in the plea of the respondent-Insurance Company that the claim petition is not maintainable because of the provisions of the Fatal Accidents Act. [Para 12] [845-C-D]

3. The proceeding before the Motor Vehicle Claims Tribunal is a summary proceeding and unless there is evidence in support of such pleading that the claimant is not a legal representative and, therefore, the claim petition

be dismissed as not maintainable, no such plea can be raised at a subsequent stage and that also through a writ petition. The Tribunal did frame issue regarding maintainability of the claim petition on law and fact as issue no.1 but the findings recorded by the Tribunal show that this issue together with issue nos. 2 and 3 were not pressed by the opposite parties during trial and were accordingly decided in favour of the claimants. In such circumstances, the order under appeal allowing the writ petition suffers from apparent mistake in not noticing the relevant issue decided by the Tribunal and also the fact that the Insurance Company, which was the writ petitioner, had not pressed this issue. It had neither raised pleadings nor led evidence relevant for the said issue. On coming to know about the High Court judgment the appellants filed a review petition in which they gave all the relevant facts including the constitution of the society appellant no.1 in support of their claim that a 'Brother' of the Society renounced his relations with the natural family and all his earnings and belongings including insurance claims belonged to the society. These facts could not have been ignored by the High Court but even after noticing such facts the review petition was rejected. [Paras 13, 14, 15] [845-D-H; 846-A-C]

4. The judgment of the Tribunal disclosed that although issue regarding the maintainability of the claim petition was not pressed and hence decided in favour of the claimants/appellants, while considering the quantum of compensation for the claimants, the Tribunal adopted a very cautious approach and framed a question for itself as to what should be the criterion for assessing compensation in such case where the deceased was a Roman Catholic and joined the church services after denouncing his family, and as such having no actual dependants or earning? For answering this issue, the

Tribunal relied not only upon judgments of American and English Courts but also upon Indian judgments for coming to the conclusion that even a religious order or organization may suffer considerable loss due to death of a voluntary worker. The Tribunal also referred to some Indian judgments in which it was held that successors to the trusteeship and trust property are legal representatives within the meaning of Section 2(11) of the Code of Civil Procedure. [Para 16] [846-C-H]

5. The High Court erred in law in setting aside the judgment of the Tribunal by ignoring the fact that the respondent-Insurance Company had not pressed issue of maintainability nor it had pleaded and led evidence in respect to the said issue. The Court explained that the appellants were not the legal representatives of the deceased. Such an issue of facts could not be decided by the High Court for the first time in a writ petition which could only be entertained under Article 227 of the Constitution for limited purpose. The order of the Tribunal is restored. [Paras 17, 18] [847-A-C]

Gujarat State Road Transport Corporation, Ahmedabad vs. Raman Bhai Prabhatbhai & Anr. **AIR 1987 SC 1690: 1987 (3) SCR 404 – referred to.**

Case Law Reference:

1987 (3) SCR 404 referred to Para 11

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3269-3270 of 2007.

From the Judgment and Order dated 20.08.2002 of the High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram, & Arunachal Pradesh, Aizwal Bench: Aizwal in Writ Petition No. 20 of 2002.

Ashwani Kumar, Kuljeet Rawal for the Appellant.

V.S. Chopra, Manjeet Chawla, K.N. Madhusoodhanan, R. Sathish for the Respondents.

The Judgment of the Court was delivered by

SHIVA KIRTI SINGH,J. 1. Heard learned counsel for the appellants and learned counsel for the respondent-Insurance Company.

2. The facts relevant for deciding this appeal are not in dispute and hence noted only in brief.

143. The appellant No.1 is a charitable society registered under the Societies Registration Act, 1960. It runs various institutions as a constituent unit of Catholic Church. It is running various orphanages, industrial schools and other social service activities besides number of educational schools/institutions. Its members after joining the appellant society renounce the world and are known as “Brother”. Such a `Brother’ severs his all relations with the natural family and is bound by the constitution of the society which includes Article 60 quoted in paragraph 3 of the order dated 10.12.2003 passed in Review Petition No.4 of 2002 and in annexure P.5 as such:

> “Whatever the `Brother’ receives by way of salary, subsidies, gifts, pension or from insurance or other such benefits belongs to the community as by right and goes into the common purse.”

4. Appellant No.2 is Principal of St. Paul’s Higher Secondary School, Aizawal, Mizoram and represents appellant no.1 as well.

5. One ‘Brother’ of the Society, namely, Alex Chandy Thomas was a Director-cum-Head master of St. Peter High School and he died in a motor accident on 22.06.1992. The accident was between a Jeep driven by the deceased and a Maruti Gypsy covered by insurance policy issued by the respondent Insurance Company. At the time of death the

deceased was aged 34 years and was drawing monthly salary of Rs.4,190/-. The claim petition bearing No.55 of 1992 was filed before M.A.C.T., Aizawal by appellant no.2 on being duly authorized by the appellant no.1-the society. The owner of the Gypsy vehicle discussed in his written statement that vehicle was duly insured and hence liability, if any, was upon the Insurance Company. The respondent-Insurance Company also filed a written statement and thereby raised various objections to the claim. But as is clear from the written statement under Annexure P.2 it never raised the issue that since the deceased was a 'Brother' and therefore without any family or heir, the appellant could not file claim petition for want of locus standi. The issue no.1 regarding maintainability of claim petition was not pressed by the respondents. The Tribunal awarded a compensation of Rs.2,52,000/- in favour of the claimant and against the opposite parties with a direction to the insurer to deposit Rs.2,27,000/- with the Tribunal as Rs.25,000/- had already been deposited as interim compensation. The Tribunal also permitted interest at the rate of 12% per annum, but from the date of judgment dated 14.07.1994 passed in MACT case Nos. 55 and 82 of 1992.

6. Instead of preferring appeal against the order of the Tribunal, the respondent-Company preferred a writ petition under Article 226 of the Constitution of India before the Gauhati High Court and by the impugned order under appeal dated 20.08.2002, the High Court allowed the aforesaid writ petition (C) No.20 of 2002 ex-parte, and held the judgment and order of the learned Tribunal to be invalid and incompetent being in favour of person/persons who according to the High court were not competent to claim compensation under the Motor Vehicle Act. This was the only ground of challenge to the judgment and Award of the Tribunal. The High Court, however, did not disturb the Award of Rs.25,000/- already made as interim compensation. Review Petition preferred by the appellants was also rejected on 10.12.2003 but after noticing the relevant facts relating to locus of the appellants.

7. From the facts noted above, it is evident that there is no dispute between the parties with regard to the quantum of compensation determined by the Tribunal and the only issue is whether the High Court was correct in law in holding that the appellants are not competent to claim compensation under the Motor Vehicle Act for the accidental death of 'Brother' belonging to the appellant-society.

8. The only issue noted above requires to look into Section 166 of the Motor Vehicles Act, 1988, (hereinafter referred to as 'The Act'). Sub-section (1) of Section 166 is relevant for the purpose. It provides thus:

> "166. Application for compensation:-(1) An application for compensation arising out of an accident of the nature specified in sub- section (1) of section 165 may be made—
>
> (a) by the person who has sustained the injury; or
>
> (b) by the owner of the property; or
>
> (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or
>
> (d) by any agent duly authorised by the person inured or all or any of the legal representatives of the deceased, as the case may be:
>
> Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application. "

9. The Act does not define the term "legal representative" but the Tribunal has noted in its judgment and order that clause

(C) of Rule 2 of the Mizoram Motor Accident Claims Tribunal Rules, 1988, defines the term `legal representative' as having the same meaning as assigned to it in clause (11) of Section 2 of the Code of Civil Procedure, 1908, which is as follows:

> "Section 2(11)`Legal representative' means a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves On the death of the party so suing or sued".

10. From the aforesaid provisions it is clear that in case of death of a person in a motor vehicle accident, right is available to a legal representative of the deceased or the agent of the legal representative to lodge a claim for compensation under the provisions of the Act. The issue as to who is a legal representative or its agent is basically an issue of fact and may be decided one way or the other dependent upon the facts of a particular case. But as a legal proposition it is undeniable that a person claming to be a legal representative has the locus to maintain an application for compensation under Section 166 of the Act, either directly or through any agent, subject to result of a dispute raised by the other side on this issue.

11. Learned counsel for the Insurance Company tried to persuade us that since the term 'legal representative' has not been defined under the Act, the provision of Section 1-A of the Fatal Accidents Act, 1855, should be taken as guiding principle and the claim should be confined only for the benefit of wife, husband, parent and child, if any, of the person whose death has been caused by the accident. In this context, he cited judgment of this Court in the case of *Gujarat State Road Transport Corporation, Ahmedabad vs. Raman Bhai Prabhatbhai & Anr.*[1]. In that case, covered by the Motor Vehicles Act of 1939, the claimant was a brother of a deceased

1. AIR 1987 SC 1690.

killed in a motor vehicle accident. The Court rejected the contention of the appellant that since the term 'legal representative' is not defined under the Motor Vehicles Act, the right of filing the claim should be controlled by the provisions of Fatal Accident Act. It was specifically held that Motor Vehicles Act creates new and enlarged right for filing an application for compensation and such right cannot be hedged in by the limitations on an action under the Fatal Accidents Act. Paragraph 11 of the report reflects the correct philosophy which should guide the courts interpreting legal provisions of beneficial legislations providing for compensation to those who had suffered loss.

> **"11.** We feel that the view taken by the Gujarat High Court is in consonance with the principles of justice, equity and good conscience having regard to the conditions of the Indian society. Every legal representative who suffers on account of the death of a person due to a motor vehicle accident should have a remedy for realisation of compensation and that is provided by Sections 110-A to 110-F of the Act. These provisions are in consonance with the principles of law of torts that every injury must have a remedy. It is for the Motor Vehicles Accidents Tribunal to determine the compensation which appears to it to be just as provided in Section 110-B of the Act and to specify the person or persons to whom compensation shall be paid. The determination of the compensation payable and its apportionment as required by Section 110-B of the Act amongst the legal representatives for whose benefit an application may be filed under Section 110-A of the Act have to be done in accordance with well-known principles of law. We should remember that in an Indian family brothers, sisters and brothers' children and some times foster children live together and they are dependent upon the bread-winner of the family and if the bread-winner is killed on account of a motor vehicle accident, there is no justification to deny them compensation relying upon the

provisions of the Fatal Accidents Act, 1855 which as we have already held has been substantially modified by the provisions contained in the Act in relation to cases arising out of motor vehicles accidents. We express our approval of the decision in *Megjibhai Khimji Vira v. Chaturbhai Taljabhai*, (AIR 1977 Guj.195) and hold that the brother of a person who dies in a motor vehicle accident is entitled to maintain a petition under Section 110-A of the Act if he is a legal representative of the deceased."

12. From the aforesaid quoted extract it is evident that only if there is a justification in consonance with principles of justice, equity and good conscience, a dependant of the deceased may be denied right to claim compensation. Hence, we find no merit in the submission advanced on behalf of the respondent-Insurance Company that the claim petition is not maintainable because of the provisions of the Fatal Accidents Act.

13. On behalf of the appellants it has been rightly contended that proceeding before the Motor Vehicle Claims Tribunal is a summary proceeding and unless there is evidence in support of such pleading that the claimant is not a legal representative and therefore the claim petition be dismissed as not maintainable, no such plea can be raised at a subsequent stage and that also through a writ petition. The objection filed on behalf of the Insurance Company, contained in annexure P.2, does not raise any such objection nor there is any evidence led on this issue. As noted earlier, the Tribunal did frame any issue regarding maintainability of the claim petition on law and fact as issue no.1 but the findings recorded by the Tribunal at page 41 of the paper book show that this issue together with issue nos. 2 and 3 were not pressed by the opposite parties during trial and were accordingly decided in favour of the claimants.

14. In the aforesaid circumstances, the order under appeal dated 20.8.2002 allowing the writ petition suffers from apparent mistake in not noticing the relevant issue decided by the Tribunal and also the fact that the Insurance Company, which

was the writ petitioner, had not pressed this issue. It had neither raised pleadings nor led evidence relevant for the said issue.

15. On coming to know about the High Court judgment the appellants filed a review petition in which they gave all the relevant facts including the constitution of the society appellant no.1 in support of their claim that a 'Brother' of the Society renounced his relations with the natural family and all his earnings and belongings including insurance claims belonged to the society. These facts could not have been ignored by the High Court but even after noticing such facts the review petition was rejected.

16. A perusal of the judgment and order of the Tribunal discloses that although issue no.1 was not pressed and hence decided in favour of the claimants/appellants, while considering the quantum of compensation for the claimants the Tribunal adopted a very cautious approach and framed a question for itself as to what should be the criterion for assessing compensation in such case where the deceased was a Roman Catholic and joined the church services after denouncing his family, and as such having no actual dependants or earning? For answering this issue the Tribunal relied not only upon judgments of American and English Courts but also upon Indian judgments for coming to the conclusion that even a religious order or organization may suffer considerable loss due to death of a voluntary worker. The Tribunal also went on to decide who should be entitled for compensation as legal representative of the deceased and for that purpose it relied upon the Full Bench judgment of Patna High Court reported in AIR 1987 Pat. 239, which held that the term 'legal representative' is wide enough to include even "intermeddlers" with the estate of a deceased. The Tribunal also referred to some Indian judgments in which it was held that successors to the trusteeship and trust property are legal representatives within the meaning of Section 2(11) of the Code of Civil Procedure.

17. In the light of the aforesaid discussions, we have no hesitation in holding that the High Court erred in law in setting aside the judgment of the learned Tribunal by ignoring the fact that the respondent-Insurance Company had not pressed issue no.1 nor it had pleaded and led evidence in respect to the said issue. The Court explained that the appellants were the legal representatives of the deceased. Such an issue of facts could not be decided by the High Court for the first time in a writ petition which could only be entertained under Article 227 of the Constitution for limited purpose.

18. Accordingly, orders of the High Court dated August 20, 2002 and December 10, 2003 are set aside and the judgment and order of the Tribunal dated July 14, 1994, is restored. The dues of compensation including interest, as per judgment of the Tribunal, shall be deposited by the respondent-Insurance Company with the Tribunal within eight weeks from the date of this order. The Tribunal shall permit the claimants to withdraw the same in the light of its order.

19. The appeals are allowed to the extent indicated above. No costs.

D.G. Appeals allowed.

SANJAY KUMAR

v

THE STATE OF BIHAR & ANR.

(Special Leave Petition (Crl.) No.9967 of 2011)

JANUARY 28, 2014.

[DR. B.S. CHAUHAN, J. CHELAMESWAR AND M.Y. EQBAL, JJ.]

PLEADINGS:

Complaint for offences punishable u/ss 406 and 420 IPC and s. 138 of Negotiable Instruments Act – Quashed by High Court – SLP by complainant – Notice to petitioner-complainant to show that the institution was a fake one as pleaded by him – Petitioner seeking to ignore such pleadings – Held: Pleadings have to be true to the knowledge of parties and in case a person takes such misleading pleadings, he can be refused not only any kind of indulgence by court but can also be tried for perjury — In case, pleading taken by petitioner is true, he cannot ask for ignoring the same — In case, it is false and as such statement had been made on oath, he is liable to be tried for perjury — More so, whether such a pleading is relevant or not is a matter to be decided by court and u/s 165 of the Evidence Act, 1872, court has a right to ask the party even relevant or irrelevant questions and parties or their counsel cannot raise any objection to any such question — Conduct of petitioner condemned – Code of Criminal Procedure, 1973 — s. 482 — Evidence Act, 1872 – s. 165.

PRACTICE AND PROCEDURE:

Advocate-on-Record – Not appearing before Court in spite of directions – Held: In Re: Rameshwar Prasad Goyal, Court has held that in case AOR does not appear in Court,

his conduct may tantamount to criminal contempt of Court – In the instant case, AOR, with impunity was disdainful towards the order of the Court directing him to appear in Court — He had also not filed any appearance for the counsel who had appeared, nor did the said counsel disclose his name — Court takes serious note of the conduct of AOR and warns him to behave in an appropriate manner befitting the conduct of an advocate and an AOR, otherwise Court will take action against him — His conduct will be under close watch of the Court.

In Re: Rameshwar Prasad Goyal **(2014) 1 SCC 572 – relied on.**

Case Law Reference:

(2014) 1 SCC 572 relied on para 5

CRIMINAL APPELLATE JURISDICTION : Special Leave Petition (Criminal) No. 9967 of 2011.

From the Judgment and Order dated 22.07.2011 of the High Court of Patna in CRLM No. 13116 of 2009.

Manu Shanker Mishra for the Appellant.

Gopal Singh, Chandan Kumar for the Respondents.

The following Order of the Court was delivered

O R D E R

1. This special leave petition has been filed against the impugned judgment and order dated 22.7.2011, passed by the High Court of Judicature at Patna in Criminal Misc. No.13116 of 2009 quashing the criminal proceedings against the respondent no.2 while allowing the application under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.').

2. Facts and circumstances giving rise to this petition are that:

A. The petitioner claimed to have been appointed by the private respondent no.2 in a fake dental college as a Senior Lecturer for a period of one year and issued 12 post dated cheques for payment of his salary out of which 9 cheques had bounced. The complainant-petitioner sent legal notice to the respondent no.2 but without giving them sufficient time to file a reply, filed a complaint before the Magistrate at Danapur, Patna under Sections 34, 403, 404, 406, 408, 418, 420 and 504 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and under Section 138 of Negotiable Instrument Act, 1881 (hereinafter referred to as 'NI Act').

B. Learned Magistrate, Danapur vide an order dated 12.5.2008 summoned the private respondent for appearance on 12.6.2008, being *prima facie* of the view that a case under Sections 406, 420 IPC and under Section 138 of NI Act was made out by the petitioner. The private respondent challenged the said order by filing the petition before the High Court which has been allowed vide impugned judgment and order on various grounds, *inter-alia* that there was an agreement between the parties for service for one year and one of the conditions in the agreement was that the petitioner would not resign from the institute till the completion of 3 years. More so, the petitioner did not even give sufficient time to the accused to respond to the legal notice as he filed the complaint within the close proximity of the date of the notice. The High Court also concluded that there was nothing on record to show that the notice had ever been served upon the private respondent and ultimately allowed the said petition on the ground that it was a case of civil nature as it was a matter of recovery of salary.

C. Aggrieved, the petitioner approached this Court making the averment in the petition that accused persons had been running a fake institution and offered the appointment to the

petitioner on certain terms and in spite of working therein, he was not paid the salary.

Hence, this petition.

3. In the instant case the counsel appearing in the court for the petitioner designated himself merely as a proxy counsel. The Advocate-on-record (for short 'AOR') had no courtesy to send, at least, a slip mentioning the name of the counsel who has to appear in the court. Thus, in such a fact-situation, we had no advantage even to know the name of the counsel who was appearing in the court.

4. Earlier, this Court had issued notice to the petitioner himself to show cause that in case it was a fake institution, what was the reason or rationale for the petitioner to join the same and to continue to serve there for one year. In reply to the said show cause notice, the petitioner submitted that such pleadings be ignored and may not be taken into account for the purpose of disposal of the instant petition. We do not see any reason to allow a party to make a pleading in the petition and then make a submission to the court to ignore it as such an issue has no bearing on the merits of the case being totally irrelevant. Pleadings have to be true to the knowledge of the parties and in case a person takes such misleading pleadings, he can be refused not only any kind of indulgence by the court but can also be tried for perjury. In case, the pleading taken by the petitioner is true, he cannot ask for ignoring the same. In case, it is false and as such statement had been made on oath, he is liable to be tried for perjury. More so, whether such a pleading is relevant or not is a matter to be decided by the court and under Section 165 of the Indian Evidence Act, 1872, court has a right to ask the party even relevant or irrelevant questions and the parties or their counsel cannot raise any objection to any such question.

5. In such a fact-situation, words fail us to condemn the audacity of the petitioner to tell the highest court of the land to ignore the pleadings taken by him.

Be that as it may, this Court had insisted at the time of first round of hearing of this case that AOR, Shri Manu Shanker Mishra should remain present in the Court at the time of arguments and also passed over the matter for his appearance. In the second round, it was informed to us that the AOR refused to come to the court. We take a very serious note of the conduct of this AOR, particularly, in view of the judgment of this Court *In Re: Rameshwar Prasad Goyal,* (2014) 1 SCC 572, wherein this Court has categorically held that in case the AOR does not appear in the court, his conduct may tantamount to criminal contempt of the court. In fact, a very few AsOR have spoiled the working system of the institution of AsOR who simply lend their signatures for petty amount. The AOR involved herein is living in a fool's paradise if he thinks that he can play hide and seek with any court of law.

In such a chaotic situation, any "Arzi", "Farzi", half-baked lawyer under the label of "proxy counsel", a phrase not traceable under the Advocates Act, 1961 or under the Supreme Court Rules, 1966 etc., cannot be allowed to abuse and misuse the process of the court under a false impression that he has a right to waste public time without any authority to appear in the court, either from the litigant or from the AOR, as in the instant case. The AOR, with impunity was disdainful towards the order of this Court directing him to appear in the court. He had also not filed any appearance for the counsel who had appeared, nor the said counsel disclosed his name. The Court takes serious note of the conduct of the AOR, Shri Manu Shanker Mishra and warns him to behave in an appropriate manner befitting the conduct of an advocate and an AOR otherwise this Court will not hesitate to take action against him. His conduct will be under close watch of this Court.

6. With the aforesaid observations, the petition stands dismissed.

R.P. SLP dismissed.

HANUMANAGOUDA
v.
UNITED INDIA INSURANCE CO. LTD. & ORS. ETC.
(Civil Appeal No. 5901 of 2008)

JANUARY 28, 2014

[P. SATHASIVAM, CJI, RANJAN GOGOI AND SHIVA KIRTI SINGH, JJ.]

MOTOR VEHICLES ACT, 1988:

Fatal accident—Liability of insurer – Deceased as 'Gumasthe' accompanying the goods in lorry – Held: The relevant clause in the policy, i.e. "persons employed in connection with the operation", is clearly over and above the coverage provided by the policy to "persons employed in connection with loading/unloading of motor vehicle" — The deceased, as Gumasthe, was accompanying the goods in transit for the purpose of delivery of goods and, as such, would be covered by the expression "persons employed in connection with operation of motor vehicle" — Insurance Company will be bound by the award and liable to pay compensation to claimants

In an appeal filed against the order of the Motor Accidents Claim Tribunal holding the owner-cum-driver of the vehicle and the insurer jointly and severally liable, the High Court held that the award made against the insurer in respect of the deceased was bad in law because the deceased working as 'Gumasthe' accompanying the goods, could not be covered by the clause under which premium was paid for covering the risk of the persons employed in connection with the operation of loading and unloading of the goods.

The question for consideration before the Court

was: whether clause IMT 17 for which premium was paid to the insurer in respect of the lorry would cover the deceased or not.

Allowing the appeal, the Court

HELD: 1.1. The High Court has clearly fallen in error in holding that the insurer is not liable in respect of death of the deceased. The clause, "persons employed in connection with the operation" is clearly over and above the coverage provided by the policy to "persons employed in connection with loading/unloading of motor vehicle". The deceased, as 'Gumasthe', was accompanying the goods in transit for the purpose of delivery of goods. This has been accepted by the High Court. Obviously, as 'Gumasthe', the deceased would be covered by the expression "persons employed in connection with operation of motor vehicle". The operation of the clause has wrongly been restricted and limited only to persons employed in connection with loading/unloading of the motor vehicle. The respondent-Insurance Company will be bound by the award and liable to pay compensation as per orders of the Tribunal. [para 6-7] [856-C-E-G]

1.2. The order impugned is set aside and the order of the Tribunal restored. The dues of compensation along with interest shall be deposited by the respondent Insurance Company with the Tribunal. [para 7] [856-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5901 of 2008.

From the Judgment and order dated 11.11.2005 of the High Court of Karnataka at Bangalore in MFA Nos. 2451,2452 and 2454 of 2002.

M. Gireesh Kumar, S.K. Kulkarni, Ankur S. Kulkarni, Vijay

Kumar, for the Appellant.

M.K. Dua for the Respondents.

The Judgment of the Court was delivered by

SHIVA KIRTI SINGH, J. 1. Heard learned counsel for the appellant and learned counsel for the respondent-Insurance Company.

2. Due to accident involving a goods vehicle, a lorry, two persons died and others received injuries. All the thirteen claim petitions were decided by a common judgment dated 21.01.2002 by the Motor Vehicle Accidents Claim Tribunal (hereinafter referred to as 'The Tribunal') presided by the Principal District Judge at Raichur (Karnataka). This appeal relates only to claim filed by dependents and legal representatives of deceased Hanumanth which included his widow Smt. Mariyamma and three minor children, who are respondents 2 to 4 in this appeal. The Tribunal allowed their claim in MCV No. 616 of 1999 and held them entitled for compensation of Rs.2,55,000/- from the owner-cum-driver of the lorry, the appellant and also from respondent-Insurance Company as they were held responsible jointly and severally. The claim was allowed with 6% interest from the date of claim petition till its realization with costs fixed at Rs.200/-.

3. In appeals preferred by the Insurance Company, the High Court by the order under Appeal dated 17.10.2005 interfered with the Award made against the Insurer in respect of death of Hanumanth and held that the Award was bad in law because the deceased was in a clerical cadre working as a Gumasthe accompanying the goods in transit for the purpose of delivery and as such he could not be covered by the clause under which premium was paid for covering the risk of the persons employed in connection with the operation of loading and unloading of the goods. Against this order passed in MFA No.2451 of 2002, the appellant/owner of the goods vehicle has preferred this appeal.

4. The only issue requiring determination is whether the

clause IMT 17 for which premium was paid to the insurer in respect of the concerned lorry will cover the deceased Hamumanth or not.

5. For deciding the above issue, one is simply required to go through the relevant clause IMT 17 of the policy, whose copy has been made available to us. The clause reads thus:

> "Add: for LL to persons employed in connection with the operation and/or loading unloading of motor vehicle IMT 17".

6. The High Court has clearly fallen in error in holding that the insurer is not liable in respect of death of Hanumanth. The clause - "persons employed in connection with the operation" is clearly over and above the coverage provided by the policy to "persons employed in connection with loading/unloading of motor vehicle". As Gumasthe, the deceased was accompanying the goods in transit for the purpose of delivery of goods. This has been accepted by the High Court. Obviously, as Gumasthe the deceased would be covered by the expression "persons employed in connection with operation of motor vehicle" The operation of the aforesaid clause has wrongly been restricted and limited only to persons employed in connection with loading/unloading of the motor vehicle.

7. In view of the aforesaid error committed by the High Court, the order under appeal is set aside and the order of the Tribunal is restored. As a result, the respondent-Insurance Company will be bound by the Award made by the Tribunal for paying compensation to the claimants for the death of Hanumath as per orders of the Tribunal. The dues of compensation along with due interest should be deposited by the respondent Insurance Company within eight weeks with the Tribunal which will permit the claimants to withdraw the amount as per order of the Tribunal.

8. The appeal is allowed to the aforesaid extent. No costs.

R.P. Appeal allowed.

VISHAL AGRAWAL & ANR.
v.
CHHATTISGARH STATE ELECTRICITY BOARD & ANR.
(Criminal Appeal No. 275 of 2014)

JANUARY 29, 2014

[K.S. RADHAKRISHNAN AND A.K. SIKRI, JJ.]

ELECTRICITY ACT, 2003:

s. 151r/w ss.135/126 of the Act and r.12 of Electricity Rules, 2005 — Theft of electricity – Officers authorized to file complaint – Cognizance of offences – Plea that Assistant Engineer had no authority to make a written complaint – Held: Amendment to s.151 is clarificatory in nature – Further, notwithstanding the provisions of s. 151 of the Act, an FIR could be filed with the police — Even when a Magistrate is to take cognizance on a complaint filed before him, that would not mean that no other avenue is opened and complaint/FIR cannot be lodged with the police — Offences under Electricity Act are also to be tried by applying the procedure contained in the Code — It cannot be said that a complete machinery is provided under Electricity Act as to how such offences are to be dealt with — If the offence under the Code is cognizable, provisions of Chapter XII containing s.154 Cr.P.C. and onward would become applicable and it would be the duty of police to register FIR and investigate into the same – Code of Criminal Procedure, 1973 – ss.4, 154 and 172.

The appellants, who were consumers of electricity and getting supply thereof from State Electricity Board, were found committing theft of electricity. The Board lodged a complaint at the Police Station. An FIR for offences punishable u/ss 135/126 of the Electricity Act, 2003 was registered on 31.3.2006. After investigation into the matter, a challan was filed before the Special Judge,

who passed orders dated 30.6.2006 taking cognizance of the offence. The appellants filed petition before the High Court seeking to quash the proceedings on the ground that the Assistant Engineer had no authority to make any written complaint and the Special Judge could not have taken cognizance of the offence without complying with the provisions of s.151 of the Electricity Act, 2003. The High Court directed the appellants to approach the Special Judge, who held that since the complaint had not been made by the officers named in r. 9 of the Chhattisgarh State Electricity Rules, 2006, cognizance thereof could not be taken. Accordingly, the appellants were discharged from the case. The Board filed a criminal revision before the High Court by on 4.2.2007. Meanwhile, the Electricity Act was amended by inserting, *inter alia*, ss. 151(A) and 151(B) to the Act with effect from 15.6.2007. The High Court reversed the orders of the Special Judge holding that as per r. 12 of the Rules, the police was authorised by the Central Government to forward the complaint received by the officers authorised u/s 151 of the Electricity Act to the court concerned and, therefore, the complaint was validly instituted.

In the instant appeal filed by the accused-consumers, the question for consideration before the Court was: whether the amendment in s. 151 of the Electricity Act, 2003, which empowered the court to take cognizance of an offence upon a report made by the police u/s 173 of the Code of Criminal Procedure, 1973, would be applicable to the pending complaints filed prior to the said amendment.

Dismissing the appeal, the Court

HELD: 1.1. In view of the judgment of this Court in *Satyendra Rai's case, conclusively holding that amendment to s.151 is clarificatory in nature and further that notwithstanding the provisions of s. 151 of the Act,**

an FIR could be filed with the police, the matter stands clinched in favour of the Board. [para 17] [871-G]

* *Assistant Electrial Engineer* vs. *Satyendra Rai & Anr*. **(2012) 1 PLJR 476 - relied on.**

1.2. As far as the scheme of the Code of Criminal Procedure is concerned, it demarcates the offences into two categories, namely, cognizable and non-cognizable offences. Section 154 of the Code prescribes that in respect of every offence which is a cognizable one, information thereof is to be given to an officer in-charge of a police station, who shall reduce the same into writing. Thus, it is the duty and responsibility of the police authorities to register an FIR. Sub-s. (3) of s. 154 further obligates the police authorities to investigate the same as per the manner prescribed in subsequent sections and thereafter submit the report to the Magistrate, who is empowered to take cognizance of the offence on police report u/s 173 of the Code, on completion of investigation. [para 19] [878-B-E]

1.3. Section 4 of the Code makes it clear that provisions of the Code would be applicable where an offence under the IPC or under any other law is being investigated, inquired into, tried or otherwise dealt with. These offences under any other law could also be investigated, inquired into or tried with according to the provisions of the Code except in case of an offence where the procedure prescribed thereunder is different than that under the Code. It is so specifically provided u/s 155 of the Electricity Act also. Thus, it is not a case where any special or different procedure is prescribed. Rather, the procedure contained in the Code is made applicable for the offences to be tried under the Electricity Act as well. [para 21] [871-B-D]

M. Narayandas v. State of Karnataka and Ors. **2004 Cri LJ 822 – approved.**

1.4. Thus, even when a Magistrate is to take cognizance on a complaint filed before him, that would not mean that no other avenue is opened and the complaint/FIR cannot be lodged with the police. The offences under the Electricity Act are also to be tried by applying the procedure contained in the Code. Thus, it cannot be said that a complete machinery is provided under the Electricity Act as to how such offences are to be dealt with. In view thereof, if the offence under the Code is cognizable, provisions of Chapter XII containing s.154 Cr.P.C. and onward would become applicable and it would be the duty of the police to register the FIR and investigate into the same. Sections 135 and 138 of the Act only prescribe that certain acts relating to theft of electricity etc. would also be offences. It also enables certain persons/parties, as mentioned in s.151, to become complainant in such cases and file complaint before a court in writing. When such a complaint is filed, the court would be competent to take cognizance straightaway. However, that would not mean that other avenues for investigation into the offence which are available would be excluded. It is more so when no such special procedure for trying the offences under the Electricity Act is formulated and the cases under this Act are also to be governed by the Code of Criminal Procedure. [para 23] [881-H; 882-A-E]

1.5. It is significant to note that the notification dated 8.6.2005 issued by the Central Government in exercise of powers u/s 176 of the Act contains the Electricity Rules, 2005. Rule 12 provides, *inter alia,* that police shall take cognizance of the offence punishable under the Act on a complaint, investigate such complaint and forward the report to the court for trial. [para 24] [882-F-H; 883-A]

Chacko, A.K. & Anr. Vs. Assistant Executive Engineer, K.S.E.B. **(2010) 2 KLJ 569;** *Biswanath Patra Vs. Divisional Engineer* AIR 2007 Cal 189; *Ranjeet Kr. Bag Vs. State of West Bengal* **(2006) 1 C CrlJ (Cal) 334;** *Paramasivan vs. Union of India* **(2007) 2 KLT 733;** *Kumaran Chemicals (P) Ltd. Rep. By its Managing Partner D. Thillairaj and Ors. vs. Government of Pondicherry rep. by the Inspector of Police* **MANU/TN/0584/2010 — disapproved.**

Bimla Gupta vs. NDPL **136(2007) DLT 521; and** *Asish Kumar Jain vs. State of Jharkhand* **(2010) Cri LJ 271— approved.**

Anjan De vs. *State of West Bengal* **(2008) 1 Cal LT 486 – referred to.**

Case Law Reference:

***K.S.E.B*. (2010) 2 KLJ 569**	**disapproved**	**para 12**
AIR 2007 Cal 189	**disapproved**	**para 12**
(2006) 1 C CrlJ (Cal) 334	**disapproved**	**para 12**
(2007) 2 KLT 733	**disapproved**	**para 12**
MANU/TN/0584/2010	**disapproved**	**para 12**
***NDPL* 136(2007) DLT 521**	**approved**	**para 13**
(2010) Cri LJ 271	**approved**	**para 13**
(2008) 1 Cal LT 486	**referred to**	**para 13**
(2012) 1 PLJR 476	**relied on**	**para 14**
2004 Cri LJ 822	**approved**	**para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 275 of 2014.

From the Judgment & Order dated 26.02.2008 of the High

Court of Chhattisgarh at Bilaspur in Criminal Revision No. 49 of 2007.

Navin Prakash, Harmeet Ruprah, S.K. Verma for the Appellants.

C.S. Vaidyanathan, Jugalkishore Gilda, AAG, Abhimanyu Singh (For C.D. Singh), Yogmaya Agnihotri, Ashok Kumar Singh for the Respondents.

The Judgment of the Court was delivered by

A.K. SIKRI, J. 1. Leave granted.

2. A pure question of law which arises for consideration is: whether the amendment in Section 151of the Electricity Act, 2003 (hereinafter referred to as the Act] which empowers the Court to take cognizance of an offence upon a report made by the police under Section 173 of the Code of Civil Procedure [hereinafter referred to as the Code], would be applicable to the pending complaints filed before the aforesaid amendment. To answer this question, scope and interpretation of Section 151, as it stood prior to the amendment, also needs to be considered. This issue has arisen in the following set of facts:

3. The respondent, viz. Chhattisgarh State Electricity Board (hereinafter to be referred as the 'Board') is the supplier of electricity in the State of Chhattisgarh. The appellants are the consumers of the Electricity and getting supply thereof through the Electricity connection provided by the Board. As per the Board, the appellants were found committing theft of the electricity which was revealed on 23.3.2006 when the Electricity meter of the appellant was inspected by the Inspection Team of the Board. It transpired that instead of the approved 55.204 KW, the appellants were using load of 59.810 KW and the meter was also tampered with. The Board made a complaint to the Station House Officer (SHO), Police Station, Civil Lines, Bilaspur. On the aforesaid allegations with request to the SHO to register a FIR against the appellants on the basis of a

complaint dated 30.3.2006, the FIR was registered by the SHO on 31.3.2006 being FIR No. 227 of 2006 under Section 135/ 126 of the Act. After investigating into the matter, officer in-charge of the Police Station filed the challan before the Special Judge, Bilaspur who passed orders dated 30.6.2006 taking cognizance of offence under the aforesaid provisions of the Act.

4. Against this order, the appellants filed quashing petition before the High Court on the ground that the Assistant Engineer had no authority to make any written complaint and the Special Judge could not have taken cognizance of the offence without complying with the provisions of Section 151 of the Act. This petition was disposed of by the High Court with a direction to the appellants to approach and raise the said objection before the Special Judge. On that basis, the aforesaid plea was pressed before the Special Judge as well by filing an application to this effect. The contention of the appellants was found convincing by the Special Judge who passed orders dated 26.9.2006 thereupon holding that since the complaint had not been made by the officers named in Rule 9 of the Chhattisgarh State Electricity Rules, 2006, cognizance thereof could not be taken. As a sequittor, the appellants were discharged from the case. At the same time liberty was also given to the Board to take appropriate action in accordance with law.

5. The Board did not accept the aforesaid order and challenge the same before the High Court by filing Criminal Revision on 4.2.2007. Within four months thereof the Electricity Act was amended by inserting, inter alia, Sections 151(A) and 151(B) to the said Act with effect from 15.6.2007. The High Court has by impugned order dated 26.2.2008, reversed the orders of the Special Judge holding that as per Rule 12 of Chhattisgarh State Electricity Rules, the police has been authorised by the Central Government to forward the complaint received by the officers authorised under Section 151 of the

Electricity Act to the concerned Court and, therefore, the complaint was validly instituted.

6. Before we take note of the contentions advanced before the High Court and the manner in which the High Court has dealt with the same, it would be apt to reproduce relevant provisions of the Electricity Act as well as Chhattisgarh Electricity Rules, interpretation whereof is involved in the present case.

7. Section 151 of the Act, as it existed before the amendment, is as follows:

> "151. Cognizance of offences:- No Court shall take cognizance of an offence punishable under this Act except upon a complaint in writing made by appropriate government or appropriate Commissioner or any of their officer authorized by them or a Chief Electrical Inspector or an Electrical Inspector or Licensee or the generating company, as the case may be, for this purpose."

In exercise of powers conferred by Section 176 of the Electricity Act, 2003 the Central Government framed Electricity Rules, 2005, Rule 12 reads thus:-

> "12. Cognizance of the Offence –
>
> (1) The police shall take cognizance of the offence punishableunder the Act on a complaint in writing made to the police by the appropriate Government or the appropriate Commission or any of their officers authorized by them in this regard or a Chief Electrical Inspector or an Electrical Inspector or an authorized officer of Licensee or a Generating Company, as the case may be.
>
> (2)The police shall investigate the complaint in accordance withthe general law applicable to the investigation of anycomplaint. For the purposes of

investigation of the complaintthe police shall have all the powers as available under the Code of Criminal Procedure, 1973.

(3) The police shall after investigation, forward the report along with the complaint filed under sub-clause (1) to the Court fortrial under the Act.

(4) Notwithstanding anything contained in sub-clause (1), (2) and (3) above, the complaint for taking cognizance of an offence punishable under the Act may also be filed by the appropriate Government or the appropriate Commission or any of theirofficers authorized by them or a Chief Electrical Inspector or an Electrical Inspector or an authorized officer of Licensee ora Generating Company, as the case may be directly in the appropriate Court.

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, every special court may take cognizance of an offence referred to in Sections 135 to 139 of the Act without the accused being committed to it for trial.

(6) The cognizance of the offence under the Act shall not in anyway prejudice the actions under the provisions of the Indian Penal Code."

The principal Electricity Act, 2003 was further amended by the Electricity (Amendment) Act, 2007 and apart from other amendments in Section 151 of the prinicipal Act was also amended and provisions in Sections 151, 151(A), 151 (B) were inserted. In the Statement of Objects and Reasons for amending the Act, it was stated as under:

"4. As per the provisions contained in Section 151 of the Act, the offences relating to theft of electricity, electric lines and interference with the meters are cognizable offences.

Concerns have been expressed that the present formulation of Section 151 stands as a barrier to investigation of these cognizable offences by the police. It is proposed to amend Section 15 so as to clarify the position that the police would be able to investigate the cognizable offences under the Act. The expedite the trial before the Special Court, it is also proposed to provide that a Special Court shall be competent to take cognizance of an offence without the accused being committed to it for trial.

1.Short title and commencement. (1) This act may be called the Electricity (Amendment) Act, 2007.

2. It shall come into force on such date as the CentralGovernment may, by notification in the Official Gazette,appoint:

"15. Amendment of Section 151. - In Section 151 of the Principal Act, the following provisos shall be inserted, namely:-

Provided that the Court may also take cognizance of an offence punishable under this Act upon a report of a police officer filed under Section 173 of the Code of Criminal Procedure, 1973 (2 of 1974).

Provided further that a special court constituted under Section 153 shall be competent to take cognizance of an offence without the accused being committed to it for trial.

16. Insertions of new Sections 151-A and 151-B – After Section 151 of the principal act, the following sections shall be inserted namely:-

"151-A. Power of police to investigate – For the purposes of investigation of an offence punishable under this Act, the police officer shall have all the

powers as provided in Chapter XII of the Code of Criminal Procedure, 1973 (2 of 1974).

151-B Certain offences to be cognizable and non-bailable. - Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence punishable under Sections 135 to 140 or Sections 150 shall be cognizable and non-bailable."

8. As per unamended Section 151 of the Act the cognizance of the offence punishable under the Electricity Act can be taken only when complaint is made in writing by:

(i) Appropriate Government, or

(ii) Appropriate Commissioner, or

(iii) Any of their officer authorized by them, or

(iv) A Chief Electrical Inspector,

(v) Electrical Inspector,

(vi) Licensee, or

(vii) The Generating Company, as the case may be.

9. It was the submission of the appellant that the complaint could be made to the Court by the appropriate Government or any of its officers so authorised (as other persons specifically named to make such complaints under Section 151 were not relevant). It was argued that the State of Chhattisgarh has framed Chhattisgarh State Electricity Rules, 2005 in exercise of powers under Section 151 of the Act. As per Rule 9 of the said Rules, the persons who are authorized to make the written complaints were either Assistant Electrical Inspector of Chief Electrical Inspectorate of the State Government or an officer not below the rank of Junior Engineer of the Board or Distribution

Licensee. It was the submission of the appellant that in the present case the complaint was made by the Assistant Engineer who was below the rank of Junior Engineer and, therefore, was not authorised to lodge the complaint under Section 151. It was also argued that as per the provisions of Section 151 of the Act, the complaint was required to be made in the Court and not to the police and both these mandatory conditions contained in Section 151 of the Act were not adhered to.

10. The High Court rejected the aforesaid contention holding that Rule 12 of the Electricity Rules authorised the police to take cognizance of the offence punishable under the Act and, therefore, it was not necessary for the Board to file the complaint under Section 151. The High Court also held that by adding proviso to Section 151 along with insertion of Sections 151(A) and 151 (B) vide Electricity (Amendment) Act, 2007, this position was made abundantly clear namely cognizance of an offence punishable under the Act could be taken upon a report of police officer filed under Section 173 of the Code of Criminal Procedure. Contention of the appellants that the said amendment came into effect only from 15.6.2007 with the passing of Electricity Amendment Act, 2007 has been repelled by the High Court taking note of the Statement of Objects and Reasons for amending the Act which makes it absolutely clear that the purpose for amendment is to clarify the position already prevailed viz. the police would be able to investigate the cognizable offences under the Act. These are the reasons given by the High Court for setting aside the order of the Trial Court and allowing the Revision Petition of the Board.

11. Before us arguments of the parties remained the same. The submission of learned Counsel for the appellant was that proviso to Section 151 as well as provisions contained in Section 151(A) and 151(B) of the Electricity Act are substantive provisions which could operate only prospectively i.e. the date

on which the amendment was notified and could not have retrospective operation, more particularly when the provisions are in the realm of criminal law. He also referred to certain judgments of few High Courts wherein such a view has been taken. Learned Counsel for the respondent-Board, on the other hand, extensively relied upon the reasoning of the High Court in the impugned judgment and cited certain decisions of other High Courts which have taken this very line of action.

12. We may mention at the outset that there is difference of opinion on this issue among various High Courts. Kerala and Calcutta High Court, have taken the view which goes in favour of the appellant herein, in the following cases:-

Chacko, A.K. & Anr. Vs. Assistant Executive Engineer, K.S.E.B. (2010) 2 KLJ 569; *Biswanath Patra Vs. Divisional Engineer* AIR 2007 Cal 189; *Ranjeet Kr. Bag Vs. State of West Bengal* (2006) 1 C CrlJ (Cal) 334; *Paramasivan vs. Union of India* (2007) 2 KLT 733; *Kumaran Chemicals (P) Ltd. Rep. By its Managing Partner D. Thillairaj and Ors. vs. Government of Pondicherry rep. By the Inspector of Police* MANU/TN/0584/2010.

13. A contrary view has been taken by High Courts of Delhi and Jharkhand in the following cases:

Bimla Gupta vs. NDPL 136(2007) DLT 521; *Ashish Kumar Jain vs. State of Jharkhand* (2010) CriLJ 271

Interestingly, though Calcutta High Court has taken different view in the two judgments cited above, which are of the years 2006 and 2007, different view has been taken in the case *Anjan De vs. State of West Bengal* (2008) 1 Cal LT 486 which is in tune with the judgments of Delhi and Jharkhand High Courts.

14. Before we embark on detailed discussion, it is pertinent to point out that this Court has already dealt with the same issue in the case of *Assistant Electrial Engineer* vs. *Satyendra Rai & Anr*. (2012) 1 PLJR 476 wherein it has

accepted the proposition that FIR with the police can be registered *de hors* Section 151 of the Act (unamended) which provides for filing of the complaint before the Special Court. The relevant portion of the said judgment is as under:-

> Though the report was made by the Assistant Electrical Engineer, it was pointed out before the High Court that even if the police had decided to file a report under Section 173 Code of Criminal Procedure. Complaining the theft, the Court could not have taken the cognizance as provided under Section 151 of the Act and only a complaint should have been filed in writing by the appropriate Government or their officers.
>
> The High Court accepted this contention and held that the very inception of the case was not in accordance with law and, therefore, the first information report in the present case could not be sustained. This is the judgment which has fallen for our consideration.
>
> We have heard learned Counsel appearing for the parties and gone through the appeal.
>
> Considering the position in law, it is obvious that the High Court has completely misconstrued the relevant provision. Considering the definition of "theft" of electricity in Section 135 of the Act, there could be no difficulty that in the first information report, the theft as contemplated in Section 135 of the Act was reported. The only question is as to whether the police could have investigated on that basis and could have filed a charge sheet against the Respondent No. 1-accused, particularly in view of the language of Section 151 of the Act.

15. In that very judgment this Court also categorically pointed out that proviso to Section 151 of the Act was clarificatory in nature. This is so observed in para 9 which is as follows:

THEREFORE, CONSIDERING THE LANGUAGE OF PARA 4 OF THE STATEMENT OF OBJECTS AND REASONS, IT IS CLEAR THAT THE AMENDMENT BROUGHT IN IS CLARIFICATORY IN NATURE AND AS SUCH IT WOULD TAKE INTO ITS AMBIT EVEN THE PENDING MATTERS AND IN THAT SENSE IT WOULD BE A RETROSPECTIVE AMENDMENT.

16. Yet, there is one more reason given by the Court to hold that FIR with the police officer would be competent, as can be found from the following extracts from the said judgment:-

> There is one more reason why the High Court's order can be faulted. The High Court has clearly ignored the First Schedule of the Code of Criminal Procedure and more particularly the second part thereof, which is under the head "Classification of Offences against other laws". The second entry reads as follows:
>
> If punishable with imprisonment for three years, and upwards but not more than seven years, then such offences are held to be cognizable, non-bailable and triable by the Court of Magistrate of the first class.
>
> Therefore, the High Court ought to have considered this provision which makes the first information report acceptable by the police in the sense that the police could investigate into the matter and if found guilty could have also filed a report under Section 173 Code of Criminal Procedure, before the Court on which the Court could have taken the cognizance of the offence.

17. In view of the aforesaid judgment of this Court, conclusively holding that amendment to Section 151 is clarificatory in nature and further that notwithstanding the provisions of Section 151 of the Act, a FIR could be filed with the police, the matter stands clinched in favour of the Board. However, at the same time we would like to elaborate the view taken by this Court in the aforesaid judgment.

18. It would be essential to first take note of the relevant provisions of the Electricity Act and the Code of Criminal Procedure. The five provisions of the Electricity Act which are referred to are Sections 135, 138, 151, 154 and 175 and these may be reproduced at this stage:

"S. 135. Theft of electricity.

(1) Whoever, dishonestly,

(a) taps, makes or causes to be made any connection with overhead, underground or under water lines or cables, or service wires, or service facilities of a licensee; or

(b) tampers a meter, installs or uses a tampered meter, current reversing transformer, loop connection or any other device or method which interferes with accurate or proper registration, calibration or metering of electric current or otherwise results in a manner whereby electricity is stolen or wasted; or

(c) damages or destroys an electric meter, apparatus, equipment, or wire or causes or allows any of them to be damaged or destroyed as to interfere with the proper or accurate metering of electricity, so as to abstract or consume or use electricity shall be punishable with imprisonment for a term which may extend to three years or with fine or with both:

Provided that in a case where the load abstracted, consumed, or used or attempted abstraction or attempted consumption or attempted use-

(i) does not exceed 10 kilowatt, the fine imposed on first conviction shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction the fine imposed shall not be less than six times the financial gain on account of such theft of electricity;

(ii) exceeds 10 kilowatt, the fine imposed on first conviction shall not be less than three times the financial gain on account of such theft of electricity and in the event of second or subsequent conviction, the sentence shall be imprisonment for a term not less than six months but which may extend to five years and with fine not less than six times the financial gain on account of such theft of electricity:

Provided further than if it is proved that any artificial means or means not authorised by the Board or licensee exist for the abstraction, consumption or use of electricity by the consumer, it shall be presumed, until the contrary is proved, that any abstraction, consumption or use of electricity has been dishonestly caused by such consumer.

(2)Any office authorised in this behalf by the State Government may-

(a) enter, inspect, break open and search any place or premises in which he has reason to believe that electricity [has been or is being], used unauthorisedly;

(b) search, seize and remove all such devices, instruments, wires and any other facilitator or article which [has been or is being], used for unauthorised use of electricity;

(c)examine or seize any books of accounts or documents which in his opinion shall be useful for or relevant to, any proceedings in respect of the offence under Sub-section (1) and allow the person from whose custody such books of account or documents are seized to make copies thereof or take extracts there from in his presence.

(3) The occupant of the place of search or any person on his behalf shall remain present during the search and a list

of all things seized in the course of such search shall be prepared and delivered to such occupant or person who shall sign the list:

Provided that no inspection, search and seizure of any domestic place or domestic premises shall be carried out between sunset and sunrise except in the presence of an adult male member occupying such premises.

(4)The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to search and seizure shall apply, as far as may be, to searches and seizure under this act.

Xxxxx

S. 138. Interference with meters or works of licensee.-(1) Whoever,

(a) unauthorisedly connects any meter, indicator or apparatus with any electric line through which electricity is supplied by a licensee or disconnects the same from any such electric line; or

(b) unauthorisedly reconnects any meter, indicator or apparatus with any electric line or other works being the property of a licensee when the said electric line or other works has or have been cut or disconnected; or

(c) lays or causes to be laid, or connects up any works for the purpose of communicating with any other works belonging to a licensee; or

(d) maliciously injures any meter, indicator, or apparatus belonging to a licensee or willfully or fraudulently alters the index of any such meter, indicator or apparatus or prevents any such meter, indicator or apparatus from duly registering; shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to ten

thousand rupees, or with both, and, in the case of a continuing offence, with a daily fine which may extend to five hundred rupees; and if it is proved that any means exist for making such connection as is referred to in Clause (a) or such re-connection as is referred to in Clause (b), or such communication as is referred to in Clause (c), for causing such alteration or prevention as is referred to in Clause (d), and that the meter, indicator or apparatus is under the custody or control of the consumer, whether it is his property or not, it shall be presumed, until the contrary is proved, that such connection, reconnection, communication, alteration, prevention or improper use, as the case may be, has been knowingly and willfully caused by such consumer.

Xxxxx

S. 151. Cognizance of offences.-No court shall take cognizance of an offence punishable under this Act except upon a complaint in writing made by Appropriate Government or Appropriate Commission or any of their officer authorised by them or a Chief Electrical Inspector or an Electrical Inspector or licensee or the generating company, as the case may be, for this purpose.

Xxxxx

S. 154. Procedure and power of Special Court.-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under Sections 135 to 139 shall be triable only by the Special Court within whose jurisdiction such offence has been committed.

(2) Where it appears to any court in the course of any inquiry or trial that an offence punishable under Sections 135 to 139 in respect of any offence that the case is one which is triable by a Special Court constituted under this

Act for the area in which such case has arisen, it shall transfer such case to such Special Court, and thereupon such case shall be tried and disposed of by such Special Court in accordance with the provisions of this Act.

Provided that it shall be lawful for such Special Court to act on the evidence, if any, recorded by any court in the case of presence of the accused before the transfer of the case of any Special Court:

Provided further that is such Special Court is of opinion that further examination, cross-examination and re-examination of any of the witnesses whose evidence has already been recorded, is in the interest of justice, it may re-summon any such witness and after such further examination, cross-examination and re-examination, if any, as it may permit, the witness shall be discharged.

(3) The Special Court may, notwithstanding anything contained in Sub-section (1) of Section 260 or Section 262 of the Code of Criminal Procedure, 1973 (2 of 1974), try the offence referred to in Sections 135 to 139 in a summary way in accordance with the procedure prescribed in the said Code and the provisions of Sections 263 to 265 of the said Code shall, so far as may be, apply to such trial:

Provided that where in the course of a summary trial under this sub-section, it appears to the Special Court that the nature of the case is such that it is undesirable to try such case in summary way, the Special Court shall recall any witness who may have been examined and proceed to re-hear the case in the manner provided by the provisions of the said Code for the trial of such offence:

Provided further that in the case of any conviction in a summary trial under this section, it shall be lawful for a Special Court to pass a sentence of imprisonment for a term not exceeding five years.

(4) A Special Court may, with a view to obtaining ;the evidence of any person supposed to have been directly or indirectly concerned in or privy to, any offence tender pardon to such person or condition of his making a full and true disclosure of the circumstances within his knowledge relating to the offence and to every other person concerned whether as principal or abettor in the commission thereof, and any pardon so tendered shall, for the purposes of Section 308 of the Code of Criminal Procedure, 1973 (2 of 1974), be deemed to have been tendered under Section 307 thereof.

(5) The Special Court may determine the civil liability against a consumer or a person in terms of money for theft of energy which shall not be less than an amount equivalent to two times of the tariff rate applicable for a period of twelve months preceding the date of detection of theft of energy or the exact period of theft if determined whichever is less and the amount of civil liability so determined shall be recovered as if it were a decree of civil court.

(6) In case the civil liability so determined finally by the Special Court is less than the amount deposited by the consumer or the person, the excess amount so deposited by the consumer or the person, to the Board or licensee or the concerned person, as the case may be refunded by the Board or licensee or the concerned person, as the case may be, within a fortnight from the date of communication of the order of the Special Court together with interest at the prevailing Reserve Bank of India prime lending rate for the period from the date of such deposit till the date of payment.

Explanation.-For the purposes of this section, "civil liability" means loss or damage incurred by the Board or licensee or the concerned person, as the case may be, due to the commission of an offence referred to in Sections 135 to 139.

S. 175. Provisions of this Act to be in addition to and not in derogation of other laws:- The provisions of this Act are in addition to and not in derogation of any other law for the time being in force."

19. As far as the scheme of the Code of Criminal Procedure (hereinafter referred to as the 'Code') is concerned, it is essential to point out that it demarcates the offences into two categories, namely, cognizable and non-cognizable offences. As per Part II of Schedule I of the Code, any offence punishable with three years or more of imprisonment is a cognizable offence. Section 154 of the Code prescribes that in respect of every offence which is a cognizable one, information thereof is to be given to an officer in-charge of a police station, who shall reduce the same into writing. Thus, it is the duty and responsibility of the police authorities to register a First Information Report. Sub-section (3) of Section 154 further obligates the police authorities to investigate the same as per the manner prescribed in subsequent sections and thereafter submit its report to the Magistrate, who is empowered to take cognizance of the offence on police report, under Section 173 of the Code, on completion of investigation."

20. Here, the provisions of Section 4 of the Code become relevant which provide a complete answer to the submission of the appellant. It reads:

"4. Trial of offence under the Indian Penal Code and other laws. -

(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the

time being in force regulating the manner of place of investigation, inquiring into, trying or otherwise dealing with such offences."

21. It is apparent from the reading of Section 4 that provisions of the Code would be applicable where an offence under the IPC or under any other law is being investigated, inquired into, tried or otherwise dealt with. These offences under any other law could also be investigated, inquired into or tried with according to the provisions of the Code except in case of an offence where the procedure prescribed there under is different than the procedure prescribed under the Code. It is so specifically provided under Section 155 of the Electricity Act also. Thus, it is not a case where any special or different procedure is prescribed. Rather, the procedure contained the Code is made applicable for the offences to be tried under the Electricity Act as well.

22. We would like to discuss here the judgment in the case of In *M. Narayandas v. State of Karnataka and Ors.* 2004 CriLJ 822, which has direct bearing on the issue at hand. The question arose as to whether Section 195 and Section 340 of the Code. affect the power of police to investigate into a cognizable offence. Section 195 provides for prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence. It also states that no Court shall take cognizance of the offences specified therein except on a complaint in writing of that Court or of some other Court to which that Court is subordinate. Section 340 of the Code prescribes the procedure as to how the complaint may be preferred under Section 195 of the Cr.P.C. Alleging that the accused had committed an offence under Section 195, the complainant had made a complaint to the police and police had initiated investigation thereon. The accused/respondent had contended that since the case was filed under Section 195 of the Code it was provisions of Chapter XVI of the Code which

would apply and not Chapter XII thereof (relating to investigation by the police). This contention was rejected in the following manner:

"8. We are unable to accept the submissions made on behalf of the respondent. Firstly, it is to be seen that the High Court does not quash the complaint on the ground that Section 195 applied and that the procedure under Chapter XXVI had not been followed. Thus such a ground could not be used to sustain the impugned judgment. Even otherwise, there is no substance in the submission. The question whether Sections 195 and 340 of the Criminal Procedure Code affect the power of the police to investigate into a cognizable offence has already been considered by this Court in the case of *State of Punjab v. Raj Singh;* 1998 Cri LJ 1104 . In this case it has been held as follows:

> We are unable to sustain the impugned order of the High Court quashing the FIR lodged against the respondent alleging commission of offences under Sections 419, 420, 467 and 468 IPC by them in course of the proceeding of a civil suit, on the ground that Section 195(1)(b)(ii) CrPC prohibited entertainment of and investigation into the same by the police. From a plain reading of Section 195 CrPC it is manifest that it comes into operation at the stage when the court intends to take cognizance of an offence under Section 190(1) CrPC; and it has nothing to do with the statutory power of the police to investigate into an FIR which discloses a cognizable offence, in accordance with Chapter XII of the Code even if the offence is alleged to have been committed in, or in relation to, any proceeding under the Code is not in any way controlled or circumscribed by Section 195 CrPC. It is of course true that upon the charge-sheet (challan), if any, filed

on completion of the investigation into such an offence the court would not be competent to take cognizance thereof in view of the embargo of Section 195(1)(b) CrPC, but nothing therein deters the court from filing a complaint for the offence on the basis of the FIR (filed by the aggrieved private party) and the materials collected during investigation, provided it forms the requisite opinion and follows the procedure laid down in Section 340 CrPC. The judgment of this Court in *Gopalakrishna Menon* v. *D. Raja Reddy*; 1983 (3) SCR 836 on which the high Court relied, has no manner of application to the facts of the instant case for there cognizance was taken on a private complaint even though the offence of forgery was committed in respect of a money receipt produced in the civil court and hence it was held that the court could not take cognizance on such a complaint in view of Section 195 CrPC.

Not only are we bound by this judgment but we are also in complete agreement with the same. Section 195 and 340 do not control or circumscribe the power of the police to investigate under the Criminal Procedure Code. Once investigation is completed then the embargo in Section 195 would come into place and the court would not be competent to take cognizance. However, that court could then file a complaint for the offence on the basis of the FIR and the material collected during investigation provided the procedure laid down in Section 340 of the Criminal Procedure Code is followed. Thus no right of the respondent much less the right to file an appeal under Section 341, is affected."

23. Thus, the clear principle which emerges from the aforesaid discussion is that even when a Magistrate is to take cognizance when a complaint is filed before it, that would not

mean that no other avenue is opened and the complaint/FIR cannot be lodged with the police. It is stated at the cost of repetition that the offences under the Electricity Act are also to be tried by applying the procedure contained in the Code. Thus, it cannot be said that a complete machinery is provided under the Electricity Act as to how such offences are to be dealt with. In view thereof, we are of the opinion that the respondent's Counsel is right in his submission that if the offence under the Code is cognizable, provisions of Chapter XII containing Section 154 Cr.P.C. and onward would become applicable and it would be the duty of the police to register the FIR and investigate into the same. Sections 135 and 138 only prescribe that certain acts relating to theft of electricity etc. would also be offences. It also enables certain persons/parties, as mentioned in Section 151, to become complainant in such cases and file complaint before a Court in writing. When such a complaint is filed, the Court would be competent to take cognizance straightway. However, that would not mean that other avenues for investigation into the offence which are available would be excluded. It is more so when no such special procedure for trying the offences under the Electricity Act is formulated and the cases under this Act are also to be governed by the Code of Criminal Procedure.

24. In this backdrop, the notification dated 8.6.2005 issued by the Central Government in exercise of powers under Section 176 of the Electricity Act also requires a mention. Vide this notification the Electricity Rules, 2005, have been framed and Rule 12, which is relevant, reads as under:

> 12 (1) The police shall take cognizance of the offence punishable under the Act on a complaint in writing made to the police by the Appropriate Government or the Appropriate Commission or any of their officer authorized by them in this regard or a Chief Electrical Inspector or an Electrical Inspector or an

authorized officer of Licensee or a Generating Company, as the case may be.

(2) The police shall investigate the complaint in accordance with the general law applicable to the investigation of any complaint. For the purposes of investigation of the complaint, the police shall have at the powers as available under the Code of Criminal Procedure, 1973.

(3) The police shall after investigation, forward the report along with the complaint filed under Sub-clause (1) to the Court for trial under the Act.

(4) Notwithstanding anything contained in Sub-clauses (1), (2) and (3) above, the complaint for taking cognizance of an offence punishable under the Act may also be filed by the Appropriate Government or the Appropriate Commission or any of their officer authorized by them or a Chief Electrical Inspector or an Electrical Inspector or an authorized officer of Licensee or a Generating Company, as the case may be directly in the appropriate Court.

(5) Notwithstanding anything contained in the Code of Criminal Procedure 1973, every special Court may take cognizance of an offence referred to in Section 135 to 139 of the Act without the accused being committed to it for trial."

25. In view of the aforesaid discussion, we hold that the decisions of Kerala High Court as well as Calcutta High Court and Madras High Court in *Chacko, A.K. & Anr. Vs. Assistant Executive Engineer, K.S.E.B*. (2010) 2 KLJ 569; *Biswanath Patra Vs. Divisional Engineer* AIR 2007 Cal 189; *Ranjeet Kr. Bag Vs. State of West Bengal* (2006) 1 C CrlJ (Cal) 334; *Paramasivan vs. Union of India* (2007) 2 KLT 733; *Kumaran Chemicals (P) Ltd. Rep. By its Managing Partner D. Thillairaj and Ors. vs. Government of Pondicherry rep. by the Inspector*

of Police MANU/TN/0584/2010 do not lay down correct law and the view taken by the High Court of Delhi in *Abhay Tyagi v. State NCT of Delhi & Anr*. and *Asish Kumar Jain vs. State of Jharkhand* (2010) CriLJ 271 is hereby approved.

26. As a result this appeal fails and is hereby dismissed with costs.

R.P. Appeal dismissed.